

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

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Case No. 2016-CP-07-2541  
Court of Appeals Appellate Case No. 2022-000231  
Supreme Court of South Carolina Appellate Case No. 2025-000436

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**Forum Benefits, LLC,**

**Plaintiff-Respondent,**

**v.**

**Brian Bannon and Assured Partners, NL,**

**Defendants – Petitioners.**

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**APPENDIX**

**VOLUME IV OF VI**

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**S.C. SUPREME COURT**

July 3, 2025

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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

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Case No. 2016-CP-07-2541  
Appellate Case No. 2022-000231

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Forum Benefits, LLC,

Appellant,

v.

Brian Bannon and Assured Partners, NL,

Respondents.

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**RECORD ON APPEAL**

**VOLUME IV**

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STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2016-CP-07-2541

Forum Benefits, Inc.,

Plaintiff,

v.

Brian Bannon and Assured Partners, NL

Defendants.

**DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

COME NOW Defendants Brian Bannon ("Bannon") and Assured Partners, NL ("Assured Partners"), and files this Motion for Summary Judgment. Defendants move to for summary judgment on Plaintiff's five claims against Bannon: (1) breach of contract, (2) conversion, (3) breach of fiduciary duty/duty of loyalty, (4) South Carolina of Trade Secrets Act ("SCTSA"), and (5) tortious interference with contractual relationships. Defendants also move for summary judgment on Plaintiff's two claims against Assured Partners: (1) SCTSA and (2) tortious interference with contractual relationships. This Motion is supported by the pleadings on file and the following documents:

1. **EXHIBIT 1** - Memorandum of Law in Support of Defendants' Motion for Summary Judgment;
2. **EXHIBIT 2** – Judge Goodstein's Order granting summary judgment in *Computer Products, Inc. v. Jem Restaurant Group, Inc., et al*, Charleston County Court of Common Pleas, Case No. 04-CP-10-301 (2005);
3. **EXHIBIT 3** – Deposition Transcript and Exhibits of Brian Stritt. Based on Plaintiff's extensive allegations of confidentiality, Defendants will be filing these

transcript pages and exhibits under seal to avoid any disputes relating to confidentiality;

4. **EXHIBIT 4** – Deposition Transcript and Exhibits of Plaintiff’s Rule 30(b)(6) Deponent. Based on Plaintiff’s extensive allegations of confidentiality, Defendants will be filing these transcript pages and exhibits under seal to avoid any disputes relating to confidentiality;
5. **EXHIBIT 5** – Deposition Transcript and Exhibits of Brian Bannon;
6. **EXHIBIT 6** – Deposition Transcript and Exhibits of Mack Ward;
7. **EXHIBIT 7** – Deposition Transcript and Exhibits of Plaintiff’s employee Laurie Winston; and
8. **EXHIBIT 8** – Unpublished Decisions.

WHEREFORE, Defendants respectfully request that this Court grant their Motion for Summary Judgment and dismiss all of Plaintiff’s claims. Bannon requests attorneys’ fees as a prevailing party on Plaintiff’s breach of contract claim. Defendants request attorneys’ fees under S.C. Code Ann. § 39-8-80 because Plaintiff has pursued the claim of misappropriation of trade secrets in bad faith. Defendants request costs associated with this litigation and any further relief as the Court deems just and proper.

Date: April 20, 2020

Respectfully submitted,

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**STATE OF SOUTH CAROLINA**

**COUNTY OF BEAUFORT**

**IN THE COURT OF COMMON PLEAS**

**CIVIL ACTION NO. 2016-CP-07-2541**

**Forum Benefits, Inc.,**

**Plaintiff,**

**v.**

**Brian Bannon and Assured Partners, NL**

**Defendants.**

**EXHIBIT TO  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

**EXHIBIT 1**

Memorandum of Law in Support of Defendants' Motion for Summary Judgment.

**STATE OF SOUTH CAROLINA**  
**COUNTY OF BEAUFORT**

**IN THE COURT OF COMMON PLEAS**  
**CIVIL ACTION NO. 2016-CP-07-2541**

**Forum Benefits, LLC,**

**Plaintiff,**

**v.**

**Brian Bannon and Assured Partners, NL**

**Defendants.**

**MEMORANDUM OF LAW IN SUPPORT  
 OF DEFENDANTS' MOTION FOR  
 SUMMARY JUDGMENT**

COME NOW Defendants Brian Bannon ("Bannon") and Assured Partners, NL ("Assured Partners"), and submit this Memorandum of Law in Support of Defendants' Motion for Summary Judgment.<sup>1</sup>

**I. INTRODUCTION**

This case is about Brian Stritt attempting to exact revenge on Brian Bannon for Bannon's decision to move his clients to a competitor during the time Stritt was trying to get "top dollar" for selling his business, Forum Benefits, LLC ("Plaintiff"). So much so, that Stritt has completely self-funded this 3.5-year litigation on behalf of Plaintiff. The desire for revenge does not always translate into viable legal claims, though.

The record plainly demonstrates that none of Plaintiff's claims are viable. Indeed, no contracts have been breached. No trade secrets have been misappropriated. And, perhaps most importantly, no damages have been sustained. Instead, the record in this case reveals nothing more than normal competition between two insurance brokers. Based on the indisputable facts and

<sup>1</sup> This Memorandum of Law is being filed as **EXHIBIT 1** to Defendants' Motion for Summary Judgment.



applicable law as outlined fully below, Plaintiff cannot establish essential elements of its claims. Therefore, Defendants Brian Bannon and Assured Partners are entitled to summary judgment as a matter of law.

## **II. STATEMENT OF THE CASE**

Plaintiff filed this action in December of 2016, and asserted five claims against Bannon: (1) breach of contract, (2) conversion, (3) breach of fiduciary duty/duty of loyalty, (4) South Carolina of Trade Secrets Act (“SCTSA”), and (5) tortious interference with contractual relationships. Plaintiff asserted two claims against Assured Partners: (1) SCTSA and (2) tortious interference with contractual relationships. Significantly, Plaintiff’s SCTSA claim and fiduciary duty claim involving an independent contractor are substantially similar to claims dismissed on summary judgment by Judge Diane Schafer Goodstein, Charleston County Circuit Court Judge, in the case of *Computer Products, Inc. v. Jem Restaurant Group, Inc., et al.*<sup>2</sup>

Pursuant to the Court’s Scheduling Order issued in this case, discovery ended on March 6, 2020. Therefore, this matter is now ripe for summary judgment.

## **III. STATEMENT OF THE FACTS**

### **A. BANNON’S INITIAL EMPLOYMENT WITH PLAINTIFF.**

Plaintiff provides management services to corporations related to their employee benefits and insurance needs. (Stritt Dep. 8.<sup>3</sup>) Plaintiff hired Bannon on April 1, 2009, initially classifying him as an employee. (Complaint ¶ 5-6.) Plaintiff alleges that at the initiation of Bannon’s employment he signed an Employment Agreement that governed his employment relationship. (Complaint ¶¶ 5-8, 22-24; Stritt Dep. 101-103.) However, Plaintiff admits that it does not have

<sup>2</sup> EXHIBIT 2 to Motion – Judge Goodstein’s Order granting summary judgment in *Computer Products, Inc. v. Jem Restaurant Group, Inc., et al*, Charleston County Court of Common Pleas, Case No. 04-CP-10-301 (2005).

<sup>3</sup> EXHIBIT 3 to Motion – Deposition Transcript and Exhibits of Brian Stritt.

and cannot produce a signed copy of any Employment Agreement. (Stritt Dep. 139; Rule 30 Dep. 115-118.<sup>4</sup>) Bannon denies that he ever signed the Employment Agreement. (Bannon Dep. 30.<sup>5</sup>) Plaintiff admits that during the relevant time period associated with this case, it has only asked one other employee to sign an employment agreement. (Rule 30 Dep. 108-109.) None of Plaintiff's other employees were required to sign any agreement related to confidential information or restrictive covenants. (*Id.* at 147-148.) None of Plaintiff's independent contractors signed agreements related to confidential information or restrictive covenants. (Rule 30 Dep. 48.)

**B. BANNON'S BECAME AN INDEPENDENT CONTRACTOR.**

Plaintiff admits that in April of 2013, Bannon and Plaintiff agreed to change their relationship from an employment relationship to an independent contractor relationship. (Complaint ¶ 5-6; Stritt Dep. 103-110.) On May 1, 2013, Bannon's employment ended and he officially became an independent contractor. (*Id.*) Bannon was treated as an independent contractor and not an employee after that point, which included the following changes to his status: (1) Plaintiff stopped paying employment taxes on Bannon, (2) Bannon stopped receiving all employee benefits from Plaintiff, (3) Bannon was removed from Plaintiff's payroll, (4) Bannon was removed from Plaintiff's insurance plan, (5) Bannon was no longer covered on Plaintiff's unemployment or workers' compensation coverage. (Stritt Dep. 104-110.) The primary element of an independent contractor relationship is lack of control as compared to an employee relationship. There was never any document, agreement or contract of any type in place that addressed Bannon's independent contractor status or placed limitations on Bannon as an independent contractor. (Stritt Dep. 107-108.) Bannon worked as an independent contractor with Plaintiff for over three years after this change in the relationship. (Stritt Dep. 124.)

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<sup>4</sup> **EXHIBIT 4** to Motion – Deposition Transcript and Exhibits of Plaintiff's Rule 30(b)(6) Deponent.

<sup>5</sup> **EXHIBIT 5** to Motion – Deposition Transcript and Exhibits of Brian Bannon.

Bannon's role as an independent contractor was to obtain new client relationships for Plaintiff to service. (Rule 30 Dep. 31-32; Bannon Dep. 8, 14.) Bannon and Plaintiff split the commissions for these clients on a percentage basis. Bannon considered himself an independent agent who was running "his clients" through Plaintiff for servicing. (Bannon Dep. 27.) Plaintiff admits that it never had any discussions with Bannon regarding who owned the client relationships. (Stritt Dep. 107-108; Rule 30 Dep. 71.)

Some of Plaintiff's independent contractors like Bannon were individuals and some were business entities. (Rule 30 Dep. 30-33; Rule 30 Dep. Ex. 2.) Plaintiff did not have agreements with any of its independent contractors related to confidential information or trade secrets issues. (*Id.* at 48) Plaintiff had several independent contractor relationships with agents who referred and shared clients with Plaintiff. (*Id.* at 71-72.) Plaintiff had management services agreements with some of these independent contractors but did not have Bannon sign any such agreement. (Stritt Dep. 107-108.) Plaintiff had a contract with one of its independent contractors (Assure South) and this contract provided that the independent contractor owned the client information. (Stritt Dep. 185-187, Stritt Dep. Ex. 17; Ward 26,<sup>6</sup> 38-44.) Plaintiff admits that some of its independent contractors had a right to all of the client information that was maintained by Plaintiff. (Rule 30 Dep. 72.) Plaintiff cannot produce any evidence to show that Bannon's independent contractor relationship was any different than its other independent contractor relationships.

**C. BANNON MOVES HIS CLIENTS TO ASSURED PARTNERS.**

In 2016, Plaintiff informed Bannon that there was going to be a change in their relationship and a reduction in Bannon's commission percentage. (Bannon Dep. 30-31; Stritt 63-64.) Bannon believed that Plaintiff was attempting to steal his clients and to sell his client relationships to a

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<sup>6</sup> EXHIBIT 6 to Motion – Deposition Transcript and Exhibits of Mack Ward.

third party without his consent. (*Id.* at 28.) Plaintiff admits that it intended to reduce Bannon's commissions by 15 percent and, as a result, his compensation by \$30,000.00 annually. (Rule 30 Dep. 36-37, 41-42.) Plaintiff admits that it was attempting to sell its business to the Alera Group and that the sale price was calculated in a manner that included revenue received from Bannon's clients. (*Id.* at 31, 40.)

As a result of this circumstances, Bannon began considering opportunities to move his clients to a competitor. (Bannon Dep. 15-17.) Bannon truthfully informed Assured Partners that he was an independent contractor and that he did not have any contract with Plaintiff. (Bannon Dep. 14, 27, 42-43.) Bannon informed Assured Partners that he owned the client relationship and that he was running his clients through Plaintiff for servicing. (*Id.*) Bannon informed Assured Partners that he had the right to move his clients to Assured Partners and there were no restrictions on such movement. (*Id.*)

Assured Partners previously purchased Assure South and was familiar with Plaintiff's independent contractor relationships. (Bannon 13-14, 65; Ward 9-11.) When Assure South terminated its relationship with Plaintiff it had a contract that required Plaintiff to service the clients during a notice period. (Ward Dep. 43-44; Stritt Dep. 187-188; Stritt Dep. Exs. 17-18.) Plaintiff admits that Assure South was an independent contractor of Plaintiff and that Assure South owned the client relationship. (*Id.*) Despite this fact, Plaintiff refused to honor its contract with Assure South, refused to provide Assure South with client information during its transition to Assured Partners, terminated client access to necessary employee benefits information, and refused to provide client information directly to the client. (*Id.*; Winston Dep. 28-32, 68, 70, 73, 76-77, 151-152, 154.<sup>7</sup>) Forum admits that it was selective in which clients it provided information and

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<sup>7</sup> **EXHIBIT 7** to Motion – Deposition Transcript and Exhibits of Forum employee Laurie Winston.

which clients it refused to provide information. (Winston Dep. 159-160.) With regard to Assure South clients, Forum decided not to provide the same information it had provided other clients. (*Id.*) Plaintiff's conduct caused significant disruption to Assure South's clients during its transition to Assured Partners. (Ward 43-44; Winston 160-166.) This conduct is the subject of litigation in *Assure South et al. v. Forum Benefits et al.*, Case Number 2019-CP-42-00832, pending in Spartanburg County Court of Common Pleas.

Prior to moving his clients to Assured Partners, Bannon received information regarding the improper manner in which Plaintiff handled the termination of Assure South's independent contractor relationship. (Bannon Dep. 65; Ward Dep. 37-44.) Bannon received information that Plaintiff engaged in disruptive behavior when Assure South attempted to move its clients to Assured Partners. (Ward Dep. 43-44.) Bannon received information that Plaintiff prevented Assure South's clients from accessing their own data during the transition to Assured Partners. (Ward 43-44.) Bannon received information that many Assure South clients were upset with the disruption Plaintiff caused during this transition. (Ward Dep. 43-44; Winston Dep. 160-166; Winston Dep. Ex. 7, ¶ 6.)

**D. BANNON COPIED HIS CLIENT'S INFORMATION FROM PLAINTIFF'S SHAREPOINT SYSTEM.**

Bannon was concerned that Plaintiff would respond to the news that he was moving his clients to Assured Partners in a manner that was the same or worse than Plaintiff's response to Assure South. (Bannon Dep. 28.) Therefore, Bannon took steps to mitigate any damages to his clients by downloading and retaining his clients' files. (Bannon Dep. 28-29, 61.) Bannon admits that he downloaded everything from Plaintiff's SharePoint system that was in his clients' files. (*Id.* at 61.)

Plaintiff maintained client information such as payroll documents and insurance contracts

electronically in its SharePoint system so that employees could easily access these documents in servicing the accounts. (Rule 30 Dep. 89-90.) Plaintiff admits that most of the information housed in its SharePoint system is available at the payroll level directly from the client or from the insurance carrier. (Rule 30 Dep. 72-76.) This information can be obtained directly by requesting it from the client or from sending an agent/broker of record letter to the carrier. (*Id.*) A competitor could become an agent/broker of record for a client and properly obtain this information from these external sources and rebuild most of the information that was maintained in the SharePoint system. (*Id.*) Obtaining the information from Plaintiff simply saved time and resources. (*Id.*) It also eliminated the concern that the client would not have access to information during any transition to a different insurance broker.

Bannon and all of Plaintiff's employees had access to the SharePoint system. (*Id.* 146-147.) During the relevant time period, Plaintiff did not have any agreements with its employees restricting the use of any alleged confidential information or trade secrets. (*Id.* 147-148.) There were no rules in place related to restricted or controlled access or use. (*Id.* at 149.) Plaintiff limited access to some very limited information in SharePoint and only a few select individuals had access to that information. (*Id.* at 88-90.) There was an extra password for this additional protected information. (*Id.*) However, Bannon did not have access to this type of protected information, did not access that information, and that information is not the subject of this litigation. (*Id.*)

The information that is the subject of this litigation was available to Bannon and all employees without any restriction. (*Id.* at 88-90, 147-149.) Bannon had access to information related to his clients and all other clients being serviced by Plaintiff, despite the fact that he only needed access related to his clients. (*Id.* at 87.) Plaintiff's employees had access to information about Bannon's clients and all other clients being serviced by Plaintiff. (*Id.* 87-89.)

Bannon never transferred any of the information he downloaded from SharePoint to Assured Partners. (Bannon at 45, 74.) In November of 2016, Bannon's personal computer crashed and he lost all of the information he downloaded from Plaintiff's SharePoint system. (Bannon Dep. 73-74; Bannon Dep. Ex. 13.) This fact is confirmed by an e-mail Bannon sent prior to the initiation of this litigation. (*Id.*) None of the information downloaded from Plaintiff's SharePoint system was ever transferred to Assured Partners, and Plaintiff admits there is no evidence of any such transfer. (Bannon 74; Rule 30 Dep. 91-92.)

**E. DEFENDANTS OBTAINED CLIENT CONSENT TO COPY THEIR INFORMATION.**

Plaintiff also alleges that Defendants copied client information from its Employee Navigator system. Employee Navigator is a benefits administration system sold by a third party vendor. (Stritt Dep. 38.) It is a benefits enrollment and election system that Plaintiff used to provide clients with immediate access to benefits information and to provide clients the ability to directly modify participant information. (Stritt Dep. 38; Winston Dep. 156-158, 169.) Plaintiff does not own Employee Navigator but rather had a contract that allowed Plaintiff to use the system. (Stritt Dep. 39.) Several insurance and benefits agencies use this software. Plaintiff's employees and clients had unrestricted access to Employee Navigator without any agreement related to use. (*Id.* at 154; Stritt Dep. 40-41.) Plaintiff did not in any way restrict clients from allowing competitors to access the client information in Employee Navigator. (Stritt Dep. 42-43.) There were no confidentiality agreements in place with the individuals or entities to whom Plaintiff provided access to Employee Navigator. (Rule 30 Dep. 154.) Plaintiff admits that the clients did not violate any legal obligation or the SCTSA by providing their passwords and information from Employee Navigator to Defendants. (Stritt Dep. 45.) Despite this fact, Plaintiff illogically alleges that Defendants violated the law by receiving information that was legally provided.

Defendants obtained client information from Employee Navigator for those clients that indicated an intent to move their business with Bannon to Assured Partners. Defendants obtained this information based on the fact that Plaintiff improperly terminated client access when Assure South terminated its relationship with Plaintiff. (Ward 71; Winston Dep. 28-32; Winston Dep. Ex. 1.) This caused significant disruption to Assure South's clients who lost access to important information during the transition. (Winston Dep. 160-166; Winston Dep. Ex. 7, ¶ 6; Ward Dep. 43-44.) With this knowledge, Bannon and Assured Partners took steps to minimize and mitigate any client disruption during the transition. Bannon's clients willingly provided Defendants with authority to access their Employee Navigator account and copy their information to protect the information during the transition process. (*Id.*)

Plaintiff admits that all of the information in Employee Navigator could have been recreated by Defendants obtaining the information from the client's payroll files and from the insurance carrier. (*Id.* at 103-104; Stritt Dep. 44) Plaintiff used these sources to enter all of this information into Employee Navigator. (*Id.*)

**F. BRIAN STRITT TRANSFERRED OWNERSHIP OF PLAINTIFF TO ALERA.**

It is clear that the only reason Plaintiff's prior owner initiated this case was that he was angry that the transfer of Bannon's accounts occurred when he was negotiating to sell Plaintiff to the Alera Group. Prior to November 30, 2016, Plaintiff was solely owned by Brian Stritt ("Stritt"). On November 30, 2016, Stritt sold the assets of Plaintiff to the Alera Group ("Alera"). (Stritt Dep. 8-9.) Plaintiff negotiated the terms of the sale prior to Bannon transitioning any of his clients to Assured Partners. (Stritt Dep. 12-14.) After Bannon began transitioning his clients, Stritt notified Alera of this issue. (Stritt Dep. 20-21.) According to Plaintiff, Alera was concerned that it may be overpaying for Plaintiff based on the potential loss of clients who followed Bannon to Assured



Partners. Rather than reducing the sale price, Alera negotiated an earn-out hold back (“earn-out”) in the amount of \$1,497,000.00. (Stritt Dep. 14-15, 22-23.) Essentially, the earn-out caused \$1,497,000.00 of the purchase price to be withheld until certain conditions were met. To receive the full earn-out, in 2017 Stritt had to grow the purchased business by 5 percent over pre-sale EBITDA (which included the value of Bannon’s clients). (Stritt Dep. 22; Rule 30 Dep. 55-57.) If Stritt met this goal, he received the full earn-out. If he did not, that money went back to Alera. (Stritt Dep. 34.) This was clearly a damages mitigation measure by the new owner of Plaintiff to protect the purchased business value. Plaintiff and, thus, Alera would either receive the increase in value based on significant growth in 2017 or it would receive back the \$1,497,000.000 from Stritt not satisfying the earn-out. Alera as the new owner of Plaintiff was satisfied with either option and proceeded with the sale knowing that Bannon’s clients were likely leaving.

The sale of Plaintiff to Alera closed in December of 2016. (Stritt Dep. 8-9.) Plaintiff alleges that Defendants’ actions caused the earn-out. (Stritt Dep. 32-33.) To ensure that the earn-out was met, in 2017 Stritt managed Plaintiff utilizing significant cost cutting measures to increase profitability. (*Id.* 58-59, 129.) Plaintiff admits that “no chances were taken” to ensure that the earn-out requirements were met. (*Id.*) Plaintiff’s spending behaviors changed dramatically. (*Id.*) For example, raises in wages were not given to employees, changes were made related to fixed assets, Brian Stritt did not personally take commissions, and changes were made to control expenses. (*Id.*) All of these additional measures were caused by the earn-out and resulted in a “more profitable business” in 2017. (*Id.* at 59.) Plaintiff far exceeded the 5 percent required growth in EBITDA and actually obtained a record 12 percent growth in 2017. (*Id.* at 63.) As a result, the full earn-out was paid personally to Stritt and is no longer an element of damages. (Rule 30 Dep. 60-61, 100-101.) Plaintiff and Alera would not have achieved this level of profitability in

2017 but for the earn-out clause. (*See Id.* at 129-130.)

#### IV. ARGUMENTS

##### A. STANDARD OF REVIEW

A party's summary judgment motion should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." S.C. R. Civ. P. 56(c). In deciding whether issues of fact exist, "the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *RoTec Services, Inc., v. Encompass Services, Inc.*, 597 S.E.2d 881, 882-83 (S.C. Ct. App. 2004).

This is Defendant's second motion for summary judgment. On March 8, 2018, Defendants filed their first motion for summary judgment. Plaintiff argued that the motion was based in part on affirmative defenses that were not raised in Defendants' answer. Thus, the motion was denied, but Defendants were granted leave to amend their answer. The Court subsequently issued a scheduling order that closed discovery on March 6, 2020. Defendant's prior motion is not a bar to a second motion for summary judgment. The South Carolina Supreme Court has made clear that a trial court has the discretionary authority to hear a renewed motion for summary judgment. *Dorrell v. S.C. DOT*, 361 S.C. 312, 325, 605 S.E.2d 12, 18 (2004). "That a different trial judge previously denied the motion did not preclude [the defendant] from renewing its motion once new evidence came to light. *Id. citing Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). Further, "if the first motion for summary judgment is unsuccessful the court has the power to permit a second motion for summary judgment prior to trial." *Crosswell Enter., Inc. v. Arnold*, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App. 1992).

Defendants' motion for summary judgment is proper based on changes in and developments of the facts, changes to the pleadings, and new discovery since the previous motion.

**B. PLAINTIFF'S BREACH OF CONTRACT CLAIM AGAINST BANNON ONLY**

1. Statute of Frauds defense

Plaintiff admits that it cannot produce any signed contract in this case. (Rule 30 Dep. 115-118.) As of February 10, 2020, Plaintiff was not even sure whether it was still pursuing a breach of contract claim based on its admission that it cannot produce a signed agreement. (*Id.*) According to Plaintiff's Rule 30 designee, "I don't know if we're going to pursue this without the document." (*Id.* at 118) We are over three years into this lawsuit, discovery is closed, and Plaintiff does not even know what claims it is pursuing.

Regardless of Plaintiff's own confusion related to whether it is still pursuing this claim, it is clear that its breach of contract claim must be dismissed based on Defendants' Statute of Frauds defense. "The Statute of Frauds requires that a contract that cannot be performed within one year be in writing and signed by the parties." *Springob v. Univ. of S.C.*, 407 S.C. 490, 495-96, 757 S.E.2d 384, 387 (2014). "If there is a possibility that a contract might be performed within one year, the statute of frauds is not a bar to enforcement of the contract." *Id.*

The facts related to this claim are clear and indisputable. Plaintiff alleges that Bannon signed an Employment Agreement at the initiation of his employment with Plaintiff. (Complaint ¶ 6, Complaint Ex. A.) However, Plaintiff cannot produce a signed copy of the Employment Agreement. (Stritt Dep. 101-103, 139; Rule 30 Dep. 115-116.) Bannon denies that he ever signed the Employment Agreement. (Bannon Dep. 30.) The Employment Agreement states that it governs Bannon's entire term of employment and multiple provisions apply "for a period of two (2) years following the termination of Employee's employment with the Company." (Complaint

Ex. A, ¶¶ 4, 7, 13, 14, 18.) Accordingly, the alleged obligations in the contract could not possibly be performed within one year.

Plaintiff cannot defeat summary judgment on this issue by relying on the self-serving allegation of Stritt that Bannon signed the agreement but that he cannot locate a signed copy. The South Carolina Court of Appeals specifically addressed this issue in favor of the defendant in *Yadkin Valley Bank & Tr. v. Oaktree Homes, Inc.*, No. 2014-UP-306, 2014 S.C. App. Unpub. LEXIS 395, at \*1-4 (Ct. App. July 30, 2014).<sup>8</sup> First, the Court of Appeals noted that South Carolina has not adopted an exception to the Statute of Frauds where the signed agreement has been lost. However, the Court ruled that even if such an exception were adopted, the Plaintiff would be required to satisfy a heightened standard of “clear and convincing” proof that the signed document existed. The Court ruled that if this exception were adopted, the reasoning of *Zander v. Ogihara Corp.*, 213 Mich. App. 438, 443, 540 N.W.2d 702, 705 (1995) and *Weinsier v Soffer*, 358 So. 2d 61, 62-63 (Fla App, 1978) would apply. These cases addressed an exception to the Statute of Frauds defense where there is “clear and convincing evidence” that the contract was signed but that the signed document could not be located. *Id.* However, all of these cases make clear that the self-serving testimony of the plaintiff that the defendant signed the agreement is not sufficient to satisfy this standard or defeat summary judgment. These cases make clear that a court “will not permit plaintiffs to defeat the purpose and intent of this statute solely on the basis of their own self-serving testimony.” *Id.*

In the instant case, it is indisputable that Stritt is the only person who alleges that Bannon actually signed the Employment Agreement. Stritt was the sole owner of Plaintiff when this case was filed and he initially sought personal damages in this case. He is personally financing this

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<sup>8</sup> **EXHIBIT 8** to Motion – Unpublished Decisions.

lawsuit and expects to benefit financially from any award to the Plaintiff. (Rule 30 Dep. 19-20.) He admits that if this Court orders Plaintiff to pay Bannon's attorney's fees under a prevailing party provision, he would pay that amount personally. (Id. at 119.) Stritt's self-serving testimony must not be considered in ruling on Bannon's Statute of Frauds defense. Therefore, the Statute of Frauds applies to bar this claim and summary judgment is proper.

2. The terms of any alleged contract expired in 2015.

Even assuming *arguendo* that Plaintiff could have produced a signed contract, the face of the contract establishes that it expired by its own terms in 2015, before any of the alleged breaches occurred. Plaintiff alleges that Bannon signed the Employment Agreement at the initiation of employment in April of 2009. (Complaint ¶¶ 5-6.) Even assuming that this Employment Agreement applied to Bannon, it clearly only applied during the "employment relationship." The Employment Agreement clearly states it applies only to "employment" throughout the document. (Complaint Ex. A.)

Plaintiff admits that Bannon's employment ended on April 30, 2013, and that he became an independent contractor on May 1, 2013. (Complaint ¶ 5-6; Stritt Dep. 103-110.) The restrictive covenants that are the subject of this lawsuit state that they apply "for a period of two (2) years following the termination of Employee's employment with the Company." (Complaint Ex. A, ¶¶ 12(g), 13, and 14) (emphasis added). The two year restriction was triggered on April 30, 2013, when Bannon's employment was terminated and he became an independent contractor. Therefore, these post-employment restrictions were at most only applicable between May 1, 2013 and May 1, 2015. Plaintiff alleges that Bannon first breached the Employment Agreement in 2016, which was well after any restrictions would have expired. Therefore, Plaintiff's breach of contract claim must also be dismissed based on its expiration prior to any alleged breach.

For the independent reasons outlined above, Bannon respectfully requests that this Court grant summary judgment in his favor and dismiss Plaintiff's breach of contract claim.

**C. PLAINTIFF'S TRADE SECRETS CLAIM**

To establish a claim for misappropriation of trade secrets under the South Carolina Trade Secrets Act ("SCTSA"), a plaintiff must first show that the SCTSA applies to a relationship that involved voluntary access or disclosure. If it applies, then a plaintiff must show: (1) the existence of a trade secret; (2) misappropriation, wrongful use, or wrongful disclosure of a trade secret by the defendant; and (3) damages." *Sonoco Products Co. v. Guven*, No. 4:12-CV-00790-BHH, 2015 U.S. Dist. LEXIS 1906, 2015 WL 127990, at \*6 (D.S.C. Jan. 8, 2015); *Nucor Corp. v. Bell*, 482 F. Supp. 2d 714, 725-26 (D.S.C. 2007); S.C. Code Ann. § 39-8-30(C) (2016). Plaintiff cannot establish these elements based on the multiple reasons outlined below, each of which provides its own independent basis for granting summary judgment.

1. Bannon was not an employee of Plaintiff and was not in a confidential relationship with Plaintiff that qualified for trade secret protection.

Plaintiff concedes that Bannon was an independent contractor of Plaintiff at all relevant times to this litigation. It also concedes that there was no contract that governed the independent contractor relationship. Judge Diane Schafer Goodstein, Charleston County Circuit Court Judge, has specifically ruled that the SCTSA does not apply to independent contractors. *Computer Products, Inc. v. Jem Restaurant Group, Inc., et al*, Charleston County Court of Common Pleas, Case No. 04-CP-10-301 (2005) (**EXHIBIT 2**). In *Computer Products*, Judge Goodstein granted summary judgment in favor of an independent contractor, ruling "The SCTSA prohibits only 'employees' from misappropriating trade secrets from an employer." *Id.* at p. 5. For this reason alone, summary judgment is proper in this case.

Judge Goodstein's order is well reasoned and supported by significant South Carolina law.

The SCTSA specifically addresses the obligations of employees to protect an employer's trade secrets. The SCTSA creates a duty of every "employee" who knows, or reasonably should know, of their "employer's" trade secrets to not use or disclose the trade secret. S.C. Code § 39-8-30(B); see *Dove Data Prods. v. Murray*, Civil Action No. 4:05-00072, 2006 U.S. Dist. LEXIS 108680, at \*13-14 (D.S.C. Nov. 2, 2006). However, the SCTSA does not place this same requirement on independent contractors. The Legislature clearly intended to place the burden on the holder of a trade secret to contractually or otherwise protect the information in non-employment relationships where the holder voluntarily provides access to the information. This is something that must be specifically addressed with anyone who has access to a trade secret that is not an employee. Otherwise, the SCTSA simply does not apply. "A confidential relationship is the keystone of a trade secret action." *Future Plastics, Inc. v. Ware Shoals Plastics, Inc.*, 340 F.Supp. 1376, 1384 (D.S.C.1972). There must be an express understanding between the parties as to the confidential nature of the information or circumstances so that the individual is aware of the confidence placed in him by the holder of the trade secret. *Id.* The SCTSA creates this confidential relationship for employees, but it does not create this relationship for independent contractors. S.C. Code § 39-8-30(B).

Even assuming *arguendo* that an independent contractor could be liable under the SCTSA, the plaintiff would have a very high burden to establish the nature of the confidential relationship and the express understanding related to the trade secret information and protection. As outlined in Sections II.B and II.D. above, there is no such evidence in this case. Bannon was given unrestricted access to information in Plaintiff's SharePoint system, which contained information regarding all of Plaintiff's clients (despite the fact that Bannon only needed access to information regarding his clients). There was no contract or agreement related to his independent contractor

relationship. There was no policy, practice or procedure in place related to confidential or trade secret information. There was no way for Bannon to know that a confidential relationship existed that could lead to trade secret requirements or obligations. Plaintiff never had any conversations with Bannon regarding who owned the client relationship. Plaintiff had an obligation to take affirmative steps to address these issues with independent contractors and completely failed to do so. Therefore, Plaintiff cannot establish that the nature of Bannon's independent contractor relationship was one of confidence that created trade secret obligations and summary judgment is proper.

2. Plaintiff cannot prove any misappropriation by improper means.

The SCTSA prohibits misappropriation of a trade secret. S.C. Code Ann. § 39-8-30(C). A misappropriation requires proof of an acquisition by improper means. S.C. Code Ann. § 39-8-20(2). Improper means is defined to include breach of a duty to maintain secrecy. S.C. Code Ann. § 39-8-20(1). It is indisputable that Plaintiff willingly provided Bannon access to all the information that is the subject of this litigation. As outlined in Section II.C.1. above, Bannon was an independent contractor and did not have a duty to maintain the secrecy of the information in Plaintiff's systems. Thus, Plaintiff cannot prove that the information was acquired by improper means and cannot prove any misappropriation.

With regard to Assured Partners, it is clear that it did not acquire any of Plaintiff's information by improper means. Assured Partners had a right to rely on the fact that Bannon was an independent contractor of Plaintiff and, under established South Carolina law, that he did not have any duty to maintain the secrecy of information Plaintiff willingly shared with him. Furthermore, Assured Partners never acquired any of the information that Bannon copied from Plaintiff's SharePoint system, some of which was copied before Bannon began employment with



Assured Partners. (Bannon 4, 74; Rule 30 Dep. 93.) Thus, Assured Partners did not have a reason to believe that Bannon acquired information from Plaintiff by improper means and it never acquired any of the information from SharePoint.

The only information Assured Partners acquired in this case was information from the Employee Navigator system which it accessed through the clients. The clients willingly provided and consented to Assured Partners access and the access was for the benefit and protection of the clients' information. Plaintiff admits that the client did not have a duty to maintain the secrecy of the information in Employee Navigator and that the client did not violate the SCTSA by providing Assured Partners with the information in Employee Navigator. (See Section II.E above.) Thus, Assured Partners did not acquire any information from Employee Navigator by improper means. Plaintiff cannot prove that Defendants acquired any trade secret information by improper means as required by the SCTSA and, therefore, summary judgment is proper.

3. Plaintiff did not take ANY steps to identify or protect its alleged trade secret information with its employees, clients and independent contractors.

Plaintiff cannot satisfy one of the most basic requirements of a trade secrets claim - the requirement of taking reasonable steps to identify and protect the trade secret. The holder of a trade secret has an affirmative obligation to take steps to identify the trade secret and to protect it. In order to be protected under the SCTSA, a trade secret must be the subject of reasonable efforts "to maintain its secrecy." S.C. Code Ann. § 39-8-20(5)(a)(ii).

Plaintiff did not take any reasonable steps to protect its alleged trade secret information. It had the ability to add additional password restrictions within SharePoint. (See Section II.D. above.) It used this additional restriction with regard to some very limited information but failed to do so with regard to the information that is the subject of this litigation. (Rule 30 Dep. 88-90.) Plaintiff never attempted to communicate with employees or independent contractors about what

it considered to be trade secret information. (*Id.* at 156-157.) Plaintiff did not have confidentiality agreements in place with those who had access to any of the information that is the subject of this lawsuit. (*Id.* at 147-148.) It did not have an employee handbook or any policies that addressed confidential information or trade secret issues. (*Id.* at 149.) It never had any verbal conversation with Bannon or others regarding information being confidential or a trade secret. (*Id.* at 152.) The only communication Plaintiff had with its employees about confidential information was the requirements under HIPAA to protect individual health information. (*Id.* at 151.) Clearly, employee health information is not a trade secret.

Similarly, there were no restrictions placed on Plaintiff's clients related to access or use of the information in Employee Navigator. (*See* Section II.E. above.) Plaintiff admits that the clients did not have any trade secret obligations related to the information contained in Employee Navigator. (*Id.*) There were no restrictions placed on employees or former employees related to obtaining this information directly from the clients. There was absolutely no way to identify any information as a trade secret in the Employee Navigator system.

Plaintiff's general use of logins and passwords are not sufficient to satisfy the reasonable steps to protect the trade secrets element. Almost all employers require a password for an employee to sign in to their computers and systems. This simply allows an employer to identify who has accessed the system. Plaintiff's login and password practice allowed access to some of the most basic information about its business and simply allowed employees to perform their work. This is not remotely relevant to the requirement of reasonable efforts to maintain specific trade secret information. Plaintiff's broad reading of "reasonable steps" would essentially eliminate this requirement from the statute altogether because almost all employers use login and passwords for access to non-trade secret information. The SCTSA requires much more.

South Carolina courts have required proof of significant efforts to protect trade secrets. For example in *Sonoco Prods. Co. v. Güven*, No. 4:12-cv-00790-BHH, 2015 U.S. Dist. LEXIS 1906, at \*11 (D.S.C. Jan. 8, 2015), Sonoco took the following efforts to identify and protect its trade secrets: (1) it required employees to sign a confidentiality agreement that defined and identified its confidential and trade secret information and specified the restrictions on use or disclosure; (2) it required employees to agree to terms of Sonoco's Policies on Business Conduct, which set a high ethical standard for employees; and (3) it provided annual copies of policies on Business Conduct and required employees to regularly affirm their promise to abide by policies, which included protection of confidential information. In these circumstances, the court ruled that Sonoco took reasonable steps to protect its trade secret information. *Id.* Plaintiff took none of the steps identified as reasonable in this case. South Carolina courts have outlined for employers what constitutes reasonable steps to protect trade secrets. Plaintiff cannot be allowed to simply ignore all of these steps and seek trade secret protection.

Similarly, in *Indus. Packaging Supplies v. Davidson*, No. 6:18-0651-TMC, 2018 U.S. Dist. LEXIS 234771, at \*12-13 (D.S.C. June 22, 2018), the plaintiff required employees to sign agreements that defined trade secrets and contained specific restrictions on use and disclosure. It also had a strict password policy, unique login ID requirements, and controlled access to its trade secret information. The court ruled that these combined efforts were sufficient to constitute reasonable protection efforts. Plaintiff did not take any of these protection measures. It did not have any agreements with employees or independent contractors which defined trade secrets (or even confidential information), did not have any policies related to passwords or confidential information, and did not have controlled access to its trade secret information. Plaintiff's

employees (and some independent contractors) had access to all of the alleged trade secret information without any guidance or restrictions from Plaintiff.

Because Plaintiff did not make reasonable efforts "to maintain its secrecy," S.C. Code Ann. § 39-8-20(5)(a)(ii), there can be no trade secret that "is protectable and enforceable." S.C. Code Ann. § 39-8-30(A); see *Hartsock v. Goodyear Dunlop Tires N. Am. Ltd.*, 422 S.C. 643, 650, 813 S.E.2d 696, 701 (2018). Accordingly, Plaintiff's trade secret claim must be dismissed.

4. Plaintiff has not established evidence that the information in question in this case qualifies as a trade secret.

Plaintiff's trade secret claim is based on the allegation that Bannon downloaded files from Plaintiff's SharePoint system and that Plaintiff's customers provided their passwords to allow Defendants to copy their information from Employee Navigator. (Rule 30 Dep. 152.) Plaintiff has not produced sufficient evidence to show that information located in either one of these systems qualifies as a trade secret.

Under the SCTSA, a trade secret is defined as,

- (a) information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code that:
  - (i) 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

S.C. Code Ann. § 39-8-20(5)(a).

A plaintiff must adequately identify and describe the subject matter of its alleged trade secrets in sufficient detail to establish each element of a trade secret and to enable the jury to differentiate that which is claimed as a trade secret from "matters of general knowledge in the trade." *Trandes Corp. v. Guy F. Atkinson, Co.*, 996 F.2d 655, 661-62 (4th Cir.1993); *Poly-Med, Inc. v. Novus Sci. Pte, Ltd.*, No. 8:15-cv-01964-JMC, 2016 U.S. Dist. LEXIS 168902, at \*17

(D.S.C. Dec. 6, 2016).

Plaintiff alleges that thousands of pages of documents in this case constitute trade secrets. (Rule 30 Dep. 146-147, 152, 155, 158.) Defendants demanded that Plaintiff state in detail the information that was a trade secret. (See Plaintiff's Answers to Defendants' First Set of Interrogatories, Interrogatory No. 9.) Plaintiff responded by simply referring to all of the documents downloaded or accessed in this case. (*Id.*) However, most of these documents are documents that can be obtained directly from the client's payroll system or the insurance carrier through an agent of record letter. (See Section II.D. above.) Plaintiff even admits that most of these documents are easily obtainable from other sources. (*Id.*) The law is clear, where the information that is the subject of the litigation is readily ascertainable from other sources, it does not qualify for protection under § 39-8-20(5). See *Atwood Agency v. Black*, 374 S.C. 68, 72-73, 646 S.E.2d 882, 884 (2007).

Plaintiff has not specifically identified trade secrets with particularity as required by the law. It has not shown how specific information 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. The insurance industry does not lend itself to having substantial trade secret information. There is no evidence that Plaintiff is selling and servicing insurance in such a way that gives it some secret competitive advantage. Plaintiff has not retained any expert witness to testify on these issues. Any testimony at this stage would simply be speculative and self-serving. Discovery is now closed and Plaintiff continues to allege that "all" of its information is a trade secret, despite the fact that this is clearly not true. Plaintiff has had over three years to narrow this issue, specifically identify its trade secrets, and update its discovery responses. It has failed to do so and summary judgment is

now proper.

For the independent reasons outlined above, Defendants respectfully request that this Court grant summary judgment in their favor and dismiss Plaintiff's trade secrets claim.

**D. PLAINTIFF'S FIDUCIARY DUTY CLAIM AGAINST BANNON ONLY**

The South Carolina Court of Appeals has specifically ruled that a fiduciary duty/duty of loyalty does not exist under common law in an independent contractor relationship. *Computer Products v. Jem Rest. Grp., Inc.*, No. 2007-UP-066, 2007 S.C. App. Unpub. LEXIS 150, at \*2 (Ct. App. Feb. 12, 2007). It is not disputed that Bannon was an independent contractor at all relevant times to this litigation. There are no specific facts in this case that could overcome the general rule that independent contractors do not have a duty of loyalty. Bannon did not have an agreement that applied to his independent contractor status. Plaintiff did not discuss issues about restrictions related to confidential information with Bannon. Plaintiff did not have discussions with Bannon regarding who owned the client relationship. Plaintiff did not have any policies related to confidential information that applied to Bannon (or any employee for that matter). There are absolutely no facts in this case to establish a foundation of a fiduciary duty or duty of loyalty between Plaintiff and Bannon. Therefore, Bannon respectfully requests that the Court grant summary judgment in his favor and dismiss Plaintiff's fiduciary duty/duty of loyalty claim.

**E. PLAINTIFF'S TORTIOUS INTERFERENCE CLAIM**

Plaintiff's tortious interference claim is based on the following allegation: "Upon information and belief, Defendants Bannon and Assured have utilized the information from Plaintiff's Records to contact Plaintiff's customers/clients, to solicit their businesses and inappropriately and intentionally interfere with Plaintiff's contractual relations with its customers/clients." (Complaint ¶ 38.) Plaintiff's "on information and belief" allegation is simply

not true and Plaintiff has not produced any evidence that Defendants improperly obtained or used its information to interfere with clients. To establish a claim for tortious interference with contract, Plaintiff must prove: (1) a valid contract exists; (2) the defendant had knowledge of the contract; (3) the defendant intentionally procured its breach; (4) the defendant acted without justification; and (5) the plaintiff suffers prejudice. *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 205, 662 S.E.2d 444, 449 (Ct. App. 2008); *Broach v. Carter*, 732 S.E.2d 185, 188 (S.C. Ct. App. 2012)

Again, it is not disputed that Bannon was an independent contractor. Plaintiff admits that there was no contract in place related to his independent contractor status. There were no restrictions placed on Bannon's use of information as an independent contractor. There was no clear designation about who owned the client information or the relationship. Bannon's understanding was that he owned the client relationship and he was only using Plaintiff to service his clients. (See Section II.B. above.) Therefore, there were no exclusive contracts in place with which Bannon tortiously interfered.

There is no evidence that Defendants used Plaintiff's information intentionally or improperly to cause clients to terminate their relationship with Plaintiff. Plaintiff admits that Bannon had good relationships with his clients, some of whom he had known for an extensive period of time. (Rule 30 Dep. 76-77.) Bannon simply called his clients, informed them he was moving to Assured Partners and told clients that they had the choice to stay with Plaintiff or move to Assured Partners with Bannon. (Bannon Dep. 29.) Plaintiff cannot dispute this testimony. Plaintiff never asked Bannon's clients why they left. (*Id.* at 95.) Plaintiff did not make any efforts to try to keep Bannon's clients. (*Id.* at 82.) Plaintiff admits that there is no way to know how many clients would have followed Bannon regardless of the time or manner in which Bannon contacted them. (Rule 30 Dep. 76-77.) There is no evidence that Bannon used any of Plaintiff's

information to solicit the clients to terminate their relationship with Plaintiff. The information was simply not necessary for Bannon to ask his clients to follow him to Assured Partners.

With regard to Plaintiff's tortious interference claim against Assured Partners, Plaintiff admits there is no evidence that Bannon ever transferred Plaintiff's information to Assured Partners. (Bannon Dep. 45, 74; Rule 30 Dep. 91-92.) The only information Assured Partners obtained was from the client itself, who voluntarily provided Assured Partners access to its Employee Navigator information. Assured Partners had the right to rely on Bannon's communication that he was an independent contractor who owned his client relationships and that he had the right to transfer these clients to Assured Partners. Assured Partners had the right to rely on the fact that Bannon's clients had unrestricted access to the information maintained in Employee Navigator. Assured Partners had the right to rely on the fact that the client's consent for it to access and copy their information on Employee Navigator was properly obtained, and was given voluntarily within the client's rights to its own information. Assured Partners had the right to take steps to protect the client's information during the transition of business to Assured Partners to ensure that the client's employee benefits and insurance services were not unnecessarily disrupted.

For the independent reasons outlined above, Defendants respectfully request that this Court grant summary judgment in their favor and dismiss Plaintiff's tortious interference claim.

**F. PLAINTIFF'S CONVERSION CLAIM AGAINST BANNON ONLY**

Plaintiff alleges that Bannon improperly maintained possession of certain Records and Equipment. (Complaint ¶ 26.) With regard to tangible property, Plaintiff admits that Bannon has returned all of property and that he did so in December of 2016. (Rule 30 Dep. 169-170.) Thus, the only potential remaining conversion issues relate to intangible property. Intangible rights are



normally not the proper subject for a conversion claim. *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 684 S.E.2d 756, 763 (S.C. 2009). For example, patient or medical information is intangible and cannot support a claim for conversion. *Dickerson v. TLC Lasik Ctrs.*, No. 6:10-cv-00685-JMC, 2011 U.S. Dist. LEXIS 10883, at \*42-44 (D.S.C. Feb. 3, 2011).

To the extent Plaintiff continues to allege that Bannon converted intangible property by copying information in 2016 from its SharePoint system, Plaintiff cannot establish the essential elements of this claim. Under South Carolina law, "[c]onversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights." *Crane v. Citicorp Nat'l Servs., Inc.*, 313 S.C. 70, 437 S.E.2d 50, 52 (S.C. 1993); *Moseley v. Oswald*, 376 S.C. 251, 656 S.E.2d 380, 381 (S.C. 2008).

First, Plaintiff cannot prove that it had exclusive ownership rights to the information and that Bannon did not have rights to retain the information. Plaintiff granted Bannon access to the information without restrictions, without any discussion regarding confidentiality, without any obligations to return the information, and without any discussion regarding who owned the information. (See Section II.D. above.) Bannon's position has always been that he was an independent contractor who owned the client relationship and that he was only using Plaintiff to service his clients. (See Section II.B. above.) Plaintiff cannot produce any agreement or communication that proves otherwise. Plaintiff cannot give a third party unrestricted access to information and then allege a conversion when that third party keeps the information. In addition, with regard to information obtained through Employee Navigator, Bannon received specific consent from third parties (the clients) who had the right to grant access to the information. Therefore, Plaintiff cannot prove that it had exclusive ownership of the information.

Second, Plaintiff cannot prove that Bannon altered the condition of the information or excluded Plaintiff from accessing the same information. Plaintiff alleges that Bannon “copied” information from its SharePoint system. Plaintiff does not allege that Bannon deleted this information or altered the condition. Plaintiff at all times had access to the same information. Thus, Plaintiff cannot establish the elements of alteration or exclusion.

Third, Bannon lost all access to the information he copied from SharePoint in November of 2016, prior to the initiation of this lawsuit. (Bannon Dep. 73-74.) Bannon has not maintained this information at any point during this litigation.

For the independent reasons outlined above, Bannon respectfully requests that this Court grant summary judgment in his favor and dismiss Plaintiff’s conversion claim.

**G. PLAINTIFF CANNOT PROVE DAMAGES**

On December 15, 2016, the Court denied Plaintiff’s motion for injunctive relief. Therefore, all of Plaintiff’s claims now require a showing of actual damages. *See Vortex Sports & Entm’t, Inc. v. Ware*, 378 S.C. 197, 205, 662 S.E.2d 444, 449 (Ct. App. 2008)(tortious interference with contractual relationships claim); *Nucor Corp. v. Bell*, 482 F. Supp. 2d 714, 725-26 (D.S.C. 2007); S.C. Code Ann. § 39-8-30(C) (2016) (trade secrets claim); *Moseley v. Oswald*, 376 S.C. 251, 656 S.E.2d 380, 381 (S.C. 2008), *Bateman v. Rouse*, 358 S.C. 667, 673, 596 S.E.2d 386, 389 (Ct. App. 2004)(conversion claim); *Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004)(fiduciary duty claim); *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012)(breach of contract claim). Plaintiff cannot prove damages for multiple reasons.

1. Plaintiff fully mitigated any alleged damages.

Plaintiff has fully mitigated any alleged damages. Plaintiff alleges that Bannon’s conduct

in taking his clients was known to Alera prior to the December 2016 transaction. (Rule 30 Dep. 67.) Bannon's conduct caused Alera to require an earn-out. This was clearly an assessment of how Bannon might negatively impact the value of the business and was a mitigation measure to prevent any harm to the post transaction entity, which is now Plaintiff. If the earn out was not met, it only had the ability to damage the seller (Brian Stritt). (*Id.* at 68-69.) The earn-out actually benefited the Plaintiff. The "earn-out" placed an extreme motivation on Brian Stritt to make Plaintiff profitable in 2017. As outlined in Section II.F. above, significant new measures were implemented and efforts taken to ensure increases in profitability and to the ensure that Plaintiff exceeded the requirements of the earn-out. These measures ultimately led to EBITDA growth over and above any clients that left with Bannon by 12 percent. The earn-out only required a growth of 5 percent. This level of profitability in 2017 would not have occurred but for the earn-out. Therefore, Plaintiff actually benefited from Bannon's conduct. The earn-out was a mitigation of damages measure that resulted in Plaintiff avoiding any damages in this case. Plaintiff cannot prove that it would have been less profitable in 2017 had Defendants not engaged in the conduct that resulted in the earn-out requirement. See *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 208, 662 S.E.2d 444, 450 (Ct. App. 2008) ("When the tortious conduct of a defendant causes a plaintiff to lose prospective profits, the plaintiff may recover such profits when he can prove: (1) it is reasonably certain that such profits would have been realized except for the tort; and (2) such lost profits can be ascertained and measured from the evidence produced with reasonable certainty.")

2. Plaintiff's alleged damages are speculative.

Plaintiff cannot meet its burden of proving damages with any degree of reasonable certainty. "[T]he law does not require absolute certainty . . . but only reasonable certainty that the damages are not purely speculative and there exists a fairly accurate method to estimate the lost

profits." *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 662 S.E.2d 444, 450-51 (S.C. Ct. App. 2008); see also *LeinbachInv'rs, LLC v. Magnolia Paradigm, Inc.*, 769 S.E.2d 242, 249 (S.C. Ct. App. 2014) ("As a general rule ... all damages must be susceptible of ascertainment with a reasonable degree of certainty, and ... uncertain, contingent, or speculative damages cannot be recovered in any action ex contractu or ex delicto." (internal quotation marks omitted)); *APAC-Carolina, Inc. v. Towns of Allendale and Fairfax, S.C.*, 868 F.Supp. 815, 830 (D.S.C. 1993) (holding that where damages are merely speculative, the plaintiff has failed to meet its burden of proving damages to a reasonable certainty.)

Plaintiff admits that it has not engaged an expert witness to analyze and prove its alleged damages. (Rule 30 Dep. 12.) Plaintiff alleges that it lost "approximately" \$200,000 per year in lost revenues associated with the loss of Bannon's clients. (*Id.* 101, 170.) Defendant noticed a Rule 30(b)(6) deposition on the issue of damages, which took place on February 10, 2020. During this deposition, Plaintiff admitted that it does not know the market value of the lost revenue related to Bannon's clients. (Rule 30 Dep. 170.) Plaintiff admitted that it never calculated these damages. (*Id.*) Plaintiff admitted that it has not retained a damages expert in this case and has not calculated the market value of the lost accounts. (*Id.* at 12, 170.) Plaintiff never calculated the impact Bannon's clients leaving negatively impacted EBITDA compared to the savings for not having to pay Bannon. (*Id.* 56-57.) Plaintiff cannot produce any evidence regarding how the mitigation efforts outlined above impacted any alleged damages. Plaintiff cannot produce any evidence to prove that Bannon's clients left Plaintiff based on any of the alleged misconduct in this case. (*Id.* at 76-77.) Plaintiff admits that it never asked any of Bannon's clients why they moved their business to Assured Partners. (*Id.* at 95.) Discovery is now closed, Plaintiff never supplemented any discovery responses with this information. At this point, it is clear that Plaintiff cannot prove

any damages related to alleged lost revenue.

With regard to Plaintiff's allegations of damages related to the loss of confidential information or trade secrets, Plaintiff admits that its damages are purely "speculative." (Rule 30 Dep. 102-107.) With regard to SharePoint, Plaintiff cannot show that Defendants ever actually used the information that was copied. Bannon confirmed that all of the information was lost in 2016 because his computer crashed. Defendants have confirmed that the information was never transferred to Assured Partners. Where there is no evidence of use, the only way to establish trade secrets damages is using a reasonable royalty theory. See *Sonoco Prods. Co. v. Güven*, No. 4:12-cv-00790-BHH, 2015 U.S. Dist. LEXIS 1906, at \*21 (D.S.C. Jan. 8, 2015). Significantly, Plaintiff admits that it is not seeking a reasonable royalty fee in this case. (*Id.* 160.) This is fatal to Plaintiff's claims on this issue.

With regard to Employee Navigator, Plaintiff has admitted that there is no way to calculate the value of the information. (Rule 30 Dep. 103-106.)

Plaintiff has not identified any expert witness on the issue of trade secret damages. Plaintiff cannot establish the essential element of actual damages in this case. These are complicated issues that required expert testimony. Plaintiff has the burden to prove damages and cannot meet this burden. For the independent reasons outlined above, Defendants respectfully request that this Court grant summary judgment in their favor and dismiss all of Plaintiff's claims based on the fact that Plaintiff cannot prove its damages.

## **V. CONCLUSION**

Defendants respectfully request that this Court grant their motion for summary judgment and dismiss all of Plaintiff's claims. Bannon requests attorneys' fees as a prevailing party on Plaintiff's breach of contract claim. Defendants request attorneys' fees under S.C. Code Ann. §

39-8-80 because Plaintiff has pursued the claim of misappropriation of trade secrets in bad faith. Defendants request costs associated with this litigation and any further relief as the Court deems just and proper.

Date: April 20, 2020

Respectfully submitted,

FORD & HARRISON LLP

s/ Jeffrey A. Lehrer

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STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2016-CP-07-2541

Forum Benefits, Inc.,

Plaintiff,

v.

Brian Bannon and Assured Partners, NL

Defendants.

EXHIBIT TO  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT

**EXHIBIT 2**

Judge Goodstein's Order granting summary judgment in

*Computer Products, Inc. v. Jem Restaurant Group, Inc., et al,*

Charleston County Court of Common Pleas, Case No. 04-CP-10-301 (2005).

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

IN THE CIRCUIT COURT

COMPUTER PRODUCTS, INC., )  
Plaintiff, )

<sup>D4</sup>  
Case No. ~~03~~-CP-10-301

vs. )

**ORDER GRANTING  
SUMMARY JUDGMENT  
FOR DEFENDANT VALMUS**

JEM RESTAURANT GROUP, INC.; )  
JOHN E. MCGRATH; MONOLITH )  
SOFTWARE SOLUTIONS, INC.; and )  
W. DAVID VALMUS, )  
Defendants. )

**FILED**  
2005 JUN -7 AM 10:27  
JULIE A. HARRIS, CLERK OF COURT  
BY

This matter was heard before the Court upon Defendants' Motions for Summary Judgment on March 17, 2005. All parties submitted memoranda and Jenny Anderson Horne, Esquire, appeared for W. David Valmus; Wendy J. Keefer appeared for Defendants JEM Restaurant Group, Inc., John McGrath, and Monolith Software Solutions; and Paul Tinkler, Esquire appeared for Plaintiff. After having considered the argument of counsel, the pleadings, the parties' memoranda and accompanying deposition transcripts, this Court hereby grants summary judgment in favor of Defendant Valmus on all causes of action.

Plaintiff has brought the present action alleging three causes of action against all Defendants for (1) violation of the South Carolina Trade Secrets Act; (2) breach of the duty of loyalty; (3) breach of the implied covenant of good faith and fair dealing. Plaintiff has also brought a cause of action against Defendants McGrath and JEM for violation of the South Carolina Unfair Trade Practices Act. Plaintiff alleges that Mr. Valmus breached a duty of



loyalty, the implied covenant of good faith and fair dealing, and the South Carolina Trade Secrets Act by forming Defendant Monolith and developing new software.

### **UNDISPUTED FACTS**

Mr. Valmus, once an independent contractor computer programmer doing business as Monolith Data Solutions (hereinafter "Mr. Valmus"), performed certain computer programming services for a customer of Plaintiff Computer Products, Inc. ("CPI"), JEM Restaurant Group ("JEM"), in the fall of 2001 and January of 2002. Henry Scott McClain ("McClain") is the sole owner of CPI and the 30(b) (6) representative of CPI. (Deposition of H. Scott McClain, p. 12) ("McClain Depo.") CPI sells computer hardware and phone systems, maintains networks, and performs web hosting services. (McClain Depo. at 13) In October of 2000, JEM Restaurant Group purchased hardware from CPI and paid for a service contract for maintenance of same. (Service Contract)

Mr. McClain admits he is incapable of performing computer programming functions. CPI outsourced programming work to Mr. Valmus and other independent contractors. (McClain Depo at 117) Mr. Valmus was and is a UNIX computer programmer. In 2001, JEM purchased a UNIX-based computer and polling manager software from Pizza Hut, Inc. ("Pizza Hut software") but was unsuccessful in getting the system to work because it had been damaged in shipping. JEM contacted CPI for help with the problem. Because CPI did not have an employee capable of working on UNIX-based systems, Mr. McClain contacted Mr. Valmus and hired him to repair the operating system and modify the software. (McClain Depo. at 132-33) Two proposals fully describe the work performed for JEM. (Proposals) In the fall of 2001 and in January of 2002, Mr. Valmus modified the Pizza Hut polling manager software. Mr. Valmus completed his UNIX programming work on the project in January of 2002 but did not receive compensation for same until November of 2002 when the project had been completed.

(Deposition of W. David Valmus, p. 29; Receipt, dated Nov. 19, 2002) Mr. Valmus performed no other work on the project after January of 2002, he simply called JEM on a regular basis to see if the project had been completed so he would know when to expect payment from CPI. (Valmus Depo. at 29 & 31) Mr. Valmus was paid by CPI for his services in November of 2002, and he signed a receipt of same. CPI did not hire Mr. Valmus to perform any additional work for JEM after completion of the modification of the polling manager software in January 2002. (McClain Depo. at 151)

CPI issued a 1099 to Mr. Valmus and his company Monolith Data Solutions, as a non-employee independent contractor, for the work performed for JEM. (1099) At the hearing of this motion, counsel for Plaintiff conceded that Mr. Valmus was not an employee, but an independent contractor of CPI. CPI admits that it never entered into any contract with Mr. Valmus or his company to restrict his disclosure of confidential information or to restrict his ability to earn a livelihood as it routinely did with its full-time employees. (McClain Depo. at 108)

On or before June of 2002 and after Mr. Valmus's completion of his work on the modification of the Pizza Hut software, Plaintiff and John McGrath ("McGrath"), the President of JEM, met on one occasion to discuss the possibility of entering into a business relationship whereby CPI would partner with JEM to develop new restaurant software. It is undisputed that all discussions were in general terms and no specific details of the software were ever discussed. Mr. McClain prepared a proposal which was not accepted by Mr. McGrath. This proposal states in two separate places that the project should not proceed "without formal agreements" regarding ownership of the software code. (June 3, 2002 Proposal) McClain admits that no formal agreement was ever reached with JEM, and CPI took no steps to develop any software. (McClain Depo at 70-71; 92)

In August of 2002, Mr. Valmus dissolved his company Monolith Data Solutions and was hired as a full-time employee of JEM Pizza Group, a separate company from JEM Restaurant Group, to maintain its UNIX computer systems which had previously been serviced by an outside company, NCR. (Valmus Depo. at 37) In November of 2002, Mr. Valmus, Defendant McGrath, and Bruce Belvin (“Mr. Belvin”) formed a new corporation, Defendant Monolith Software Solutions (“Defendant Monolith”), for the purpose of developing new software for the fast food industry. CPI continued to perform services for JEM Restaurant Group until at least May of 2003, after Mr. Valmus became employed by JEM Pizza Group and after the formation of Defendant Monolith. (McClain Depo. at 155; May 2003 Invoice) In 2003, Defendant Monolith developed a new UNIX-based software which performs wholly different functions than the original Pizza Hut software. Defendant Monolith treats<sup>0</sup> its new software as a trade secret.

### **APPLICABLE LEGAL STANDARDS**

Rule 56(c) of the South Carolina Rules of Civil Procedure requires that summary judgment be granted if “there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law.” S.C. R. Civ. P. 56(c). Although the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, “this initial responsibility may be discharged by ‘showing’ – that is, pointing out to the trial court – that there is an absence of evidence to support the nonmoving party’s case.” Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Once the moving party makes this demonstration, the opposing party “must, under Rule 56(e), do more than simply show some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a *genuine issue for trial*.” Id. (emphasis in original); Midland Mutual Life Ins. Co. v. Darrell, 331 S.C. 394, 397, 503 S.E.2d 189, 190 (Ct. App. 1998). The nonmoving party must specifically set forth such facts, “as would be admissible in evidence,” to show that a true jury

issue exists. See S.C. R. Civ. P. 56(e). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003); George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001). Under South Carolina law, where “plain, palpable and indisputable facts exist on which reasonable minds cannot differ,” summary judgment in favor of the moving party is proper. Williams v. Chesterfield Lumber Co., 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976). I find that there are no material facts in dispute and summary judgment is an appropriate means of adjudicating this case.

#### **A. South Carolina Trade Secrets Act**

Plaintiff concedes that Mr. Valmus was an independent contractor and not an employee of CPI. Computer Product’s claim that Mr. Valmus violated the South Carolina Trade Secrets Act, S.C. Code Ann §39-8-10 et seq., (“SCTSA”) fails as a matter of law because the Act has no application to independent contractors such as Mr. Valmus. The SCTSA prohibits only “employees” from misappropriating trade secrets from an employer. S.C. Code Ann. § 39-8-30(B). The SCTSA, by its plain and ordinary meaning, is inapplicable to independent contractors. City of Myrtle Beach v. Juel Corp., 344 S.C. 43, 543 S.E.2d 538 (2001) (In construing statutes, words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation; statutes in derogation of common law must be strictly construed and should not be impliedly extended to cases not within their scope and purpose). Accordingly, Plaintiff has no SCTSA claim against Mr. Valmus, or derivatively to the other Defendants, as a matter of law.

Even if the SCTSA applied to Mr. Valmus, which it does not, Plaintiff cannot meet its burden to prove the existence of a trade secret. The burden of proving the existence of a trade secret falls upon the plaintiff. Lowndes Prods. v. Brower, 259 S.C. 322, 191 S.E.2d 761 (1972).

Mr. McClain admits he took no steps to develop any new software. Indeed, McClain admits that he is incapable of writing computer programs and that no agreement was ever entered into between CPI and JEM for the development of new fast food industry software. I find that CPI has not met its burden of proof on the existence of a trade secret under the SCTSA. For the reasons set forth in more detail in this Court's Order Granting Defendants JEM Restaurant Group, Inc., John E. McGrath, and Monolith Software Solutions, Inc.'s Motion for Summary Judgment, I find that no trade secret was created by Plaintiff and Defendant Valmus is entitled to summary judgment on the SCTSA claim.

**B. Breach of the Duty of Loyalty**

Plaintiff claims in the instant action Mr. Valmus breached a duty of loyalty he owed to CPI by forming Monolith Software Solutions and developing software for the fast food industry. McClain admits that CPI never entered into any written non-competition agreement with Mr. Valmus, and Plaintiff can prove no duty owed it by Mr. Valmus as a matter of law. At oral argument plaintiff relied heavily upon the case of Lowndes Prods. v. Brower, 259 S.C. 322, 191 S.E.2d 761 (1972) to support its claim of a breach of the duty of loyalty by Mr. Valmus. However, Lowndes Products is a trade secrets case concerning the activities of current, and not former, employees. Indeed, CPI has cited to no case establishing the existence of a duty owed by Mr. Valmus, an independent contractor, to CPI under the facts and circumstances of the present case.

In fact, South Carolina courts have declared that former employees do not owe a duty of loyalty to their former employers. Absent a contrary agreement, an employee has a right to compete with his employer following the termination of his employment. An employee, however, has a duty "not to do disloyal acts looking to future competition." Futch v. McAllister Towing of Georgetown, Inc., 328 S.C. 312, 491 S.E.2d 577 (S.C. App. 1997). This rule of law

applies only to disloyal acts which take place before the conclusion of the employment relationship and not to post-termination conduct. Plaintiff has cited no authority for the proposition that an independent contractor owes a broad or indefinite duty of loyalty after the completion of a discrete task. Indeed, Futch allows former employees to engage in acts of competition in the absence of a valid and enforceable restrictive covenant.

This Court concludes that Mr. Valmus owed no duty to Plaintiff as a matter of law. McClain admits, and it is undisputed, that the parties never entered into a restrictive covenant in any way limiting Mr. Valmus's future work as an independent contractor. This Court is not persuaded by Plaintiff's argument that Mr. Valmus acknowledged the existence of a duty to CPI in his deposition. The existence of a legal duty is a question of law for the courts. See Doe v. Batson, 345 S.C. 316, 548 S.E.2d 854 (2001). Having found that Mr. Valmus owed no duty<sup>1</sup> to CPI as a matter of law, this Court grants summary judgment for Mr. Valmus on CPI's breach of the duty of loyalty claim.

Assuming for purposes of summary judgment there was such a duty, this Court finds that Mr. Valmus did not engage in any disloyal acts of competition with CPI at any time. Mr. Valmus was not employed by JEM Pizza Group (a separate non-party entity) until August of 2002, some seven months after he completed wholly unrelated work on Pizza Hut's proprietary software for JEM Restaurant Group in January of 2002. Thereafter, Mr. Valmus, as an employee of JEM Pizza Group, formed Monolith Software Solutions in November of 2002, some ten months after completing the work for CPI. There is no evidence that Mr. Valmus engaged in any alleged disloyal actions at any time and certainly not before he completed services for CPI in

---

<sup>1</sup> Plaintiff has advanced the argument that Mr. Valmus, an independent contractor, owed a fiduciary duty to CPI; however, Plaintiff has not alleged a cause of action for breach of fiduciary duty in the Complaint. Assuming for purposes of summary judgment that Plaintiff had made such an allegation, Plaintiff has cited no authority, and this Court can locate none, for the contention that a fiduciary duty exists between Mr. Valmus and CPI under the facts of this case.

January of 2002. Accordingly, summary judgment is proper for Defendant Valmus on the breach of the duty of loyalty claim on two grounds.

**C. Breach of the Covenant of Good Faith & Fair Dealing**

It is undisputed that CPI and Mr. Valmus never entered into any contract to restrict Mr. Valmus's ability to earn a living or to disclose otherwise confidential information. The South Carolina Court of Appeals recently recognized that the implied covenant of good faith and fair dealing is not an independent cause of action separate from a claim for breach of contract. See RoTec Services, Inc. v. Encompass Services, Inc., 359 S.C. 467, 597 S.E.2d 881, 884 (Ct. App. 2004). CPI has brought no breach of contract claim against Mr. Valmus; indeed, Mr. McClain, CPI's President, admits he never entered into any contracts with Mr. Valmus or with any other Defendant. I find Plaintiff's argument that the November 18, 2002 receipt for payment constitutes a contract or restrictive covenant unpersuasive. The document was signed by Mr. Valmus at the end of the project and is not supported by consideration. Further, the document does not restrict Mr. Valmus in any way but is simply an acknowledgement of receipt of payment and that certain information may be a trade secret as defined by statute. Having found the South Carolina Trade Secret Act inapplicable to Mr. Valmus and in the present case, the document is of no legal effect and does not create any contractual obligations on behalf of Mr. Valmus. Accordingly, this cause of action fails as a matter of law.

**IT IS SO ORDERED** that this Court finds that there is no material issue of fact and that Mr. Valmus's motion for summary judgment on the Plaintiff's claims of violation of the South Carolina Trade Secrets Act; breach of the duty of loyalty; and breach of the implied covenant of good faith and fair dealing is hereby granted.

**AND IT IS SO ORDERED.**



Diane Schafer Goodstein  
Presiding Judge

May 25, 2005



STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2016-CP-07-2541

Forum Benefits, Inc.,

Plaintiff,

v.

Brian Bannon and Assured Partners, NL

Defendants.

EXHIBIT TO  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT

**EXHIBIT 3**

Deposition Transcript and Exhibits of Brian Stritt.

*Based on Plaintiff's extensive allegations of confidentiality, Defendants will be filing these transcript pages and exhibits under seal to avoid any disputes relating to confidentiality.*

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2016-CP-07-2541

Forum Benefits, Inc.,

Plaintiff,

v.

Brian Bannon and Assured Partners, NL

Defendants.

EXHIBIT TO  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT

**EXHIBIT 4**

Deposition Transcript and Exhibits of Plaintiff's Rule 30(b)(6) Deponent.

*Based on Plaintiff's extensive allegations of confidentiality, Defendants will be filing these transcript pages and exhibits under seal to avoid any disputes relating to confidentiality.*

**STATE OF SOUTH CAROLINA**

**COUNTY OF BEAUFORT**

**IN THE COURT OF COMMON PLEAS**

**CIVIL ACTION NO. 2016-CP-07-2541**

**Forum Benefits, Inc.,**

**Plaintiff,**

**v.**

**Brian Bannon and Assured Partners, NL**

**Defendants.**

**EXHIBIT TO  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

**EXHIBIT 5**

Deposition Transcript and Exhibits of Brian Bannon.

**Excerpts of  
Brian Bannon  
Deposition Transcript  
and Exhibits**

1 IN THE COURT OF COMMON PLEAS  
2 FOURTEENTH JUDICIAL CIRCUIT  
3 STATE OF SOUTH CAROLINA  
4 COUNTY OF BEAUFORT

5 FORUM BENEFITS, INC.,

6 Plaintiff,

7  
8  
9  
10 vs. CIVIL ACTION NUMBER  
11 2016-CP-07-02541  
12  
13  
14

15 BRIAN BANNON AND ASSURED PARTNERS, NL,

16 Defendants.

17 -----/

18 The deposition of BRIAN BANNON, a  
19 witness in the above-entitled cause, taken  
20 pursuant to Notice and agreement, before Ceil  
21 Weser, Certified Court Reporter and Notary  
22 Public, at the Law Offices of Harvey & Battey,  
23 P.A., 1001 Craven Street, Beaufort, South  
24 Carolina, on the 6th day of October, 2017,  
25 commencing at or about the hour of 10:00 a.m.

1 subjects for inquiry by me to ascertain whether  
2 there have been any witness coaching, or if so  
3 to what extent and nature. Any conferences  
4 which occur pursuant to or in violation of this  
5 Rule shall be noted on the record by me, and the  
6 purpose of the outcome of the conference shall  
7 be noted on the record.

8 Mr. Bannon, where are you employed?

9 A Assured Partners.

10 Q And who do you report to?

11 A Jon Taylor.

12 Q And what is your position?

13 A Senior Vice-President, Producer.

14 Q And has that been your position since  
15 you first became employed there?

16 A Yes.

17 Q What are your responsibilities and  
18 duties as a Senior Vice-President and Producer?

19 A To manage my current block of business.  
20 Basically keep the clients happy.

21 Go out and negotiate renewal, present  
22 the renewal.

23 And most importantly find new clients  
24 to bring on board.

25 Q What do you mean manage your book of

1 employment with Forum Benefits.

2 Q So is it your testimony that Mack Ward  
3 told Ben Taylor to call you?

4 A Yes.

5 Q How would Mack Ward have known about  
6 you?

7 A Because we both knew each other from  
8 Forum Benefits.

9 Q But you weren't employed by Forum  
10 Benefits, is that correct, at that time?

11 A I was a 1099. I was running my  
12 business through Forum Benefits at the time Mack  
13 Ward told me to call Ben Taylor.

14 Q Okay.

15 When did you first meet with Jon  
16 Taylor?

17 A Sometime in the summer of 2016.

18 Q I believe you testified in the hearing  
19 on the injunctive relief we sought in this case  
20 that you met him sometime in July or August?

21 MR. HARVEY: If you are going to  
22 refer to "I believe you testified",  
23 show him the transcript, please.

24 MR. HASKELL: I would be glad to.

25 MR. HARVEY: That occurred almost

1 a year ago.

2 BY MR. HASKELL:

3 Q I refer you to -- start with line 22 on  
4 page 74 and go to line 3 on page 75.

5 A Okay.

6 Q If you could read that, please.

7 A So line 22?

8 Q Yes.

9 A "And when did you approach -- did you  
10 approach Assured Partners by going to work for  
11 them?

12 No, they approached me through a couple  
13 of people I know.

14 And when was that?

15 Late July, August.

16 Q That is all. Thank you.

17 A That is accurate.

18 Q Did you speak to Mr. Taylor by  
19 telephone prior to your first meeting with him?

20 A I can't remember.

21 Q What did you discuss at your meeting  
22 with Mr. Taylor?

23 A It was like a getting to know you  
24 meeting. My background, what my history was,  
25 family, friends, where I went to school.



1       Clemson Tigers, college football, where he went  
2       to school, his history; that type of thing.

3           Q     Did he describe the business of Assured  
4       Partners?

5           A     Not really. We didn't really talk  
6       about business a whole lot in that meeting.

7           Q     When did you have a second meeting or  
8       did you have a second meeting?

9           A     Jeez, I don't know that we had a second  
10      meeting.

11                  We may have. I can't remember.

12          Q     Where did you first meet with Mr.  
13      Taylor?

14          A     I think it was a place called Early  
15      Bird Diner, I think, if that is the name. I  
16      can't remember. It was his suggestion. I had  
17      never eaten there before. It was off -- it was  
18      in West Ashley in Charleston. I think it was  
19      off 17 somewhere.

20          Q     Okay.

21                  Did you ever discuss with Mr. Taylor  
22      the book of business that you had with Forum  
23      Benefits at the time?

24                  MR. HARVEY: Ever?

25                  MR. HASKELL: Ever.

1 MR. HARVEY: Okay.

2 THE WITNESS: I think we -- yeah,  
3 we probably covered it.

4 BY MR. HASKELL:

5 Q Did you cover it before you were  
6 employed by Assured Partners?

7 A Yeah, I probably told him about how big  
8 I thought it was, how many clients I had.

9 Q And how many clients and how big was  
10 the business?

11 A I think I had 16 or 17 clients. I  
12 can't remember the exact number. I told him it  
13 was somewhere between 200 and I estimated  
14 240,000 worth of revenue. That doesn't include  
15 all the overrides. I was just giving him a  
16 guesstimate in what I thought was being reported  
17 to me it was actually worth based on just  
18 looking at my monthly commission statements.

19 Q Would that be annual revenue?

20 A Yes.

21 Q What are overrides?

22 A They are basically contingencies for --  
23 if a broker can place a lot of business with a  
24 particular carrier, renew that business, or for  
25 writing business the insurance company will

1 employee for Forum Benefits, is that correct?

2 A Yes.

3 Q When did you cease representing Forum  
4 Benefits?

5 A I believe when I sent in the agent of  
6 record letters. The date that I started sending  
7 them in is when I stopped representing Forum  
8 Benefits.

9 Q And what agent of record letters are we  
10 referring to?

11 A The ones that I sent in to Blue  
12 Cross/Blue Shield.

13 Q And what were the dates of those?

14 A I don't know. I believe they were  
15 sometime in November.

16 Q So it is your testimony that you ceased  
17 representation of Forum Benefits sometime in  
18 November, is that correct?

19 A Well, I was a 1099 employee, so I was  
20 an independent contractor. I was simply running  
21 my benefits, business through Forum. I wasn't  
22 an employee of Forum Benefits, so I was  
23 representing myself.

24 Q Were you soliciting business for Forum  
25 Benefits --

1 A No --

2 Q -- As a 1099 employee?

3 A No, at the time that I left I wasn't.

4 I had stopped soliciting business a  
5 year earlier.

6 Q So you sopped soliciting business -- is  
7 it your testimony that you stopped soliciting  
8 business for Forum Benefits in 2015?

9 A Yes, November.

10 Q November of 2015, is that correct?

11 A Yes.

12 Q Did you generate any business for Forum  
13 Benefits post November of 2015?

14 A I can't recall.

15 Q How did you notify Forum Benefits that  
16 you had accepted a position at their competitor  
17 Assured Partners?

18 A I didn't.

19 Q Why didn't you?

20 A Because I had a sneaky suspicion that  
21 Brian Stritt was attempting to steal my entire  
22 block of business and sell it to somebody else;  
23 and I knew that if I told him what I was doing  
24 he was going to shut me out and approach all of  
25 my clients, and attempt to subterfuge my ability

1 to bring my clients with me.

2 Q When were you first employed by Forum  
3 Benefits -- excuse me, by Assured Partners?

4 A It was either October -- I think  
5 October 15, 2016.

6 Q After October 15, 2016 did you visit  
7 any client while holding yourself out as a  
8 representative of Forum Benefits?

9 A No.

10 Q That would have been wrong, correct?

11 MR. HARVEY: Objection to form.

12 THE WITNESS: When I approached my  
13 clients after October 15 any  
14 conversations, I was very transparent  
15 and clear about what was going on. I  
16 was leaving Forum Benefits. I was  
17 going to Assured Partners, and they had  
18 a choice; they could either stay or  
19 come with me.

20 BY MR. HASKELL:

21 Q Thank you.

22 I believe it is your testimony that you  
23 stopped soliciting business for Forum Benefits  
24 in November of 2015, is that correct?

25 A I stopped trying to bring new clients

1 on to Forum in November of 2015.

2 Q Did you notify Forum Benefits at that  
3 time that you were stopping those actions?

4 A No, I was waiting on the employment  
5 contract that Brian Stritt said he was going to  
6 deliver to me.

7 Q And when was that?

8 A That was in November of 2015, I think.

9 Q Did you have an employment agreement  
10 with Forum Benefits?

11 A No.

12 Q Did you have an employment agreement  
13 with your prior employer?

14 A I did.

15 Q Were you hesitant in signing an  
16 employment agreement with Forum Benefits?

17 A Sure.

18 Q Why was that?

19 A Because once you sign an employment  
20 agreement they are enforceable.

21 Q And what kind of provisions are  
22 enforceable that would trouble you?

23 A Typically there is something call a  
24 non-compete and nonsolicitation from my previous  
25 employer, and if they give you a certain amount

1 of -- it is my understanding if they give you a  
 2 certain amount of consideration and you sign it,  
 3 under my previous agreement I was unable to  
 4 contact or solicit business from any of my  
 5 previous clients for a period of I think it was  
 6 24 months once I left my previous employer.

7 So I in no way, shape or form intended  
 8 on signing another employment agreement.

9 Q But didn't you just testify in November  
 10 of 2015 you were waiting for an employment  
 11 agreement from Brian Stritt?

12 A And he was said he was going to deliver  
 13 one. I didn't agree to sign it. He just said  
 14 he was going to deliver it. I said I would  
 15 review it. I would have my attorney look at it  
 16 and I would send it back to him.

17 Q So the reason why you didn't notify --  
 18 is it your testimony that the reason why you  
 19 didn't notify Forum Benefits in November of 2015  
 20 that you were stopping solicitation of new  
 21 clients for them was because you were waiting  
 22 for an employment agreement from Brian Stritt at  
 23 the time?

24 A I wanted to see what was in it.

25 Q Yes or no?

1 question.

2 MR. HARVEY: You can answer the  
3 question how you deem appropriate.

4 THE WITNESS: Can you repeat the  
5 question?

6 (Whereupon, the record  
7 was read back as requested.)

8 THE WITNESS: I was disclosing the  
9 revenue of my block of business to  
10 Assured Partners as a 1099 independent  
11 contractor.

12 BY MR. HASKELL:

13 Q Okay, thank you.

14 In 2016 were you placing business for  
15 Assured Partners -- I mean for Forum Benefits?

16 MR. HARVEY: When in 2016?

17 MR. HASKELL: Any time.

18 THE WITNESS: Can you elaborate on  
19 placing business, what do you mean by  
20 that?

21 BY MR. HASKELL:

22 Q In 2016 prior to -- excuse me, prior to  
23 October 15, 2016, did you have clients who were  
24 serviced by Forum Benefits?

25 A Yes.



1 Q Did you place that business with those  
2 clients with Forum Benefits?

3 A They were already clients.

4 Q Had you placed that business with Forum  
5 Benefits at the time?

6 MR. HARVEY: Objection to form.

7 Placed business? You need to  
8 define that term.

9 THE WITNESS: I don't know what  
10 you mean.

11 MR. HARVEY: You need to define  
12 that term.

13 MR. HASKELL: Okay.

14 BY MR. HASKELL:

15 Q Prior to October 15, 2016 had you  
16 secured clients that were Forum Benefits'  
17 customers?

18 A I had clients. They were being  
19 serviced through Forum Benefits.

20 Q Thank you.

21 (Whereupon, Plaintiff's Exhibit  
22 Number 6 was marked for  
23 identification.)

24 BY MR. HASKELL:

25 Q Did you ever download files or copy

1 information that you had downloaded from the  
2 SharePoint system?

3 A That would be accurate.

4 Q All 2000 files?

5 A I believe some of those files were on  
6 the desktop that was returned back to Brian  
7 Stritt.

8 Q And did you transfer those files to  
9 anybody else?

10 A No.

11 MR. HARVEY: You need to answer  
12 yes or no.

13 THE WITNESS: No.

14 BY MR. HASKELL:

15 Q What kind of information was in those  
16 files?

17 A Client information; demographic  
18 information, meaning Social Security numbers,  
19 dates of birth; dependent information,  
20 addresses, zip codes; client policy info,  
21 medical carrier, dental carrier.

22 You know, anything else pertaining to  
23 their employee benefit plans, like Section 125,  
24 Federal HOA info, payroll deductions, that type  
25 of stuff.

1 A It says denied.

2 Q During the period January of 2016  
3 through November 15, 2016 you deny accessing,  
4 copying, or downloading files from Forum  
5 Benefits' computer systems that included  
6 Employee Navigator Guides, is that correct?

7 A I downloaded my clients' files.

8 Q Did you download those from Assured  
9 Partners' computer systems -- I mean excuse me,  
10 Forum Benefits' computer systems?

11 A Not intentionally. If they were in a  
12 client file, I did have a dump of the client  
13 file. My client file data dumped everything in  
14 it.

15 Q Could they have included Employee  
16 Navigator Guides?

17 A I can't say.

18 Like I said, I am not familiar with the  
19 Employee Navigator Guide.

20 Q I refer you back to Exhibit 8, the  
21 first sentence.

22 A Okay.

23 Q What does that say?

24 A Once Benesolv has confirmed they have  
25 copied the Employee Navigator website's over

1 info, to make copies of Employee Navigator  
2 website's for the following clients that are  
3 moving with me to Assured Partners/NL."

4 Q Where did you get the attached info  
5 that you are referring to in your Email?

6 A Some of it would have been from their  
7 current policy information from the insurance  
8 company. The rest of the information I would  
9 have gotten from the clients themselves.

10 Q Does this Email show that Mr. Taylor,  
11 Miss Hagan, Mr. Brady all received this attached  
12 info also?

13 A It seems to indicate that, yes,  
14 correct.

15 Q Why was Mack Ward involved in, or why  
16 did Mack Ward receive a copy of your October 22,  
17 2016 Email that we just discussed?

18 A Mack was asked to help out because he  
19 basically went through the same transition when  
20 he came on from AssureSouth -- Forum, when he  
21 transitioned his business to Assured Partners,  
22 he kind of knew the logistics of how this stuff  
23 got done.

24 Q Who asked Mr. Ward to be involved?

25 A I am not sure.

1 Q Would you assume that to be Jim is  
2 taking the lead on screen shooting?

3 A That is plausible, yes.

4 (Whereupon, Plaintiff's Exhibit  
5 Number 13 was marked for  
6 identification.)

7 MR. HARVEY: Can we take a short  
8 break?

9 (Whereupon, a short break was  
10 taken.)

11 BY MR. HASKELL:

12 Q Mr. Bannon, would you look at Exhibit  
13 13, please.

14 A Sure.

15 Q And that first Email, is that an Email  
16 from you to Michelle Fralix who is now known as  
17 Michelle Cofield?

18 A It appears to be.

19 Q And what is the date of that Email?

20 A November 30, 2016.

21 Q And would you read the first sentence  
22 of that.

23 A "Michelle, my hard drive broke and I no  
24 longer have available info for these guys."

25 Q And what device are you referring to as

1 the hard drive?

2 A My personal laptop.

3 Q Is that the laptop that you used to  
4 download information from Forum Benefits?

5 A Yes.

6 Q When did that hard drive break?

7 A November 30 or thereabouts. Probably  
8 within a day I mean, you know.

9 Q Had you sent information -- strike  
10 that.

11 I believe it was your testimony that  
12 you had downloaded information from Forum?

13 A From the Share Drive Partners.

14 Q From the Share Drive to your hard  
15 drive?

16 A Right.

17 Q Had you uploaded or transferred that  
18 information to Assured Partners or any of that  
19 information?

20 A No.

21 Q You are sure of that?

22 A Oh, I am positive.

23 Q Okay.

24 A It is not something I planned.

25 (Whereupon, Plaintiff's Exhibit

**Dean Haskell**

**From:** Brian Bannon <Brian.Bannon@assuredptrnl.com>  
**Sent:** Wednesday, November 30, 2016 4:02 PM  
**To:** Michelle Fralix  
**Subject:** FW: Renewal

Michelle,

My hard drive broke and I no longer have renewal info. for these guys.

Have we been sent copies of their 1/1 renewal stuff yet?

Brian

**From:** Paula Gant [mailto:accounting@alphagenesisinc.com]  
**Sent:** Wednesday, November 30, 2016 10:53 AM  
**To:** Brian Bannon <Brian.Bannon@assuredptrnl.com>  
**Subject:** RE: Renewal

Hi Brian,

Next week for me is full. Is the 15<sup>th</sup> or 16<sup>th</sup> too late?

Also, how do I sign up employees now. Who do I need to send new enrollee information?

**Paula Gant**

Accounting and Human Resources

For Brian,

866-789-MONK (6665)  
 843-589-5190 ext.26 (office)  
 843-589-5290 (fax)  
[www.AlphaGenesisInc.com](http://www.AlphaGenesisInc.com)



Please consider the environment before printing this e-mail.

**From:** Brian Bannon [mailto:Brian.Bannon@assuredptrnl.com]  
**Sent:** Wednesday, November 23, 2016 10:45 AM  
**To:** Paula Gant (accounting@alphagenesisinc.com) <accounting@alphagenesisinc.com>  
**Subject:** Renewal

Hi Paula,

Let me know how you'd like to proceed re: your 1/1 renewal. Also, please send me a few dates that work for you for the renewal meeting.....we're almost in December.

The first week of December maybe?

Have a Happy Thanksgiving!

**Brian Bannon, PAHM**

Senior Vice President

**AssuredPartners NL**

3860 Faber Place Drive, Suite 400

North Charleston, SC 29405

C 843.860.1291 P 843.706.2438

F 843.569.7209

[Brian.Bannon@assuredptrnl.com](mailto:Brian.Bannon@assuredptrnl.com)

[www.assuredptrnl.com](http://www.assuredptrnl.com)

DISCLAIMER

11/10/14

ASSURED

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**STATE OF SOUTH CAROLINA**

**COUNTY OF BEAUFORT**

**IN THE COURT OF COMMON PLEAS**

**CIVIL ACTION NO. 2016-CP-07-2541**

**Forum Benefits, Inc.,**

**Plaintiff,**

**v.**

**Brian Bannon and Assured Partners, NL**

**Defendants.**

**EXHIBIT TO  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

**EXHIBIT 6**

Deposition Transcript and Exhibits of Mack Ward.

# **Excerpts of Mack Ward Deposition Transcript and Exhibits**

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL CIRCUIT

COUNTY OF BEAUFORT

FORUM BENEFITS, INC.,

Plaintiff,

vs.

CASE NO. 2016-CP-07-02541

BRIAN BANNON AND ASSURED  
PARTNERS, NL,

Defendants.

DEPOSITION OF: MACK WARD

DATE: October 5, 2017

TIME: 10:04 a.m.

LOCATION: Law Offices of  
Dority & Manning  
75 Beattie Place  
Suite 1100  
Greenville, SC 29601

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: ERIC S. GLAZIER, Court Reporter

---

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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1 Brian Bannon was for Forum Benefits or as an  
2 independent contractor?

3 A. No.

4 Q. But you were a salesperson or broker of  
5 insurance policies for Assure South?

6 A. Assure South, yes. But we did  
7 represent them. We sold an account and they  
8 represented us on the service side. I know that's  
9 a little confusing.

10 Q. Tell me what you know about Brian  
11 Bannon's relationship with Forum Benefits from 2012  
12 to 2016.

13 A. Can you give me a little more detail?

14 Q. I think you said before you're not sure  
15 if he was an employee of Forum Benefits or a 1099  
16 independent contractor, right?

17 A. One time he was an employee, and then  
18 we went to independent contractor. I don't know  
19 the years of that.

20 Q. So you know at one time he was an  
21 employee of Forum Benefits? And you need to answer  
22 yes or no.

23 A. I'm sorry. What was the question?

24 Q. At one time you do know that Brian  
25 Bannon was an employee of Forum Benefits?

1 have?

2 A. Yes.

3 Q. Were you involved at all in the  
4 recruitment of Brian Bannon to Assured Partners?

5 A. Yeah.

6 Q. Tell me what your involvement there  
7 was.

8 A. He called me.

9 Q. Brian Bannon called you?

10 A. Mm-hmm (affirmatively).

11 Q. About when?

12 A. Well, I reached out to him after our  
13 arrangement. Our noncompete had gone away. So we  
14 talked probably summertime of -- late summer of  
15 2016.

16 Q. Let me clarify something there. You  
17 reached out to Brian Bannon when your noncompete  
18 with Forum Benefits expired?

19 A. Yes.

20 Q. When did your noncompete with Forum  
21 Benefits expire?

22 A. 60 days at the end of terminated  
23 contract.

24 Q. And your noncompete prevented you from  
25 reaching out to their current what?

1           A.    Well, clients, employees, and -- I  
2    think it's just clients and employees. And --  
3    yeah, clients and employees.

4           Q.    It was your understanding you could not  
5    reach out to Brian Bannon because he was an  
6    employee of Forum Benefits?

7           A.    Brian Stritt asked Ben Taylor that we  
8    not talk in March or April since we're friends, so  
9    we respected that.

10          Q.    Then so towards the end of the summer  
11   of 2016 was the first time you spoke with Brian  
12   Bannon about possibly changing to Assured Partners?

13          A.    I didn't speak to him about possibly  
14   changing to Assured Partners. He wanted some  
15   advice about what to do. I said, you need to call  
16   Ben Taylor. So he called Ben Taylor.

17          Q.    Why did you tell Brian Bannon he needed  
18   to call Ben Taylor?

19          A.    Because of the arrangement that he had  
20   with Stritt in regards to -- I didn't quite  
21   understand that, but I knew he had to no  
22   noncompete. So that's why I just told him to call  
23   Ben. He understands business better than I do, and  
24   what to do, so I just thought he would be a better  
25   contact.

1 Q. When you said the arrangement he had  
2 with Brian Stritt, you meant the arrangement Ben  
3 Taylor had with Brian Stritt?

4 A. No, that Bannon had.

5 Q. If I understand correctly, at the end  
6 of the summer in 2016, Brian Bannon reached out to  
7 you to ask for advice on what he should do?

8 A. Yep.

9 Q. And you said, talk to Ben Taylor?

10 A. Yep.

11 Q. Anything else?

12 A. Yeah. I told him what went down when  
13 we separated from Forum.

14 Q. Okay. What went down when we separated  
15 from Forum, let me ask you a few questions about  
16 that. You mean what happened when you and Ben  
17 Taylor stopped your arrangement between Assure  
18 South and Forum Benefits?

19 A. Yes.

20 Q. What did you tell Brian Bannon happened  
21 then?

22 A. I told him that noncompetes were  
23 violated.

24 Q. Noncompetes between who and who?

25 A. Between Assure South and Forum

1 Benefits.

2 Q. And who do you think violated them?

3 A. Forum Benefits.

4 Q. Why do you think Forum Benefits  
5 violated a noncompete between Forum Benefits and  
6 Assure South?

7 A. Because we have many clients who said  
8 so.

9 Q. Because Assure South has a lot of  
10 clients that said --

11 A. That they got solicitation calls from  
12 Forum Benefits.

13 Q. And that would have been a violation of  
14 the noncompete?

15 A. Yes.

16 Q. Was there a time limit on that  
17 noncompete?

18 A. It expired at the end of the contract.

19 Q. So clients of Assure South got service  
20 calls from Forum Benefits before the end of the  
21 contract?

22 A. Asking to retain their accounts.

23 Q. And that would have been a violation of  
24 the noncompete?

25 A. Yes.



1 Q. Was the noncompete a written agreement  
2 between Assure South and Forum Benefits?

3 A. Yes.

4 Q. So you told Brian that Forum Benefits  
5 violated the noncompete --

6 A. Yep.

7 Q. -- between Assure South and Forum  
8 Benefits --

9 MR. HARVEY: Brian Stritt or Brian  
10 Bannon?

11 MR. LEBLANC: Thanks.

12 BY MR. LEBLANC:

13 Q. You told Brian Bannon that Forum  
14 Benefits violated the noncompete agreement between  
15 Assure South and Forum Benefits?

16 A. Yes.

17 Q. And why did you tell him that?

18 A. Because I told him everything that went  
19 down.

20 Q. Were you concerned that Forum Benefits  
21 might contact Brian Bannon's clients and try and  
22 keep them?

23 A. No.

24 Q. What was your concern?

25 A. My concern was the fact of who he's in

1 with.

2 Q. Who Brian Bannon is in with?

3 A. (Nods head up and down)

4 Q. Meaning he was in with Forum Benefits?

5 A. Correct.

6 Q. Is there anything else you told Brian  
7 Bannon about the winding down or the relationship  
8 between Assure South and Forum Benefits?

9 A. Sure.

10 Q. Tell me what that was.

11 A. Nondisclosure agreement was violated.

12 Q. There was a nondisclosure agreement  
13 between Assure South and Forum Benefits?

14 A. Yes. And also I told him about -- I  
15 just basically in a very nice, exactly the way I'm  
16 using tone, told one of his employees, are you  
17 aware there's a noncompete out there? And she  
18 started crying, and then I get accused in the email  
19 of berating her to tears and making her cry.

20 Q. Who was that employee?

21 A. Laurie Winston.

22 Q. And Laurie Winston worked for Brian  
23 Bannon?

24 A. No, worked for Brian Stritt.

25 Q. She works for Brian Stritt?

1           A.     Yes. And then the last thing I told  
2 him was about when we tried to end things well with  
3 Stritt, we tried everything to go on a good note.  
4 And his line was -- we tried to leave accounts with  
5 him, put business in his name for overrides, and  
6 his comment was, I will not do a long-term  
7 transition because I want the client disrupted so  
8 they come back to me.

9           Q.     You told Brian Bannon that?

10          A.     Yep.

11          Q.     Anything else you told Brian Bannon?

12          A.     Yeah. I told him about what our  
13 clients experienced when they moved over to us, to  
14 AP.

15          Q.     You told Brian Bannon about the  
16 clients' experience when they moved from Assure  
17 South to Assured Partners?

18          A.     Correct.

19          Q.     What was that experience?

20          A.     Exactly disruption. Exactly what he  
21 said it was going to be.

22          Q.     Anything else you told Brian Bannon  
23 about?

24          A.     Yeah. I told him about all the  
25 horrific things that were done to clients on their

1 way out the door in terms of them getting their  
2 data cut, their reporting functions cut so they  
3 can't access their systems.

4 Q. Who cut the clients' data?

5 A. Forum.

6 Q. Forum Benefits?

7 A. Yes.

8 Q. Do you know who at Forum Benefits did  
9 that?

10 A. No idea.

11 Q. So some clients that transferred from  
12 Assure South to Assured Partners were no longer  
13 able to access some of their data?

14 A. You got it.

15 Q. Anything else?

16 A. That's it.

17 Q. Who owns the data that clients have in  
18 their insurance plans?

19 A. Who owns the data?

20 Q. Yes, sir.

21 A. The client.

22 Q. Who creates the data?

23 A. Who creates the data?

24 Q. Who created the data?

25 A. There could be many folks who create

1                   So Jim Brady says, we have not taken  
2 all the screenshots yet, as we wanted to get  
3 everything copied over ASAP. Why was there such an  
4 urgency to copy everything over as soon as  
5 possible?

6           A.    Let's go back to my clients. They got  
7 locked out of the system.

8           Q.    You're clients were locked out of the  
9 system?

10          A.    Their systems, their data.

11          Q.    This is back in spring of 2016?

12          A.    Yeah.

13          Q.    Your clients did not have access to  
14 their data?

15          A.    Correct.

16          Q.    Okay.

17          A.    Yes.

18          Q.    Then is Jim Brady suggesting that that  
19 would be the same thing in this situation?

20          A.    I suggested it to Bannon. Everybody  
21 did. Everybody knew what happened.

22          Q.    So when Jim Brady said we haven't got  
23 the screen shots yet, as we wanted to get  
24 everything copied over as soon as possible, was Jim  
25 Brady expressing that these clients, Carolina Youth

**STATE OF SOUTH CAROLINA**  
**COUNTY OF BEAUFORT**

**IN THE COURT OF COMMON PLEAS**  
**CIVIL ACTION NO. 2016-CP-07-2541**

**Forum Benefits, Inc.,**

**Plaintiff,**

**v.**

**Brian Bannon and Assured Partners, NL**

**Defendants.**

**EXHIBIT TO**  
**DEFENDANTS' MOTION FOR**  
**SUMMARY JUDGMENT**

**EXHIBIT 7**

Deposition Transcript and Exhibits of Plaintiff's employee Laurie Winston.

**Excerpts of  
Laurie Winston  
Deposition Transcript and  
Exhibits**

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Laurie Winston

**B SHOP**  
REPORTING SERVICES, LLC

6/25/2019

Page 1

STATE OF SOUTH CAROLINA     )   IN THE COURT OF COMMON PLEAS  
                                          )  
COUNTY OF SPARTANBURG     )   C.A. NO. 2019-CP-42-00832

ASSURE HOLDING, INC., F/K/A)  
ASSURE SOUTH, INC., AND     )  
ASSURED PARTNERS NL, LLC,   )  
                                  )  
                  PLAINTIFFS,   )  
                                  )  
                  VS.            )  
                                  )  
FORUM BENEFITS, LLC, F/K/A   )  
PALMETTO BENEFIT            )  
MANAGEMENT, INC. AND        )  
BRIAN STRITT,                )  
                                  )  
                  DEFENDANTS.   )

DEPOSITION  
  
OF  
  
LAURIE WINSTON

THE DEPOSITION OF LAURIE WINSTON, TAKEN BEFORE HOLLY W.  
WILSON, PROFESSIONAL VERBATIM REPORTER AND NOTARY PUBLIC IN  
AND FOR THE STATE OF SOUTH CAROLINA, COMMENCING AT THE HOUR  
OF 9:02 A.M., TUESDAY, THE 25TH DAY OF JUNE, 2019, AT FORD &  
HARRISON, LLP, 100 DUNBAR STREET, SUITE 300, SPARTANBURG,  
SOUTH CAROLINA.



Laurie Winston

# B SHOP

REPORTING SERVICES, LLC

6/25/2016

Page 28

1 A Yes, if it pertained to renewal. If it was just  
2 dropping by take books or something like that, then,  
3 no.

4 Q So any type of sales visit to a client of Mack's, you  
5 would have generally included him prior to February of  
6 2016?

7 A Correct.

8 Q Prior to February of 2016, did you have any  
9 understanding of who, kind of, was the owner of the  
10 client, whether that was Forum or Assure South?

11 A I believe most of the accounts were written under Forum  
12 as the agent of record.

13 Q Have you ever seen the contract that was signed in 2012  
14 between Palmetto and Assure South?

15 A No.

16 (MARKED FOR IDENTIFICATION, PLAINTIFF'S EXHIBIT  
17 NUMBER 1, CONTRACT, ATTACHED.)

18 BY MR. LEHRER:

19 Q Ms. Winston, I'm going to show you what's been marked  
20 as Exhibit 1 to your deposition.

21 A Okay.

22 Q And I'll just represent to you that this is the  
23 contract between Assure South and Palmetto Benefits  
24 from 2012. Okay?

25 A Okay.

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1 Q And, so, if you kind of look at the first part, that  
2 first paragraph, it says that, "Palmetto Benefit  
3 Management agrees to compensate Assure South a portion  
4 of earned commissions from all business submitted and  
5 controlled by Assure South written under Palmetto  
6 Benefits." Is that right? Is that what it says?

7 A Yes.

8 Q And then it kind of -- it goes over the commission  
9 structure; right?

10 A Correct.

11 Q And, so, would you agree with me that that's kind of  
12 defining what we defined earlier as these are the  
13 people that include Mack's clients or Assure South  
14 clients?

15 A Correct.

16 Q Okay. And just for the purpose of us, kind of, in our  
17 definition today, I would include anyone that would be  
18 defined under these commissions as a Mack client or an  
19 Assure South client. Do you understand that?

20 A Yes.

21 Q And do you see any reports that show that their  
22 commission's paid to Mack or Assure South?

23 A No.

24 Q All right. If you'll look down to this next paragraph,  
25 after the numbered paragraphs, it says, "Palmetto

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1 Benefit Management will act as the servicing agent and  
2 conduct all needed account services for Assure South."  
3 Did I read that correctly?

4 A Yes.

5 Q Okay. Were you aware of the requirement in this  
6 contract that Palmetto Benefits Management would be the  
7 servicing agent for these clients?

8 A I'm not even sure I understand servicing agent, the  
9 definition there.

10 Q Okay. Were you aware that Palmetto Benefits Management  
11 was required to service the clients that we've defined  
12 as Mack's clients?

13 A Correct.

14 Q Okay.

15 A We were the agent under that, yes.

16 Q And then were you aware that -- that Palmetto Benefit  
17 was required to conduct all needed account services for  
18 these clients?

19 A Yes.

20 Q Okay. So, even though you hadn't necessarily read this  
21 contract, you were aware, generally, of those  
22 requirements?

23 A It -- correct.

24 Q Then it says, "Palmetto Benefits Management will also  
25 act as an agent for the purposes of carrier

1 negotiations." Were you aware that Palmetto Benefit  
2 Management was an agent of Assure South?

3 A Clarify the question.

4 A Well, did you know that Palmetto Benefit was acting as  
5 an agent of Assure South when interacting with Mack's  
6 clients?

7 MS. ANDERSON: Object to the extent it calls for a  
8 legal conclusion.

9 THE WITNESS: I don't understand the acting as an  
10 agent for Assure South ---

11 BY MR. LEHRER:

12 Q Yes.

13 A --- or their clients?

14 Q That Palmetto Benefits was acting as an agent of Assure  
15 South in servicing Mack's clients. Did you know that?

16 A I'm not understanding the question, really.

17 Q Okay.

18 A I know that Palmetto Benefit Management was the agent  
19 of record for the clients.

20 Q Okay.

21 A And we were to service those clients. Is that ---

22 Q So you, kind of, understand what an agent is; right?

23 A Yes.

24 Q Someone who is acting on behalf of someone?

25 A Right.

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1 MS. ANDERSON: Object to the extent it calls for a  
2 legal conclusion.

3 BY MR. LEHRER:

4 Q Okay. And just -- this is just your layman's opinion  
5 of what you think an agent is. I'm not asking you for  
6 any legal conclusions. And, so, you understand what  
7 the -- at least your understanding seems to be that  
8 Palmetto Benefit, or Forum, was acting as an agent for  
9 the client; correct?

10 A Correct.

11 Q But was it your understanding that Palmetto Benefit  
12 Management and Forum was acting as an agent for Assure  
13 South?

14 A No.

15 Q Okay. In the next sentence, it says that, "These  
16 services will be congruent with all services currently  
17 provided for Palmetto Benefit Management customers  
18 unless specifically noted or agreed upon by the  
19 parties." And, so, did you understand that Assure  
20 South -- strike that.

21 Did you understand that Palmetto, and then Forum,  
22 was required to provide the same services it provided  
23 its customers to Mack's customers?

24 A Yes.

25 Q The next paragraph says that, "The agreement recognizes

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1 clients stayed with Forum?

2 A No.

3 Q Did you receive any additional compensation, other than  
4 your base, as part of the sale of Forum to Alera?

5 A No.

6 Q During that notice period, the February to April 2016,  
7 did you tell any of Mack's clients that you wanted them  
8 to stay with Forum?

9 A I do not recall saying that.

10 Q Okay. And did you -- do you recall that during that  
11 notice period in any way encouraging clients, Mack's  
12 clients, to stay with Forum?

13 A No.

14 Q Do you recall, during the notice period, telling  
15 clients that there were benefits if they stayed because  
16 of the Employee Navigator system?

17 A That we had that system? I guess. And the other one  
18 didn't. Yes, there -- there would be benefits.  
19 However, if they were offering that, then the point is  
20 moot.

21 Q But did you tell clients that there could be benefits?

22 A Yes, I told them that, if they left, they would no  
23 longer have access to that system. When they asked,  
24 you know, what are the differences, that was one of the  
25 topics at Dantherm.

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1 A I don't recall listing any benefits or differences.

2 Q At some point, did you begin tracking your  
3 communications with Mack's clients?

4 A Every email that I send is saved in our -- in that  
5 client folder.

6 Q Was there ever any direction to start keeping track of  
7 your communications with clients of Forum during that  
8 February, March 2016 time frame?

9 A What do you mean by communications? Emails?

10 Q Just any communications with clients; telephone,  
11 meetings?

12 A I believe, after we were informed that passwords were  
13 given out, usernames and passwords were asked to be  
14 given, to download the information and take screenshots  
15 of the build of our system, that's when we shut off the  
16 system and we were reporting back to Brian, who, you  
17 know, asked for information.

18 Q Reporting back to Brian?

19 A To Brian Stritt, who asked for information.

20 Q What was the stewardship tracking spreadsheet?

21 A That is something we use internally. It was used  
22 through a system, but that system wasn't working very  
23 well, so we began to do it on a spreadsheet. That's  
24 what we do to track, our entire company uses, to track  
25 all communication we have with every client. So

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1 A I don't remember a phone call with her. I did have a  
2 meeting that was scheduled with her, already, during  
3 that time period.

4 Q Okay. You don't recall calling Ms. Andress and asking  
5 if Willson, Jones, Carter, and Baxley was keeping its  
6 business with Forum?

7 A Like I said, I don't believe that was a phone call,  
8 that I had a meeting with her already scheduled and,  
9 during that meeting, I did ask if they had had the  
10 conversation with Mack, and they had.

11 Q So you initiated that question?

12 A Yes.

13 Q Okay. So she -- she didn't mention Mack?

14 A Yes. I mean, yes. She did mention that he had -- was  
15 there.

16 Q Okay. But you asked if he had informed her that he was  
17 leaving?

18 A Yes.

19 Q And that was before she had indicated to you what he  
20 said to her?

21 A Correct.

22 Q Okay. And did you, in that meeting, ask her if she was  
23 going to stay with Forum?

24 A Yes.

25 Q Okay. During the meeting, did you tell Teresa that --



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1 A Yes.

2 Q Okay. Was this the first conversation you had had with  
3 Mr. Willson about Mack leaving?

4 A Yes.

5 Q Okay. And you initiated that call?

6 A Yes.

7 Q And you asked him if he was staying with Forum?

8 A Yes.

9 Q What did he -- do you recall what he said?

10 A He said, yes, he was.

11 Q That he was going to keep his business with Forum?

12 A Sorry, that he was leaving.

13 Q After you were informed that Willson, Jones, Carter and  
14 Baxley would be leaving with Mack, was the reporting  
15 function of Employee Navigator cut off for that client?

16 A I don't remember when the reporting functions were cut  
17 off, but they weren't cut off by client. They were cut  
18 off altogether.

19 MR. LEHRER: Let's mark this. This is the first  
20 time this is being produced, so if you want to take a  
21 minute to review that with her, I'll provide you that  
22 opportunity.

23 MS. ANDERSON: Okay.

24 MR. LEHRER: Would you like the opportunity to  
25 talk to her?

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1 (OFF THE RECORD)

2 (MARKED FOR IDENTIFICATION, PLAINTIFF'S EXHIBIT  
3 NUMBER 7, AFFIDAVIT, ATTACHED.)

4 BY MR. LEHRER:

5 Q All right. We're back on the record. Ms. Winston,  
6 have you had the opportunity to read the affidavit of  
7 Teresa Andress?

8 A Yes.

9 Q And do you have any reason to dispute the truth of any  
10 statement that she made in that affidavit?

11 A I only recall the in-person meeting ---

12 Q Okay.

13 A --- that I had. So I recall that, you know, this is  
14 her -- her words, her affidavit.

15 Q So could there have been a meeting and a call?

16 A I only recall the -- the face-to-face meeting that I  
17 had with her.

18 Q Okay. So, other than your recollection that this was a  
19 meeting and not necessarily a call, do you have any  
20 other reason to dispute any other statement that Ms.  
21 Andress made in her affidavit?

22 A Again, these are her words. So I only recall the --  
23 the meeting.

24 Q I understand that. My question is do you have any  
25 reason to dispute the accuracy of her statements, other

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1 A Follow-up.

2 Q "Follow-up Navigator webinar today. She spoke with  
3 Jenny and asked if those two employees knew they were  
4 leaving. Jenny said yes, but Steve told her they would  
5 still have access to Navigator and just needed to  
6 supply the login information so all the information  
7 could be transferred. Not sure if she misinterpreted  
8 or something else." Did I read that correctly?

9 A Yes.

10 Q Okay. Does that refresh your recollection about  
11 anything you might have been told about the situation?

12 A I don't remember this. You know, obviously, I wasn't  
13 in on this conversation, but, yes, that sounds like at  
14 the point where we were told that passwords and  
15 information were given out. Or not "we" but Michelle.

16 Q And it sounds to me like this is Steve telling the  
17 client that; right?

18 A That's what it says, yes.

19 Q And Generations is not a Mack client?

20 A Correct.

21 Q So are you aware of any Mack client stating that their  
22 -- they were asked to give login information?

23 A No, not directly to me, no.

24 Q And when you testified earlier, I think you -- you  
25 thought it was a Mack client, but does this -- does

1           this refresh your recollection that it was not a Mack  
2           client that said this to Michelle. It was a Steve  
3           client?

4    A     Right. And I'm not sure if this is the only, you know,  
5           communication that other people have had.

6    Q     You're not aware of any other communication?

7    A     Right.

8    Q     Okay. But despite this, you know, assuming that this  
9           is true and it was a Steve client, why was -- why was  
10          Mack's client's turned off?

11   A     I can't answer that question.

12   Q     Okay.

13   A     I mean, we would have been told what to do, what to  
14          turn on and off.

15   Q     And who makes that decision?

16   A     Brian.

17   Q     And, so, after -- after Heather sends this email, Brian  
18          responds, "Anyway we can take away their ability to  
19          download the data, all of them." And I -- you know, if  
20          we go on up, the next email you're on it. And, so,  
21          it's hard to tell, the way this is -- this is done, but  
22          it seems like you're on this email string, or at least  
23          at some point you were added, because the next email,  
24          which is a carryover page.

25   A     Uh-huh.

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1 A Correct.

2 Q Why -- why did you include Mack in that?

3 A Because that was probably -- they're both  
4 transitioning, you know, during the time period.

5 Q Okay. And then he responds, "Let me think about it.  
6 Interesting that they are now telling them to use  
7 Navigator. I am trying to decide if it's worth  
8 upsetting the groups." Did -- did you believe that  
9 turning off the reporting options for Navigator would  
10 upset the client?

11 A I think if they -- if they went in there to pull  
12 something out and they couldn't, right, they would be  
13 confused ---

14 Q Okay.

15 A --- by that.

16 Q And that -- if you turned the -- the reporting option  
17 off for Mack's clients, that would be -- that would be  
18 treating them differently than the other Forum clients,  
19 wouldn't it?

20 A True.

21 A And isn't it true that the original contract we looked  
22 at, which is Exhibit 1, requires Forum to provide  
23 services that are congruent with all other services  
24 provided to their clients; correct?

25 A That's what that says, yes.

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1 time.

2 Q Okay. And you said, if we're going to cut off access,  
3 it would have to be you, right?

4 A Yeah. Technically, Heather has that access, as well.  
5 But I would have probably done it because I have more  
6 experience with the system.

7 Q And did you know, at this point, if Steve was going  
8 with Mack or not?

9 A I don't recall.

10 Q Okay. And then it looks like Heather responds to the  
11 email, and basically says, "Yes, they would have to  
12 build out the plans and upload the documents." What  
13 does that mean? What -- if you cut off the reporting  
14 portion, what do you mean by they would have to build  
15 out the plans and up -- upload documents. Or what does  
16 Heather -- do you know what Heather means? I guess  
17 that's not a good question. You know, when you refer  
18 to them, a client having to build out the plan and  
19 upload the documents, do you have any knowledge of what  
20 that means?

21 A I think she's responding to Brian's question where it  
22 says, I think you said they still have to build out the  
23 other parts. And, so, she's saying, yes, they would  
24 have to build out the plans in the system. So it's a  
25 benefit admin system that our team built, internally.

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1 So we have, you know, someone that is paid to do that  
2 on all of our accounts. I was a big part of that team  
3 and it involves a lot of time to set up this system,  
4 and we build it from scratch. Building out all of  
5 their plans, their rates, employee communications, the  
6 emails that go out of the system, the notifications.  
7 So, all of that. So, it really has nothing to do with  
8 the employee level data. The reporting is employee  
9 level data. The other pieces of it is something that  
10 -- that we build internally.

11 Q And when you say you built it, does that mean that  
12 y'all took the information from somewhere and somebody  
13 sat down and put it in the Navigator system?

14 A It would've been the -- their contracts, their Blue  
15 Cross contracts, or whoever their carrier is, yes. But  
16 all of the customization of the system, like, direct  
17 communications, the wording that's in there on the  
18 pages, describing things, that's -- that's from us.  
19 We're not taking that out of a Blue Cross contract.

20 Q And do you believe that the information that you've  
21 used to build out the system internally, that that  
22 could be re-created by another organization. It just  
23 would take them the same amount of time to do it as it  
24 took you?

25 A I believe that, yes, the information. Now, the

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1 knowledge and expertise that we have on the system, I  
2 think that someone who doesn't have that same amount,  
3 it would take them longer.

4 Q Okay. So it's -- it's not about whether or not this  
5 can be re-created at -- at a competitor; it's about how  
6 long it would take to re-create it?

7 A Right. And the extent of what's in there.

8 Q Okay. And why doesn't the client own the -- their  
9 information that you built for them?

10 A They -- they don't pay for the system. We offer the  
11 system to them at no charge. So definitely the  
12 employee level data is their employee's data. But  
13 everything else, you know, we build. I wouldn't  
14 necessarily say that they would own that data. I mean,  
15 it's information about their plans, but it's our words  
16 and information that we put in there.

17 Q Do you have any communication you're aware of with  
18 clients to let them know that, if they leave Forum,  
19 then they're not going to be able to have access to --  
20 to copy over their information?

21 A I don't think that we've had, like, a sit-down  
22 conversation with the clients, that they understand  
23 that. Or, you know, and told specifically, if you  
24 leave, you will not have access to this. But I think  
25 it's pretty known that, if they are not paying for it,



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1           it's our system that we're giving them. If they're no  
2           longer our clien, then they no longer have access to  
3           that system.

4       Q     Don't you think it would be reasonable, when you're  
5           trying to sell a client on this Navigator system, and  
6           you're telling them all of the benefits of this, and  
7           that they'll -- they can come to rely on this  
8           information, that you also tell them, if they leave,  
9           they lose access to all of it, and you're not going to  
10          give them the information to carry over?

11      A     We do supply them -- any clients that -- that leave, we  
12          do give them their employee level data.

13      Q     Yeah, you do?

14      A     Yes.

15      Q     Just in a PDF format?

16      A     It depends.

17      Q     How do you decide what format you're going to give it  
18          to them?

19      A     That's probably just an internal decision.

20      Q     So some clients actually get the Excel spreadsheet if  
21          they ask for it?

22      A     Yes.

23      Q     Okay. But that was not done for Mack's client, was it?

24      A     I don't believe so.

25      Q     Okay. And, so, his clients were treated different than

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1 other Forum clients who left; correct?

2 A I don't think we've had anyone leave that system prior  
3 to this.

4 Q Well, after -- after -- after this occurred, clients  
5 received the Excel spreadsheet when they left?

6 A Yes.

7 Q Okay. And then, in this email on March 15th, you say,  
8 "It typically takes about two to three hours to build  
9 the plan settings and compliance." Is that accurate?

10 A Heather's -- those are Heather's words.

11 Q I'm sorry.

12 A But it depends. That is an estimate. It depends on  
13 the complexity of the group.

14 Q Okay. Would you agree with me that it makes a  
15 transition away from Forum a lot easier on a client if  
16 all of their reports are provided and information were  
17 provided them in an Excel spreadsheet?

18 A Yes, if they're uploading into the same system, yes.  
19 They could download it from one and easily import into  
20 another.

21 Q Okay. And then you -- and then you go up to the next  
22 page, 2920. And you say, "Just got an email from  
23 Alupress. They are asking why they are missing  
24 reporting access." And you say, "I turned theirs off  
25 last week since they specifically asked about getting

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1           their data." Tell me -- tell me about their request.

2       A     They pretty much asked for, point by point, of what  
3           would be a template that would be taken right out of  
4           Navigator. So, if we're importing a group into  
5           Employee Navigator, there's a template you download and  
6           you put -- it's columns that are on there, and it has,  
7           point by point, what needs to be put in to build the  
8           system. And they were essentially asking, literally,  
9           copy/paste from that template. You know, can I get  
10          this, this, this, this, this, this? So we knew what  
11          was happening as they were asking for all of this for  
12          Forum to do all of the work, to pull all of this  
13          information out, to then where they can basically  
14          upload it into what's now a competitor's site, which we  
15          typically don't get those requests from. When we take  
16          over a group, we never asked them, go into, you know,  
17          the system you're in and download all of the data and  
18          give it to us so we can, you know, build this.  
19          Typically, we just build that on our own.

20       Q     Okay. Well, did -- did someone at Alupress tell you  
21           that they were asking for this information so that they  
22           can give it to a competitor?

23       A     They were asking for it for Mack, yes.

24       Q     They specifically said ---

25       A     We need this information to move our account over to

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1 Mack.

2 Q Okay. Who said that?

3 A Robin. That's who I would have communicated to.

4 Q And, so, she asked for kind of a list of the  
5 information for you to provide?

6 A Correct.

7 Q And, outside of someone leaving, if this had just been  
8 a client saying, "Hey, I need this information"?

9 A Uh-huh.

10 Q Would you have provided it?

11 A If -- say that one more -- outside of ---

12 Q Outside of a situation where a client was leaving, so  
13 this is just a client ---

14 A Uh-huh.

15 Q --- that you don't expect to lose. And they -- they  
16 ask you for the information that Alupress asked for,  
17 would you provide it?

18 A I don't think a client would ask for the level of  
19 information that they asked for, outside of them  
20 leaving.

21 Q Okay.

22 A If they're asking for that, red flags are going to be  
23 thrown up, because they're asking for information that  
24 we built and put into the system for them to export out  
25 in this particular format. Typically, when a client

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1 leaves and goes to another broker, they don't ask us  
2 for information. That's just -- it just happens. You  
3 know, the other broker will get that from the carrier,  
4 from their payroll provider.

5 Q Okay. And, so, based on a conversation you had with  
6 Alupress, you immediately turned off their reporting  
7 function so they couldn't go in and pull this  
8 information themselves?

9 A I believe that's what this email is about, right.

10 Q So you did that?

11 A Turn -- am I the one that went in and turned all these  
12 clients off?

13 Q Well, you say here -- I'm talking about this email.  
14 You say that -- that you -- it says, "I turned theirs  
15 off last week." So you turned it off?

16 A Must have, yes.

17 Q Yeah. So, as soon as Alupress let you know that they  
18 were asking for this information to give Mack, you went  
19 in and turned them off?

20 A Correct.

21 Q Did -- when they asked for the information, did you  
22 tell them you were going to turn off their reporting  
23 access?

24 A I don't recall a conversation about that.

25 Q Okay. Don't you think you should tell a client if

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1           you're going to cut off their access and the reason  
2           that you're going to do that?

3     A     Probably, yes.

4     Q     But you don't recall if you did that?

5     A     I don't remember a phone a conversation about it.

6     Q     Well, you just -- you say here, you just got an email.  
7           They're asking why they're missing the reports, so it  
8           appears that you didn't tell them you were turning it  
9           off; correct?

10    A     Correct.

11    Q     So you cut them off and then a week later they're  
12           asking why they were cut off?

13    A     Correct.

14    Q     Would you agree that that would cause a client  
15           disruption, to not know they're going to lose access to  
16           the reporting, and then just lose it without notice?

17    A     Correct.

18    Q     All right. And, so, then we go up and Brian asks  
19           what's the upside, he doesn't want to upset the group  
20           to the point they would never come back. Did you agree  
21           with that, that that was a potential, if you turn off  
22           reporting, that you upset the group to the point that  
23           they would never come back?

24    A     Yes, that is a possibility.

25    Q     And would you agree that some of the clients that Forum

1           turned off the reporting access, that it upset the  
2           clients?

3     A     Yes.

4     Q     And would you agree that, pretty much, all of the --  
5           the clients that you turned off the reporting access  
6           to, that it upset that client, of Mack's clients?

7     A     I don't know. Some of the clients probably didn't log  
8           into the system at all. It just depends.

9     Q     Okay. All right. Then we go up and Heather says she  
10          thinks we should turn the reporting off. "They can  
11          request a report from us and we can send a PDF." Was  
12          that what happened? If somebody requested it, y'all  
13          send it in a PDF?

14    A     Yes.

15    Q     And that was specifically designed so that they -- they  
16          could see the information, but somebody's going to have  
17          to type it in versus being able to export it?

18    A     They couldn't import it right into the competitor  
19          system.

20    Q     And, so, basically, the reason to do that is to make it  
21          harder on the client to move the data; correct?

22    A     It would make it so that they can't directly download  
23          and then upload into a competitor system.

24    Q     Right. So it makes it harder on the client to  
25          transition their data; correct?

1 A Yes.

2 Q Okay. And then, on March 15th, March 15, 2016, Mr.  
3 Stritt responds, "Turn it all off." Right? Turn it  
4 all off?

5 A Yes.

6 Q And that means turn off all of Mack's clients and all  
7 of Steve's clients?

8 A Correct.

9 Q Okay. And then it appears from the next email that  
10 Heather might have done the turning off?

11 A Correct.

12 Q Is that -- that's what you remember, that she actually  
13 did that one?

14 A Yeah, I don't remember exactly who did it, but we both  
15 had access to do that.

16 Q All right. And, so, she gives you -- she gives the  
17 names of the Mack/Steve groups on Navigator that access  
18 has been denied on; right?

19 A Uh-huh. Yes.

20 Q Is it your memory, in looking at this list, that that  
21 is all of Mack's -- that includes all of Mack's clients  
22 that were on Navigator?

23 A I would assume so. I can't say for sure.

24 Q So -- so, for example, if somebody -- if somebody had  
25 said, "Hey, we're going to stay with Forum as of this



# B SHOP

REPORTING SERVICES, LLC

1 specific client request or just in general?

2 A In general.

3 Q Just any census information?

4 A Right.

5 Q So, if a client asked for census information, you were  
6 instructed not to give that to them until you heard  
7 otherwise?

8 A Correct.

9 Q And that -- would you agree that, if a non-Mack client  
10 called and asked for census information during this  
11 time period, that you would have provided that to them?

12 A Typically, we don't get those requests for census  
13 information.

14 Q But ---

15 A If we did, we would probably ask for the context of it,  
16 and then, you know, discuss with Brian and then send  
17 it. But typically, we're not sending census  
18 information to clients because they have that  
19 information.

20 Q Well, they have it because they have the reporting  
21 function of Navigator; right?

22 A No, they have that through payroll records through  
23 internal HRIS systems. I mean, Employee Navigator is a  
24 benefit enrollment -- an election system. So the  
25 information that's in there is what they're enrolled,



# PALMETTO BENEFIT MANAGEMENT

Insurance Brokers & Benefits Consultants

May 28, 2012

This agreement is between Palmetto Benefit Management (PBM) and Assure South. Palmetto Benefit Management agrees to compensate Assure South a portion of earned commissions from all business submitted and controlled by Assure South, written under PBM. The agreement is as follows:

1. All existing accounts will be compensated at 75% of standard negotiated commissions for Assure South, with PBM taking 25% of standard negotiated commissions, and 100% of any overrides.
2. All new business will be compensated at 50% for both parties, including overrides.
3. All compensation will transfer to the formula listed above (2) for both new and existing business at the earliest date of: (a) two years from the date of the agreement, or (b) net growth of 20% for Assure South total revenue produced.

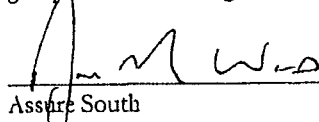
Palmetto Benefit Management will act as the servicing agent, and conduct all needed account services for Assure South. PBM will also act as agent for the purpose of carrier negotiations. These services will be congruent with all services currently provided for PBM customers, unless specifically noted and agreed upon by the parties. The scope of services will be included in addendum, agreed upon by both parties.

This agreement recognizes Assure South as the agent of record for the accounts, and is valid through any sale or transference of Palmetto Benefit Management. The agreement shall stay in force for the duration of Palmetto Benefit Management serving as the writing agent, and Assure South serving as the agent of record. Palmetto Benefit Management agrees not to solicit Assure South Employee Benefits Clients or its employees. Assure South agrees not to solicit Palmetto Benefit Management clients or employees.

Palmetto Benefit Management shall defend, indemnify and hold harmless Assure South, its directors, officers and employees, from any and all losses, damages and expenses (including court costs and reasonable attorney's fees) arising out of or as a result of: (i) a third party claim arising from a material failure by Palmetto Benefit Management to perform its obligations under this agreement, or (ii) any fraudulent, grossly negligent, willful, tortuous or criminal act of Palmetto Benefit Management, its directors, officers or employees.

Assure South shall defend, indemnify and hold harmless Palmetto Benefit Management, its directors, officers and employees, from any and all losses, damages and expenses (including court costs and reasonable attorney's fees) arising out of or as a result of: (i) a third party claim arising from a material failure by Assure South to perform its obligations under this agreement, or (ii) any fraudulent, grossly negligent, willful, tortuous or criminal act of Assure South, its directors, officers or employees.

This agreement is also subject to review and change with the consent of both parties, due to commission, group or market changes. The agreement can also be terminated by either party with 60 days notice.

  
Assure South

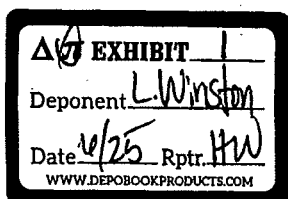
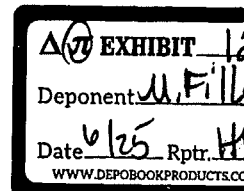
Brian Stritt  
President, Palmetto Benefit Management

Principal  
Title

Charleston Office  
1005 Albatross Lane - Mount Pleasant, SC 29466  
Local: 843-884-5832

Corporate Office  
23 Cleveland Street, Suite A - Greenville, SC 29601  
Toll Free: 888.233.0301

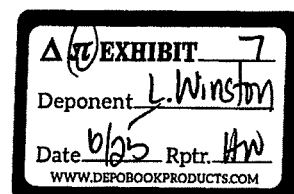
Fax: 864.233.6902  
www.PalmettoBenefit.com



**AFFIDAVIT OF TERESA ANDRESS**

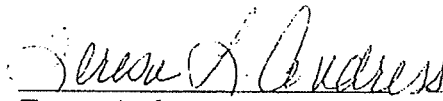
I, Teresa Andress, being first duly sworn, deposes and states as follows:

1. I am employed as the firm and plan administrator at Willson Jones Carter & Baxley. Prior to April of 2016, Willson Jones Carter & Baxley was a client of AssureSouth with our employee benefits being managed through Forum Benefits.
2. In approximately February or March of 2016, I received a call from Laurie Winston with Forum Benefits. Ms. Winston called me and asked if Willson Jones Carter & Baxley was keeping its business with Forum Benefits or going with Mack Ward.
3. During my call with Ms. Winston, she told me that the reason we would want to keep our business with Forum Benefits was because of Forum's system called Employee Navigator, that it would keep things smooth for us if we stayed with Forum, and that there would not be any change in the system.
4. Ms. Winston also questioned if I was aware that our account would be serviced out of Charleston and not Greenville if we stayed with Mack Ward, and that our account would not be handled locally from a day to day service perspective as it was when Forum was involved.
5. I informed Ms. Winston that Hal Willson, Jr., would have to be involved in the decision of whether the company would continue with Forum Benefits or Mack Ward. Ms. Winston asked to speak with Hal and asked where he was that day. I told her that he was in Charlotte that day. I was informed that Ms. Winston attempted to call Hal in Charlotte that day.



6. Hal and I decided that the company would continue with Mack Ward instead of Forum Benefits. After we informed Ms. Winston of this decision, the reporting function of Employee Navigator was removed by Forum Benefits on approximately March 17, 2016. This caused some disruption to the management of our account and made it difficult to transition our account to AssuredPartners.

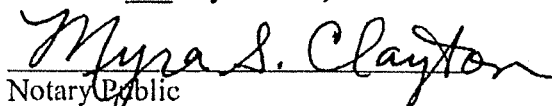
I certify that I have read this affidavit and that the information contained therein is true and correct based upon my personal knowledge.

  
Teresa Andress

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

BEFORE ME, the undersigned authority, this day personally appeared Teresa Andress, who is known by me and says that the above statements are true and correct to the best of her knowledge, information and belief and that she has read the above affidavit and knows the contents thereof.

SWORN TO AND SUBSCRIBED BEFORE ME this 24<sup>th</sup> day of June, 2019.

  
Notary Public  
State of South Carolina

My Commission Expires: 4/18/2022

WSACTIVELLP:10587770.1

**STATE OF SOUTH CAROLINA**

**COUNTY OF BEAUFORT**

**IN THE COURT OF COMMON PLEAS**

**CIVIL ACTION NO. 2016-CP-07-2541**

**Forum Benefits, Inc.,**

**Plaintiff,**

**v.**

**Brian Bannon and Assured Partners, NL**

**Defendants.**

**EXHIBIT TO  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

**EXHIBIT 8**

Unpublished Decisions.

# UNPUBLISHED CASES

## Computer Prods. v. Jem Rest. Group, Inc.

Court of Appeals of South Carolina

January 1, 2007, Submitted; February 12, 2007, Filed

Unpublished Opinion No. 2007-UP-066

### Reporter

2007 S.C. App. Unpub. LEXIS 150 \*; 2007 WL 8326593

Computer Products, Inc., Appellant, v. JEM Restaurant Group, Inc., John E. McGrath, Monolith Software Solutions, Inc., and W. David Valmus, Respondents.

B. Craig Killough, John A. Jones, and Susan Taylor Wall, all of Charleston, for Respondents.

**Judges:** HEARN, C.J., HUFF and BEATTY, JJ., concur.

**Notice:** THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

**Prior History:** [\*1] Appeal From Charleston County. Diane Schafer Goodstein, Circuit Court Judge.

**Disposition:** AFFIRMED.

### Core Terms

circuit court, matter of law, fiduciary duty, fair dealing, abandoned, argues, appellate court, loyalty, covenant of good faith, supporting authority, breach of covenant, claim for breach, fail to preserve, cause of action, duty of loyalty, good faith, South Carolina Trade Secrets Act, conclusory, abet

**Counsel:** Paul E. Tinkler and Spiro S. Ferderigos, both of Charleston, for Appellant.

### Opinion

**PER CURIAM:** Computer Products, Inc. (Computer Products) appeals orders of the circuit court granting summary judgment to JEM Restaurant Group, Inc. (JEM), John E. McGrath (McGrath), Monolith Software Solutions, Inc. (Monolith), and W. David Valmus (Valmus). Computer Products argues the circuit court erred in not finding: (1) an agency relationship between Valmus and Computer Products; (2) a duty of loyalty and/or fiduciary duty Valmus owed to Computer Products; and (3) that McGrath aided or abetted Valmus's breach of loyalty and/or fiduciary duty. Computer Products also argues the circuit court erred in its application of: (1) South Carolina Trade Secrets Act; (2) Unfair Trade Practices Act; and (3) the implied covenant of good faith and fair dealing. We affirm.<sup>1</sup>

I. Computer Products failed to preserve its argument regarding [\*2] the circuit court's finding that Valmus was an agent because it did not make this argument in a Rule 59(e), SCRCR, motion. West v. Newberry Elec. Coop., 357 S.C. 537, 543, 593 S.E.2d 500, 503 (Ct. App. 2004) (certiorari denied) (holding issue that is neither addressed by the circuit court in the final order nor raised by way of Rule 59(e) motion is not preserved for review).

<sup>1</sup> We decide this case without oral argument pursuant to **Rule 215, SCACR**.

II. Computer Products argues that because Valmus was an agent/employee of Computer Products, Valmus had a duty of loyalty to Computer Products. However, at trial, Computer Products conceded that Valmus was an independent contractor, not its employee; therefore, this argument is without merit. See, e.g., *Kirkland v. Allcraft Steel Co., Inc.*, 329 S.C. 389, 392-93, 496 S.E.2d 624, 626 (1998) (finding a concession made at trial precludes a party from contesting the issue on appeal).

III. Computer Products contends that the circuit court erred in finding as a matter of law that McGrath did not aid or abet Valmus's breach of loyalty and/or fiduciary duty. Because we have determined that no duty of loyalty and/or fiduciary duty existed between Valmus and Computer Products, we need not address this issue. See *Whiteside v. Cherokee County Sch. Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) [\*3] (stating the appellate court need not address remaining issues when resolution of a prior issue is dispositive).

IV. Computer Products failed to preserve its argument regarding the circuit court's finding that as a matter of law the South Carolina Trade Secrets Act is inapplicable, or in the alternative that Computer Products did not meet its burden of proof. *Humbert v. State*, 345 S.C. 332, 337, 548 S.E.2d 862, 865 (2001); *Shealy v. Aiken County*, 341 S.C. 448, 460, 535 S.E.2d 438, 445 (2000) (holding that where a trial court does not explicitly rule on an argument raised, and appellant makes no Rule 59(e) motion to obtain a ruling, the appellate court may not address the issue).

V. Computer Products abandoned its argument regarding its allegation that the circuit court erred in finding as a matter of law that McGrath did not violate the Unfair Trade Practice Act. *Fields v. Melrose Ltd. P'ship.*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court."). The issue is also abandoned as to McGrath because Computer Products' presentation of this issue in its brief [\*4] is conclusory and lacks supporting authority. *Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct.App.2005) (noting when an appellant fails to cite any supporting authority for his position and makes conclusory arguments, the appellant abandons the issue on appeal).

VI. Computer Products argues the circuit court erred in finding as a matter of law that a covenant of good faith

and fair dealing is inapplicable. Computer Products did not bring a claim for breach of contract; therefore, its cause of action for breach of the covenant of good faith and fair dealing does not succeed as a matter of law. See *Rotec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 471-473, 597 S.E.2d 881, 883-884 (Ct. App. 2004) (finding there can be no separate cause of action for breach of covenant of good faith and fair dealing because it is subsumed under the claim for breach of contract.)

**AFFIRMED.**

**HEARN, C.J., HUFF and BEATTY, JJ., concur.**

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Neutral

As of: March 26, 2020 6:29 PM Z

## **Dickerson v. TLC Lasik Ctrs.**

United States District Court for the District of South Carolina, Greenville Division

February 3, 2011, Decided; February 3, 2011, Filed

C.A. No. 6:10-cv-00685-JMC

### **Reporter**

2011 U.S. Dist. LEXIS 10883 \*

Charles Benjamin "Ben" Dickerson, on behalf of himself and all others similarly situated, Plaintiff, v. TLC LASIK Centers: TLC The Laser Eye Center (Institute), Inc.; TLC The Laser Center (Carolina), Inc.; TLC The Laser Center (Madison), Inc.; TLC The Laser Center (Institute), Inc. d/b/a TLC Denver; TLC The Laser Center (Institute), Inc. d/b/a TLC Atlanta; TLC Laser Eye Centers Oklahoma City; TLC The Laser Center (Tri-Cities), Inc.; TLC The Laser Center (Massachusetts), Inc.; TLC The Laser Center (Brea), Inc.; TLC Laser Eye Centers Cleveland; TLC Laser Eye Centers Columbus; TLC The Laser Center (Boca Raton), Inc.; TLC Laser Eye Centers (Pittsburgh), TLC Laser Eye Centers (Fargo); Valley Laser Eye Center, LLC; TLC The Laser Center (Institute), Inc. d/b/a TLC Manhattan; TLC The Laser Center (Institute), Inc. d/b/a TLC Garden City; TLC The Laser Center (Institute), Inc. d/b/a TLC Torrance; TLC The Laser Center (Northeast), Inc. d/b/a TLC North Jersey; TLC Laser EyeCenters Tulsa; TLC Laser Center (Northeast), Inc. d/b/a TLC Rockville; TLC The Laser Center (Institute) Inc. d/b/a TLC White Plains; TLC Midwest Eye Laser Center, Inc. d/b/a TLC Chicagoland; TLC The Laser Center (Northeast), Inc. d/b/a TLC Big Sky; TLC The Laser Center (Institute), Inc. d/b/a TLC Charleston; TLC The Laser Center (Institute), Inc. d/b/a TLC San Antonio; TLC Laser Eye Centers Edina; TLC The Laser Center (Indiana), LLC; TLC The Laser Center (Institute), d/b/a TLC Ft. Lauderdale; TLC The Laser Center (Institute), d/b/a TLC Tampa; TLC Clinical Directors: Jo Angeles, O.D.; Kristen Brown, O.D.; E. Edward Carmen, O.D.; Phillip Cuva, O.D.; Despina Fikaris, O.D.; J. Christopher Freeman, O.D.; Jeffrey J. Genos, O.D.; Lee Ann Gertz, O.D.; Rhonda Kerzner, O.D.; David Kohler, O.D.; William Bruce Laurie, Jr., O.D.; Michael Mariano, O.D.; Elizabeth M. McLemore, O.D.; Melissa Melott, O.D.; Andrew S. Morgenstern O.D.; Debbie Pian, O.D.; Mary J. Rauch, O.D.; Carl J. Roth, O.D.; Susan Shin, O.D.; Stephen Siegel, O.D.; Mark A. Slosar, O.D.; Thomas Spetalnick, O.D.; Derek Van Veen, O.D.; Cynthia

Yaeger, O.D.; Individually and in their capacity as Clinical Director for TLC The Laser Eye Center (Institute), Inc.; TLC LASIK Surgeons:Jodi Abramson, M.D.; Alberto Aran, M.D.; Robert Arffa, M.D.; David K. Aymond, M.D.; David Boes, M.D.; Stan Braverman, M.D.; Stephen Brint, M.D.; Barry Concool, M.D.; Charles Davis, M.D.; Eric Donnenfeld, M.D.; Martin Fox, M.D.; David Hunter, M.D.; Scott Jaben, M.D.; Jeffrey Machat, M.D.; Peter Mogyordy, M.D.; John Oster, M.D.; George Pardos, M.D.; Edward Perraut, M.D.; Louis Probst, M.D.; Randall Rabon, M.D.; Jeff Robin, M.D.; Roy Rubinfeld, M.D.; Stephen Slade, M.D.; Mark Speaker, M.D.; Robert Spector, M.D.; Nancy Tanchel, M.D.; Brad Taylor, M.D.; Gregory Temas, M.D.; Stewart Terry, M.D.; Mark E. Whitten, M.D.; Larry Womack, M.D.;Wendell Wong, M.D.; Jonathan Woolfson, M.D.; TLC Management: Brian Andrew, Esq.; Stacey Anne Lerum; Bob May, Esq.; John Potter, M.D., Defendants.

**Subsequent History:** Motion denied by [Dickerson v. TLC LASIK Ctrs., 2011 U.S. Dist. LEXIS 147374 \(D.S.C., Dec. 21, 2011\)](#)

### **Core Terms**

patients, surgery, alleges, medical record, conversion, enterprise, medical information, motion to dismiss, plaintiff's claim, diagnosis, mail, statute of limitations, cause of action, malpractice, pattern of racketeering activity, equitable tolling, injunctive relief, expiration, discovery, database, injuries, damages, fraudulent, Centers, rights, property interest, racketeering, continuity, diligence, racketeering activity

**Counsel:** [\*1] For John Hollman, on behalf of himself

and all others similarly situated, Plaintiff: Douglas Franklin Patrick, LEAD ATTORNEY, Covington Patrick Hagins Stern and Lewis, Greenville, SC; James Edward Bell , III, Jeffrey Ryan Heiskell, J Edward Bell III Law Office, Georgetown, SC; James W Fayssoux , Jr, Paul Swain Landis, Fayssoux Law Firm, Greenville, SC; Stephen Richard Hedrick Lewis, Covington Patrick Hagins Stern and Lewis, Greenville, SC; W Walter Wilkins , III, Wilkins Law Firm, Greenville, SC.

For Charles Benjamin Dickerson, on behalf of himself and all others similarly situated also known as Ben, Plaintiff: Douglas Franklin Patrick, Stephen Richard Hedrick Lewis, Covington Patrick Hagins Stern and Lewis, Greenville, SC; James Edward Bell , III, Jeffrey Ryan Heiskell, J Edward Bell III Law Office, Georgetown, SC; James W Fayssoux , Jr, Paul Swain Landis, Fayssoux Law Firm, Greenville, SC; W Walter Wilkins , III, Wilkins Law Firm, Greenville, SC.

For TLC The Laser Eye Center Institute Inc, Defendant: Jennifer E Johnsen, Luanne Lambert Runge, Ronald G Tate , Jr, LEAD ATTORNEYS, Gallivan White and Boyd, Greenville, SC; W Howard Boyd , Jr, Gallivan White and Boyd, Greenville, SC.

For TLC [\*2] The Laser Center Carolina Inc, TLC The Laser Center Madison Inc, TLC Laser Eye Centers Oklahoma City, TLC The Laser Center Tri-Cities Inc, TLC The Laser Center Massachusetts Inc, TLC The Laser Center Brea Inc, TLC Laser Eye Centers Cleveland, TLC Laser Eye Centers Columbus, TLC The Laser Center Boca Raton Inc, TLC Laser Eye Centers Pittsburgh, TLC Laser Eye Centers Fargo, TLC Laser EyeCenters Tulsa, TLC Laser Eye Centers Edina, TLC The Laser Center Institute-Ft Lauderdale, doing business as TLC Ft Lauderdale, also known as TLC The Laser Center Institute, Defendants: Ronald G Tate , Jr, LEAD ATTORNEY, Gallivan White and Boyd, Greenville, SC; Jennifer E Johnsen, , Luanne Lambert Runge, Howard Boyd , Jr, Gallivan White and Boyd, Greenville, SC.

For Valley Laser Eye Center LLC, Defendant: Jennifer E Johnsen, Luanne Lambert Runge, Ronald G Tate , Jr, LEAD ATTORNEYS, Gallivan White and Boyd, Greenville, SC; W Howard Boyd , Jr, Gallivan White and Boyd, Greenville, SC.

For TLC The Laser Center Indiana LLC, Defendant:

Robert H Hood, LEAD ATTORNEY, Hood Law Firm, Charleston, SC; Ronald G Tate , Jr, LEAD ATTORNEY, Gallivan White and Boyd, Greenville, SC; Jennifer E Johnsen, Luanne Lambert Runge, [\*3] W Howard Boyd , Jr, Gallivan White and Boyd, Greenville, SC.

For Jo Angeles, OD, Individually and in their capacity as Clinical Director for TLC The Laser Center Institute Inc, Kristen Brown, OD, Individually and in their capacity as Clinical Director for TLC The Laser Center Institute Inc, E Edward Carmen, OD, Individually and in their capacity as Clinical Director for TLC The Laser Center Institute Inc, Andrew S Morgenstern, OD, Individually and in their capacity as Clinical Director for TLC The Laser Center Institute Inc, Defendants: Henry Donald Sellers, LEAD ATTORNEY, Haynsworth Sinkler Boyd, Greenville, SC; Bonnie A Lynch, Christopher B Major, Haynsworth Sinkler Boyd, Greenville, SC.

For Phillip Cuva, Despina Fikaris, OD, Individually and in their capacity as Clinical Director for TLC The Laser Center Institute Inc, Defendant: Bradford William Cranshaw, LEAD ATTORNEY, Grier Law Firm, Columbia, SC; Henry Donald Sellers, LEAD ATTORNEY, Haynsworth Sinkler Boyd, Greenville, SC; Armando Pedro Rubio, PRO HAC VICE, Cole Scott and Kissane, Miami, FL; Bonnie A Lynch, Christopher B Major, Haynsworth Sinkler Boyd, Greenville, SC; Henry Salas, PRO HAC VICE, Cole Scott and Kissane, Miami, FL.

For [\*4] J Christopher Freeman, OD, Individually and in their capacity as Clinical Director for TLC The Laser Center Institute Inc, Jeffrey J Genos, OD, Individually and in their capacity as Clinical Director for TLC The Laser Center Institute Inc, Rhonda Kerzner, OD, Individually and in their capacity as Clinical Director for TLC The Laser Center Institute Inc, David Kohler, OD, Individually and in their capacity as Clinical Director for TLC The Laser Center Institute Inc, William Bruce Laurie, Jr, OD, Individually and in their capacity as Clinical Director for TLC The Laser Center Institute Inc, Michael Mariano, OD, Individually and in their capacity as Clinical Director for TLC The Laser Center Institute Inc, Cynthia Yaeger, OD, Individually and in their capacity as Clinical Director for TLC The Laser Center Institute Inc, Defendants: Henry Donald Sellers, LEAD ATTORNEY, Haynsworth Sinkler Boyd, Greenville, SC; Bonnie A Lynch, Christopher B Major, Haynsworth Sinkler Boyd, Greenville, SC.

For Elizabeth M McLemore, OD, Individually and in their capacity as Clinical Director for TLC The Laser Center Institute Inc, Debbie Pian, OD, Individually and in their capacity as Clinical Director for TLC [\*5] The Laser Center Institute Inc, Derek Van Veen, OD, Defendants: Bradford William Cranshaw, LEAD ATTORNEY, Grier Law Firm, Columbia, SC; Henry Donald Sellers, LEAD ATTORNEY, Haynsworth Sinkler Boyd, Greenville, SC; Bonnie A Lynch, Christopher B Major, Haynsworth Sinkler Boyd, Greenville, SC; Armando Pedro Rubio, Henry Salas, PRO HAC VICE, Cole Scott and Kissane, Miami, FL.

For Melissa Melott, OD, Individually and in their capacity as Clinical Director for TLC The Laser Center Institute Inc, David K Aymond, MD, Charles Davis, MD, Randall Rabon, MD, Nancy Tanchel, MD, Defendants: James B Hood, Robert H Hood, LEAD ATTORNEYS, Hood Law Firm, Charleston, SC; Andrew Walker Barnes, Barbara Wynne Showers, Frederick Felton Fisher, Hood Law Firm, Charleston, SC.

For Mary J Rauch, OD, Individually and in their capacity as Clinical Director for TLC The Laser Center Institute Inc, Carl J Roth, OD, Individually and in their capacity as Clinical Director for TLC The Laser Center Institute Inc, Susan Shin, OD, Individually and in their capacity as Clinical Director for TLC The Laser Center Institute Inc, Stephen Siegel, OD, Individually and in their capacity as Clinical Director for TLC The Laser Center [\*6] Institute Inc, Mark A Slosar, OD, Individually and in their capacity as Clinical Director for TLC The Laser Center Institute Inc, Defendants: Bradford William Cranshaw, LEAD ATTORNEY, Grier Law Firm, Columbia, SC; Henry Donald Sellers, LEAD ATTORNEY, Haynsworth Sinkler Boyd, Greenville, SC; Bonnie A Lynch, Christopher B Major, Haynsworth Sinkler Boyd, Greenville, SC; Armando Pedro Rubio, PRO HAC VICE, Cole Scott and Kissane, Miami, FL; Henry Salas, Cole Scott and Kissane, Miami, FL.

For Thomas Spetalnick, OD, Individually and in their capacity as Clinical Director for TLC The Laser Center Institute Inc, Defendant: Dennis Gary Lovell, Jr, Lee Cannon Weatherly, LEAD ATTORNEYS, Carlock Copeland Semler and Stair, Charleston, SC; Henry Donald Sellers, LEAD ATTORNEY, Haynsworth Sinkler Boyd, Greenville, SC; Bonnie A Lynch, Christopher B Major, Haynsworth Sinkler Boyd, Greenville, SC.

For Jodi Abramson, MD, David Boes, MD, Stan Braverman, MD, Eric Donnenfeld MD, Defendants: Daniel Richard D'Alberto, LEAD ATTORNEY, Nelson Mullins Riley and Scarborough (Cola), Columbia, SC; A Marvin Quattlebaum, Jr, David Eidson Dukes, Nelson Mullins Riley and Scarborough, Greenville, SC; James F Rogers, Nelson [\*7] Mullins Riley and Scarborough (Cola), Columbia, SC.

For Alberto Aran, MD, Defendant: James B Hood, LEAD ATTORNEY, Hood law firm, Charleston, SC; Andrew Walker Barnes, Barbara Wynne Showers, Frederick Felton Fisher, Hood Law Firm, Charleston, SC; Robert H Hood, Hood Law Firm, Charleston, SC.

For Stephen Brint, MD, Defendant: Donald Jay Davis, Jr, LEAD ATTORNEY, Young Clement Rivers and Tisdale, Charleston, SC; Christine Kent Toporek, Young Clement Rivers and Tisdale, Charleston, SC.

For Barry Concool, MD, Defendant: Edwin Brown Parkinson, Jr, Jennifer Lauren Breaux, LEAD ATTORNEYS, Devlin and Parkinson, Greenville, SC.

For Matin Fox, MD, Defendant: Daniel Richard D'Alberto, LEAD ATTORNEY, Nelson Mullins Riley and Scarborough (Cola), Columbia, SC; Jack Gordon Gresh, LEAD ATTORNEY, Hall Booth Smith and Slover, Sullivan's Island, SC; A Marvin Quattlebaum, Jr, David Eidson Dukes, Nelson Mullins Riley and Scarborough, Greenville, SC; James F Rogers, Nelson Mullins Riley and Scarborough (Cola), Columbia, SC.

For Scott Jaben, MD, Defendant: Keith D Munson, LEAD ATTORNEY, Womble Carlyle Sandridge and Rice, Greenville, SC.

For John Oster, MD, Defendant: Daniel Richard D'Alberto, LEAD ATTORNEY, [\*8] Nelson Mullins Riley and Scarborough (Cola), Columbia, SC; A Marvin Quattlebaum, Jr, David Eidson Dukes, Nelson Mullins Riley and Scarborough, Greenville, SC; James F. Rogers, Nelson Mullins Riley and Scarborough (Cola), Columbia, SC.

For George Pardos, MD, Defendant: Daniel Richard D'Alberto, LEAD ATTORNEY, Nelson Mullins Riley and Scarborough (Cola), Columbia, SC; Dennis Gary Lovell, Jr, LEAD ATTORNEY, Carlock Copeland

Semler and Stair, Charleston, SC; A Marvin Quattlebaum, Jr, David Eidson Dukes, Nelson Mullins Riley and Scarborough, Greenville, SC; James F Rogers, Nelson Mullins Riley and Scarborough (Cola), Columbia, SC.

For Edward Perraut, MD, Mark E Whitten, MD, Defendants: David Harlan Batten, LEAD ATTORNEY, Batten Lee, Cary, NC; Charles Houston Foppiano, PRO HAC VICE, Batten Lee Cary, NC.

For Louis Probst, MD, Defendant: Daniel Richard D'Alberto, LEAD ATTORNEY, Nelson Mullins Riley and Scarborough (Cola), Columbia, SC; Dennis Gary Lovell, Lee Cannon Weatherly Jr, LEAD ATTORNEYS, Carlock Copeland Semler and Stair, Charleston, SC; A Marvin Quattlebaum, Nelson Mullins Riley and Scarborough, Greenville, SC; James F Rogers, Nelson Mullins Riley and Scarborough (Cola), Columbia, SC. [\*9]

For Jeff Robin, MD, Defendant: A Marvin Quattlebaum, Jr, David Eidson Dukes, Nelson Mullins Riley and Scarborough, Greenville, SC; Daniel Richard D'Alberto, LEAD ATTORNEY, Nelson Mullins Riley and Scarborough (Cola), Columbia, SC; James F Rogers, Nelson Mullins Riley and Scarborough (Cola), Columbia, SC.

For Roy Rubinfeld, MD, Defendant: Daniel Richard D'Alberto, LEAD ATTORNEY, Nelson Mullins Riley and Scarborough (Cola), Columbia, SC.

For Stephen Slade, MD, Defendant: James B Hood, Robert H Hood, LEAD ATTORNEYS, Hood Law Firm, Charleston, SC; Andrew Walker Barnes, Barbara Wynne Showers, Frederick Felton Fisher, Hood Law Firm, Charleston, SC.

For Mark Speaker, MD, Defendant: Daniel Richard D'Alberto, LEAD ATTORNEY, Nelson Mullins Riley and Scarborough (Cola), Columbia, SC; A Marvin Quattlebaum, Nelson Mullins Riley and Scarborough, Greenville, SC; David Eidson Dukes, Nelson Mullins Riley and Scarborough, Greenville, SC; James F Rogers, Nelson Mullins Riley and Scarborough (Cola), Columbia, SC.

For Robert Spector, MD, Defendant: Dennis Gary Lovell

, Jr, LEAD ATTORNEY, Carlock Copeland Semler and Stair, Charleston, SC; Edwin Brown Parkinson, Jr, LEAD ATTORNEY, Jennifer Lauren Breaux, [\*10] LEAD ATTORNEYS, Devlin and Parkinson, Greenville, SC; Lee Cannon Weatherly Jr, LEAD ATTORNEYS, Carlock Copeland Semler and Stair, Charleston, SC.

For Brad Taylor, MD, Defendant: Edwin Brown Parkinson, Jr, Edwin Brown Parkinson, Jr, Jennifer Lauren Breaux, LEAD ATTORNEYS, Devlin and Parkinson, Greenville, SC.

For Gregory Tamas, MD, Defendant: Dennis Gary Lovell, Jr, Lee Cannon Weatherly, LEAD ATTORNEY, Carlock Copeland Semler and Stair, Charleston, SC.

For Stewart Terry, MD, Defendant: Daniel Richard D'Alberto, LEAD ATTORNEY, Nelson Mullins Riley and Scarborough (Cola), Columbia, SC; Denis Gary Lovell, Lee Cannon Weatherly, LEAD ATTORNEYS, Carlock Copeland Semler and Stair, Charleston, SC; Robert H Hood, LEAD ATTORNEY, Hood Law Firm, Charleston, SC; A Marvin Quattlebaum, Jr, David Eidson Dukes, Nelson Mullins Riley and Scarborough, Greenville, SC; James F Rogers, Nelson Mullins Riley and Scarborough (Cola), Columbia, SC; Blaine Aric Holbrook, PRO HAC VICE, Evan and Rowe, San Antonio, TX.

For Larry Womack, MD, Wendell Wong, MD, Defendant: Daniel Richard D'Alberto, LEAD ATTORNEY, Nelson Mullins Riley and Scarborough (Cola), Columbia, SC; James B Hood, Robert H Hood, LEAD ATTORNEYS, Hood [\*11] Law Firm, Charleston, SC; A Marvin Quattlebaum, Jr, Nelson Mullins Riley and Scarborough, Greenville, SC; Andrew Walker Barnes, Barbara Wynne Showers, Frederick Felton Fisher, Hood Law Firm, Charleston, SC; David Eidson Dukes, Nelson Mullins Riley and Scarborough, Greenville, SC; James F Rogers, Nelson Mullins Riley and Scarborough (Cola), Columbia, SC.

For Jonathan Woofson, MD, Defendant: Daniel Richard D'Alberto, LEAD ATTORNEY, Nelson Mullins Riley and Scarborough (Cola), Columbia, SC; Dennis Gary Lovell, Jr, Lee Cannon Weatherly, LEAD ATTORNEYS, Carlock Copeland Semler and Stair, Charleston, SC; A Marvin Quattlebaum, Jr, David Eidson Dukes, Nelson Mullins Riley and Scarborough, Greenville, SC; James F Rogers, Nelson Mullins Riley and Scarborough (Cola),



Columbia, SC.

For Brian Andrew, Esq, Defendant: Stacey Anne Lerum, Stacey Anne Lerum, John Potter, TLC The Laser Center Institute Inc-Denver, doing business as TLC Denver, also known as TLC The Laser Center Institute Inc, TLC The Laser Center Institute Inc-Atlanta, doing business as TLC Atlanta, also known as TLC The Laser Center Institute Inc, TLC The Laser Center Institute Inc Manhattan, doing business as TLC Manhanttan, also [\*12] known as TLC The Laser Center Institute Inc, TLC The Laser Center Institute Inc-Garden City, doing business as TLC Garden City, also known as TLC The Laser Center Institute Inc, TLC The Laser Center Northeast Inc North Jersey, doing business as TLC North Jersey, TLC The Laser Center Northeast Inc, TLC Laser Center Northeast Inc Rockville, doing business as TLC Rockville, also known as TLC Laser Center Northeast Inc, TLC The Laser Center Institute Inc White Plains, doing business as TLC White Plains, also known as TLC The Laser Center Institute Inc, TLC Midwest Eye Laser Center Inc-Chicagoland, doing business as TLC Chicagoland, aalso known as TLC Midwest Eye Laser Center Inc, TLC The Laser Center Northeast Inc-Big Sky, doing business as TLC Big Sky, also known as TLC The Laser Center Northeast Inc, TLC The Laser Center Institute Inc Charleston, doing business as TLC Charleston also known as TLC The Laser Center Institute Inc, TLC The Laser Center Institute Inc-San Antonio, doing business as TLC San Antonio , also known as TLC The Laser Center Institute Inc, Defendants: Ronald G Tate , LEAD ATTORNEY, Gallivan White and Boyd, Greenville, SC, Jr, Jennifer E Johnsen, Luanne Lambert Runge, [\*13] Gallivan White and Boyd, Greenville, SC; W Howard Boyd , Jr, Gallivan White and Boyd, Greenville, SC.

For TLC The Laser Institute Inc Torrance, doing business as TLC Torrance, also known as TLC The Laser Center Institute Inc, Defendants: Frederick Felton Fisher, Robert H Hood, James B Hood, LEAD ATTORNEYS, Hood Law Firm, Charleston, SC; Andrew Walker Barnes, Barbara Wynne Showers, Hood Law Firm, Charleston, SC.

For TLC The Laser Institute-Tampa, doing business as TLC Tampa, also known as TLC The Laser Institute, Defendants: Jennifer E Johnsen, Luanne Lambert Runge, Ronald G Tate , Jr, LEAD ATTORNEYS, Gallivan White and Boyd, Greenville, SC; W Howard Boyd , Jr, Gallivan White and Boyd, Greenville, SC.

**Judges:** J.Michelle Childs. United States District Judge.

## Opinion

### ORDER AND OPINION

This matter is before the court on all Defendants TLC LASIK Centers, TLC Clinical Directors, TLC LASIK Surgeons, and TLC Management's Motions to Dismiss Plaintiff's Amended Complaint [Docs. 27, 63, 75, 124, 128, 209, 213, 247, 248, 255, 281, 291, and 300].<sup>1</sup> Extensive memoranda in support of and in opposition to these motions have been filed by the parties and the court heard oral arguments from the parties on December 29, 2010. [\*14] Based upon the record before the court and after having considered the arguments of counsel, Defendants' Motions to Dismiss are granted.

### FACTUAL BACKGROUND

Plaintiff Charles Benjamin "Ben" Dickerson ("Plaintiff") brings this action as a putative class representative alleging causes of action for violations under [\*15] the Racketeer Influenced and Corrupt Organization Act ("RICO") and declaratory and equitable relief relating to certain medical records of the putative class members against the individual and corporate Defendants who for

<sup>1</sup> Defendants Jo Angeles, Kristen Brown, E. Edward Carmen, Phillip Cuva, Despina Fikaris, J. Christopher Freeman, Jeffrey J. Genos, Rhonda Kerzner, William Bruce Laurie, Jr., Michael Mariano, Elizabeth M. McLemore, Andrew S. Morgenstern, Debbie Pian, Mary J. Rauch, Carl J. Roth, Susan Shin, Stephen Siegel, Mark A. Slosar, Thomas Spetalnick, and Brad Taylor were dismissed from this action pursuant to [Fed. R. Civ. P. 41\(a\)\(2\)](#) without prejudice to any party and upon no admission of wrongdoing by any party. Because Defendants David Kohler, Derek Van Veen, and Cynthia Yaeger remain parties to this matter, the court addresses their Motion to Dismiss [Doc. 291] as outlined herein. Defendant Taylor's Motions to Dismiss [Docs. 75, 300] are dismissed without prejudice in accordance with the Order of Voluntary Dismissal consented to by the parties and entered by the court on February 1, 2011.

the sake of convenience are listed in four groups - the TLC LASIK Centers, TLC Clinical Directors, TLC LASIK Surgeons, and TLC Management.<sup>2</sup>

TLC The Laser Eye Center (Institute), Inc. operates laser vision correction centers in many locations throughout the country. Plaintiff alleges that, from 1998 through 2003, Defendants were responsible for the performance of laser-in-situ [\*16] keratomileusis ("Lasik") [\*17] surgery on a substantial number of patients who were not medically acceptable candidates for the surgery because of various contraindications for the procedure. Dr. Jonathan Woolfson performed laser vision correction surgery on Plaintiff at a TLC Center during this period and Plaintiff alleges he developed a post-surgical condition known as ectasia, generally described as an instability or bulging of the cornea. He alleges this is a complication from Lasik surgery that may occur, in some cases, over an extended period of time after surgery and he exhibited conditions before his surgery that disqualified him as a candidate for Lasik surgery. Plaintiff further contends that Defendants were aware that he and others were poor candidates for the surgery and failed to inform them of important medical information, including actual diagnoses, which would have mitigated or prevented further damage to their vision. Plaintiff's counsel acknowledges that any claim for personal injury arising from these limited facts would be appropriately pursued as a medical malpractice action. However, Plaintiff alleges that Defendants' wrongdoing extends beyond mere medical malpractice.

Plaintiff claims that [\*18] Defendants prepared and maintained risk management files on each patient without the patients' knowledge. In the Amended Complaint, Plaintiff alleges that Defendants engaged in a fraudulent scheme featuring:

- a) Creation of a system to identify these patients subjected to substandard LASIK surgeries without informing the patient of his/her condition or cause;
- b) Use of that system to monitor the patients'

condition without the knowledge and/or consent of the patient;

c) Maintenance of a separate file for each patient outside of the typical medical records of the patients for purposes of identification, monitoring and/or control of these patients and the risk posed to the Defendants' assets;

d) Delay both in treatment of and discovery by the patient of his/her medical conditions;

e) Communication of false representations to the patients concerning the use of new LASIK equipment and surgeries to enhance or correct vision in the patients when the Defendants knew the patients were not candidates for LASIK surgery;

f) The periodic scheduling, canceling and rescheduling of the LASIK surgery described above in order to create delay and buy time until the expiration of patients' rights;

g) Misrepresentation [\*19] of the patient's true medical condition and cause;

h) Withholding of the information and diagnosis of known surgery induced eye condition from the patient;

i) Use of the Lifetime Commitment Contract ["LTC"] to cover costs of treatments, examinations, glasses, contact lenses and medicines as a method to keep patients at TLC facilities and physicians, along with representations that such conduct would continue for the life of the patient;

j) Predetermined decision by Defendants that the LTC contract benefits described above would be withdrawn or discontinued when patients' risk to Defendants expired;

k) Creating and perpetuating a separate file on the patients which included medical diagnosis, treatment options and risk information not contained in the patients' medical records;

l) Ongoing efforts by Defendants to keep the patients at TLC facilities by discouraging outside consultations or physician intervention;

m) Obtaining releases for nominal consideration for some patients after the expiration of the patients' rights, said expiration caused by the actions of Defendants; and

n) Intentional misrepresentation of the patients' true medical conditions through misleading diagnosis and dissemination [\*20] of medical information and advice and/or the omission of necessary medical information, advice and/or diagnosis.

See Amended Complaint at ¶ 43.

<sup>2</sup> Plaintiff contends that the substance of this case arises from discoveries made during the prosecution of two state court medical malpractice cases currently pending in the Court of Common Pleas, Greenville County, South Carolina, *Hollman v. Woolfson, et al.*, C.A. No. 2007-CP-23-2347 and *Carter v. Nimmons, et al.*, C.A. No. 2007-CP-23-7587. The original plaintiff John Hollman and certain TLC Defendants have been involved in litigation for several years. On May 14, 2010, Plaintiff's Complaint was amended [Doc. 96]; wherein Charles Benjamin "Ben" Dickerson was substituted as the named Plaintiff.

Plaintiff further alleges that Defendants concealed from him and the class members their true diagnoses by taking the following steps:

That, specifically as to Ben Dickerson and all other class members, Defendants:

- a) Created a separate file of medical information and used this file to communicate information about him without his knowledge or consent and for purposes contrary to his best medical treatment and patient rights;
- b) Failed to disclose his medical diagnosis and cause until after expiration of his right to bring a claim and further specifically hid the actual diagnosis of ectasia thereby exacerbating the disease and causing additional injury;
- c) Failed to treat his known surgery induced condition in order to delay discovery until the expiration of his right to bring a claim;
- d) Advised Ben Dickerson that he was a LASIK surgery candidate when Defendants knew such representation was false;
- e) Repeated scheduling, canceling and rescheduling of Ben Dickerson for LASIK surgery upon representing that new technology existed and without Defendants [\*21] disclosing their real reasons for such tactics and, in particular, without disclosing to Dickerson that he was not a candidate for LASIK surgery;
- f) Failed to disclose Ben Dickerson's correct medical condition to him and placing erroneous or misleading medical information in his medical records;
- g) Paid for cost of medical treatment, glasses and contact lenses and agreed to pay for travel and associated expenses under the Lifetime Commitment Contract program while repeatedly representing that these types of benefits would continue for life;
- h) Following the expiration of Dickerson's right to pursue a claim, discontinuing his lifetime commitment benefits and he was no longer viewed as a risk to company assets;
- i) Forever hiding his true diagnosis in an effort to mitigate potential malpractice suits; and
- j) Illegally and without the patient's permission, disseminating his medical records to physicians and risk managers throughout the country in furtherance of the fraud and scheme.

See Amended Complaint at ¶ 44.

The systems described by Plaintiff were designated as

the "Complex Case System" and the "Advocacy Program." They were eventually merged into a single database which was allegedly transferred [\*22] to and reviewed by various individuals associated with TLC. Defendants used the database to monitor information for possible liability exposure arising from Defendants' performance of Lasik surgery on various patients. Plaintiff's Amended Complaint claims that Defendants, using this database, were involved in a scheme "designed to hide the patients [sic] true condition and to manage the patients' expectations until that patient no longer posed a risk to Defendants' assets because of the expiration of the statute of limitations governing the patient's claim. The Defendants' fraudulently and/or negligently misrepresented facts to induce the class members to use their laser facility." Amended Complaint at ¶ 50. Plaintiff contends that Defendants' actions were illegally taken to disguise their wrongdoing and to reduce the likelihood of legal action. Conversely, Defendants argue that the creation, use, and maintenance of such system is a legitimate risk management tool and that they owe no liability to Plaintiff. Based on Defendants' actions in creating and utilizing the database without the consent and knowledge of the patients, Plaintiff brought this action under the civil RICO statute [\*23] and for declaratory and injunctive relief.

All Defendants filed motions to dismiss Plaintiff's Amended Complaint on the grounds that Plaintiff failed to state a claim under RICO and failed to state a claim for declaratory and injunctive relief.<sup>3</sup> The individual Defendants also moved for dismissal on the basis of lack of personal jurisdiction. However, the parties agreed to defer any argument and decision on the jurisdictional matters pending resolution of the substantive issues currently before the court.

#### STANDARD OF REVIEW

For a complaint to survive a motion to dismiss, the Federal Rules of Civil Procedure require that it contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. Although *Rule 8(a)* does not require "detailed factual allegations," it requires "more [\*24] than an unadorned,

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<sup>3</sup> Defendants' motions also raised other grounds for dismissal including, but not limited to, Plaintiff's alleged failure to meet class certification requirements. However, Defendants clarified and narrowed the scope of their motions to the issues addressed in this order during the hearing on this matter.

the-defendant-unlawfully-harmed-me accusation," Ashcroft v. Iqbal, U.S. , 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-57, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)), in order to "give the defendant fair notice ... of what the claim is and the grounds upon which it rests," Twombly, 550 U.S. at 555 (internal citations omitted). Stated otherwise, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 570). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw [a] reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting Twombly, 550 U.S. at 556). A complaint alleging facts which are "merely consistent with a defendant's liability ... stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting Twombly, 550 U.S. at 557, 127 S. Ct. 1955) (internal quotation marks omitted).

In evaluating a motion to dismiss, a plaintiff's well-pleaded allegations are taken as true, and the complaint, including all reasonable [\*25] inferences there from, is liberally construed in the plaintiff's favor. McNair v. Lend Lease Trucks, Inc., 95 F.3d 325, 327 (4th Cir.1996). The court may consider only the facts alleged in the complaint, which may include any documents either attached to or incorporated in the complaint, and matters of which the court may take judicial notice. Tellabs v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007). Although the court must accept the plaintiff's factual allegations as true, any conclusory allegations are not entitled to an assumption of truth, and even those allegations pled with factual support need only be accepted to the extent that "they plausibly give rise to an entitlement to relief." Iqbal, 129 S. Ct. at 1950. A court may dismiss a complaint where "after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir.1999).

## DISCUSSION

### I. Racketeer Influenced and Corrupt Organization Act

Defendants [\*26] contend, in large part, that Plaintiff's Amended Complaint is merely an attempt to transform a medical malpractice claim into a RICO claim. However, even assuming that Plaintiff's goal is not the pursuit of an alternative recourse for medical malpractice as Defendants allege, Defendants further contend that Plaintiff has failed to prove a pattern of racketeering activity. Defendants also question the sufficiency of Plaintiff's allegations to establish the structure of the alleged enterprise and challenge Plaintiff's ability to establish cognizable damages.

RICO makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." 18 U.S.C. § 1962(c) (2006). To state a RICO claim, a plaintiff must sufficiently plead facts tending to demonstrate "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). Recovery under RICO may only be had by a "person injured in his business [\*27] or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c).

#### A. Pattern of Racketeering

Defendants allege that Plaintiff's claims fail because they do not allege a pattern of racketeering activity.

To establish a pattern of racketeering activity, a plaintiff must show two or more predicate acts of racketeering occurring within a ten-year period. 18 U.S.C. § 1961(1) and (5). Racketeering activity consists of a violation of a specified state crime or federal statute or an act indictable under federal mail or wire fraud statutes. 18 U.S.C. § 1961(1). A plaintiff is required to "show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." H. J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989). This requirement represents an acknowledgment of the legislative intent to curtail long-term criminal conduct through the RICO Act. *Id.*

The Fourth Circuit consistently employs a "continuity relationship plus test" in evaluating the existence of an ongoing criminal enterprise in RICO actions to "prevent [the statute's] harsh sanctions, such as treble damages, from being applied to garden-variety fraud schemes."



*Eplus Tech., Inc. v. Aboud*, 313 F.3d 166, 181-82 (4th Cir. 2002). [\*28] "Continuity" is both a closed and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. . . . A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time." *H.J. Inc.*, 492 U.S. at 241. To allege open-ended continuity, a plaintiff must show "a reasonable expectation that the racketeering activity will extend indefinitely into the future." *US Airline Pilots Ass'n v. Awappa, LLC*, 615 F.3d 312, 318 (4th Cir. 2010). "Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case." *H.J. Inc.*, 492 U.S. at 241. Racketeering activity which has a built-in ending point generally does not demonstrate the necessary threat of long-term, continued criminal activity. See *GE Inv. Private Placement Partners II v. Parker*, 247 F.3d 543, 549 (4th Cir. 2001); see also *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 186 (2d Cir. 2008) (holding "a serious, but discrete and relatively short-lived scheme ... insufficient [\*29] to establish open-ended continuity" (internal quotation marks omitted)). A plaintiff's conclusory recital of the RICO statute in a complaint will be insufficient to meet the necessary requirements to bring otherwise common fraudulent conduct within the purview of the RICO Act. See *GE Inv. Private Placement Partners II*, 247 F.3d at 551; and *Al-Abood ex rel. Al-Abood v. El-Shamari*, 217 F.3d 225, 238 (4th Cir. 2000) (advising caution in preserving a "distinction between ordinary or garden-variety fraud claims better prosecuted under state law and cases involving a more serious scope of activity").

Plaintiff founds his claim of Defendants' racketeering activity on predicate acts of mail and wire fraud. Mail fraud requires a showing of "(1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme." *Pereira v. United States*, 347 U.S. 1, 8, 74 S. Ct. 358, 98 L. Ed. 435 (1954). The elements of wire fraud are similar, but involve the use of electronic or telephonic communication. Plaintiff attempts to plead multiple instances of mail and wire fraud against certain Defendants. Specifically, Plaintiff alleges "[o]n February 22, 1999, Defendant Kohler faxed and mailed patient records [\*30] and private health care information to the enterprise clinical affairs office for purposes of entering the plaintiff into the Complex Case system and secretly tracking his condition." Amended Complaint at ¶ 64. Plaintiff further contends "[o]n August 25, 1999, Defendant Machat created a LASIK procedure

report which falsely indicated that he had ruled out a possibility of keratoconus, . . . which was mailed in furtherance of the conspiracy on August 25, 1999 [sic] to Defendant TLC Laser Eye Center (Institute), Inc." *Id.* Finally, Plaintiff alleges "[o]n May 5, 2005, Defendant Van Veen mailed or caused to be mailed, without the patients [sic] consent and in violation of HIPAA, all of the patients [sic] medical records, to Defendant Potter for the purpose of allowing Potter to track his case and monitor the statute of limitations." *Id.*

Defendants argue that Plaintiff's pleading fails to establish a scheme to defraud. Instead, Defendants claim that they have merely established a risk management system - which Defendants contend is neither fraudulent nor illegal. Plaintiffs, on the other hand, take issue with Defendants' position. In addressing the criminal offense of mail fraud, the Fourth [\*31] Circuit has indicated that a scheme to defraud may result in a deprivation of tangibles such as money or of intangibles such as the honest and faithful performance of duties. See *United States v. Barber*, 668 F.2d 778, 784 n.4 (4th Cir. 1982). It is generally established that a physician has a duty to inform a patient of a correct diagnosis and failure to provide the patient with his true diagnosis is a breach of that duty. See *Hook v. Rothstein*, 281 S.C. 541, 547, 316 S.E.2d 690, 694-95 (Ct. App. 1984) (noting that under the doctrine of informed consent, a physician has a duty to disclose "(1) the diagnosis, (2) the general nature of the contemplated procedure, (3) the material risks involved in the procedure, (4) the probability of success associated with the procedure, (5) the prognosis if the procedure is not carried out, and (6) the existence of any alternatives to the procedure."); see also, 61 AM. JUR. 2D *Physicians, Surgeons, Etc.* § 212. While there are legitimate uses for risk management systems and the creation of such a system cannot be said to be illegal in and of itself, the transmission of the information from such system through wire and mail for the purpose of depriving [\*32] a patient of a true diagnosis could form the basis of a predicate act sufficient to meet the requirements of the RICO Act. Although Defendants deny any disreputable purpose in transmitting Plaintiff's medical records, the court must liberally construe the well-pleaded complaint in Plaintiff's favor. Therefore, Plaintiff has alleged acts that relate to one another through shared purpose, participants, and victims occurring over a sufficient continuity of time to establish a pattern of racketeering.

## B. Existence of an Enterprise

Defendants next argue that Plaintiff's RICO claim fails because he cannot show the existence of a RICO enterprise.

Under RICO, an "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. [18 U.S.C. § 1961\(4\)](#). A RICO enterprise is characterized by "continuity, unity, shared purpose and identifiable structure." [United States v. Fiel, 35 F.3d 997, 1003 \(4th Cir. 1994\)](#) (internal citations and quotation marks omitted). The enterprise is not defined by the pattern of racketeering activity, but must exist separate and apart from the pattern of [\*33] racketeering activity in which it engages. [United States v. Turkette, 452 U.S. 576, 583, 101 S. Ct. 2524, 69 L. Ed. 2d 246 \(1981\)](#).

According to Defendants, TLC Vision Corp. cannot be the RICO enterprise. However, Plaintiff makes reference in the Amended Complaint to the intricate manner in which TLC Vision Corp. controls the TLC LASIK Centers and the management structure utilized throughout the TLC Vision Corp. operations. Specifically, Plaintiff alleges that TLC Vision Corp. set up the TLC LASIK Centers in various locations in the United States and hired licensed optometrists as clinical directors to coordinate business operations and oversee Lasik surgeries. Amended Complaint at ¶¶ 17-21. Taking Plaintiff's well-pleaded allegations as true, including all reasonable inferences there from, it is conceivable that these allegedly associated entities constitute a RICO enterprise.

Defendants contend that Plaintiff failed to allege that all Defendants are separate and distinct from the enterprise. Although Plaintiff's pleading may have some shortcomings as to TLC Vision Corp.'s relationship to the TLC LASIK Centers, Plaintiff has set forth a clear distinction between TLC Vision Corp. and the TLC LASIK Centers as enterprises [\*34] and the separate actions of TLC Management, TLC Clinical Directors, and TLC LASIK Surgeons in conducting the affairs of the enterprises. Any individual "who conducts the affairs of a corporation through illegal acts comes within the terms of a statute that forbids any "person" unlawfully to conduct an "enterprise," particularly when the statute explicitly defines "person" to include "any individual ... capable of holding a legal or beneficial interest in property," and defines "enterprise" to include a "corporation." [Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163, 121 S. Ct. 2087, 150 L. Ed. 2d 198 \(2001\)](#).

Therefore, the court finds that Plaintiffs successfully plead the existence of a RICO enterprise.

### C. Showing of Damages for Standing

Defendants further argue that Plaintiff fails to show proper damages to meet the standing requirements of a civil RICO claimant. While Plaintiff may have met the requisite threshold of pleading a pattern of racketeering activity and demonstrating the establishment of an enterprise, the court agrees that Plaintiff does not possess the necessary standing to pursue his RICO action.

The civil RICO statute provides that "[a]ny person injured in his business or property by reason of [\*35] a violation of [section 1962](#) of this chapter may sue . . . in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." [18 U.S.C. § 1964\(c\)](#). A private RICO plaintiff must show damage to "business or property" proximately caused by the defendant's RICO violation to have standing to bring suit. [Potomac Elec. Power Co. v. Elec. Motor & Supply, Inc., 262 F.3d 260, 264 \(4th Cir. 2001\)](#). "A defendant who violates [section 1962](#) is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured." [Sedima, S.P.R.L., 473 U.S. at 496-97](#) (internal citations omitted). Allegations of personal injuries and the pecuniary losses incurred there from do not qualify as injury to "business or property." [Bast v. Cohen, Dunn & Sinclair, PC, 59 F.3d 492, 495 \(4th Cir. 1995\)](#).

Defendants argue that Plaintiff does not have standing to bring this RICO claim because he cannot show an injury to his business or property. Specifically, Defendants contend that Plaintiff's claims of injuries arising from the conversion of his medical records [\*36] do not produce the type of injuries for which a RICO action is intended and that the injuries Plaintiff alleges are actually personal injuries which are not recoverable under RICO. The primary focus of Defendants' arguments is that the physical medical records are property of the physician and Plaintiff has no property interest in them whatsoever.

Plaintiff, however, contends that he is not making any claim for personal injuries and that he has a protectable property interest in his medical information. He further alleges that Defendants mistakenly focus on the

physical medical file instead of the information collected and created from the treatment of the patient.<sup>4</sup> Plaintiff takes the position that there is a distinction between the interest in a physical file and the information contained in a file and that it is Defendants' conversion or wrongful use of Plaintiff's property interest in the underlying medical information which gives rise to a cognizable RICO injury. Specifically, Plaintiff seeks recovery for 1) conversion of his property resulting in the loss of income and costs associated with obtaining the return of and restraining any further misuse of his property; and 2) the [\*37] monetary amounts paid for unnecessary surgeries.

Plaintiff's argument that he has a protectable interest in his medical information has some appeal. It is well-established that patients have certain rights in obtaining truthful diagnoses. See [Hook, 281 S.C. at 547, 316 S.E.2d at 694-95](#). South Carolina law also protects a patient's right to access the information contained in the medical files maintained by physicians despite the grant of ownership in the actual physical file to the physician. See [S.C. Code Ann. §§ 44-115-20; 44-115-30](#) (2009).<sup>5</sup> However, the question before the court today is whether a patient has any property interest in medical information such that the denial of access to or concealment of such information could form the basis of a RICO injury. After carefully reviewing the available authorities, this court finds that a patient's interest in medical information is an intangible property interest - the conversion of which does not precipitate an injury to business or property sufficient to confer standing under [\*38] RICO.

Courts in the Fourth Circuit have not addressed this matter. The District Court for the Western District of

Pennsylvania examined a case which is instructive to the matter at hand. In [Vavro v. Albers, 2006 U.S. Dist. LEXIS 62237, 2006 WL 2547350 \(W.D. Pa. Aug. 31, 2006\)](#), the plaintiff claimed to suffer from toxic solvent encephalopathy ("TSE") which he attributed to alleged chronic and uncontrolled exposure to chlorinated solvents while working for A.K. Steel Corporation in Butler, Pennsylvania. After filing an unsuccessful claim for workers' compensation [\*39] benefits, the plaintiff brought a suit in federal court alleging, *inter alia*, a state law claim for conversion and a civil RICO claim. The crux of plaintiff's claims centered upon the alleged gathering and use of his private medical information ("PMI") for research in a publication and other purposes, including to allegedly conceal the cause of his illness and provide a defense for A.K. Steel Corporation in his worker's compensation claim, without his consent. The plaintiff contended that such alleged use constituted conversion and that such conversion "*caused him to sustain injury to his property interest in his PMI.*" *Id.* at 21. The types of injuries claimed by the plaintiff included such items as the costs of continuing health care over his lifetime; and amounts for personal and financial injuries including damages for "intentionally inflicted distress," "physical pain and mental distress," "diminished capacity to enjoy life," "sustained loss of income, a diminished earning capacity, and other substantial economic losses."

In making the "injury" analysis for RICO standing, the court noted, "all of the injuries Plaintiff claims to have suffered constitute either personal injuries (intentionally [\*40] inflicted distress, physical pain and mental distress, a diminished capacity to enjoy life, intentional infliction of emotional distress, denial of medical treatment and care), or financial injuries that derive from the alleged personal injuries (i.e., incurred medical bills for treatment and care, loss of income, diminished earning capacity, and other substantial economic losses), none of which are deemed compensable under RICO." *Id.* As an additional ground for dismissal, the court found that, "Plaintiff's property interest in his PMI. . . is normally not the type of property which, when injured, is capable of incurring a concrete financial loss, and therefore, is insufficient to create RICO standing." *Id.* The court determined that "Plaintiff's alleged injury to his property interest in his PMI is, at best, merely an injury to a valuable intangible property interest, the damage to which is speculative and incapable of quantification. Further, Plaintiff's claimed injuries of out of pocket medical expenses, lost income, diminished earning capacity, although capable of valuation, all derive from his alleged TSE and the denial of his

<sup>4</sup> Plaintiff admits that South Carolina statutory law gives physicians ownership rights in the medical files of their patients. See [S.C. Code Ann. § 44-115-20](#).

<sup>5</sup> The South Carolina Code also provides that a physician's "unreasonable refusal to release the *entire medical record* constitutes unprofessional conduct and subjects the physician to disciplinary action." [S.C. Code Ann. §§ 44-115-60](#) (emphasis added). However, the code does not define the scope of "medical record" and both parties have ostensibly assumed that the term is limited to certain documents. Because Plaintiff is clearly referring to the whole body of information collected or created from a physician's treatment of a patient regardless of where it is recorded and stored, the court need not address this matter in resolving the motions currently before it.



workers' compensation claim, not an alleged injury [\*41] to his intangible property interest in his PMI. Therefore, Plaintiff's alleged injuries are not the type of "injury" that creates RICO standing.

Here, Plaintiff alleges two categories for recovery. First, Plaintiff claims that he has incurred costs and attorney's fees to protect and recover his medical information. See Plaintiff's Mem. at 11 [Doc. 303]. Under RICO, costs and attorneys fees are mandatory elements of recovery for a successful plaintiff and are separate from the analysis of injury to "business or property." See [18 U.S.C. § 1964\(c\)](#). Secondly, Plaintiff claims that he has lost the monetary amounts paid for unnecessary surgeries. In the Amended Complaint, Plaintiff alleges that a TLC Center initially performed on him Lasik surgery for which he was contraindicated. He further alleges that *prosepective* patients were offered Lifetime Commitment Contracts ("LTC") as an inducement to engage TLC to perform the Lasik surgery and that the LTC covered the cost of additional treatments needed after the initial Lasik surgery. Amended Complaint at ¶¶ 26-27. Plaintiff also alleges that "[a]s a consequence of the surgeries, Ben Dickerson and all others similarly situated began developing [\*42] vision problems *directly caused by the LASIK surgery.*" Amended Complaint at ¶ 39. (emphasis added). Based on the allegations of the Amended Complaint, Plaintiff's loss of money for amounts paid for unnecessary surgeries derives from the performance of the initial surgery and the alleged failure to properly inform Plaintiff of his proper diagnoses, not Defendant's creation of and internal use of databases which were undisclosed to Plaintiff. Therefore, Plaintiff's claim of conversion of his medical information and damages allegedly arising there from do not amount to injuries in business or property. While Plaintiff has submitted a well-pleaded complaint, no cause of action for violation of RICO can exist here because there can be no injury to Plaintiff's business or property under the facts as alleged.

Furthermore, the court is unpersuaded that a plaintiff may maintain a civil RICO action on the basis of an injury founded simply in the alleged "conversion" of medical records or medical information. "Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion [\*43] of the owner's rights." [Crane v. Citicorp Nat'l Servs., Inc.](#), 313 S.C. 70, 73, 437 S.E.2d 50, 52 (1993). "Conversion may arise by some illegal use or misuse, or by illegal detention of another's personal property." [Regions Bank v. Schmauch](#), 354 S.C. 648,

[667, 582 S.E.2d 432, 442 \(Ct. App. 2003\)](#). The South Carolina Supreme Court has expressed reluctance "to expand the tort of conversion as it relates to intangible property and conclude[d] that it should be limited to intangible property rights that are identified with some document." See [Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.](#), 385 S.C. 452, 466, 684 S.E.2d 756, 763 (2009). Claims for the conversion of medical records have been treated similarly in other jurisdictions. See [Vavro, 2006 U.S. Dist. LEXIS 62237, 2006 WL 2547350 at 15](#). (finding that "a property interest in medical information is an intangible right that is not customarily merged in or identified with some document, and therefore, cannot be the subject of a conversion claim"); see also, [Hanson v. Hancock County Mem'l Hosp.](#), 938 F. Supp. 1419, 1438 (N.D. Iowa 1996) (court rejected plaintiff's argument that privacy interest in hospital patient information constituted protected intangible personal [\*44] property finding there was no authority for finding that plaintiff's privacy interest was in fact a property right, and in any event, it was not a property right that is "customarily merged in, or identified with, some document") (quoting [Hurst v. Dezer/Reyes Corp.](#), 82 F.3d 232, 235-36 (8th Cir. 1996)) (other citations omitted); [Rao v. Verde](#), 222 A.D.2d 569, 635 N.Y.S.2d 660, 661 (N.Y. App. Div. 1995) (holding that information obtained from medical records was intangible and therefore could not be the subject of a conversion claim).

Given that conversion of Plaintiff's medical information is not a legally cognizable action under South Carolina law and that Plaintiff has failed to demonstrate any concrete, quantifiable injury to his business or property, Plaintiff does not have standing to pursue his RICO claim, even under the well-pleaded facts of the Amended Complaint. Accordingly, the court grants Defendants' Motions to Dismiss Plaintiff's cause of action under the RICO statute.

#### D. Conspiracy

Defendants claim Plaintiff has not stated a RICO conspiracy claim. Where the pleadings do not state a substantive RICO claim under [§ 1962\(c\)](#), a plaintiff's RICO conspiracy claim fails as well. See [\*45] [GE Investment Private Placement Partners II v. Parker](#), 247 F.3d 543, 551 (4th Cir. 2001) (citing [Efron v. Embassy Suites \(Puerto Rico\), Inc.](#), 223 F.3d 12, 21 (1st Cir. 2000), cert. denied, 532 U.S. 905, 121 S. Ct. 1228, 149 L. Ed. 2d 138 (2001)).

Because the court finds that Plaintiff has failed to state a

substantive RICO claim, the court also grants Defendants' Motions to Dismiss Plaintiff's RICO conspiracy claim.

## II. Declaratory and Injunctive Relief

Plaintiff requests an order from the court seeking the following relief: (1) that Plaintiff and the putative class members are entitled to full disclosure of all medical records, including medical opinions and findings in the alleged "illegal databases"; (2) that Defendants are enjoined from further use of the "fraudulent database"; (3) that Defendants are enjoined from violations of HIPAA and dissemination of medical records among Defendants without consent; and (4) that Defendants are required to return all of the class members' medical records which were allegedly converted by Defendants. Defendants argue that Plaintiff's claims for declaratory and injunctive relief should be dismissed because the allegations of Plaintiff's Amended Complaint do not establish a justiciable [\*46] controversy over which the court has jurisdiction nor has Plaintiff stated a claim.

Plaintiff's claim for a declaration of entitlement to disclosure of medical records is ill suited for resolution as postured. Instead, Plaintiff's request for disclosure is one that should be resolved in a discovery motion where the court may properly consider all factors relevant to disclosure including, but not limited to, the rulings of the state court concerning the databases and standing issues.

As to Plaintiff's request for injunctive relief, the court finds Plaintiff has not sufficiently pled a cause of action requiring the remedy of injunctive relief. "An injunction is a drastic remedy and will not issue unless there is an imminent threat of illegal action." *Bloodgood v. Garrahty*, 783 F.2d 470, 475 (4th Cir.1986). A plaintiff must plead a cause of action entitling him to injunctive relief, not just request injunctive relief in the abstract.

Here, Plaintiff has made conclusory allegations that Defendants' creation of the databases is illegal and that sharing the patient information among the related entities is a violation of the Health Insurance Portability and Accountability Act ("HIPAA"). However, [\*47] Plaintiff's Amended Complaint does not contain any allegations of a violation of any statute which renders such information collection illegal nor does it contain any assertion of a private right of action under HIPAA.

Because Plaintiff has failed to plead a cause of action

entitling him to injunctive relief, the court grants Defendants' request to dismiss this claim of the Amended Complaint.

## III. Statute of Limitations.<sup>6</sup>

Defendants claim Plaintiff's RICO claim is barred by the statute of limitations. Plaintiff denies that any applicable limitations period can be determined from the face of the Amended Complaint and, further that even if any limitations period can be determined, such period should be equitably tolled due to Defendants' [\*48] fraudulent concealment of their conduct.

The RICO statute does not contain an express statute of limitations. However, the Supreme Court has established a four-year statute of limitations applicable to civil RICO actions. See *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987). In determining when the statute begins to run, the Court adopted the discovery accrual rule. Accordingly, the statute of limitations begins to run when the plaintiff knows or should know of the existence of a RICO injury, not discovery of the other elements of a claim such as the underlying pattern of racketeering activity. See *Rotella v. Wood*, 528 U.S. 549, 555-56, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000) (stating that the discovery rule for a RICO injury is analyzed in the same manner as the discovery rule for medical malpractice). This is true even if the pattern of racketeering activity includes fraud. *Id.* at 557. In cases where the RICO claim is based on fraudulent concealment, a plaintiff must use reasonable diligence to discover the claim. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194-95, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997).

Equitable tolling may extend the statute of limitations period applicable to RICO actions. See *Pacific Harbor Capital, Inc. v. Barnett Bank, N.A.*, 252 F.3d 1246 (11th Cir. 2001); [\*49] *Grimmett v. Brown*, 75 F.3d 506 (9th Cir. 1996); *Bontkowski v. First Nat. Bank of Cicero*, 998 F.2d 459 (7th Cir. 1993). To toll the limitations period, a

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<sup>6</sup> Certain Defendants also contend that Plaintiff's claims are barred by the six-year statute of repose applicable to medical malpractice actions brought under South Carolina law. Plaintiff concedes that this is not a medical malpractice action and no Defendant argues that the state law statute of repose is applicable to Plaintiff's federal civil RICO claims. Therefore, the court need not address whether Plaintiff's claims are also barred by the statute of repose.

plaintiff must show that he exercised due diligence to discover his cause of action prior to the running of the statute and that the defendant was guilty of some affirmative act of fraudulent concealment which frustrated discovery notwithstanding such diligence. Lukenas v. Bryce's Mountain Resort, Inc., 538 F.2d 594, 595-96 (4th Cir. 1976). Fraudulent concealment may exist where a defendant's misconduct has induced or tricked the plaintiff into allowing the filing deadline to pass. See Chao v. Virginia Department of Transportation, 291 F.3d 276, 283 (4th Cir. 2002) (citing Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990)). When the doctrine of equitable tolling applies, the statute of limitations period does not begin to run until the plaintiff discovers the fraud. See Supermarket of Marlinton, Inc. v. Meadow Gold Diaries, Inc., 71 F.3d 119, 122 (4th Cir. 1995).

However, courts should use equitable tolling only in exceptional circumstances, and not as a routine method of preserving a plaintiff's stale cause of action. [\*50] See Rotella, 528 U.S. at 561. The application of equitable tolling is not always clear, particularly in circumstances where the cause of action itself includes an element of fraud. This is often the case in RICO actions. "A 'pattern of predicate acts may well be complex, concealed, or fraudulent,' but those characteristics of a RICO action are not enough to toll the statute of limitations." See Pacific Harbor Capital, Inc. v. Barnett Bank, N.A., 252 F.3d 1246, (11th Cir. 2001) (citing Rotella, 528 U.S. at 556). The RICO plaintiff which is the victim of fraudulent conduct has the obligation to take steps to discover the pattern responsible for his injury with diligence and, like a medical malpractice victim, cannot wait for a chance revelation that the defendant's actions contributed to his injury. *Id.* See accord, Grimmett, 75 F.3d at 514-15 (dismissing RICO complaint on limitations grounds and finding that a "failure to 'own up' does not constitute active concealment" sufficient to warrant tolling where plaintiff did not exercise diligence to discover her claim).

Assuming, arguendo, that Plaintiff's claimed damages concerning the conversion of his medical records could qualify as an [\*51] appropriate RICO injury, Plaintiff's claim would be barred by the statute of limitations. Although Plaintiff claims that the face of his Amended Complaint reveals no dates of conversion, he clearly makes a case that Defendants initially "converted" his medical records to their own use beginning as early as February 1999, and continued to use his medical records in the course of their alleged racketeering

scheme through May 2005. Although Plaintiff's cause of action under the RICO statute was complete and could have been brought as early as August 1999, when Defendant Machat allegedly completed the second predicate act of mailing Plaintiff's medical records to Defendant TLC Laser Eye Center (Institute), Inc. in "furtherance of their conspiracy," Plaintiff's RICO claim certainly accrued by May 2005. This action was not initiated until March 2010 and Plaintiff's claims were not raised until May 2010, well after the expiration of the statute of limitations. However, Plaintiff argues that equitable tolling is applicable to his claims against Defendants based on their allegedly fraudulent and intentional conduct.

As explained in Defendants' Memorandum in Support of Motion to Dismiss Plaintiff's [\*52] First Amended Complaint [Doc. 213] and supporting documentation [Doc. 212],<sup>7</sup> Plaintiff's first Lasik surgery occurred in 1998. Plaintiff had a second surgery in 1999. After Plaintiff's second surgery, he remained displeased with the results and returned to the local TLC Center complaining of decreased visual capacity. Plaintiff's vision continued to deteriorate, yet he did not seek additional care from the TLC Center and did not seek

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<sup>7</sup> As a procedural note, Defendants filed a copy of Plaintiff's medical records under a Motion to Seal [Doc. 212] as an attachment to its Motion to Dismiss. The general rule is that when matters outside the pleadings are presented to the court on a 12(b) motion, that motion must be treated as a motion for summary judgment under Rule 56, Fed. R. Civ. P. 12(d). The Fourth Circuit has held that a court may consider material outside the complaint in evaluating a motion to dismiss [\*53] where such material is integral to and explicitly relied upon in the complaint and where the plaintiff does not challenge the authenticity of the material. See Am. Chiropractic v. Tricron Healthcare, 367 F.3d 212, 234 (4th Cir. 2004). Plaintiff has not challenged the authenticity of the records, but does argue against the court's reliance on them in determining Defendants' motions. In this case, Defendants' attachment may be considered without converting their motion to dismiss into a motion for summary judgment. However, the court is expressly relying only upon the face of the Amended Complaint in granting Defendants' motions and only references Plaintiff's medical records and Defendants' arguments regarding those records as they relate to Plaintiff's equitable tolling argument. The court also notes that, outside of the allegations regarding the RICO predicate acts, Plaintiff did not plead with particularity any argument for fraudulent concealment in his Amended Complaint, see Iqbal, 129 S. Ct. at 1949, Fed. R. Civ. P. 9(b), but waited until his response in opposition to Defendants' Motions to Dismiss to first make his equitable tolling claim.

his medical records from the TLC Center. Had Plaintiff investigated the reason for his deteriorating vision, he may have discovered Defendants' alleged efforts to conceal his true diagnosis or, at least, demonstrated the requisite diligence to preserve an equitable tolling argument.

Because Plaintiff failed to bring his [\*54] RICO claim within four years of the accrual of his injury and because Plaintiff did not pursue his claim with reasonable diligence, the court grants Defendants' Motion to Dismiss based on the statute of limitations.<sup>8</sup>

## CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss [Docs. 27, 63, 75, 124, 128, 209, 213, 247, 248, 255, 281, 291, and 300] are **GRANTED**.

**IT IS SO ORDERED.**

Greenville, South Carolina

February 3, 2011

/s/ J. Michelle Childs

United States District Judge

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<sup>8</sup> The court's statute of limitations and equitable tolling analysis is made in reference to the named Plaintiff and his alleged facts as applied to the specific causes of action addressed in this order. The court makes no determination regarding the running or tolling of any prospective class plaintiff's cause(s) of action.



## **Dove Data Prods. v. Murray**

United States District Court for the District of South Carolina, Florence Division

November 2, 2006, Decided; November 2, 2006, Filed

Civil Action No.: 4:05-00072

### **Reporter**

2006 U.S. Dist. LEXIS 108680 \*

DOVE DATA PRODUCTS, INC., Plaintiff, vs. BRIAN MURRAY, Defendant.

**Opinion by:** Terry L. Wooten

## **Core Terms**

summary judgment, trade secret, employment agreement, argues, customers, Technology, compete, covenant, asserts, summary judgment motion, non-moving, alleges, allowance, genuine issue of material fact, contracts, mileage, intentional interference, unfair trade practice, misappropriation, breached, parties, contractual relationship, no evidence, promise, solicit, prospective contractual relation, intentionally interfere, equitable relief, cause of action, inappropriate

**Counsel:** [\*1] For Dove Data Products Inc, Plaintiff: Paul M Platte, LEAD ATTORNEY, Rogers Townsend and Thomas, Columbia, SC USA; Kristine L Cato, Blair Cato Pickren Casterline LLC, Columbia, SC USA.

For Brian Murray, Defendant, Counter Claimant: James Walker Coleman, IV, LEAD ATTORNEY, K&L Gates LLP (Chas), Charleston, SC USA; Ellis Reed-Hill Lesemann, Lesemann and Associates LLC, Charleston, SC USA.

For Dove Data Products Inc, Counter Defendant: Kristine L Cato, LEAD ATTORNEY, Blair Cato Pickren Casterline LLC, Columbia, SC USA; Paul M Platte, LEAD ATTORNEY, Rogers Townsend and Thomas, Columbia, SC USA.

**Judges:** Terry L. Wooten, United States District Judge.

## **Opinion**

### **ORDER**

Plaintiff Dove Data Products, Inc. ("Dove Data") filed the instant action against Defendant Brian Murray ("Murray") on January 10, 2005 alleging causes of action for (1) breach of contract, (2) misappropriation of trade secrets, (3) intentional interference with contractual relations, (4) interference with prospective contractual relations, (5) breach of the employee duty of loyalty, (6) unfair trade practices, and (7) equitable relief. (Doc. #1). The Court previously issued an order in this case on February 23, 2006. (Doc. #61). That [\*2] order addressed the question of whether a preliminary injunction should be issued against Murray. The Court held hearings on Dove Data's motion for a preliminary injunction on November 21, 2005 and January 26, 2006. At both hearings, testimony was taken from witnesses and argument was made by the parties' counsel. In its order of February 23, 2006, the Court denied Dove Data's motion for a preliminary injunction. *Id.* Murray has now moved for summary judgment. (Doc. #96).

In its February 23, 2006 order, the Court stated the December 8, 2000 written employment agreement between Dove Data and Murray, which forms the basis of this case, is "properly tailored and not overbroad . . . [it] appears to be reasonably limited in its operation with respect to time and place." (Doc. #61). Further, the Court noted in its order that the South Carolina Supreme Court held in Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533 (S.C. 1961), that



a similar restrictive employment agreement was valid. Id. Assuming consideration supports the December 8, 2000 agreement, its enforcement would be appropriate. Had the Court concluded consideration existed, it is likely Dove Data's motion for a preliminary injunction would have been granted. The Court noted, however, that [\*3] there was uncertainty as to the consideration question. Id. With this background, the Court turns to Murray's pending motion for summary judgment.

### **Facts**

Dove Data, a South Carolina corporation engaged in the manufacture, re-manufacture, and sale and distribution of supplies, including toner and ink, for computer printers, fax machines, and copiers, hired Murray as a marketing representative and account manager on May 17, 1999. Dove Data assigned Murray the territory within a 100 mile radius of New Orleans, Louisiana. On December 8, 2000, Dove Data presented the employment agreement, which forms the basis of this lawsuit, to Murray.<sup>1</sup> Murray signed the agreement. Murray presented his resignation to Dove Data on June 8, 2004. His last day of work was July 9, 2004. Prior to presenting his resignation and ending his employment with Dove Data, Murray's wife incorporated a company, Rebo Technology, LLC, on March 26, 2004. Rebo Technology is a company similar to Dove Data in that it sells supplies, including toner and ink, for computer printers and copiers to customers in the area within a 100 mile radius of New Orleans, Louisiana. On July 25, 2004, shortly after Murray's employment with Dove [\*4] Data ended, Rebo Technology signed a contract with Hospital Corporation of America ("HCA") for the sale of computer printer and copier supplies. Murray allegedly negotiated this agreement. Prior to this contract with Rebo Technology, HCA contracted with Dove Data for its computer, fax machine, and copier supplies. In his memorandum supporting his summary judgment motion, Murray asserts HCA allowed its contract with Dove Data to expire on May 26, 2004, and, based on the poor performance of Dove Data's product, HCA elected not to renew this contract. (Doc. #96) Subsequently, on January 10, 2005, Dove Data filed the instant action. As stated, following the Court's denial of Dove Data's motion for a preliminary injunction, Murray filed the pending motion for summary judgment on June

30, 2006. (Doc. #96). Dove Data responded to Murray's motion on July 18, 2006. (Doc. #101). Murray filed his reply on July 28, 2006. (Doc. #102). The Court has carefully reviewed the memorandum, case law, and exhibits submitted by the parties. Murray's motion is ripe for disposition.

### **Summary Judgment Standard**

In a motion for summary judgment, the moving party bears the burden of showing summary judgment is proper. [\*5] Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [\*Fed. R. Civ. P. 56\(c\)\*](#); [\*Celotex Corp. v. Catrett\*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 \(1986\)](#). Summary judgment is proper if the non-moving party fails to establish an essential element of any cause of action upon which the non-moving party has the burden of proof. [\*Celotex\*, 477 U.S. at 322](#). Once the moving party has brought into question whether there is a genuine issue for trial on a material element of the non-moving party's claims, the non-moving party bears the burden of coming forward with specific facts which show a genuine issue for trial. [\*Fed. R. Civ. P. 56\(e\)\*](#); [\*Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.\*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 \(1986\)](#). The non-moving party must come forward with enough evidence, beyond a mere scintilla, upon which the fact finder could reasonably find for it. [\*Anderson v. Liberty Lobby, Inc.\*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 \(1986\)](#). The facts and inferences to be drawn therefrom must be viewed in the light most favorable to the non-moving party. [\*Shealy v. Winston\*, 929 F.2d 1009, 1011 \(4th Cir. 1991\)](#). However, the non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. [\*Barber v. Hosp. Corp. of Am.\*, 977 F.2d 872, 874-75 \(4th Cir. 1992\)](#). The evidence relied on must meet "the substantive evidentiary standard of proof that would apply at a trial on the merits." [\*Mitchell v. Data General Corp.\*, 12 F.3d 1310, 1316 \(4th Cir. 1993\)](#).

### **Discussion**

Murray's has moved for summary judgment as to each of Dove Data's seven asserted [\*6] causes of action. Therefore, each claim will be individually addressed.

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<sup>1</sup>Murray did sign an employment agreement when he first accepted a position at Dove Data. Dove Data is not pursuing claims as a result of this agreement.

## I. Breach of Contract

Dove Data alleges it and Murray entered into the binding December 8, 2000 agreement whereby Murray agreed not to solicit Dove Data's customers or compete against Dove Data for a specified period. (Complaint ¶ 21). Dove Data alleges Murray breached this agreement and is now soliciting Dove Data's customers. (Complaint ¶ 22). Assuming consideration, the Court concludes the restrictions in the employment agreement are valid because they are limited with respect to time, place, and duration. Generally, the restrictions are not overbroad. Whether this claim survives summary judgment turns on the question of whether the agreement was supported by consideration. Murray has moved for summary judgment as to this claim on grounds the restrictive covenants in the employment agreement are void and unenforceable. Murray specifically argues, in part, that the restrictive covenants are void and unenforceable because they were not supported by consideration. However, Dove Data argues, in part, that there was consideration for the December 8, 2000 agreement. Dove Data asserts the specific consideration was, [\*7] in addition to Murray's continued at-will employment, Dove Data furnishing Murray with confidential trade secret data reflecting both names and addresses of present and prospective customers, as well as, methods of selling and delivering products to customers, Dove Data compensating Murray with a weekly draw plus commission, Dove Data providing Murray with an exclusive territory, and Dove Data giving Murray a \$50.00 per month increase in his mileage allowance.<sup>2</sup>

"Ordinarily employment is a sufficient consideration to support a restrictive negative covenant, but where the employment contract is supported by the purported consideration of continued employment, there is no consideration when the contract containing the covenant is exacted after several years employment and the employee's duties and position are left unchanged." Poole v. Incentives Unlimited, Inc., 345 S.C. 378, 548 S.E.2d 207, 209 (S.C. 2001)(citing Kadis v. Britt, 224 N.C. 154, 29 S.E.2d 543 (N.C. 1944)). Therefore, "when a covenant is entered into after the inception of employment, separate consideration, in addition to

continued at-will employment, is necessary in order for the covenant to be enforceable." Id. The December 8, 2000 employment agreement between Dove Data and Murray contains a covenant not to compete provision. Specifically, Murray agreed that [\*8] at no time during his employment with Dove Data, or for a period of two years after his employment with Dove Data, would he for himself or any other person or entity compete against Dove Data within a 100 mile radius of New Orleans, Louisiana, or sell to, solicit, or take orders from any person or entity who had been a customer of Dove Data during Murray's employment. (Employment Agreement, pp. 2-3). As previously stated, Rebo Technology was incorporated on March 26, 2004. Murray's last day of work at Dove Data was July 9, 2004. HCA's contract with Dove Data expired on May 26, 2004, and HCA signed a contract with Rebo Technology on July 25, 2004. Dove Data argues this chain of events evidences Murray breached the employment agreement's covenant not to compete. However, also as previously stated, the parties disagree over whether consideration exists for the employment agreement of December 8, 2000, specifically the covenant not to compete provision. Assuming consideration existed, considering the facts in the light most favorable to Dove Data, the non-moving party, Murray arguably may have breached the employment agreement's covenant not to compete provision. Of course, if no consideration [\*9] existed, then there was no binding promise by Murray not to compete directly against Dove Data.

Murray began working for Dove Data on May 17, 1999. He signed the employment agreement with the covenant not to compete and other restrictions on December 8, 2000, some 19 months after his employment began. Therefore, under the holding in Poole, separate consideration, in addition to Murray's continued at-will employment, was necessary to make the employment agreement, and the covenant not to compete, binding. Sufficient consideration for a covenant not to compete after the inception of an employee's employment can be, among other examples, a change in duties, a change in pay, or a change in position. See Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533 (S.C. 1961). However, continued at-will employment is not sufficient consideration to support a covenant not to compete entered into after the inception of employment. Poole, 548 S.E.2d at 209. In the instant action, after Murray signed the December 8, 2000 employment agreement, there was no apparent change in his terms and conditions of employment as his duties, pay, and

<sup>2</sup>The Court notes that Dove Data argues other forms of consideration existed, such as Dove Data's forbearance of its rights and detrimental reliance upon Murray's promises, among other examples, and that it seeks to enforce a non-solicitation agreement, not a non-compete agreement. The Court is not persuaded by these arguments at this stage of the proceedings.

position all remained substantially unchanged. After a careful review of the December 8, 2000 employment agreement, the record does not provide abundantly [\*10] clear evidence at this stage of a change in Murray's employment duties or salary that would support consideration to enforce the covenant not to compete. However, Dove Data argues the \$50.00 per month increase in Murray's mileage allowance served as sufficient consideration.<sup>3</sup> If this increase in mileage allowance was given in exchange for Murray agreeing to the covenant not to compete provision in the December 8, 2000 employment agreement, it could serve as sufficient consideration as consideration for a promise is defined as a return promise bargained for and given in exchange for the promise. See *Restatement of Contracts* § 75. Dove Data's promise to provide Murray with a \$50.00 per month increase in his mileage allowance may have been bargained for in exchange for Murray's promise not to compete against, or solicit customers from, Dove Data for two years following the completion of his employment with the company.

Murray argues to the contrary. He asserts Dove Data tried to "invent consideration by isolating an unrelated change in employee fringe benefit that was closest in time to December 2000 and renaming it 'consideration.'" (Doc. #96). Murray argues the increase in his mileage allowance [\*11] had nothing whatsoever to do with the

employment agreement he signed on December 8, 2000. This may be the case. However, as noted, Dove Data argues this evidence of the mileage increase allowance, if allowed, (i) constitutes consideration and (ii) this is a disputed fact. Specifically, David Harris, Vice President of Administration for Dove Data, states in his affidavit that "Dove Data gave valuable consideration in exchange for Defendant's consent to the Employment Agreement's terms . . . [as] Dove Data gave Defendant and the other sales employees who signed the Employment Agreement a \$50.00 per month increase in their vehicle mileage allowance." (Harris Affidavit, ¶ 12). Therefore, at this stage, the Court finds there is arguably a genuine issue of material fact as to whether consideration existed to support the binding promises of the December 8, 2000 employment agreement.

In summary, as previously stated, it is clear the December 8, 2000 employment agreement was executed well after Murray began his employment with Dove Data. At this stage, the Court is not prepared to reach the conclusion that the increase in Murray's mileage allowance was unrelated to the employment agreement. [\*12] The question at this stage of the proceedings is whether there is arguably a genuine issue of material fact regarding the connection between the increased mileage allowance and the employment agreement that will establish sufficient consideration. Again, Murray asserts the increase in his mileage allowance was offered to "invent consideration by isolating an unrelated change in employee fringe benefit that was closest in time to December 2000 and renaming it 'consideration.'" (Doc. #96). As discussed, however, Dove Data has raised a sufficient factual question at this stage that compels the Court to deny summary judgment on this claim. The Court will carefully review all the testimony and evidence presented at trial on this claim to determine if it is ultimately submitted for the jury's consideration. Currently, a sufficient factual question exists over whether the \$50.00 increase in Murray's mileage allowance constitutes consideration to support the promises made between Murray and Dove Data in the December 8, 2000 employment agreement. Therefore, for these reasons, Murray's motion for summary judgment as to Dove Data's breach of contract claim is **DENIED**.

## II. Misappropriation of Trade [\*13] Secrets

Dove Data alleges Murray's actions constitute a willful and malicious misappropriation of Dove Data's trade

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<sup>3</sup> The parties disagree over whether evidence of the \$50.00 per month increase in Murray's mileage allowance should be deemed inadmissible as parol evidence. "When a written agreement is clear and complete, extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument cannot be used to contradict, explain, or vary its terms." *Iseman v. Hobbs*, 290 S.C. 482, 351 S.E.2d 351, 352 (S.C. Ct. App. 1986). However, "parol evidence is admissible to show a different consideration from that expressed in a written instrument when language of consideration is intended as a mere recital." *Id.*; see also *Childers Oil Company, Inc. v. Exxon Corp.*, 960 F.2d 1265, 1270 (4th Cir. 1992) ("[w]here consideration is a mere recital (e.g. 'one dollar and other good and valuable consideration'), parol evidence may establish what the actual consideration was."). The December 8, 2000 agreement between Dove Data and Murray states, "in consideration of the premises and of the mutual covenants and agreements herein contained, the parties hereto covenant and agree as follows." (Employment Agreement, p.1). Thus, the December 8, 2000 agreement arguably contains consideration as a mere recital. Therefore, in light of the *Iseman* and *Childers Oil* cases, at this stage of the proceedings the Court will consider the evidence of the \$50.00 per month increase in Murray's mileage allowance as possible evidence of consideration.



secrets in violation of the South Carolina Uniform Trade Secrets Act. (Complaint ¶ 19). Murray has moved for summary judgment as to this claim on grounds there is no evidence of misappropriation of alleged trade secrets by him. Specifically, Murray argues that Dove Data admits there is no evidence of any possession, use, or misappropriation of any item by Murray that would provide support for this claim and thus summary judgment is appropriate. However, Dove Data argues the facts and law support this claim. Specifically, Dove Data asserts it gave trade secrets, such as its customer and pricing lists, profit margins, and operating policies, to Murray and he is now using this information to compete directly against Dove Data. Dove Data argues summary judgment is inappropriate also because a factual dispute exists as to whether Dove Data's information constitutes trade secrets and whether they were maintained as such.

The South Carolina Trade Secrets Act creates a duty of every employee who knows, or reasonably should know, of their employer's trade secrets to not use or disclose [\*14] the trade secret. [S.C. Code § 39-8-30\(B\)](#). The Act defines "trade secrets" as "information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code" that derives independent economic value from not being generally known to others who could obtain economic value from its disclosure and is the subject of efforts used to maintain its secrecy. [S.C. Code § 39-8-20\(5\)\(a\)\(i\)-\(ii\)](#). The Act also provides a cause of action to the employer by stating "[a] person aggrieved by a misappropriation, wrongful disclosure, or wrongful use of his trade secrets may bring a civil action to recover damages incurred as a result of the wrongful acts and to enjoin its appropriation, disclosure, use, or wrongful acts pertaining to the trade secrets." [S.C. Code § 39-8-30\(C\)](#).

In the instant action, the parties clearly disagree over whether there is evidence of any possession, use, or misappropriation of any item by Murray that would provide support for this claim. Again, Murray argues there is no such evidence. Dove Data argues it gave trade secrets, such as its customer and pricing lists, profit margins, and operating policies, to Murray and he is now using this information to compete [\*15] directly against Dove Data. As there is a genuine issue of material fact as to whether Murray has misappropriated Dove Data's asserted trade secrets, summary judgment is inappropriate. Additionally, the parties appear to disagree over whether Dove Data's alleged trade

secrets fall under the South Carolina Trade Secrets Act's definition of "trade secrets." Thus, whether the information Dove Data gave to Murray constitutes a trade secret and whether Dove Data took reasonable steps to maintain the secrecy of this possible trade secret presents a genuine issue of material fact as well. Therefore, for these reasons, Murray's motion for summary judgment as to Dove Data's misappropriation of trade secrets claim is **DENIED**.

### III. Intentional Interference with Contractual Relations

Dove Data alleges Murray's actions intentionally interfered with Dove Data's contracts with its customers. (Complaint ¶ 25). Murray has moved for summary judgment as to this claim on grounds there are no allegations that any customers have breached any contracts with Dove Data. Specifically, Murray argues there is no evidence of a breach of contract by a third party that would possibly be attributable to Murray's actions. [\*16] Murray asserts Dove Data admitted it had contracts in the sales territory where Murray worked with only two customers, HCA and Rapids Hospital, and that neither HCA nor Rapids Hospital ever breached its contract with Dove Data. Therefore, according to Murray, there can be no viable claim for intentional interference with contractual relations. However, Dove Data argues it has contracts with customers in Murray's former sales territory and Murray has interfered with these contracts. Specifically, Dove Data asserts HCA told Dove Data that HCA was going to renew its contract with Dove Data but that HCA signed a contract with Rebo Technology shortly after Murray left Dove Data. Dove Data contends HCA no longer does business with Dove Data due to Murray's actions. Therefore, according to Dove Data, there are genuine issues of material facts as to whether Dove Data has contracts with customers in Murray's former sales territory and whether Murray interfered with these contractual relations.

"The elements of the tort of wrongful interference with an existing contractual relationship are (1) a contract, (2) knowledge of the contract by the wrongdoer, (3) an intentional procurement of the contract's [\*17] breach, (4) the absence of justification, and (5) damages resulting therefrom." [Love v. Gamble, 316 S.C. 203, 448 S.E.2d 876, 882 \(S.C. Ct. App. 1994\)](#). There is a genuine issue of material fact as to whether Murray intentionally interfered with an existing contract between Dove Data and one of its customers, specifically HCA.

Again, Murray argues HCA never breached its contract with Dove Data. However, Dove Data argues HCA told Dove Data it would renew its contract with Dove Data but instead signed a contract with Rebo Technology shortly after Murray ended his relationship with Dove Data. Taking all facts and inferences in the light most favorable to Dove Data, the non-moving party, and especially in light of the close proximity in time between the expiration of the contract between Dove Data and HCA, Murray ending his relationship with Dove Data, and HCA signing a contract with Rebo Technology, there is an apparent factual dispute over whether Murray intentionally interfered with Dove Data's existing contract with HCA. Therefore, for these reasons, Murray's motion for summary judgment as to Dove Data's intentional interference with contractual relations claim is **DENIED**.

#### IV. Intentional Interference with Prospective Contractual Relations

Dove Data alleges [\*18] Murray's actions interfered with its prospective contractual relations with its customers. (Complaint ¶ 30). Murray has moved for summary judgment as to this claim on grounds there is no evidence in the record to support Dove Data's allegations. Specifically, Murray argues there are no potential contracts at issue as to this claim because HCA allowed its contract with Dove Data to expire on May 26, 2004, due to its dissatisfaction with Dove Data's product. Murray asserts the evidence is unequivocal that Dove Data was not going to receive the HCA contract, regardless of whether Murray resigned from or stayed with Dove Data. Therefore, according to Murray, there can be no viable claim for interference with prospective contractual relations. However, Dove Data argues there are disputed issues of material facts as to whether Murray interfered with any potential contracts of Dove Data. Specifically, Dove Data asserts it would have obtained a contract extension from HCA if Murray had not interfered and thus it lost potential contracts as a result of Murray's actions.

The elements for a cause of action for intentional interference with prospective contractual relations are (1) the intentional [\*19] interference with the plaintiff's potential contractual relations, (2) for an improper purpose or by improper methods, (3) causing injury to the plaintiff. [Love, 448 S.E.2d at 882](#). There is a genuine issue of material fact as to whether Murray intentionally interfered with a potential contract between Dove Data and one of its customers, specifically HCA. More

specifically, there is a factual dispute as to whether HCA would have extended its contract with Dove Data absent Murray's alleged infringement. As previously stated, Murray argues that HCA allowed its contract with Dove Data to expire on May 26, 2004 because of dissatisfaction with Dove Data's product and Dove Data never was going to receive a renewal of this contract. Dove Data argues Murray intentionally interfered with its potential contract with HCA and that HCA signed a contract with Rebo Technology shortly after he left Dove Data. Again, taking all facts and inferences in the light most favorable to Dove Data, the non-moving party, and, as previously stated, especially in light of the close proximity in time between the expiration of the contract between Dove Data and HCA, Murray ending his relationship with Dove Data, and HCA signing a contract [\*20] with Rebo Technology, there is a factual dispute over whether Murray intentionally interfered with Dove Data's potential contract with HCA. As there is an apparent genuine issue of material fact as to whether Murray intentionally interfered with a potential contract between HCA and Dove Data, summary judgment is inappropriate. Therefore, for these reasons, Murray's motion for summary judgment as to Dove Data's intentional interference with prospective contractual relations claim is **DENIED**.

#### V. Breach of the Employee Duty of Loyalty

Dove Data alleges it and Murray had an employer-employee relationship that implicated Murray owing a duty of loyalty to Dove Data. (Complaint ¶ 27). Dove Data further alleges Murray breached this duty of loyalty. (Complaint ¶ 28). Murray has moved for summary judgment as to this claim on grounds there is no evidence he took improper actions prior to his resignation from Dove Data. Specifically, Murray asserts there is no evidence that prior to his resignation from Dove Data he solicited or informed any Dove Data customer of his plans to sell toner through Rebo Technology. However, Dove Data argues Murray started Rebo Technology prior to his resignation from [\*21] Dove Data with the sole purpose of competing with Dove Data. Dove Data asserts Rebo Technology was incorporated on March 26, 2004, while Murray was still employed with Dove Data, and he actively competed against Dove Data from March 26, 2004, to the present. Thus, according to Dove Data, Murray was competing against it during his last few months with the company.

South Carolina common law recognizes a duty of loyalty

by an employee to an employer. See Young v. McKelvey, 286 S.C. 119, 333 S.E.2d 566 (S.C. 1985). The parties disagree over the facts surrounding Rebo Technology's incorporation of March 26, 2004. Murray asserts his activities at that time amounted to the laying of plans and limited steps to open his own business and that there is no evidence of pre-termination or pre-resignation solicitation by him. Dove Data asserts Murray has actively competed against it on behalf of Rebo Technology since Rebo Technology's incorporation on March 26, 2004. Therefore, according to Dove Data, Murray violated his duty of loyalty by competing against Dove Data while still employed with the company. Taking all facts and inferences in the light most favorable to Dove Data, the non-moving party, and especially in light of the close proximity in time between [\*22] Rebo Technology's incorporation, Murray's resignation from Dove Data, and the contract agreement between HCA and Rebo Technology, an inference can be drawn that Murray informed Dove Data's customers, specifically HCA, that he had opened his own business that sold products similar to Dove Data. This inference from the present facts at this stage of the proceedings is one that goes beyond simply pre-termination or pre-resignation start-up activities. Thus, there is a factual dispute over whether Murray breached his duty of loyalty to Dove Data by actively soliciting HCA while still employed by Dove Data. Therefore, for these reasons, Murray's motion for summary judgment as to Dove Data's breach of the employee duty of loyalty claim is **DENIED**.

## VI. Unfair Trade Practices

Dove Data alleges Murray's actions have harmed the public and continue to harm the public in violation of the South Carolina Unfair Trade Practices Act. (Complaint ¶ 33). Murray has moved for summary judgment as to this claim on grounds this matter is a private dispute that does not affect the public interest, and therefore, Dove Data's claim is not a viable Unfair Trade Practices Act cause of action. However, Dove Data [\*23] argues Murray's actions do affect the public interest. Specifically, Dove Data asserts if Murray's alleged conduct is permissible, employers will be less likely to trust their employees thereby causing businesses to be less efficient, and the businesses will then have to pass on the costs to the general public. Dove Data also asserts the public has an interest in having an individual honor his obligations and if Murray's alleged conduct is permissible, the public will not trust the technology industry. Thus, according to Dove Data, summary

judgment as to this claim is inappropriate as the instant action is a matter of public interest.

For a cause of action to be actionable under the South Carolina Unfair Trade Practices Act, alleged unfair or deceptive acts or practices must adversely affect the "public interest" and not merely the interests of private parties in a particular dispute. Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 351 S.E.2d 347, 349 (S.C. Ct. App. 1986). "An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the act's embrace." Id. at 349-350. After careful review of the record, and taking all facts and inferences in the light most favorable to Dove Data, the non-moving party, the Court is not persuaded [\*24] Murray's alleged actions adversely affect the public interest. The instant action is a private dispute between two private parties and does not affect the public interest such that the Unfair Trade Practices Act is implicated. Thus, Dove Data has not alleged facts sufficient to assert a viable Unfair Trade Practices Act claim. Again, this matter is a private dispute, not one of public concern. Therefore, for these reasons, Murray's motion for summary judgment as to Dove Data's Unfair Trade Practices Act claim is **GRANTED**.

## VII. Equitable Relief

Dove Data alleges it is entitled to a preliminary and permanent injunction forbidding Murray from (1) using the trade secrets he allegedly misappropriated, (2) soliciting or furnishing any services to any Dove Data customer in the prohibited area, (3) receiving any commissions, royalties, gratuities, bonuses, or other payments based upon business conducted with any customer of Dove Data within the prohibited territory, (4) otherwise breaching the employment agreement, and (5) otherwise misappropriating any of Dove Data's trade secrets. (Complaint ¶ 36).<sup>4</sup> Murray has moved for summary judgment as to this claim on grounds that since each of Dove Data's [\*25] claims should be dismissed, there is no basis for any other equitable relief. Murray asserts that Dove Data no longer conducts business in the New Orleans area, there is no evidence of misappropriation of trade secrets, and the restrictions in the employment agreement are

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<sup>4</sup> As previously stated, the Court denied Dove Data's motion for a preliminary injunction by order dated February 23, 2006. (Doc. #61). However, Dove Data may seek a permanent injunction, as raised in its complaint.

unenforceable. Therefore, according to Murray, there is no basis for equitable relief in this case, and thus, summary judgment as to this claim is appropriate. However, Dove Data argues it still conducts business in New Orleans, Murray is currently using Dove Data's trade secrets to directly compete against it, and Murray signed a contract prohibiting him from using or disclosing Dove Data's trade secrets. Therefore, according to Dove Data, there are disputed issues of material facts, and thus, summary judgment as to this claim is inappropriate.

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As the Court finds summary judgment is inappropriate as to a majority of Dove Data's claims, there may be a basis upon which equitable relief could be granted to Dove Data on the claims that survive summary judgment. Therefore, summary judgment as to this particular claim is inappropriate at this stage of the proceedings. Additionally, the parties are clearly in dispute over [\*26] whether Dove Data still conducts business in New Orleans, whether Murray misappropriated Dove Data's alleged trade secrets, and whether the restrictions in the employment agreement signed by Murray are enforceable. These are genuine issues of material fact as to this claim. Therefore, for these reasons, Murray's motion for summary judgment as to Dove Data's claim for equitable relief is **DENIED**.

### **Conclusion**

In summary, Murray's motion for summary judgment is denied in part and granted in part. More specifically, Murray's motion for summary judgment is **GRANTED** as to Dove Data's Unfair Trade Practices Act claim. Murray's motion for summary judgment is **DENIED** as to Dove Data's claims for breach of contract, misappropriation of trade secrets, intentional interference with contractual relations, interference with prospective contractual relations, breach of the employee duty of loyalty, and equitable relief.

**IT IS SO ORDERED.**

/s/ Terry L. Wooten

Terry L. Wooten

United States District Judge

November 2, 2006

Florence, South Carolina



## **Indus. Packaging Supplies v. Davidson**

United States District Court for the District of South Carolina, Greenville Division

June 22, 2018, Decided; June 22, 2018, Filed

C/A No. 6:18-0651-TMC

### **Reporter**

2018 U.S. Dist. LEXIS 234771 \*; 2018 WL 10456201

Industrial Packaging Supplies, Inc., Plaintiff, v. Geordy Davidson, John England, Stephen Schroeder, Cory Perry, Quinn Davidson, Michael Schmitt, Jason Nettles, DBE Solutions, LLC, and Axis Packaging, LLC, Defendants.

LEAD ATTORNEY, Devlin and Parkinson, Greenville, SC; Steven Edward Buckingham, LEAD ATTORNEY, The Law Office of Steven Edward Buckingham, Greenville, SC.

For Christina Davidson, Defendant: Brian P Murphy, LEAD ATTORNEY, Stephenson and Murphy, Greenville, SC.

### **Core Terms**

alleges, trade secret, contends, customers, misappropriated, individual defendant, loyalty, Pallet, motion to dismiss, resignation, soliciting, confidential information, employees, Picture, definite statement, amended complaint, unfair, fourteen days, proprietary, public interest, injunction, deceptive, website, argues, Packaging, deleted, parties, iPhone, files, sales

**Counsel:** [\*1] For Industrial Packaging Supplies Inc, Plaintiff: Giles M Schanen, Jr, LEAD ATTORNEY, Nelson Mullins Riley and Scarborough, Greenville, SC; William H Foster, III, LEAD ATTORNEY, Littler Mendelson PC (GVL), Greenville, SC.

For Geordy Davidson, John England, DBE Solutions LLC, Axis Packaging LLC, Defendants: Emily Irene Bridges, Fox Rothschild LLP, Greenville, SC; Kurt Matthew Rozelsky, Wheeler Trigg O'Donnell LLP, Greenville, SC.

For Stephen Schroeder, Cory Perry, Quinn Davidson, Defendants: Steven Edward Buckingham, LEAD ATTORNEY, The Law Office of Steven Edward Buckingham, Greenville, SC.

For Michael Schmitt, Defendant: John Robert Devlin, Jr,

For Davidson Brothers Equity LLC, Defendant: Brian P Murphy, Stephenson and Murphy, Greenville, SC; Steven Edward Buckingham, LEAD ATTORNEY, The Law Office of Steven Edward Buckingham, Greenville, SC.

For Viking Packaging LLC, Defendant: Kurt Matthew Rozelsky, LEAD ATTORNEY, Wheeler Trigg O'Donnell [\*2] LLP, Greenville, SC; Emily Irene Bridges, Fox Rothschild LLP, Greenville, SC; Receiver, Randy A Skinner; Randy Allen Skinner, LEAD ATTORNEY, Skinner and Associates, Greenville, SC.

For Axis Packaging LLC, Counter Claimant: Emily Irene Bridges, Fox Rothschild LLP, Greenville, SC; Kurt Matthew Rozelsky, Wheeler Trigg O'Donnell LLP, Greenville, SC.

For Industrial Packaging Supplies Inc, Counter Defendant: Giles M Schanen, Jr, LEAD ATTORNEY, Nelson Mullins Riley and Scarborough, Greenville, SC; William H Foster, III, LEAD ATTORNEY, Littler Mendelson PC (GVL), Greenville, SC.

**Judges:** Timothy M. Cain, United States District Judge.



**Opinion by:** Timothy M. Cain

## Opinion

### ORDER

This matter is before the court on Defendants' Motions to Dismiss or, alternatively, Motions for a More Definite Statement (ECF Nos. 44, 45, 46, 47, and 48). Plaintiff Industrial Packaging Supplies, Inc. ("IPS"), has filed responses opposing the motions (ECF Nos. 53, 54, 55, 56, and 57), and Defendants have filed replies (ECF Nos. 59 and 60). The matter is fully briefed and ready for ruling.

#### I. Background/Procedural History

Plaintiff Industrial Packaging Supplies, Inc. ("IPS"), is a distributor of packaging supplies, equipment, and services. IPS purchased [\*3] Logic Packaging Acquisition, LLC, from Defendant Geordy Davidson on September 5, 2012. (Compl. ¶ 38). Pursuant to the purchase agreement, Geordy agreed that for five years he would not compete with IPS's business in South Carolina, North Carolina, Virginia, Georgia, Mississippi, and Tennessee, and that he would not solicit any employees of IPS. (Compl. ¶¶ 40, 42).<sup>1</sup> Subsequently on February 11, 2014, IPS hired Geordy as a sales manager and later promoted him to Vice President of Sales. (Compl. ¶ 45). Geordy resigned on April 8, 2016, with an effective date of April 22, 2016. (Compl. ¶ 49).

Defendant DBE Solutions, LLC, ("DBE"), which was established on April 17, 2017, and Defendant Axis Packaging, LLC, ("Axis"), which was established October 11, 2017, are also alleged to be in the packaging industry. (Compl. ¶ 50, 51).<sup>2</sup> Both Axis and DBE were formed by, among others, Defendants

Geordy and John England, a former sales executive for IPS. *Id.* Geordy is president of Axis, and England is the General Manager at Axis. (Compl. ¶¶ 54, 65). IPS alleges Geordy and England, through Axis and DBE, have diverted IPS customers and opportunities for their own benefit. IPS also alleges that the individual [\*4] Defendants "during the time period leading up to their abrupt resignations from IPS" misappropriated confidential, proprietary, and trade secret information, and have destroyed or erased the evidence of their misconduct. (ECF No. 8-1 at 2).

All of the individual Defendants are former IPS employees, and, as a condition of their employment, they signed Non-Disclosure, Non-Solicitation, and Non-Competition Agreements (the "Agreements"). (Compl. ¶¶ 132, 133; Compl. Exs. B, D, F, H, J, L, and O).<sup>3</sup> The non-solicitation provisions of the Agreements prohibit the Defendants from soliciting IPS customers and prospective customers who they had serviced on behalf of IPS for a period of time following the termination of their employment. (Compl. at ¶ 12; Compl. Exs. B, D, F, H, J, L, O at § 1). These individual Defendants also agreed to protect IPS's confidential information and trade secrets learned by them in the course of their employment for a number of months after their employment terminated. *Id.* Additionally, Geordy and England's Agreements included a specific non-compete clause with a restricted geographical territory. (Compl. Exs. B, D at § 5). Geordy's Restricted Territory encompasses South [\*5] Carolina, North Carolina, Georgia, Tennessee, Florida, and Virginia, while England's Restricted Territory includes South Carolina, Georgia, and North Carolina. And both Geordy's and England's Agreements also prohibited them from soliciting any IPS employees. (Compl. Exs. B, D).

Schmitt began working for IPS on March 1, 2013, as a sales representative until he resigned on October 24, 2017. (Compl. ¶¶ 78, 83). Subsequently, he began working for Axis in business development. (Compl. ¶ 83-84). However, at this time, Schmitt is no longer employed with Axis. Quinn went to work for IPS on September 5, 2012, as a pallet, lumber, and crate specialist until his resignation on December 4, 2017. (Compl. ¶¶ 95, 103). Thereafter, Quinn immediately began working for Axis as a pallet, crate, and lumber specialist. (Compl. ¶ 105). Perry began working for IPS on August 2, 2010, as the marketing director until his resignation on October 24, 2017. (Compl. ¶¶ 86, 92).

<sup>1</sup> Two of the Defendants are brothers with the same last name. To avoid confusion, in this Order, the court will refer to Quinn Davidson as Quinn, and Geordy Davidson as Geordy.

<sup>2</sup> Defendant Geordy has averred that DBE "has never operated in any industry, let alone the packaging industry." (ECF No. 30-1 at ¶ 10) (emphasis in original). On a motion to dismiss, however, the court must accept as true the allegations in the Complaint.

<sup>3</sup> Defendant Jason Nettles was dismissed per settlement on April 19, 2018. (ECF No. 43).

After his resignation, Perry began working for Axis as its marketing director. (Compl. ¶ 93). Schroeder began working for IPS on May 31, 2013, in sales and sales management, and resigned on October 24, 2017. (Compl. ¶¶ 67, 68, 74). After his [\*6] resignation, he began working for Axis in business development. (Compl. ¶¶ 75, 76).<sup>4</sup> England began working for IPS on September 17, 2012, in the sales division, and resigned April 18, 2017. (Compl. ¶¶ 55, 63). After his resignation, he began working for Axis as its general manager. (Compl. ¶ 65).

IPS contends that Geordy and England actively pursued Perry, Schmitt, Schroeder, and Quinn to work for Axis. (Compl. ¶¶ 167, 168). IPS alleges that Geordy directed Nettles and the other individual Defendants to remove IPS's confidential information and trade secrets, and that the Defendants have shared IPS's confidential information and trade secrets, including pricing, purchasing histories, custom products and solutions, and the identity of IPS's vendor partners, with other Axis employees. (Compl. ¶¶ 174, 181). IPS alleges that the Defendants have solicited several IPS customers using IPS customer lists and related information. (Compl. ¶ 182, 184). IPS alleges that Axis is using IPS's proprietary website design, infrastructure, and associated computer coding to unlawfully compete with IPS. (Compl. ¶ 186).

In October 2017, IPS sent the Defendants cease and desist letters. (Compl. ¶¶ 175, 176; [\*7] Compl. Ex. AA at 2-5, 8-11, 14-17, 19-22, 24-26). In response, the individual Defendants signed certifications stating that they would abide by their Agreements. (Compl. ¶ 179, Compl. Ex. AA at 6-7, 12-13, 17-18, 22-23, 27-28). Since then, however, IPS alleges that it has become aware of acts that it alleges are in breach of these Agreements. (Compl. ¶ 181). IPS then brought this action alleging the following claims: (1) injunction; (2) violation of the federal Defend Trade Secrets Act ("DTSA"), [18 U.S.C. §1836 et seq.](#); (3) violation of the South Carolina Trade Secrets Act ("SCTSA"), [S.C. Code Ann. §§ 39-8-10 to 130](#); (4) breach of contract against Defendant Geordy Davidson; (5) breach of contract against Defendants England, Schroeder, Perry, Quinn Davidson, Schmitt, and Nettles; (6) tortious interference with contract against Defendants Axis and DBE; (7) breach of the duty of loyalty against all individual Defendants; (8) misappropriation of corporate opportunity against Defendants Geordy Davidson, England, DBE, and Axis;

(9) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"); (10) conversion; (11) unjust enrichment against Defendants Geordy Davidson, England, DBE, and Axis;<sup>5</sup> and (12) accounting against Defendants DBE [\*8] and Axis.<sup>6</sup>

## II. Applicable Law

To be legally sufficient, a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." [Fed. R. Civ. P. 8\(a\)\(2\)](#). [Rule 8](#) "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." [Ashcroft v. Iqbal](#), [556 U.S. 662, 678 \(2009\)](#) (quoting [Bell Atl. Corp. v. Twombly](#), [550 U.S. 544, 555 \(2007\)](#)).

A [Rule 12\(b\)\(6\)](#) motion to dismiss for failure to state a claim upon which relief can be granted "challenges the legal sufficiency of a complaint." [Francis v. Giacomelli](#), [588 F.3d 186, 192 \(4th Cir. 2009\)](#) (citations omitted). A [Rule 12\(b\)\(6\)](#) motion should not be granted unless it appears certain that the plaintiff can prove no set of facts that would support his claim and would entitle him to relief. [Mylan Labs., Inc. v. Matkari](#), [7 F.3d 1130, 1134 \(4th Cir. 1993\)](#). When considering a [Rule 12\(b\)\(6\)](#) motion, the court should accept all well-pleaded allegations as true and should view the complaint in a light most favorable to the plaintiff. [Ostrzenski v. Seigel](#), [177 F.3d 245, 251 \(4th Cir. 1999\)](#); [Mylan Labs., 7 F.3d at 1134](#).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" [Iqbal](#), [556 U.S. at 678](#) (quoting [Twombly](#), [550 U.S. at 570](#)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." [Iqbal](#), [556 U.S. at 678](#).

<sup>5</sup> Although IPS merely states Defendant "Davidson" in regard to this cause of action, it is apparent from the allegations under this cause of action that this claim is directed towards Geordy Davidson and not Quinn Davidson.

<sup>6</sup> In its Complaint, IPS alleges that South Carolina law applies. (Compl. ¶ 1). In the motions and responses now before this court, both IPS and the Defendants seem to be in agreement that South Carolina law is applicable to all of the causes of action except the claim for violations of the DTSA.

<sup>4</sup> However, it appears that he currently does not work for Axis. (ECF No. 47-1 at 2).

[Rule 12\(e\)](#) permits a party to move for [\*9] a more definite statement of a pleading that "is so vague or ambiguous that the party cannot reasonably prepare a response." [Fed. R. Civ. P. 12\(e\)](#). Unlike a [Rule 12\(b\)\(6\)](#) motion, which tests the legal sufficiency of a complaint, a [Rule 12\(e\)](#) motion for a more definite statement focuses on whether "a party has enough information to frame an adequate answer. . . ." *Streeter v. SSOE Sys.*, No. WMN-09-CV-01022, [2009 WL 3211019](#), at \*10 (*D.Md. Sept. 29, 2009*) (quoting *Doe v. Bayer Corp.*, [367 F.Supp.2d 904, 917 \(M.D.N.C. 2005\)](#)). "[W]hen the complaint conforms to [Rule 8\(a\)](#) and it is neither so vague nor so ambiguous that the defendant cannot reasonably be required to answer, the district court should deny a motion for a more definite statement." *Hodgson v. Virginia Baptist Hosp., Inc.*, [482 F.2d 821, 824 \(4th Cir. 1973\)](#). The Fourth Circuit further explained that a [Rule 12\(e\)](#) motion should be denied where discovery will permit the parties to ascertain the unpled information. *Id.* A complaint does not need to "make a case against a defendant or forecast evidence sufficient to prove an element," rather, the sufficiency of a complaint depends on "whether the document's allegations are detailed and informative enough to enable the defendant to respond." *Chao v. Rivendell Woods, Inc.*, [415 F.3d 342, 349 \(4th Cir. 2005\)](#) (internal quotation marks and citations omitted).

### III. Discussion

Pursuant to [Rule 12\(b\)\(6\)](#) and [\(e\) of the Federal Rules of Civil Procedure](#), Defendants Schmitt, Quinn, Perry, Schroeder each filed individual motions to dismiss or, in the alternative, [\*10] for a more definite statement. (ECF Nos. 44, 45, 46, 47). Defendants Geordy, England, DBE, and Axis filed a separate motion to dismiss, or, alternatively, for a more definite statement pursuant to [Rule 12\(b\)\(6\)](#) and [\(e\)](#). (ECF No. 48). The specific allegations and the Defendants' arguments will be discussed below as they relate to each cause of action.

#### 1) Cause of Action for an Injunction

All of the Defendants contend that IPS's first cause of action for an injunction should be dismissed as there is no independent cause of action for an injunction. (ECF Nos. 44-1 at 3 n.1; 45-1 at 3 n.1; 46-1 at 4 n.1; 47-1 at 1 n.1; 48-1 at 2 n.2). IPS does not address this argument in its responses. The court agrees with the Defendants. See [Alabama v. U.S. Army Corps of Eng'rs](#), [424 F.3d](#)

[1117, 1127 \(11th Cir. 2005\)](#) (holding that "an injunction is a type of relief rather than an independent cause of action."). See also *In re Bldg. Materials Corp. of Am. Shingle Prods. Liab. Litag.*, MDL No. 8:11-mm-02000-JMC, No. 8:11-cvv-02785-JMC, [2013 WL 139520](#), \*13 (*D.S.C. Jan. 10, 2013*). Accordingly, because a stand alone count for injunctive relief is improper, the first cause of action for injunctive relief is dismissed with prejudice.<sup>7</sup>

#### 2) Claims of violations of the DTSA and SCTSA<sup>8</sup>

IPS alleges claims under the DTSA and the SCTSA. (Compl. ¶¶ 228-243). [\*11] Both acts similarly define trade secrets as information, which has actual or potential economic value derived from not being generally known to, and not being readily ascertainable by, any other person, and are the subject of efforts that are reasonable under the circumstances to maintain its secrecy. [18 U.S.C. § 1839\(3\)](#); [S.C. Code Ann. § 39-8-20\(5\)](#). Additionally, the DTSA defines trade secrets as the following categories of information:

all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing[.]

[18 U.S.C. § 1839\(3\)](#). And SCTSA defines trade secrets as "information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code." [S.C. Code Ann. § 39-8-20\(5\)](#).

"To establish a claim for misappropriation of trade

<sup>7</sup> However, the court notes that, even with the dismissal of this cause of action, an injunction may still be imposed as IPS requests injunctive relief in its Complaint. (ECF No. 1 at 50-52).

<sup>8</sup> All of the Defendants and IPS acknowledge that the elements under the SCTSA and DTSA are substantially the same, and that the DTSA and SCTSA can be analyzed together. (ECF Nos. 44-1 at 4; 45-1 at 3; 46-1 at 4; 47-1 at 4; 48-1 at 8; 53 at 4; 54 at 4). Accordingly, the court has combined its analysis of the DTSA and SCTSA.



secrets under the South Carolina Trade Secrets Act, a plaintiff must show: (1) the existence of a trade secret; (2) [\*12] misappropriation, wrongful use, or wrongful disclosure of a trade secret by the defendant; and (3) damages." *Sonoco Prods. Co. v. Guven*, No. 4:12-CV-00790-BHH, 2015 WL 127990, at \*6 (D.S.C. Jan. 8, 2015). The DTSA and SCTSA generally define misappropriation as involving the improper acquisition, disclosure, or use of a trade secret. See U.S.C. § 1839(5) (defining misappropriation); *S.C. Code Ann. § 39-8-20(2)* (defining misappropriation). Here, the dispositive issue is whether IPS has sufficiently alleged that there are trade secrets which the Defendants misappropriated.

In its Complaint, IPS alleges that its trade secrets in regard to its customers include "identity and contact information of decision-makers, business needs, product specifications custom product needs, purchasing history, costs, service platforms, profit margins, etc." (Compl. ¶ 8). IPS also alleges its trade secrets includes information related to its "proprietary designs and products, technology, costs, processes, prices, material suppliers, and distributors." (Compl. ¶ 125). IPS alleges that the Defendants disclosed and used its pricing and customer lists for their own benefit. (Compl. ¶ 209). In addition to the Agreements, IPS alleges it has taken steps to keep this information confidential, including [\*13] having a strict password policy, unique login ID requirements, and controlled access. (Compl. ¶¶ 127-32, 249-50). Moreover, IPS has alleged that the Defendants have used such information "to target IPS customers and compete unfairly in the marketplace." (Compl. at ¶ 21). IPS also acknowledges that it currently does not know the extent to which its trade secrets and confidential information have been misappropriated. (Compl. ¶ 225).

In their motions, Schmitt, Quinn, Perry, and Schroeder contend they are minor defendants with only a few allegations and paragraphs of the 334-paragraph Complaint being directed at them. (ECF Nos. 44-1 at 2; 45-1 at 2; 46-1 at 2; 47-1 at 2). And of these paragraphs, they contend that most address jurisdictional or general factual allegations. *Id.* Schmitt and Quinn contend that only one paragraph is specific as to them. (ECF Nos. 44-1 at 2; 45-1 at 2). In that paragraph, IPS alleges that Schmitt transmitted IPS data from his work email to a personal Gmail account. (Compl. ¶ 208). Schmitt contends that IPS relies on the declaration of James R. Scarazzo, an electronic forensic specialist, in which Scarazzo avers that Schmitt emailed "IPS data" to his Gmail address [\*14] (ECF No. 8-2, ¶

12(e)). (ECF No. 44-1 at 2-3).<sup>9</sup> Scarazzo attached a screenshot to his declaration showing that Schmitt emailed six files to himself including four text files containing information about his sales performance from 2013-2016, one spreadsheet file showing Schmitt's sales performance for 2017, and the commissions he expected to earn, and a blank spreadsheet. (ECF No. 8-2 at 11). Schmitt contends this information is not a trade secret. (ECF No. 44-1 at 3).

As to Quinn, IPS alleges that it "has also learned that . . . Quinn Davidson may have also removed Confidential and Trade Secret information, including without limitation, Computer Assisted Design ("CAD") drawing

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<sup>9</sup> *Federal Rule of Civil Procedure 10(c)* provides that "statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion." The Rule goes on to provide that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." *Fed. R. Civ. P. 10(c)*. Schmitt states that IPS has incorporated these documents into the pleadings through Scarazzo's declaration pursuant to *Fed. R. Civ. P. 10(c)*. (ECF No. 44-1 at 3; 45-1 at 2). The court disagrees, as the declaration was filed with IPS's preliminary injunction motion and not a pleading. (ECF No. 8-2). See *Structural Concrete Prods., LLC v. Clarendon Am. Ins. Co.*, 244 F.R.D. 317, 321 (E.D. Va. 2007) (holding that a motion is not a pleading); see also *Fed. R. Civ. P. 7(a)* (listing types of pleadings). Nonetheless, the court can still consider Scarazzo's declaration and attachments. Ordinarily, if the court considers matters outside the pleading on a motion to dismiss, the motion will be treated as a motion for summary judgment. *Fed. R. Civ. P. 12(d)*; see *Winchester Homes, Inc. v. Osmose Wood Preserving, Inc.*, 37 F.3d 1053, 1054 (4th Cir. 1994). However, there is an exception to this rule where collateral documents are inherent to the allegations in the complaint and the parties have notice that the court will consider the documents. See *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2nd Cir. 1991) (finding conversion not required "[w]here plaintiff has actual notice of all of the information in the movant's papers and has relied upon these documents in framing the complaint"); *Alt. Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001) ("When the complaint relies upon a document . . . such a document 'merges into the pleadings' and the court may properly consider it under a *Rule 12(b)(6)* motion to dismiss."); see also *In re FAC Realty Sec. Litig.*, 990 F. Supp. 416, 420 (E.D.N.C. 1997). In *Cortec*, the court stated that, generally, the harm to the plaintiff when a court considers material extraneous to a complaint is the lack of notice that the material may be considered. *Cortec*, 949 F.2d at 48. However, "[w]here plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a *Rule 12(b)(6)* motion into one

files, by taking photographs of this data with a personal iPhone and transmitting it to a cloud-based storage provider." (Compl. ¶ 208). IPS relies on Scarazzo's declaration that he found that Quinn had taken a picture with his work-issued iPhone of a pallet design (referred to by the parties as the "Pallet Picture"). (ECF No. 8-2, ¶ 12(b)). Quinn contends that the Pallet Picture has no value and is not a trade secret, and, even if it were, the Pallet Picture is on Quinn's [\*15] work iPhone, which is still in IPS's possession. (ECF No. 45-1 at 4, 6). Further, despite IPS alleging the Pallet Picture was sent to a storage provider (Compl. ¶ 208), Quinn argues that there has been no suggestion that he transferred the Pallet Picture from his work iPhone to any other location. (ECF No. 45-1 at 6).

As to Perry, he contends that only seven paragraphs (Compl. ¶¶ 186, 188, 194 and 200-03) suggest that he has participated in any wrongful conduct. (ECF No. 46-1 at 2). Relying on Scarazzo's declaration, IPS alleges that Perry connected a USB electronic storage device to his work computer. (Compl. ¶ 200). Perry contends that IPS does not allege what information Perry allegedly transferred from the computer to the device. (ECF No. 46-1 at 3). Additionally, Perry contends that IPS has assumed that Perry has possession of the USB. *Id.*<sup>10</sup>

IPS also alleges that Perry synchronized a file identifying where other information about IPS's data is stored on its network. (Compl. ¶ 202). IPS also alleges that Perry ran applications on his work computer capable of deleting information. (Compl. ¶¶ 201, 203). Scarazzo states that the applications mentioned are capable of deleting electronic [\*16] information, but he does not identify what information Perry is alleged to have deleted. (ECF No. 8-2 at 4). Finally, IPS alleges that Perry helped develop a website for Axis that used IPS's "proprietary website design, infrastructure, and computer coding," (Compl. ¶¶ 186, 188, 194). Perry contends that IPS has not alleged that its web-presence is supported by a design, infrastructure, and code that is proprietary to IPS. (ECF No. 46-1 at 3-4).

Perry contends that using a USB device or

synchronizing a file, without allegations as to the information contained on the USB or synchronized file, is not itself a trade secret. (ECF. 46-1 at 3, 5-6). He notes that Scarazzo has identified this file as a .pdf document, which means that it is capable of being produced for the court's inspection, but he contends that IPS has withheld this document from production. (ECF No. 46-1 at 3). Likewise, Perry contends that in regard to allegations that he ran a computer application capable of deleting computer files and data, IPS has not identified any data that was allegedly lost, stolen, or compromised by Perry's use of the computer application. (ECF No. 46-1 at 6). Finally, Perry argues that IPS has [\*17] improperly characterized its website design and infrastructure as proprietary. (ECF No. 46-1 at 6-7). Perry contends that IPS allegations that Perry used its proprietary information by assisting Axis to set up multiple websites for Axis' own use does not involve a trade secret because IPS uses these multiple websites to market its products to the public generally. (ECF No. 46-1 at 7). Perry contends that he does not understand IPS's allegation that the coding he used to set up the websites is proprietary. *Id.*

Schroeder contends that, other than general and jurisdictional allegations, only four paragraphs of the Complaint (Compl. ¶¶ 204-07) are directed specifically at him. (ECF No. 47-1 at 2). In these paragraphs, IPS alleges that Schroeder connected an USB to his computer and copied several documents to it and deleted 35 files. Schroeder contends that he is not aware of possessing the USB, and that IPS has not identified what information it alleges that he deleted. (Comp. ¶¶ 204-07). Further, Schmitt contends that the documents he emailed were not trade secrets, and IPS has not alleged these documents have actual or potential economic value or that these documents consist of information [\*18] that are the subject of efforts to maintain their secrecy. He also contends that IPS has not alleged that he has misappropriated a trade secret. (ECF No. 47-1 at 4).

Geordy, England, DBE, and Axis contend that IPS has failed to allege any trade secrets in any discernible manner or expressly identify any data that would constitute trade secrets or provided sufficient information so that they could respond, and that IPS has failed to allege how these Defendants misappropriated any trade secrets. (ECF No. 48 at 7-8).

The court has carefully reviewed the allegations in the Complaint and the arguments raised by the Defendants. Accepting all of the allegations in the Complaint as true,

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under [Rule 56](#) is largely dissipated." *Id.* Therefore, this court finds it appropriate to consider materials referenced by the parties in their memoranda as having been relied upon by IPS in making its allegations without converting the motion to a motion for summary judgment.

<sup>10</sup> In his Declaration, (ECF No. 32-2), Perry avers that he is not aware of having the USB. However, on a motion to dismiss, the court must accept as true the allegations in the complaint.

as the court must on a motion to dismiss, the court finds IPS has alleged enough to survive a motion to dismiss. See, e.g., *Philips Elecs. N. Am. Corp. v. Hope*, 631 F. Supp. 2d 705, 721 (M.D.N.C. 2009) ("Customer pricing lists, cost information, confidential customer lists, and pricing and bidding formulas may constitute trade secrets."). While Defendants may desire a more particularized description of the alleged trade secrets, at this stage in the litigation, the court finds that IPS's allegations are sufficient to place Defendants on notice as to the trade secrets they are accused [\*19] of misappropriating. "The exact nature of the trade secret is a matter for discovery." *SL Montevideo Tech., Inc. v. Eaton Aerospace, LLC*, 292 F. Supp. 2d 1173, 1179 (D. Minn. 2003); see also *Sterling Computs. Corp. v. Haskell*, No. 4:17-CV-04073-KES, 2018 WL 671210, at \*4 (D.S.D. Feb. 1, 2018) (holding that a complaint does not need to precisely describe why a product is a trade secret because the exact nature of the trade secret is a matter for discovery); *RF Micro Devices, Inc. v. Xiang*, No. 1:12CV967, 2013 WL 5462295, at \*7 (M.D.N.C. Sept. 30, 2013) (finding that "[t]he parties will have the opportunity to further delineate the trade secrets at issue . . . through the discovery process."); *Fire 'Em Up, Inc. v. Technocarb Equip.* (2004) *Ltd.*, 799 F. Supp. 2d 846, 850 (N.D. Ill. 2011) ("[T]he alleged trade secrets need not be disclosed in detail in a complaint to survive a motion to dismiss."). Moreover, IPS has sufficiently alleged that the Defendants misappropriated the alleged trade secrets. See *E-Ntech Indep. Testing Servs., Inc. v. Air Masters, Inc.*, No. 16 CVS 3092, 2017 WL 73449, at \*5 (N.C. Super. Ct. Jan. 5, 2017) (holding that allegations that information was copied or recorded from plaintiff's computer system and hard files, and such information was obtained from one of three employees with access to the information, was sufficient at the *Rule 12(b)(6)* stage)). In conclusion, the court finds that IPS's Complaint contains sufficient factual allegations to plausibly allege that the Defendants misappropriated trade secrets.

### 3) SCUTPA Claims

IPS [\*20] alleges a claim under the SCUTPA against all Defendants. (Compl. ¶¶ 308-316). To state a claim under the SCUTPA, a plaintiff must show that corporate decision constitutes either an unfair or deceptive act or practice. See *S.C. Code Ann. § 39-5-140(a)*. In order for an unfair or deceptive act or practice to be covered under the SCUTPA, the unfair or deceptive act or practice must impact the public interest. See *York v. Conway Ford, Inc.*, 480 S.E.2d 726, 728 (S.C. 1997).

Such a practice has an effect on the public interest if the practice has the potential for repetition. *Noack Enters. v. Country Corner Interiors, Inc.*, 351 S.E.2d 347, 350-51 (S.C. Ct. App. 1986).

The Defendants allege that it is not clear from the Complaint what acts each of the Defendants are accused of undertaking which are unfair or deceptive. The Complaint alleges that all Defendants engaged in wrongful conduct that is unfair or deceptive. (Compl. ¶ 310). Moreover, the Defendants contend that IPS has not alleged how the wrongful acts which are alleged to have been committed by them occurred in connection with trade or commerce. (See Compl. ¶ 309.) They argue that there is no allegation that they used or disclosed any information for pecuniary benefit. Additionally, they contend that IPS has not alleged any public interest, other than the allegation that the alleged misconduct has "adversely [\*21] affect[ed] the public interest because, among other reasons, they are capable of repetition." (Compl. ¶ 312). Finally, they argue that it is not clear what damages IPS alleges it has sustained.

Quinn also contends that if IPS is alleging that taking the Pallet Picture was unfair or deceptive, it is not clear how he has violated the SCUTPA, and if IPS is alleging that Quinn engaged in some other conduct that is unfair or deceptive, that is not clear from the Complaint. He argues that the allegation is that he took the Pallet Picture on his work iPhone, and there is no allegation that he used or disclosed the Pallet Picture in any way, much less for pecuniary benefit. Accordingly, he argues that the SCUTPA action should be dismissed as to him. See, e.g., *Ethox Chem., LLC v. Coca-Cola Co.*, C.A. No. 6:12-cv-01682-TMC, 2014 WL 2719214, at \*4-5 (D.S.C. Jan. 3, 2013).

In response, IPS argues it has sufficiently stated a SCUTPA claim, and that as long as Quinn and Axis retain its trade secrets, there is the potential for repetition because the Defendants can continue to misappropriate IPS's confidential and trade secret information.

The SCUTPA is not an alternative vehicle to pursue an alleged breach of contract. See, e.g., *Key Co., v. Fameco Distribs., Inc.*, 357 S.E.2d 476, 478 (S.C. Ct. App. 1987). South Carolina law [\*22] clearly establishes that a private dispute between two competitors does not impact the public interest under the SCUTPA. See *Florence Paper Co. v. Orphan*, 379 S.E.2d 289 (S.C. 1989); see also *LaMotte v. Punch Line of Columbia*,



*Inc.*, 370 S.E.2d 711 (S.C. Ct. App. 1988) (finding no public interest involved in suit between competitors). Furthermore, disputes arising between employers and employees are private matters that fall outside the scope of the SCUTPA. See *Johnson v. Greenville Safety Consultants, Inc.*, No.: 6:17-cv-02334-AMQ, 2018 WL 2462001, at \*3 (D.S.C. June 1, 2018) ("South Carolina courts have clearly and consistently held that the SCUTPA does not apply to acts arising out of the employer-employee relationship."); see also *Miller v. Fairfield Cmty., Inc.*, 382 S.E.2d 16, 20 (S.C. Ct. App. 1989) (affirming dismissal of UTPA claim because complaint regarding "employer-employee relations matter . . . is not covered by the Unfair Trade Practices Act"). Even if IPS could establish that its injury impacts the public interest or is capable of repetition, disputes between private competitors and within the employer-employee relationship do not fall within the intended scope of the SCUTPA. See *Johnson*, 2018 WL 2462001, at \*3. Therefore, the SCUTPA claim is dismissed with prejudice.

#### 4) Breach of Loyalty Claims

IPS alleges that all of the individual Defendants breached their duty of loyalty to IPS. (Compl. ¶¶ 290-296). Specifically, IPS alleges that "by competing [\*23] with IPS, soliciting IPS's customers, prospective customers, and employees, and engaging in various other misconduct described hereinabove including, without limitation, their misappropriation of Confidential Information and Trade Secrets." (Compl. ¶¶ 208, 294). IPS does not allege when the Defendants allegedly committed these acts.

In South Carolina, an employee's duty of loyalty to his employer lasts only so long as he is employed and terminates with the period of employment. See, e.g., *Foreign Acad. & Cultural Exch. Serv. Inc. v. Tripon*, 715 S.E.2d 331, 335 (S.C. 2011). IPS agrees that an employee's duty of loyalty to his employer lasts only so long as he is employed, but contends that it sufficiently alleges that the individual Defendants may have acted prior to their resignations. (Compl. ¶ 173). IPS contends that these Defendants still owed a duty of loyalty to IPS during the time period when they were obviously communicating with Axis and planning their exit from IPS. While IPS now acknowledges that the duty does not exist once employment ends, IPS's allegations do not sufficiently state a claim of breach of loyalty prior to the end of employment. The allegations are very vague as to when the acts were committed and by whom.

Therefore, the court grants the motion [\*24] to dismiss this claim. Accordingly, this claim is dismissed without prejudice. IPS will have the opportunity to file an amended complaint within fourteen days of the filing of this Order if it so chooses. If IPS fails to file an amended complaint within fourteen days of the filing of the Order, however, the dismissal will be with prejudice as to this claim.

The court notes that while the South Carolina Supreme Court has recognized a tort action for breach of the duty of loyalty, *Tripon*, 715 S.E.2d at 335, the court has also stated that it "expresses no opinion as to the viability of the breach of duty of loyalty claim as one independent of the breach of contract action." *Id.* Thus, there seems to be a question as to whether in South Carolina there exists an independent tort for breach of loyalty where there is an employment contract. See *Spirax Sarco, Inc. v. SSI Eng'g, Inc.*, 122 F. Supp. 3d 408, 418-19 (E.D.N.C. 2015). As the parties have not briefed this issue, the court finds that it may be more appropriately addressed at the summary judgment stage of the case.

#### 5) Conversion Claims

IPS alleges a claim of conversion against all the Defendants. (Compl. at 48). However, IPS alleges that the individual Defendants copied and wrongfully obtained material converted consists of Plaintiff's confidential [\*25] information. (Compl. ¶ 319). The Defendants contends that, to the extent the material allegedly converted is a trade secret, the conversion claim would be preempted by the state and federal trade secrets acts. See, e.g., *Trevillyan v. APX Alarm Sec. Sys., Inc.*, No. 2:10-cv-01387, 2011 WL 11611, at \*10-11 (D.S.C. Jan. 3, 2011). And to the extent the material allegedly converted is not a trade secret, the Defendants question where the duty that prohibits the taking of the material comes from. Moreover, some of the Defendants allege that because IPS has alleged that their duty to refrain from taking confidential information arises under the Agreements, the economic loss rule bars a conversion claim citing *King v. Carolina First Bank*, 26 F. Supp. 3d 510, 519 (D.S.C. June 6, 2014) (citations omitted).

The economic loss rule bars a negligence action "where duties are created solely by contract." *Kennedy v. Columbia Lumber & Mfg. Co., Inc.*, 384 S.E.2d 730, 737 (S.C. 1989). The *Kennedy* court explained the economic loss rule as follows

This rule exists to assist in determining whether contract or tort theories are applicable to a given case. Where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only "economic losses." Conversely, where a purchaser buys a product which [\*26] is defective and physically harms him, his remedy is in either tort or contract. This is so, . . . because his losses are more than merely "economic."

Kennedy, 384 S.E.2d at 736. However, "[w]here there is a special relationship between the parties that is independent of the contract, . . . there exists a duty of care whose breach will support a tort action." See Palmetto Linen Serv., Inc. v. U.N.X., Inc., 205 F.3d 126, 129 (4th Cir. 2000); see also Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 463 S.E.2d 85, 88 (S.C. 1995).

Here, IPS contends that the individual Defendants have breached an independent duty because of their employment with IPS. Moreover, as to the preemption argument, a cause of action for conversion is not dependant upon a finding that the misappropriated information constitutes "trade secrets." See Nucor Corp. v. Bell, 482 F. Supp. 2d 714, 726-27 (D.S.C. 2007). Accordingly, until it is determined whether the allegedly misappropriated information constitutes a trade secret, the question of preemption cannot be addressed. See, e.g., Combined Metals of Chicago Ltd. P'ship v. Airtek, Inc., 985 F. Supp. 827, 830 (N.D.Ill. 1997) (holding breach of fiduciary duty claim not preempted where underlying information may not qualify as trade secrets). At this stage in the proceedings, the court cannot resolve any factual disputes as to what is or is not a trade secret. Nucor, 482 F. Supp. 2d at 727. Accordingly, the court declines to dismiss the conversion claim against the individual Defendants. However, as IPS in the Complaint alleges [\*27] only actions by the individual Defendants (Compl. ¶ 319), and not Axis or DBE, the conversion claims against Defendant Axis and DBE are dismissed without prejudice. IPS will have the opportunity to file an amended complaint within fourteen days of the filing of this Order if it so chooses. If IPS fails to file an amended complaint within fourteen days of the filing of the Order, however, the dismissal will be with prejudice as to this claim against Axis and DBE.

## 6) Breach of Contract Claims

IPS alleges two breach of contract claims: one against the Defendant Geordy and one against the remaining individual Defendants - England, Schroeder, Perry, Quinn, and Schmitt. (Compl. ¶¶ 260-282). In its claim against Geordy, IPS alleges Geordy breached the Agreement by directly competing with IPS within the restricted territory before and after his employment with IPS, soliciting customers and employees, and usurping business opportunities and using trade secrets and confidential information for the benefit of DBE and Axis. (Compl. ¶ 263). In the claim against the remaining individual Defendants, IPS alleges that these individual Defendants violated the non-solicitation provision of their Agreements [\*28] by soliciting IPS's customers, and by soliciting other IPS's employees to leave their employment and join Axis. (Compl. ¶ 274).

All of the Defendants allege that, in its Complaint, IPS alleges that Defendants "use[d] IPS's trade secret and confidential information for the benefit of Axis" (Compl. ¶¶ 263, 274), but IPS does not allege any specific facts to support this allegation. They also contend that IPS has not alleged which of its customers or employees the Defendants solicited. They contend that IPS must know the name of at least one customer who was wrongfully solicited by them or one employee who was tempted by them to leave their employment.

Additionally, Defendant Quinn contends that his Agreement does not contain a provision that prohibits him from engaging in the solicitation of Plaintiff's customers or prospective customers. He does acknowledge that his Agreement contains a non-compete clause, but he contends it is unenforceable as a matter of law because it contains no geographic limitation. In response, citing Rockford Manufacturing, Limited v. Bennet, 296 F. Supp. 2d 681, 689 (D.S.C. 2003), IPS argues that the Agreement is enforceable because it contains prohibitions against contacting existing customers, which is a valid substitute for a geographic [\*29] limitation. (ECF No. 54 at 11). The court agrees with IPS, and, as the Agreement contains this provision, it is not as a matter of law unenforceable. See Rockford, 296 F. Supp. 2d at 689 (holding that "[w]hile 'the general test is that contractual prohibitions must be geographically limited to what is reasonably necessary to protect the employer's business . . . [p]rohibitions against contacting existing customers can be a valid substitute for a geographic limitation.'" (quoting Wolf v. Colonial Life & Accident Ins. Co., 420 S.E.2d 217, 222 (S.C. Ct. App. 1992))).

Further, Defendant Quinn contends that IPS has failed



to allege any specific facts to substantiate its claim that he has violated the covenant against using trade secrets and confidential information. Quinn argues that IPS has alleged only that he took the Pallet Picture on his work iPhone while he was still an employee at IPS. The court addressed this argument in above in reference to the trade secret violations claims. This court could not find any South Carolina authority that requires the party seeking to enforce a noncompete provision to plead the existence of customers in a certain area or set out detailed factual allegations in the complaint regarding specific business interests in order to survive a motion to dismiss or motion for [\*30] judgment on the pleadings. At this stage of the litigation, the court finds that IPS has sufficiently pled plausible breach of contract claims.

### 7) Tortious Interference with Contract

IPS alleges a claim of tortious interference with contract against Defendants Axis and DBE. (Compl. ¶¶ 283-289). IPS alleges Axis and DBE intentionally interfered with the Agreements IPS has with Schroeder, Perry, Quinn, Schmitt, and Nettles and induced them to breach their contractual obligations with IPS. (Compl. ¶ 286). In its motions to dismiss, Axis and DBE contend that IPS has failed to sufficiently allege this claim. (ECF No. 48-1 at 11). In response, IPS contends that it had binding contracts with England, Schroder, Perry, Quinn, and Schmitt, which Davidson and England were aware of, and Axis intentionally induced these Defendants to leave their employment at IPS in violation of the Agreements, and to accept employment with a direct competitor, causing IPS harm. (ECF NO. 57 at 10).

The elements for a claim of tortious interference with a contract are: 1) the existence of a contract; 2) the defendant's knowledge of the contract; 3) intentional procurement of the contract's breach; 4) absence of justification; [\*31] and 5) damages resulting therefrom. DeBerry v. McCain, 274 S.E.2d 293, 296 (S.C. 1981). Reviewing the Complaint, the court finds that IPS does not allege how these Defendants intentionally procured the breach of contract or how it was harmed.

This claim is dismissed without prejudice. IPS will have the opportunity to file an amended complaint within fourteen days of the filing of this Order if it so chooses. If IPS fails to file an amended complaint within fourteen days of the filing of the Order, however, the dismissal will be with prejudice as to this claim.

### 8) Misappropriation of Corporate Opportunity

IPS alleges a claim for the misappropriation of corporate opportunity against Defendants Geordy, England, DBE, and Axis. (Compl. ¶¶ 297-307).

"It is well settled that corporate officers and directors have a continuing duty of loyalty to the corporation, and that this duty prevents them from acquiring interests that are adverse to the corporation." See McGuffin v. Barman (In re BHB Enterprises, LLC), No. 97-01975, 1998 WL 2016846, at \*22 (Bankr. D.S.C. Sept. 30, 1998). This duty of loyalty requires an officer or director to not engage in self-dealing and usurp corporate opportunities. *Id.* As Axis and DBE were not officers of IPS, they cannot be sued for misappropriating a business opportunity of IPS. Geordy contends that his title of Vice-President of [\*32] Sales does not equate to an officer or director, and England contends that he has never served as an officer or director. (ECF No. 48-1 at 13). In response, IPS without citing to any case law, contends that these Defendants are narrowly reading the terms "officer or director," and that it alleged Geordy had a fiduciary relationship with IPS (Compl. ¶ 298), which it clearly believes is sufficient. (ECF No. 57 at 11). IPS then details how England allegedly called upon an IPS client whom he and Geordy had worked with during his employment at IPS. *Id.* The court finds that IPS has not sufficiently alleged how Geordy had a fiduciary relationship with IPS, and IPS has not alleged England even had a fiduciary relationship with IPS. Accordingly, this claim is dismissed without prejudice. IPS will have the opportunity to file an amended complaint within fourteen days of the filing of this Order if it so chooses. If IPS fails to file an amended complaint within fourteen days of the filing of the Order, however, the dismissal will be with prejudice as to this claim.

In their reply, Defendants Geordy, England, DBE, and Axis contend that if the court concludes that any of IPS's claims survive the [\*33] motion to dismiss, the court should grant a motion for a more definite statement. (ECF No. 60 at 5). The Fourth Circuit has explained that a Rule 12(e) motion should be denied where discovery will permit the parties to ascertain the unpled information. Hodgson v. Virginia Baptist Hosp., Inc., 482 F.2d 821, 824 (4th Cir. 1973). The court has granted the motion to dismiss on several claims, and where appropriate, has stated that IPS will have an opportunity to amend its complaint to re-allege certain claims. Where the court has denied the motion to dismiss, the court declines to grant the motion for a more definite

statement.<sup>11</sup>

The Defendants' Motions to Dismiss, or, alternatively, for a More Definite Statement (ECF Nos. 44, 45, 46, 47, and 48). are **GRANTED in part and DENIED in part** as set forth in this Order.

Plaintiff IPS has filed a motion to amend its Complaint to add defendants and provide greater detail on some of its claims. (ECF No. 66). In light of this Order, which allows Plaintiff IPS to amend its Complaint in accordance with this Order, the court **DENIES the Motion to Amend (ECF No. 66) with leave to re-file**, so Plaintiff may incorporate all its amendments in one proposed Amended Complaint.

**IT IS SO ORDERED.**

/s/ Timothy M. Cain

United States District Judge

June [\*34] 22, 2018

Anderson, South Carolina

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<sup>11</sup> The court also notes that the motion for a more definite statement was pled as an alternative to the motion to dismiss.



Positive

As of: March 26, 2020 6:30 PM Z

**Poly-Med, Inc. v. Novus Scientific Pte, Ltd.**

United States District Court for the District of South Carolina, Anderson Division

December 6, 2016, Decided; December 7, 2016, Filed

CIVIL ACTION NO. 8:15-cv-01964-JMC

**Reporter**

2016 U.S. Dist. LEXIS 168902 \*; 2016 WL 7111704

POLY-MED, INC., Plaintiff, v. NOVUS SCIENTIFIC PTE LTD., NOVUS SCIENTIFIC, INC. and NOVUS SCIENTIFIC AB, Defendants.

**Opinion by:** J. Michelle Childs

**Prior History:** [Poly-Med, Inc. v. Novus Sci. Pte. Ltd., 2016 U.S. Dist. LEXIS 20815 \(D.S.C., Feb. 22, 2016\)](#)

**Core Terms**

Poly-Med, preliminary injunction, trade secret, Mesh, irreparable harm, patents, merits, manufactured, misappropriation, damages, parties, statute of limitations, patent application, injunction, Surgical, succeed, injunctive relief, Declarations, Absorbable, misappropriation of trade secrets, court finds, suffering, contends, products, royalties, selling, tissue, breach of contract claim, breach of contract, monetary damages

**Counsel:** [\*1] For Poly-Med Inc, Plaintiff: Bernie W Ellis, LEAD ATTORNEY, McNair Law Firm, Greenville, SC; Marwan S Zubi, Paul Peter Nicolai, PRO HAC VICE, Nicolai Law Group PC, Springfield, MA.

For Novus Scientific Pte Ltd, Novus Scientific Inc, Novus Scientific AB, Defendants: Jennifer L Mallory, LEAD ATTORNEY, Mark C Dukes, Robert Hall McWilliams, Jr, Nelson Mullins Riley and Scarborough (Cola), Columbia, SC.

**Judges:** J. Michelle Childs, United States District Judge.

**Opinion****FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AND OPINION DENYING POLY-MED'S MOTION FOR PRELIMINARY INJUNCTION<sup>1</sup>**

Plaintiff Poly-Med, Inc. ("Poly-Med"), filed this action against Defendants Novus Scientific Pte. Ltd. ("Novus Singapore"), Novus Scientific, Inc. ("Novus USA"), and Novus Scientific AB ("Novus Sweden") (collectively "Novus Defendants") seeking monetary damages, injunctive, and equitable relief. (ECF No. 1.)

This matter is before the court on Poly-Med's Motion for Preliminary Injunction, which is opposed by Novus Defendants. (ECF Nos. 97 & 126.) For the reasons set forth in detail below, the court **DENIES** Poly-Med's Motion for Preliminary Injunction.

**I. FINDINGS OF FACT RELEVANT TO PENDING MOTION**

1. Founded by Dr. Shalaby [\*2] W. Shalaby in 1993,

<sup>1</sup> [Rule 52 of Federal Rules of Civil Procedure](#) requires the court to "state the findings and conclusions that support" the "granting or refusing [of] an interlocutory injunction." [Fed. R. Civ. P. 52\(a\)\(2\)](#). To the extent any findings of fact constitute conclusions of law, they are adopted as such; to the extent any conclusions of law constitute findings of fact, they are so adopted.

Poly-Med is a South Carolina corporation with its principal place of business at 6309 Highway 187, Anderson, South Carolina 29625. (ECF Nos. 1 at 1 ¶ 1 & 104-1 at 1 ¶ 3.) "Poly-Med designs, develops, and manufactures products and materials [out of bio-absorbable and biodegradable polymers] for use in medical, pharmaceutical and biotechnology applications." (ECF No. 1 at 3 ¶¶ 8-9; see also ECF No. 104-1 at 1 ¶ 3.)

2. "Poly-Med has numerous trademarks, more than one hundred thirty patents and patent applications and has successfully licensed and manufactured technologies found in many commercially available medical applications." (ECF No. 104-1 at 2 ¶ 5.) "In addition to creating its own products and materials, Poly-Med offers manufacturing services and consulting, analytic and research and development services to a variety of firms in the medical, pharmaceutical and biotechnology industries." (*Id.* at ¶ 6.)

3. In December 2004, a Swedish company called Radi Medical Systems AB ("Radi") applied for a patent entitled "Mesh Implant for Use in Reconstruction of Soft Tissue Defects." (ECF No. 126-2 at 2 ¶ 4.) Radi's goal was "to commercialize the invention in order to reconstruct [\*3] soft tissue defects to promote optimal healing and tissue restoration." (*Id.*) Even though Radi "possessed the background and know-how regarding degradable polymers, polymerization, and processing into final medical devices," it "did not have all of the physical equipment needed." (*Id.* at 2-3 ¶ 5.)

4. In early 2005, Poly-Med began negotiations with and eventually entered into a Sale of Materials and License Agreement (the "Agreement") with Radi on or about June 8, 2005. (ECF No. 104-1 at 2 ¶ 7-4 ¶ 15.)

5. The Agreement required Poly-Med to "develop and manufacture at least six different types of Absorbable Composite Meshes for sale to and use by Radi" in "hernial repair products." (ECF No. 126-1 at 4 ¶ 2(a).) The Agreement defined "Absorbable Composite Mesh" as "any special absorbable composite fibrous constructs absorbed by the human body for specific use in herniated tissues which (i) has not been previously sold or licensed to any other person or entity for product development or commercial application that conflicts with its use by RADI AB in its hernial mesh application; (ii) that falls within the scope of any valid claim of any POLY-MED patent or patent application; or (iii) is manufactured [\*4] under or using a process that falls within the scope of any Valid Claim of any POLY-MED

Patent or POLY-MED Patent Application; or (iv) comprises or makes use of POLY-MED Know-How; or (v) is manufactured under, or using a process constituting, POLY-MED Know-How." (ECF No. 126-1 at 3 ¶ 1(f).)

6. From the group of six proprietary, absorbable surgical meshes, Radi was to select one or two which it believed "hold the most promise for purposes of developing RADI Products . . . ." (*Id.* at 7 ¶ 4(a).) Radi would then "have the exclusive right to use any Select Absorbable Composite Mesh used by it in the development, manufacture, sale and distribution of its medical products . . . ." (*Id.* at 8 ¶ 5.)

7. Per the terms of the Agreement, "Radi was to compensate Poly-Med for its development work, manufacturing and production of the mesh that took place exclusively in South Carolina." (ECF No. 35-2 at 2 ¶ 11.)

8. In February 2007, Radi selected one prototype surgical mesh which was then developed into a medical device called TIGR®Matrix Surgical Mesh ("TIGR®Mesh"). (ECF No. 126-2 at 4-5 ¶ 14.)

9. In December 2008, Radi transferred its rights under the Agreement to Novus Singapore.<sup>2</sup> (ECF No. 126-5 at 2 ¶ 4.)

10. Upon [\*5] receipt of an application, the U.S. Food and Drug Administration ("FDA") issued 510(k)<sup>3</sup> clearance of TIGR®Mesh on January 25, 2010, "for surgical use in 'reinforcement of soft tissue where weakness exists.'" (ECF No. 126-2 at 5 ¶ 17.) Poly-Med helped Novus Defendants obtain FDA approval of the

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<sup>2</sup> Poly-Med contends that it was told by Radi that the Agreement was assigned to Novus Singapore, but a "Transfer Agreement" provided to Poly-Med reveals that the Agreement transferred from Radi to Novus USA. (See ECF Nos. 35-2 at 3 ¶¶ 13, 15 & 35-3 at 1.)

<sup>3</sup> A 510(k) is a premarket submission made to FDA to demonstrate that the device to be marketed is at least as safe and effective, that is, substantially equivalent, to a legally marketed device (21 CFR 807.92(a)(3)) that is not subject to PMA." FDA Premarket Notification 510(k), <http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/HowtoMarketYourDevice/PremarketSubmissions/PremarketNotification510k/default.htm> (last visited Dec. 5, 2016). "Submitters must compare their device to one or more similar legally marketed devices and make and support their substantial equivalency claims." *Id.*

TIGR®Mesh by (1) maintaining their Device Master Record<sup>4</sup> ("DMR") in South Carolina and (2) allowing them to use "confidential and proprietary information located in South Carolina and substantial consultation, testing and assistance." (ECF No. 38-3 at 4 ¶¶ 19, 25.)

11. After receiving 510(k) clearance, Novus Singapore began marketing and selling TIGR®Mesh. (ECF No. 126-5 at 2 ¶ 5.)

12. In the fall of 2010, "Poly-Med learned TIGR®Mesh was used in studies for TRAM flap procedures (or abdominal wall reconstruction surgery) whereby a section of the abdomen wall is removed and used in breast reconstruction and the mesh is used to repair the hole in the abdomen wall." (ECF No. 104-1 at 16 ¶ 62.) In response to this information, Poly-Med told Novus Defendants that "it objected to commercialization of the TIGR®Mesh as a 'surgical' mesh rather than a 'hernia' mesh" and allegedly demanded "firm commitments [\*6] by Novus defendants on further orders for production at substantially increased prices." (*Id.*; see also ECF No. 126-5 at 2 ¶ 7.)

13. In December 2010, an employee of Poly-Med, Shawn J. Peniston ("Peniston"), presented a dissertation with the "primary goal" of developing and characterizing "a fully absorbable bicomponent mesh (ABM) for hernia repair which can modulate biomechanical and physical properties to work with the expected needs of the wound healing process." (ECF No. 126-25 at 3.) Peniston's dissertation described "a bioengineering approach that was used to develop and evaluate a novel hernia mesh which considers the temporal needs of the wound healing process, as well as the device functional needs to improve biocompatibility." (*Id.* at 15.)

14. On or about February 27, 2013, Novus Singapore transferred its interest in the Agreement to its Swedish entity, Novus Sweden. (ECF No. 126-8 at 1 ¶ 2.)

15. "Since August 2014, using its own manufacturing procedures, Novus Sweden has manufactured TIGR®Matrix Surgical Mesh in its own production

facilities, and has continued to sell TIGR® Matrix Surgical Mesh in accordance with the 510(k) clearance and CE registration." (*Id.* at ¶ 3.)

16. "Novus Sweden [\*7] has paid and continues to pay royalties to Poly-Med regardless of the end use of TIGR®Matrix Surgical Mesh . . . and regardless of whether Poly-Med or Novus Sweden manufactured the TIGR®Matrix Surgical Mesh." (*Id.* at 2 ¶ 5.)

17. "Poly-Med has accepted royalty payments arising from all end uses." (*Id.*)

18. On May 8, 2015, Poly-Med filed the instant action against Novus Defendants alleging four causes of action: breach of contract, tortious interference with contract, violation of the South Carolina Trade Secrets Act ("SCTSA"), [S.C. Code Ann. §§ 39-8-10 to -130 \(2016\)](#), and violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), [S.C. Code Ann. §§ 39-5-10 to -560 \(2016\)](#). (ECF No. 1 at 13-25.)

19. On June 8, 2016, Poly-Med moved for a preliminary injunction based on its breach of contract and misappropriation of trade secrets causes of action. (ECF No. 97-1.) Poly-Med alleges that Novus Defendants breached the Agreement by (1) "using, manufacturing and selling the mesh for purposes other than hernia repair"; and (2) by filing certain patent applications without notice to Poly-Med and not in its name. (*Id.* at 2.) Further, Poly-Med contends that Novus Defendants have misappropriated certain alleged trade secrets provided to Novus Defendants [\*8] pursuant to the Agreement. (*Id.*)

20. The court heard argument from the parties on this matter on August 16, 2016. (ECF No. 135.) As discussed below, upon review of the extensive briefing on the instant Motion and hearing the parties' detailed arguments, it appears to this court that there are a number of significant factual disputes at this stage of the case. The briefs and declarations in support of and in opposition to Poly-Med's Motion illustrate the parties' divergent views on numerous issues (see ECF Nos. 97-1, 126, and 133) and the court finds it unnecessary to summarize here their very different versions of the events underlying this action. Rather, it is sufficient at the outset for the court to note that it has carefully considered the parties' briefing and arguments, and it finds the many contested factual issues weigh against granting Poly-Med the requested relief. See [Price v. City of Fayetteville, N.C., No. 5:13-CV-150-FL, 2013 U.S. Dist. LEXIS 58587, 2013 WL 1751391, at \\*4 \(E.D.N.C.](#)

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<sup>4</sup>"A Device Master Record is a compilation of all the instructions, drawings and other records that must be used to produce a product." (ECF No. 38-3 at 4 ¶ 25.) "The term is used in Quality Management Systems that cover product design and production." (*Id.*) "Under FDA regulations, a DMR must be maintained by the manufacturer of any medical device for use in humans." (*Id.* at 4-5 ¶ 25.)



[Apr. 23, 2013](#)) (explaining that courts in the Fourth Circuit have recognized that, "[w]hen the facts are sharply disputed, a preliminary injunction will not be granted" because a preliminary injunction requires a "clear showing") (quoting [Prudential Sec., Inc. v. Plunkett](#), 8 F. Supp. 2d 514, 516 (E.D. Va. 1998)); [\*9] [Wellin v. Wellin](#), No. 2:13-cv-1831-DCN, 2013 U.S. Dist. LEXIS 166139, 2013 WL 6175829, at \*4 (D.S.C. Nov. 22, 2013). The parties' positions are discussed in greater detail below in the context of Poly-Med's specific allegations.

## II. LEGAL STANDARD AND ANALYSIS

### A. Preliminary Injunctions Generally

11. The court's authority to issue preliminary injunction arises from [Rule 65](#),<sup>5</sup> but "it is an extraordinary remedy never awarded as of right." [Winter v. Nat'l Res. Def. Council, Inc.](#), 555 U.S. 7, 24, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). A party seeking a preliminary injunction must establish all four of the following elements: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Id.*; [The Real Truth About Obama, Inc. v. Fed. Election Comm'n](#), 575 F.3d 342, 346-47 (4th Cir. 2009).

12. The Fourth Circuit no longer recognizes a "flexible interplay among the four criteria for a preliminary injunction." [Real Truth](#), 575 F.3d at 347. Each of these requirements "must be fulfilled as articulated." [De la Fuente v. S.C. Dem. Party](#), 164 F. Supp. 3d 794, 2016 WL 741317, at \*2 (D.S.C. 2016). A plaintiff must first prove the first two elements before a court considers whether the balance of the equities tips in his favor. See [Real Truth](#), 575 F.3d at 346-47. Additionally, the court pays particular attention to the public consequences of employing this extraordinary form of relief via injunction. [Real Truth](#), 575 F.3d at 347 (citing [Winter](#), 555 U.S. at 24).

13. "The traditional purpose of a [\*10] preliminary injunction is to protect the status quo and to prevent irreparable harm during the pendency of the lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits." [De La Fuente](#), 164

[F. Supp. 3d 794](#), 2016 WL 741317, at \*2. The parties dispute whether Poly-Med is seeking a prohibitory or a mandatory preliminary injunction and, as such, which standard is to be applied. However, because the preliminary injunction Poly-Med seeks is not appropriate under the less stringent standard, the court need not resolve this dispute.

### B. Poly-Med's Request for Relief

14. Poly-Med seeks a preliminary injunction that: (a) enjoins Novus Defendants from using or disclosing Poly-Med's trade secrets; (b) enjoins Novus Defendants from promoting, advertising, manufacturing, distributing, offering for sale, or selling TIGR®Mesh or any other surgical mesh developed with confidential information or trade secrets of Poly-Med; and (c) enjoins Novus Defendants from filing any Mesh Patent Applications. (ECF No. 97 at 32.)

### C. The Court's Review

15. In support of its Motion for Preliminary Injunction, Poly-Med relies on its Memorandum of Law (ECF No. 97-1) and Declarations from Philip Green (ECF Nos. 102-1 & 131-5), Christina Ramberg [\*11] (ECF Nos. 103-1 & 131-4), David Shalaby (ECF Nos. 104-1 & 131-6), Scott Taylor (ECF No. 131-2), Kimberly Carpenter (ECF No. 131-3) and Sean Peniston (ECF No. 139-1).

16. In opposition to the Motion for Preliminary Injunction, Novus Defendants rely on their Memorandum of Law (ECF No. 126) and Declarations from Torbjörn Mathisen (ECF Nos. 126-2 & 134), Thomas Engstrom (ECF No. 126-5), Stefan Sowa (ECF Nos. 126-8 & 126-16), Henrik Magnusson (ECF No. 126-15), Tac-Whei Ong (ECF No. 126-17), Roger Johansson (ECF No. 126-24), and Charles L. Alford Ph.D. (ECF No. 126-29.)

17. The court heard oral argument from the parties' counsel on August 16, 2016. (ECF No. 135.)

18. Both parties make a plethora of arguments regarding the meritorious value of Poly-Med's breach of contract and trade secrets claims. This court finds that Poly-Med has not met its burden under the standard the Supreme Court set out in [Winter](#). Because Poly-Med has not shown that each element required for injunctive relief has been met, the court refuses to grant injunctive relief to Poly-Med. The court addresses below the vitality of Poly-Med's assertions under each of the four requirements set forth in [Winter](#) and reiterated by [\*12] the Fourth Circuit in [Real Truth](#).

<sup>5</sup> The court observes that "rule" refers to the Federal Rules of Civil Procedure.

### III. SPECIFIC FINDINGS AND CONCLUSIONS

#### A. Clear Showing of Likely Success on the Merits

19. "[P]laintiffs seeking preliminary injunctions must demonstrate that they are likely to succeed on the merits." [\*Pashby v. Delia\*, 709 F.3d 307, 321 \(4th Cir. 2013\)](#) (citing [\*Winter\*, 555 U.S. at 20](#)). "Although this inquiry requires plaintiffs seeking injunctions to make a 'clear showing' that they are likely to succeed at trial, [\*Real Truth\*, 575 F.3d at 345](#), plaintiffs need not show a certainty of success, see 11A Charles Alan Wright *et al.*, Federal Practice & Procedure § 2948.3 (2d ed. 1995). [\*Pashby\*, 709 F.3d at 321](#)."

i. *Poly-Med Cannot Establish a Clear Showing of Likely Success as to the Merits of Its Breach of Contract Claim Due to Unanswered Factual Issues Relevant to the Application of Swedish Law to the Parties' Agreement.*

20. Firstly, as a preliminary matter, the court observes that the parties do not dispute that Swedish law governs the Agreement regarding substantive legal issues related to the contract. (See ECF Nos. 97-1 at 10-11 & 126 at 12-13; see also ECF No. 126-1 at 27 ¶ 28 ("This Agreement shall be governed by and construed in all matters with respect to the validity, interpretation, legal effect and construction hereof in accordance with the laws of SWEDEN . . .").) Accordingly, the court [\*13] is asked to apply the heavily fact specific analysis employed by courts resolving contract disputes applying Swedish law.

21. "Under Swedish contract law, the contents of a contract are established on the basis of the parties' common (subjective) intention." (ECF No. 103-1 at 3 ¶ 9.) "[T]he following factors are relevant to establish the contents of a contract: 10.1. the wording of the contract; 10.2. the underlying law (default law); 10.3. the parties' preliminary negotiations in connection with the formation of a contract; 10.4. the parties' conduct subsequent to the formation of the contract; 10.5. practices which the parties have established between themselves in earlier dealings; 10.6. the nature and purpose of the contract; 10.7. the meaning of the terms and concepts (notions) in the relevant industry; 10.8. trade usages; 10.9. the structure of the contract; and, 10.10. reasonableness, good faith and fair dealing." (*Id.* at 3-4 ¶¶ 10-10.10.)

22. The court finds that it is not clear that Poly-Med will succeed on the merits of its breach of contract claim under this fact specific review because a number of

facts are still adamantly disputed by the parties. (See ECF Nos. 103-1 at ¶¶ 14-15 & 126-20 [\*14] at 8.) The parties dispute how to interpret the Agreement, the trade practices that the parties have established between themselves in earlier dealings, and the Agreement's inclusion of a limitation on patent filings and uses of the TIGR®Mesh to hernia repair.

23. The parties further contest the contents of preliminary negotiations in connection with the Agreement and the vitality of the Agreement at present. Without resolution of these facts, the success of Poly-Med's claims is debatable, at best, and does not warrant preliminary injunction.

ii. *Poly-Med Cannot Establish a Clear Showing of Likely Success as to the Merits of Its Breach of Contract Claim Due to Unanswered Factual Issues Relevant to the Application of South Carolina's Statute of Limitations on Contract Claims Under S.C. Code Ann. § 15-3-530(1) (2016).*

24. While choice of law provisions, such as the Swedish law provision of the Agreement, govern substantive issues with the contract, the law of the forum state governs purely procedural issues. [\*Stern v. Shelley\*, 781 F. Supp. 2d 281, 284 \(D.S.C. 2011\)](#). A "statute of limitations, which requires an action to be brought within a fixed time following accrual of a cause of action, is generally procedural because it affects the remedy rather than the right." [\*Thornton v. Cessna Aircraft Co.\*, 703 F. Supp. 1228, 1230 \(D.S.C. 1988\)](#). Thus, [\*15] the law of the forum ordinarily governs the selection and application of the appropriate statute of limitations. [\*Gattis v. Chavez\*, 413 F. Supp. 33, 35 \(D.S.C. 1976\)](#).

25. Courts in South Carolina apply their own statutes of limitations to actions sounding in contract. *Id.* Accordingly, a party has three (3) years from the time it knew or reasonably should have known that the alleged breach occurred to file suit. [\*S.C. Code Ann. § 15-3-530\(1\)\*](#) (2016). The aforementioned statute of limitations is modified by the "discovery rule" wherein "the statute of limitations [only] begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct." [\*True v. Monteith\*, 327 S.C. 116, 489 S.E.2d 615, 616 \(S.C. 1997\)](#). This rule does not require that the party have actual notice of the full extent of damages or of the claim itself; simply a party must act promptly to investigate the existence of a claim when facts and circumstances indicate that one

might exist. [\*Brooks v. GAF Materials Corp.\*, 284 F.R.D. 352, 357-58 \(D.S.C. 2012\)](#), amended in part, [\*2012 U.S. Dist. LEXIS 150717, 2012 WL 5195982 \(D.S.C. 2012\)\*](#).

26. Although the court does not decide at this time whether the statute of limitations has run on Poly-Med's breach of contract claims, it notes that this is a particular point of contention between the parties. Poly-Med asserts that its breach claims related to limited [\*16] use of the TIGR®Mesh and to patent filings involve "recurring and ongoing violations," each triggering its own limitations period. (ECF No. 133 at 11 (citing, e.g., [\*Dave & Buster's Inc. v. White Flint Mall, LLP\*, 616 F. App'x 552, 558 \(4th Cir. 2015\)](#))). Yet, Poly-Med has not overcome the high burden of showing that it clearly would succeed on the merits of its claims. The disputed facts could suggest it knew as early as 2010 of actions it now seeks to enjoin, and there are legitimate questions as to whether those "acts" are continuous in and of themselves. (ECF Nos. 126 at 12, 126-11 at 5, 133 at 13 & 104-1 at 16 ¶ 62.) Thus, this point of basis alone is enough to undermine the likelihood of Poly-Med's success on the merits.

iii. *Poly-Med Cannot Establish a Clear Showing of Likely Success as to the Merits of Its Misappropriation of Trade Secrets Claim Due to Unanswered Factual Issues Relevant to the Application of South Carolina Trade Secrets Act.*

27. "To establish a claim for misappropriation of trade secrets under the South Carolina Trade Secrets Act, a plaintiff must show: (1) the existence of a trade secret; (2) misappropriation, wrongful use, or wrongful disclosure of a trade secret by the defendant; and (3) damages." [\*17] [\*Sonoco Products Co. v. Guven, No. 4:12-CV-00790-BHH, 2015 U.S. Dist. LEXIS 1906, 2015 WL 127990, at \\*6 \(D.S.C. Jan. 8, 2015\)\*](#); [\*Nucor Corp. v. Bell\*, 482 F. Supp. 2d 714, 725-26 \(D.S.C. 2007\)](#); [\*S.C. Code Ann. § 39-8-30\(C\)\*](#) (2016).

28. Information qualifies as a trade secret only if: (a) 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 by any other person who can obtain economic value from its disclosure or use," and (b) it "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." [\*S.C. Code Ann. § 39-8-20\(5\)\(a\)\*](#) (2016).

29. A plaintiff also "must adequately identify and describe the subject matter of its alleged trade secrets

in sufficient detail to establish each element of a trade secret and to enable the jury to differentiate that which is claimed as a trade secret from 'matters of general knowledge in the trade.'" [\*Vessel Med., Inc. v. Elliott, No. 6:15-cv-00330-MGL, 2015 U.S. Dist. LEXIS 122436, 2015 WL 5437173, at \\*7 \(D.S.C. Sept. 15, 2015\)\*](#).

30. Misappropriation can occur in various ways, [\*Hoechst Diafoil Co. v. Nan Ya Plastics Corp.\*, 174 F.3d 411, 417 \(4th Cir. 1999\)](#), but the statute generally defines misappropriation as involving improper acquisition, disclosure, or use of a trade secret, see [\*S.C. Code Ann. § 39-8-20\(2\)\*](#) (2016) (defining "misappropriation").

31. To show that it is entitled to a preliminary injunction, Poly-Med must make a clear showing that it is likely to succeed in proving that Novus Defendants committed an act of misappropriation as defined [\*18] in the statute.

32. Turning to the merits, there is some question as to whether the "trade secret" alleged by Poly-Med is not, in fact, publicly disclosed information. Indeed, Novus Defendants draw this court's attention to Dr. Shawn Peniston's dissertation, overseen by Dr. Shalaby W. Shalaby of Poly-Med, where the TIGR®Mesh is discussed in great detail in December 2010. (ECF No. 126-25.) The court also points to the numerous applications filed by Poly-Med, and its concession that the trade secrets were publicly disclosed. While Poly-Med maintains that it still possesses some trade secrets that Novus Defendants misappropriated, supported by the Declarations of Kimberly A. Carpenter (ECF Nos. 131-3 at 3 ¶ 7-5 ¶ 8 & 133 at 11) and Scott Taylor (ECF Nos. 131-2 at 3 ¶ 7-7 ¶ 27 & 133 at 11), Novus Defendants submitted Declarations of three witnesses, Dr. Torbjörn Mathisen, Stefan Sowa, and Thomas Engström, who directly contradict Poly-Med's allegations. (ECF Nos. 126-2 at 6 ¶¶ 21-23, 126-5 at 7 ¶ 24, 126-8 at 1 ¶ 3 & 134 at 2 ¶ 4.) The Declaration of Carpenter, in particular, is adamantly disputed because Novus Defendants assert that Poly-Med never provided Novus Defendants with information [\*19] of trade secrets pointed to in this Declaration.

33. Due to the aforementioned dispute, Poly-Med has failed to clearly show that it will likely succeed in proving its prima facie case of misappropriation of trade secrets.

34. Even in Poly-Med's attempt to show that trade secrets were disclosed, the specific make up of these guarded materials described by Poly-Med is too broad for this court to adjudicate and monitor through



injunctive relief. Poly-Med contends that, "[o]ver the years, Poly-Med sent Radi numerous emails, confidential Activity Reports and Design Review documents that contain trade secrets on how the Select Absorbable Composite Mesh was designed and developed," and the documents it identified in its motion were merely "examples." (ECF No. 133 at 10-11.) Further, Poly-Med makes the general statement that its trade secrets include "various aspects of the design, construction, development and performance of the TIGR®Mesh." (ECF No. 97-1 at 22.)

35. To the extent Poly-Med seeks a preliminary injunction based on the assertion that it has other information that is a trade secret that it has not specifically identified in conjunction with this proceeding, the court finds that such information [\*20] has not been identified in sufficient detail. Such general statements do not provide information sufficient to establish each element of a trade secret, as opposed to matters of general knowledge in the trade. [\*Trandes Corp. v. Guy F. Atkinson Co.\*, 996 F.2d 655, 661-62 \(4th Cir. 1993\)](#).

36. Finally, Poly-Med contends that information in Novus Defendants' patent applications constitutes misappropriation of trade secrets. (ECF Nos. 104-9, 131-20, 133 at 11 & 131-2 at 3 ¶ 7-7 ¶ 27.) Poly-Med has also not shown it is likely to succeed on these claims because there is a legitimate question as to whether this information was actually publicized through the Peniston Dissertation in 2010.

37. Further, information, for which Poly-Med offers a somewhat unclear description could have been disclosed in Poly-Med's own U.S. Patent No. 8,709,023, which was published on January 22, 2009, the application that matured into Novus Defendants' U.S. Patent No. 8,083,755. (See ECF No. 131-2 at 7 ¶¶ 25-27.)

*iv. Poly-Med Cannot Establish a Clear Showing of Likely Success as to the Merits of Its Misappropriation of Trade Secrets Claim Due to Unanswered Factual Issues Relevant to the Application of South Carolina's Statute of Limitations on Trade Secrets Claims Under S.C. Code Ann. § 39-8-70 (2016).*

38. There is also a potential statute of limitations issue that [\*21] arises under the claim for misappropriation of trade secrets, as well. The statute of limitations for trade secret misappropriation is three years. [\*S.C. Code Ann. § 39-8-70\* \(2016\)](#).

39. Counsel for Novus Defendants stated that they notified Poly-Med of a patent application via an October 15, 2010 letter (ECF No. 126-19) and Poly-Med conceded that it knew about this patent application in 2010. Thus, Novus Defendants notably argue that the statute of limitations has run on Poly-Med's trade secrets misappropriation claims, as well.

40. Novus Defendants further contend that misappropriation does not qualify as a continuing violation in the context of the statute of limitations. (ECF No. 126 at 28.) As observed above, it is not necessary at this time for the court to determine whether the statute of limitations has run on Poly-Med's trade secret misappropriation claims because its Motion for Preliminary Injunction does not meet the burden laid out in *Winter*. Still, it is merely possible that Poly-Med could win on this procedural issue, if argued before the court, and probability is required for injunctive relief.

41. For the reasons stated above, Poly-Med has not demonstrated that it is clearly likely to succeed on [\*22] the merits of its breach of contract or trade secret misappropriation claims and injunctive relief is inappropriate.

#### B. Likelihood of Suffering Irreparable Harm Absent an Injunction

42. *Winter* also requires that the party requesting injunctive relief demonstrate that it is likely it will suffer irreparable harm absent the preliminary injunction. [\*Winter\*, 555 U.S. at 22-23](#). The harm to be prevented must be of an immediate nature and not simply a remote possibility. [\*Am. Whitewater v. Tidwell\*, No. 8:09-cv-02665-JMC, 2010 U.S. Dist. LEXIS 127306, 2010 WL 5019879, at \\*11 \(D.S.C. Dec. 2, 2010\)](#) (citing [\*In re Microsoft Corp. Antitrust Litig.\*, 333 F.3d 517, 525 \(4th Cir. 2003\)](#)).

43. "When analyzing the irreparable harm element, there are two inquiries: 1) whether the plaintiff is indeed suffering actual and imminent harm; and 2) whether that harm is truly irreparable, or whether it can be remedied at a later time with money damages." [\*Sauer-Danfoss Co. v. Nianzhu Luo, C/A No. 8:12-3435-HMH, 2012 U.S. Dist. LEXIS 172511, 2012 WL 6042831, at \\*1 \(D.S.C. Dec. 5, 2012\)\*](#) (quoting [\*First Quality Tissue SE, LLC v. Metso Paper USA, Inc., C/A No. 8:11-2457-TMC, 2011 U.S. Dist. LEXIS 141794, 2011 WL 6122639, at \\*2 \(D.S.C. Dec. 9, 2011\)\*](#)).

*i. Is the Alleged Harm Suffered by Poly-Med Actual?*

44. Poly-Med contends it is suffering irreparable harm because the actions of Novus Defendants have resulted in Poly-Med losing (a) control of its trade secrets; (b) the benefit of its own intellectual property; (c) the ability to pursue business opportunities [\*23] and negotiate adequate compensation; and (d) credit for creation of the TIGR®Mesh and the goodwill associated with its development. (ECF Nos. 97-1 at 23-29 & 102-1 at 9 ¶ 36.)

45. Poly-Med's first contention is that it has "lost control of its trade secrets" because of Novus Defendants' actions leading to immeasurable harm. However, Poly-Med has failed to show how any loss of trade secrets is not the result of the actions of its own employees and publications on the Internet, such as Peniston's dissertation (ECF No. 126-25) and the numerous patent applications. Poly-Med's position is not persuasive because it is circular reasoning to suggest that a party who is indeed the catalyst for the harm that it suffered can then claim it is suffering from said harm.

46. Additionally, Poly-Med argues that it is not able to "enjoy the benefits of its intellectual property" because Novus Defendants are developing and using the TIGR®Mesh outside the scope of the Agreement. In a linked argument, Poly-Med claims that Novus Defendants filed patent applications in their own name, rather than in Poly-Med's name, and these applications affect Poly-Med's ongoing business opportunities and compensation for [\*24] these patents. (See ECF No. 97-1 at 25-27.) Poly-Med contends that it cannot license its technology to a third party where it is unable to ensure a future licensee that it could fully exploit a licensed field of use. (See ECF No. 102-1 at 12 ¶ 53.) However, the record indicates that reasonable minds could differ as to the cause of the barrier to commercialization experienced by Poly-Med. Novus Defendants argue that Poly-Med is actually suffering the ramifications of patents that Novus Defendants filed in 2004, prior to the Agreement with Poly-Med—patents that predated the parties' relationship altogether. (ECF No. 126 at 32.) The record is not fully developed such that the court can decisively conclude Novus Defendants did not have a right to file patents separate from the Agreement with Poly-Med resulting in the alleged harm. Moreover, this alleged harm does not suggest that Poly-Med's business is suffering in light of these patents. Indeed, it appears that Poly-Med is receiving royalties such that it is benefiting from these patents. (See ECF Nos. 126-5 at 3 ¶ 11 & 126-8 at 2 ¶ 9.) This court finds that Poly-Med has not clearly shown that it is likely to suffer irreparable harm on [\*25] this

ground.

47. Poly-Med next argues that it has lost the ability to pursue business opportunities and negotiate adequate compensation, such that it is suffering an irreparable harm. The fact that communications and royalties are still passing amongst the parties suggests otherwise. This point, in particular, is arguably vague, such that this court cannot render judgment on the impact of this alleged harm.

48. Finally, Poly-Med argues irreparable harm because it is not getting credit for the TIGR®Mesh. It asserts that Novus Defendants "falsely claim credit for developing the TIGR® Mesh" on their website and in industry publications. (ECF No. 97-1 at 29.) Novus Defendants respond that the statements on their website are true, and they have submitted declarations to that effect. (ECF Nos. 126 at 33, 126-5 at 19 ¶ 65 & 126-2 at 11 ¶ 34.) Further, the court notes that Poly-Med's argument for irreparable harm is undercut by the fact that Poly-Med's website advertises its experience with mesh products, equally claiming credit for the product. (ECF No. 126-32 at 2.) Accordingly, the court finds that Poly-Med has not shown that it is likely to suffer irreparable harm from any alleged false [\*26] advertising.

49. In consideration of the foregoing, the court is unable to infer the actuality of the irreparable harm suffered by Poly-Med.

*ii. Is the Alleged Harm Suffered by Poly-Med Imminent?*

50. Because "an application for preliminary injunction is based upon an urgent need for the protection of [a] Plaintiff's rights, a long delay in seeking relief indicates that speedy action is not required." [\*Quince Orchard Valley Citizens Ass'n v. Hodel\*, 872 F.2d 75, 80 \(4th Cir. 1989\)](#). This court is hesitant to issue preliminary injunctions when "whatever harm Plaintiffs face . . . is very much the result of their own procrastination." [\*Id.\* at 79](#).

51. In considering the imminency of the alleged harm suffered by Poly-Med, the court notes the obvious undue delay in the filing of Poly-Med's Motion for Preliminary Injunction. Even allowing time for predicate acts that Poly-Med asserts that it had to accomplish under the Agreement (*i.e.*, first send notice of default to Novus Defendants, notify Novus Defendants of the

Agreement's termination, and allow a six-month period<sup>6</sup> for expiration of inventory), this court finds that a June 8, 2016 file date is delayed and weighs against granting preliminary injunction.

52. Nowhere in the Agreement does it state that allowing for a six-month inventory [\*27] sell off period or termination of the Agreement are prerequisites to pursuing preliminary injunction or breach of contract claim. (ECF No. 126 at 31 (citing § 20 of the Agreement, which states: "The right to terminate this Agreement as provided herein is in addition to and not in lieu of the rights of the parties hereto in law or at equity with regard to a breach of this Agreement").) In this regard, the court is not persuaded that Poly-Med was prevented from filing suit and seeking a preliminary injunction in February or March 2015<sup>7</sup> when it alleges it first became cognizant of this claim.<sup>8</sup>

53. As a result of the foregoing, the court is unable to infer the imminency of the irreparable harm suffered by Poly-Med because its filing for injunctive relief on June 8, 2016, is simply too temporally removed from the spring of 2015.

### iii. Are Monetary Damages Sufficient?

54. To demonstrate a need for injunctive relief, a plaintiff must show how the harm suffered is such that other forms of damages available in the normal course of litigation are not enough. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough," because [\*28] of the "the possibility that adequate compensatory or other corrective relief will be

available at a later date." [\*Hughes Network Sys. v. Interdigital Commc'ns Corp.\*, 17 F.3d 691, 694 \(4th Cir. 1994\)](#). This "weighs heavily against a claim of irreparable harm." *Id.*

55. "A preliminary injunction is not normally available where the harm at issue can be remedied by money damages." [\*Bethesda Softworks, LLC v. Interplay Entm't Corp.\*, 452 F. App'x 351, 353 \(4th Cir. 2011\)](#).<sup>9</sup>

56. Poly-Med arguably concedes in its Complaint that monetary damages are appropriate. (ECF No. 1 at 26 ¶¶ 1-3 & 7.)

57. Moreover, in the Agreement between Poly-Med and Radi, Poly-Med valued its "know-how" and patents at a 2% royalty on sales of the TIGR® Mesh. (See ECF No. 126-1 at 15 ¶ 11.)

58. However, Poly-Med's damages expert, Philip Green ("Green"), opined that "even if Poly-Med's damages could be measured, Poly-Med cannot be adequately compensated by a judgment for monetary damages." (ECF No. 102-1 at 15 ¶ 66.)

59. In response to Green's opinion, Novus Defendants' damages expert observed:

If Green means that it is impossible to adequately compensate Poly-Med for its lost profits, that is a meaningless statement unless there is no amount that could be viewed as adequate compensation, suggesting that lost profits must be infinite. If Green intends to say that Poly-Med cannot be adequately [\*29] compensated because damages cannot be measured, the conclusion depends on the premise, which he has not demonstrated, explained, supported, or proved throughout the

<sup>6</sup> According to Poly-Med, that period expired on February 22, 2016, and that "was the earliest date Poly-Med could have sought an injunction." (See ECF no. 97-1 at 31 (citing § 21(a) of the Agreement).)

<sup>7</sup> "In or about February 2015, Poly-Med received a 'Med Watch' notice that a patient in Austria had developed a serious infection after TIGR®Mesh was implanted in the patient as part of a breast reconstruction." (ECF No. 104-1 at 20 ¶ 78.) On March 19, 2015, Poly-Med personnel viewed Novus Defendants' webpage showing their use of TIGR® Mesh for TRAM flap procedures. (ECF No. 104-19 at 3.)

<sup>8</sup> The court recognizes that this date may be much sooner if, in fact, Poly-Med is considered to be on notice of the cause of action when Novus Defendants filed with the FDA and started selling the TIGR®Mesh.

<sup>9</sup> The presumption against issuing preliminary injunctions where a harm suffered can be remedied by money damages at judgment stems from real concerns the issuance of a preliminary injunction remedy raises. These concerns include, for example, the fact that in issuing a preliminary injunction order, a district court is required, based on an incomplete record, to order a party to act in a certain way. [\*Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp.\*, 17 F.3d 691, 694 \(4th Cir. 1994\)](#). Issuing an injunction further risks repetitive litigation, that which carries significant costs for both parties. *Id.* Thus, there are only "extraordinary circumstances" that are "quite narrow" in application, where preliminary injunction is appropriate notwithstanding monetary damages. *Id.* (discussing a Plaintiff's business not being able to survive as an example of such circumstances.)

narrative of his report. If Green is referring to Novus's ability to pay, this conclusion has no place in this part of his analysis because it certainly is not supported by his reason #3.

(ECF No. 126-29 at 12 ¶ 56.) Accordingly, Novus Defendants' damages expert explained that the loss of value of intellectual property, including patents, could be measured in monetary terms. (*Id.* at 11 ¶¶ 53-55.)

60. Additionally, Poly-Med contends that TIGR®Mesh is Novus Defendants' only revenue generating product and they do not have substantial assets in the United States. (ECF Nos. 97-1 at 30-31 & 102-1 at ¶ 38.) In asking the court to bar Novus Defendants from selling TIGR®Mesh, Poly-Med suggests that when Novus Defendants cannot generate revenue by selling the product, they will not be able to pay damages and that judgment against Novus Defendants will be unenforceable for lack of assets. (*Id.*)

61. Novus Defendants respond (ECF No. 126 at 30) noting first that they have made and continue to make all royalty payments into a designated account. [\*30] (See ECF Nos. 126-5 at 3 ¶ 11 & 126-8 at 2 ¶ 9.) Novus Defendants likewise attest that they are not in financial distress, have not defaulted on payments owed to Poly-Med, and have the ability to pay any rational damages award. (ECF Nos. 126-5 at 7 ¶ 25 & 126-8 at 2 ¶ 10.)

62. Upon its review of the foregoing, the court is unable to conclude that money damages would be inadequate based on the current evidence of record.

#### C. The Balance of Equities and the Public Interest Factors

63. Generally, in determining whether to grant a motion for injunctive relief, "[t]he court must also consider the balance of hardships between the litigants and the impact on the public at large prior to issuing an injunction." [\*Uhlig, LLC v. Shirley, C/A No. 6:08-cv-01208-JMC, 2012 U.S. Dist. LEXIS 88632, 2012 WL 2458062, at \\*4 \(D.S.C. June 27, 2012\).\*](#)

64. However, because Poly-Med has failed to clearly show likelihood of success on the merits and likelihood of irreparable harm, this court, as stated above, need not address the "balance of equities" and "public interest" elements required for preliminary injunction. [\*Real Truth, 575 F.3d at 346.\*](#)

65. In sum, Poly-Med has not established that it is clearly likely to succeed on the merits of its breach of contract or its trade secret misappropriation claims, and [\*31] it has not shown that it will suffer irreparable harm absent entry of an injunction. For the foregoing reasons and after careful consideration of the entire record, the court **DENIES** Poly-Med's Motion for Preliminary Injunction (ECF No. 97.)

#### **IT IS SO ORDERED.**

/s/ J. Michelle Childs

United States District Judge

December 6, 2016

Columbia, South Carolina

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#### **IV. CONCLUSION**





Neutral

As of: March 26, 2020 6:23 PM Z

## Sonoco Prods. Co. v. Güven

United States District Court for the District of South Carolina, Florence Division

January 8, 2015, Decided; January 8, 2015, Filed

C.A. No. 4:12-cv-00790-BHH

### Reporter

2015 U.S. Dist. LEXIS 1906 \*; 2015 WL 127990

Sonoco Products Company, Plaintiff, vs. Levent Güven, Defendant.

**Opinion by:** Bruce Howe Hendricks

**Prior History:** [Sonoco Prods. Co. v. Güven, 2012 U.S. Dist. LEXIS 133542 \(D.S.C., Sept. 19, 2012\)](#)

## Opinion

### Core Terms

trade secret, damages, royalty, misappropriation, manufacturing, sales, misappropriation of trade secrets, products, notice, attorney's fees, customer, factors, lists, allegations, proprietary information, duty of loyalty, breach of duty, well-pleaded, calculating, formulas, loyalty, disclosure, employees, Policies, willful, default judgment, actual damage, per hour, discovery, estimated

**Counsel:** [\*1] For Sonoco Products Company, Plaintiff: H Sam Mabry, III, W Matthews, IIIJ, LEAD ATTORNEYS, Denny Parker Major, Haynsworth Sinkler Boyd, Greenville, SC; John Michael Florence, Jr, William Clarence Boyd, LEAD ATTORNEYS, Haynsworth Sinkler Boyd, Columbia, SC; John McKey Milling, LEAD ATTORNEY, Milling Law Firm, Darlington, SC; Samuel Ross Beheler Shealy, Haynesworth Sinkler Boyd PA, Columbia, SC.

Levent Guven, Defendant, Pro se.

**Judges:** Bruce Howe Hendricks, United States District Judge.

### OPINION AND ORDER

Plaintiff, Sonoco Products Company ("Sonoco"), filed this action against Defendant, Levent Güven ("Güven"), alleging claims for breach of contract, breach of duty of loyalty, and misappropriation of trade secrets. On October 28, 2014, this Court entered an order striking Güven's Answer and entering a default judgment in favor of Sonoco pursuant to [Federal Rule of Civil Procedure Rule 37\(b\)\(2\)\(A\)](#) based on Güven's willful failure to obey the Court's discovery orders dated June 18, 2014 and August 19, 2014 (ECF No. 124) (the "Sanctions Order"). A hearing was held on December 17, 2014 for the purpose of determining Sonoco's damages (the "Damages Hearing"). After carefully reviewing and considering the evidence presented at the [\*2] Damages Hearing, for the reasons set forth below, the Court finds that judgment shall be entered against Güven in the amounts set forth below.

#### I. REPRESENTATION OF AND NOTICE TO GÜVEN.

From the date Güven was initially served with the summons and complaint and brought into this matter, Güven was vigorously represented by qualified and able counsel in all proceedings in this lawsuit, including Sonoco's motion for sanctions, up until October 28, 2014, when the Court issued an order granting the motion to withdraw as counsel filed by Güven's counsel of record (ECF No. 124 at 18). Güven expressly

consented to his counsel's motion to withdraw as counsel as evidenced by his signed consent (ECF No. 98-2).<sup>1</sup> Güven's counsel briefed and opposed the motion for sanctions on behalf of Güven and also attended the hearing on Sonoco's motion for sanctions, where counsel for Güven argued on behalf of Güven against the sanctions sought by Sonoco. Güven's counsel also opposed Sonoco's underlying motion to compel discovery through briefs and arguments at the hearing on the motion to compel, and even sought reconsideration of the order compelling Güven to produce the discovery that ultimately led to the motion [\*3] for sanctions (ECF No. 86). The Court allowed Güven's counsel to withdraw as counsel only after the Court had already decided to grant Sonoco's motion for sanctions. See Transcript of Motion Hearing, Oct. 20, 2014, at pp. 13-15 (sanctions motion heard and ruled on before Court took up counsel's renewed motion to withdraw); ECF No. 124 at 18 (the permission for Güven's counsel to withdraw as counsel contained at end of Sanctions Order).

The Sanctions Order required Sonoco to serve Güven with copies of the Sanctions Order and Sonoco's attorney's fees affidavit (ECF No. 122) by mailing these documents to the address set forth in the Sanctions Order ("Güven's Service Address") (ECF No. 124 at 18). Güven's Service Address was provided to the Court by Güven, represented by Güven to be his address for service of papers, and represented by Güven to be the address where any service in this case would be received and accepted by him. The Certificate of Service of H. Sam Mabry, III (ECF No. 130) establishes that Sonoco mailed these documents to Güven's Service Address. The Court finds that Sonoco [\*4] has complied with the service requirements set forth in the Sanctions Order.

By Text Order dated October 30, 2014, this Court scheduled the Damages Hearing in this matter for December 17, 2014 (ECF No. 128). The Certificate of Service of H. Sam Mabry, III (ECF No. 130) establishes that Sonoco served Güven with a copy of this Text Order on November 4, 2014, by mailing a copy of the Order to Güven's Service Address (ECF No. 124 at 18). Although not required to do so, Sonoco also served Güven with a Notice of Damages Hearing which accurately and specifically set forth the time, place, location and purpose of the Damages Hearing (Sonoco Damages Hearing Exhibit 1). The written Notice advised

Güven of his and/or his counsel's right to appear at the Damages Hearing and participate as permitted by law. The Court finds that service of this notice was valid and sufficient under United States law. See [Fed. R. Civ. P. 5\(b\)\(2\)\(C\)](#) (stating that a paper filed after the summons and complaint may be served by "mailing it to the person's last known address"); Local Rule 83.1.07, DSC (requiring counsel seeking withdrawal as counsel to provide the Court "with a mailing address" for the client); ECF No. 98-1 at n. 1 (listing Güven's address). [\*5]<sup>2</sup>

In addition to mailing the Notice by United States Mail in accordance with United States law, the Notice of Damages Hearing was translated into Turkish and the translated Notice of Damages Hearing served on Güven in Turkey. Sonoco has submitted to the Court the Declaration of Murat Karkin stating that the translated Notice of Damages Hearing was served on Güven in Turkey on November 25, 2014, in accordance with Turkish law and procedure. (Sonoco Damages Hearing Exhibit 2).

The Court finds Güven was provided with more than sufficient notice of the Damages Hearing to satisfy United States law, including due process under the United States Constitution. Güven did not attend the Damages Hearing, nor did anyone attend on his behalf. However, because Güven was clearly provided with notice and opportunity to appear and participate at the Damages Hearing, his failure to attend the hearing does not affect in any way the application of this order or the enforceability of a judgment based on this order under United States law. See, e.g., [Davis v. Hutchins](#), 321 F.3d 641, 645-46 (7th Cir. 2003) (rejecting the defendant's argument [\*6] that a default judgment violated due process where the defendant failed to attend hearings on damages since the defendant "was afforded notice and the opportunity to respond."); [Yusov v. Yusuf](#), 892 F.2d 784, 787 (9th Cir. 1989) (affirming default judgment in the sum of \$2,035,387.90 against defendants who failed to attend the hearing on the default judgment where the court found the defendants "had proper notice of the hearing"); see also [Fosberry v. Coyle Bus. Prods., No. 2:10-cv-00799-RMG-BHH, 2012 U.S. Dist. LEXIS 59616 \(D.S.C. April 30, 2012\)](#) (entering a default judgment against a party that was served with a notice of the damages hearing but failed to attend).

<sup>1</sup>Güven also had the right to obtain substitute counsel after October 28, 2014, which he did not do.

<sup>2</sup>Additionally, the Service Address was shown as Güven's address on the consent to withdraw that Güven signed (ECF No. 98-2).

## II. EFFECT OF THE DEFAULT JUDGMENT.

When a default is entered against a defendant, the law is clear that the well-pleaded factual allegations in the complaint are deemed admitted and the court is to accept such factual allegations as true. DIRECTV, Inc. v. Rawlins, 523 F.3d 318, 322 n.2 (4th Cir. 2008) (citing Ryan v. Homecomings Fin. Network, 253 F.3d 778, 780 (4th Cir. 2001)); Mary Kay Inc. v. Ayres, 827 F. Supp.2d 584, 589 (D.S.C. 2011); see also Fosberry v. Coyle Bus. Prods., No. 2:10-cv-00799-RMG-BHH, 2012 U.S. Dist. LEXIS 46061 (D.S.C. March 29, 2012) adopted by, motion granted by, judgment entered by 2012 U.S. Dist. LEXIS 59616 (D.S.C. April 30, 2012). The court must then determine whether the well-pleaded factual allegations in the complaint support the relief sought in the action. Ryan, 253 F.3d at 780; Mary Kay Inc., 827 F. Supp.2d at 590. If liability is established, the court must then determine the appropriate amount of damages. Bank of Camden v. Hooker, No. 8:14-cv-01050-JMC, 2014 U.S. Dist. LEXIS 115017, at \*\*2-3 (D.S.C. Aug. 19, 2014) [\*7] (citing Ryan, 253 F.3d at 780-81). The Court's analysis will proceed in this manner.

## III. FINDINGS OF FACT AS TO LIABILITY.

Having found Güven to be in default, the Court accepts Sonoco's well-pleaded factual allegations as true, including the following factual findings that are particularly material to the damages claims:

1. Güven is a Turkish National who holds a United States Permanent Resident Card (informally known as a Green Card), issued by the United States Government, granting him permanent resident status.
2. Güven was employed by Sonoco from June 1, 1998, to April 5, 2010, when Sonoco terminated his employment.
3. Prior to his employment with Sonoco, Güven had no experience or knowledge of the industrial products business.
4. Through Sonoco's management trainee program, Güven spent time in multiple Sonoco plants, both in the United States and in foreign locations, learning the operations and competitive strategies of the Industrial Products Division of Sonoco.
5. Güven successfully completed Sonoco's management trainee program, and he thereafter accepted an expatriate assignment to be employed as

the Sales and Marketing manager for a Sonoco subsidiary in Bursa, Turkey ("Sonoco Turkey").

6. Güven was heavily [\*8] involved in managing Sonoco Turkey's operations, and Sonoco entrusted him with a high level of management autonomy and information.

7. Güven co-managed Sonoco Turkey with Adem Gürada (Gürada), who was a direct employee of Sonoco Turkey. Güven served as the Sales and Marketing Manager for Sonoco Turkey, and Gürada served as the Regional Operations Manager. Güven and Gürada managed all aspects of Sonoco Turkey's operations.

8. Güven's duties for Sonoco Turkey gave him access to and knowledge of Sonoco's trade secrets and proprietary information, including manufacturing and sales processes, product and sales formulas, manufacturing and sales strategies, pricing formulas and strategies, highly specialized manufacturing devices and equipment, customer lists, source lists, supplier lists, sales contacts, and business relationships (collectively, the "Protected Information").

9. Sonoco's Protected Information includes trade secrets under the South Carolina Trade Secrets Act, S.C. Code Section 39-8-20(5). Sonoco has made reasonable efforts to maintain the secrecy of its trade secrets.

10. Sonoco Turkey's operations are based in large part on Sonoco's Protected Information, so Güven became intimately familiar with the Protected [\*9] Information while managing Sonoco Turkey.

11. Prior to beginning work with Sonoco, Güven entered into an Employee Agreement, whereby he promised to protect certain trade secrets and proprietary information of Sonoco. Through the Employee Agreement, Güven specifically acknowledged and agreed:

- (a) that Sonoco "desires to protect its manufacturing know-how, trade secrets, technical developments, and proprietary information regarding its products and markets";
- (b) that the Protected Information includes, but is not limited to, "written as well as unwritten technical and business information [...], raw material sources, specifications and costs; production equipment configurations and designs; manufacturing techniques and process parameters; confidential marketing information including strategic plans, product preferences and purchasing frequencies

[...]. This proprietary information constitutes valuable trade secrets or confidential information [...] which are the property of [Sonoco], and I agree not to disclose or use the same other than in the business of [Sonoco]";

(c) "not to, directly or indirectly, disclose or make available to any third party or use outside of [Sonoco] during or after [\*10] my employment (including by resignation, termination, or retirement), any proprietary information or trade secrets, including information received by [Sonoco] from third parties under conditions of secrecy, without the prior written consent of an authorized official of [Sonoco]";

(d) "to safeguard all Confidential information at all times so it is not exposed to, or taken by, unauthorized persons, and when entrusted to me will exercise my best efforts to assure its safe-keeping";

(e) that he "shall not, for a period of two (2) years following my last day of employment with [Sonoco], enter into any employment relationship wherein my duties would present a material prospect of disclosure or use of Confidential Information belonging to [Sonoco] or which would otherwise violate [Sonoco's] obligations of secrecy owed to a third party. While the period of this covenant against employment under the circumstances specified in this paragraph shall expire in two (2) years, I acknowledge that my general obligation to refrain from actually using or disclosing proprietary information or trade secrets [...] shall continue beyond this term and specifically until the information shall become public [\*11] through no fault on my part."

12. In addition to the Employee Agreement, before beginning his employment with Sonoco, Güven received and agreed to the terms of Sonoco's Policies on Business Conduct, which sets forth the high ethical standards that Sonoco requires its employees to observe as a term of employment. Güven thereafter received annual copies of Sonoco's Policies on Business Conduct throughout the term of his employment with Sonoco. He regularly acknowledged receipt of the Policies on Business Conduct, and he regularly reaffirmed his promise to abide by them.

13. The Policies on Business Conduct required Güven, among other things, to conduct business in an ethical manner, to deal fairly and honestly, to disclose conflicts

of interest, not to maintain any undisclosed interests in vendors, to protect corporate assets and confidential information, and to use company work time to perform only the business of the company.

14. While employed with Sonoco, Güven and Gürada secretly formed a company called Konfida Ambalaj Tekstil San. Ve Tic. Ltd. &#350;ti. ("Konfida"), for the purpose of competing directly with Sonoco Turkey, using Sonoco's Protected Information for their own purposes [\*12] and pecuniary benefit.

15. Konfida competes directly with Sonoco Turkey, offering identical products to Sonoco's customers, and Konfida manufactures its products using the same formulas, designs, machines, equipment, and supplies as Sonoco Turkey. In particular, and without limitation, Konfida unlawfully uses Sonoco's Proprietary Information to manufacture and sell bobbins for rolled textile products without compensating Sonoco.

16. Konfida's manufacturing operations are virtually identical to Sonoco Turkey's in every respect.

17. The manufacturing equipment used by Sonoco Turkey is custom designed for Sonoco, and is part of its Protected Information.

18. Similarly, the designs of the manufacturing set-ups, the manufacturing processes, and the manufacturing formulas used by Sonoco Turkey are unique to Sonoco and are part of Sonoco's Protected Information.

19. After forming Konfida, and while still employed by Sonoco, Güven and Gürada solicited Sonoco Turkey's employees to work for Konfida.

20. In setting up and operating Konfida, Güven and Gürada used Sonoco's sales formulas, pricing strategies, customer lists, and business relationships to the detriment of Sonoco and for their own personal [\*13] benefit.

21. As the sales manager for Sonoco Turkey, Güven had access to these formulas, strategies, lists, and relationships, which are part of Sonoco's Protected Information.

22. Güven's use of Sonoco's Protected Information for his own competitive purposes has caused irreparable harm to Sonoco.

23. Güven's continued dissemination and use of Sonoco's Protected Information will have severe impacts to Sonoco's competitive position in the industry,



and would unfairly enrich its competitors.

24. Güven's actions regarding the operations of Konfida have caused and will continue to cause Sonoco irreparable and incalculable harm to Sonoco.

25. Güven's above-referenced actions were revealed to Sonoco during the early part of 2010.

26. Prior to leaving Sonoco, Güven and/or Gürada collected tangible information related to Sonoco's customers for Güven to use at Konfida, including product specifications and pricing lists, which are part of Sonoco's Protected Information.

27. Güven continues to operate Konfida in direct competition with Sonoco Turkey, and he continues to use Sonoco's Protected Information on behalf of Konfida.

28. Güven continues to actively solicit Sonoco Turkey employees and poach Sonoco's [\*14] customers, using his access to and knowledge of Sonoco's Protected Information.

29. Güven has breached the Employee Agreement and Policies on Business Conduct by refusing to take reasonable steps to safeguard Sonoco's Protected Information, by using Sonoco's Protected Information for his own personal benefit and advantage and for the purposes and pecuniary benefit of Konfida, and by secretly forming Konfida for the purpose of competing directly with Sonoco Turkey. Sonoco has suffered damages as a direct and proximate result of these breaches.

30. Güven has misappropriated Sonoco's trade secrets, as defined in [S.C. Code Section 39-8-20\(5\)](#). As a direct and proximate result of this misappropriation, Sonoco has suffered damages.

31. Sonoco has willfully disclosed and used Sonoco's Protected Information, evidencing a willful, wanton, or reckless disregard for Sonoco's rights.

32. Güven was a management level employee of Sonoco and owed a duty of loyalty to Sonoco, including the duty not to do disloyal acts looking to future compensation and the duty not to act adversely to the interest of Sonoco by serving or acquiring any private interest of his own in antagonism or opposition to Sonoco.

33. Güven breached his duty of [\*15] loyalty by creating and operating Konfida, by engaging or acquiescing in

soliciting and pressuring Sonoco Turkey's employees, by using or acquiescing in the use of Sonoco employees to perform work for Konfida while those employees were being compensated by Sonoco, by soliciting Sonoco's customers and business relationships, by using Sonoco's Protected Information for his own personal benefit and advantage and for the purposes and pecuniary benefit of Konfida, and by all other manners described more fully above. Sonoco has suffered damages as a direct and proximate result of these breaches.

#### IV. ANALYSIS OF CLAIMS.

Having found the above facts as true, the Court must ensure these facts set forth claims as to which relief can be granted pursuant to the standard of [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#). See *Mary Kay, Inc.*, 827 F.Supp.2d at 590.

##### A. Breach of Contract.

To establish its claim for breach of contract, Sonoco must show the existence of a contract, its breach, and damages caused by the breach. See [Maro v. Lewis](#), 389 S.C. 216, 222, 697 S.E.2d 684, 688 (Ct. App. 2010). Here, the facts establish that Sonoco and Güven entered into the Employee Agreement and, as an additional part of the terms and conditions of his employment contract with Sonoco, received and agreed to the terms of Sonoco's Policies on Business Conduct. Further, [\*16] as set forth above, Güven breached these contracts, and such breach has caused damages to Sonoco.<sup>3</sup>

##### B. Misappropriation of Trade Secrets.

To establish a claim for misappropriation of trade secrets under the South Carolina Trade Secrets Act, a plaintiff must show: (1) the existence of a trade secret; (2) misappropriation, wrongful use, or wrongful

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<sup>3</sup>This Court has already held that Güven's contract with Sonoco, which was formed in the United States, is separate and distinct from agreements between Güven and Sonoco Turkey. (ECF No. 52 at 7). The Court finds that Sonoco has an enforceable contract with Güven regardless of any contract Güven may have with Sonoco Turkey. In any event, Sonoco is pursuing remedies only under its claims for Misappropriation of Trade Secrets and Breach of the Duty of Loyalty.

disclosure of a trade secret by the defendant; and (3) damages. See [S.C. Code Ann. § 39-8-30\(C\)](#); see also [Secure Energy, Inc. v. Coal Synthetics, LLC, 708 F. Supp. 2d 923, 926 \(E.D. Mo. 2010\)](#) (listing these as the elements of a claim under the Missouri Uniform Trade Secrets Act). Here, the findings of fact clearly establish the existence of trade secrets of Sonoco. Sonoco disclosed such trade secrets to Güven only after Güven signed and acknowledged the Employee Agreement, which, among other things, prohibited [\*17] him from using or disclosing Sonoco's trade secrets. Thereafter, the facts reveal that Güven used and disclosed such trade secrets in breach of those contractual duties. Thus, at the time of Güven's use and disclosure of these trade secrets, Güven clearly knew or had reason to know, by virtue of the Employee Agreement, that his knowledge of Sonoco's trade secrets was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use. [S.C. Code Ann. § 39-8-20\(2\)](#) (defining "Misappropriation" to include, among other things, unauthorized "disclosure or use of a trade secret of another without express or implied consent by a person who . . . (ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was . . . (B) acquired . . . under circumstances giving rise to a duty to maintain its secrecy or limit its use."). As set forth below, Sonoco has also shown damages that are permitted under [Section 39-8-40\(B\)](#) of the South Carolina Trade Secrets Act. Consequently, the facts adequately state a misappropriation of trade secrets claim.

### C. Breach of the Duty of Loyalty.

Sonoco's third cause of action is for breach of the duty of loyalty.<sup>4</sup> To establish such a claim, a plaintiff [\*18]

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<sup>4</sup> Under its breach of the duty of loyalty claim, Sonoco seeks to recover compensation it paid to Güven during the time period of Güven's disloyalty. Such damages are separate and distinct from the reasonable royalty that Sonoco seeks to recover under its claim for misappropriation of trade secrets. Consequently, Sonoco is not required to elect between the remedies [\*19] for those two claims. See, e.g., [Homeland Training Center, LLC v. Summit Point Auto. Research Center](#), ("The basic purpose of the doctrine [of election of remedies] is to prevent a plaintiff from obtaining a windfall recovery, either by recovering two forms of relief that are premised on legal or factual theories that contradict one another or by recovering overlapping remedies for the same legal injury."); see also [Vendo Co. v. Stoner 58 Ill.2d 289, 321 N.E.2d 1, 15 \(1974\)](#) (rejecting the defendants' argument that recovery of the salary

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. See [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 \(1972\)](#). The facts establish that, among other things, Güven was an employee of Sonoco and that Sonoco entrusted him with a high level of management autonomy and information. While still employed by Sonoco, Güven formed a competing business using Sonoco's Protected information. As set forth below, Sonoco has shown damages proximately resulting from this breach. Sonoco has established a claim for breach of the duty of loyalty.

Accordingly, the Court finds that the well-pleaded allegations, which Güven is deemed to have admitted, adequately state claims upon which relief may be granted for breach of contract, misappropriation of trade secrets, and breach of the duty of loyalty.

### IV. DAMAGES.

After a court determines, as it has here, that a judgment by default should be entered, it must determine the amount and character of the recovery that should be awarded to the plaintiff. See [Hewitt v. Morris, No. 0:12-666-MGL-PJG, 2012 U.S. Dist. LEXIS 184677, 2012 WL 6864598, at \\*1 \(D.S.C. Dec. 20, 2012\)](#) (quoting 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure [\*20] § 2688 at 63 (3d ed. 1998)).<sup>5</sup>

paid to the disloyal defendant in addition to recovery of the plaintiff's lost profits constitutes an impermissible double recovery).

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<sup>5</sup> The parties do not have the right to a jury trial as to the amount of recovery. See [Adriana Intern. Corp. v. Thoeren, 913 F.2d 1406, 1414 \(9th Cir. 1990\)](#) (stating "after a default judgment has been entered under [Fed. R. Civ. P. 37\(b\)\(2\)](#), a

## A. Actual Damages.

### 1. Misappropriation of Trade Secrets.

The plaintiff in a trade secrets case may recover actual damages for misappropriation. See [S.C. Code Ann. § 39-8-40\(A\)](#). A trade secrets plaintiff does not have to show that the defendant used the information in competition with the plaintiff in order to recover damages from the defendant. See [S.C. Code Ann. § 39-8-20\(2\)](#), [§ 39-8-30\(C\)](#), [§39-8-40](#). In [Trandes Corp. v. Guy F. Atkinson Co.](#), 996 F.2d 655 (4th Cir. 1993), the Fourth Circuit rejected the defendant's argument that its acquisition of the trade secret did not constitute misappropriation because it did not use the trade secret to compete against the plaintiff. *Id.* at 665. The Fourth Circuit explained that the defendant "ignores the language of the statute. The [Maryland Uniform Trade Secrets Act] does not require proof of competition, but only proof of improper acquisition or improper use." *Id.* (emphasis added). In so holding, the Fourth Circuit cited to the definition of "misappropriation" in the [\*21] Maryland Uniform Trade Secrets Act. See *id.* The South Carolina Trade Secrets Act definition of misappropriation is identical in all relevant aspects to the definition in the Maryland Uniform Trade Secrets Act. Compare [Md. Com. Law II Code Ann. § 11-1201\(c\)](#) with [S.C. Code Ann. § 39-8-20\(2\)](#).

A plain reading of the South Carolina Trade Secrets Act confirms that a plaintiff may recover damages using a reasonable royalty theory even if the defendant is not using the plaintiff's trade secrets in direct competition with the plaintiff. [Resolution Trust Corp. v. Eagle Lake and Golf Condominiums](#), 310 S.C. 473, 476, 427 S.E.2d 646, 648 (1993) ("Words used in a statute should be given their plain and ordinary meaning."); [McClanahan v. Richland County Council](#), 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) ("language must be construed in light of the intended purpose of the statute."); [BBA Nonwovens Simpsonville, Inc. v. Superior Nonwovens, LLC](#), 303 F.3d 1332, 1339 (Fed. Cir. 2002) ("The 1997 enactment of the [South Carolina Trade Secrets Act] sought to expand trade secret protection and to implement other pro-business changes to the statute to

make the state more attractive to businesses in the manufacturing and technology areas."). [South Carolina Code Section 39-8-40 \(B\)](#) states that "[d]amages may include both the actual loss caused by misappropriation or the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability [\*22] for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret." Thus, under South Carolina law, a reasonable royalty is recoverable as a damage remedy against one who makes "unauthorized disclosure or use of a trade secret" and is recoverable "in lieu of" actual loss to the plaintiff.

A reasonable royalty focuses on the actual value of a trade secret to the misappropriator and asks what the royalty would have been if both parties were reasonably trying to reach an agreement on legally licensing the trade secret. See, e.g., [University Computing Co. v. Lykes-Youngstown Corp.](#), 504 F.2d 518, 537 (5th Cir. 1974). In looking at the issue of reasonable royalty, the cases suggest that the fact-finder should ask what royalty rate and terms would the plaintiff and defendant arrive at in an arms-length negotiation to license the plaintiff's trade secret(s). See *id.* at 539. "A reasonable royalty may be computed in various ways, including a lump-sum royalty based on expected sales or a running royalty based on a percentage of actual sales." [Secure Energy, Inc. v. Coal Synthetics, LLC](#), 708 F. Supp.2d 923, 932 (E.D. Mo. 2010) (citing [Linkco, Inc. v. Fujitsu Ltd.](#), 232 F. Supp. 2d 182, 188 (S.D.N.Y. 2002)).

In calculating a reasonable royalty, "every case requires a flexible and imaginative approach," [University Computing Co.](#), 504 F.2d at 538-39, but there are a number of factors a fact-finder may consider, including, among others: 1) "[t]he established profitability [\*23] of the product made with the trade secret" and "its commercial success;" 2) "[t]he effect of selling the trade secret product in promoting sales of other products of the defendant;" 3) "[t]he extent to which the defendant has made use of the trade secret; and any evidence probative of the value of that use;" and 4) "[t]he portion of the realizable profit that should be credited to the invention as distinguished from no-trade secret elements, the manufacturing process, business risks, or significant features or improvements added by the defendant." [Secure Energy, Inc. v. Coal Synthetics, LLC](#), 708 F. Supp.2d 923, 932 n. 4 (E.D. Mo. 2010) (citing [Linkco, Inc. v. Fujitsu Ltd.](#), 232 F. Supp. 2d 182, 187 n. 7 (S.D.N.Y. 2002)); [Georgia-Pacific Corp. v.](#)

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party has no right to jury trial under either [Fed. R. Civ. P. 55\(b\)\(2\)](#), which authorizes a district court to hold an evidentiary hearing to determine the amount of damages, or the [Seventh Amendment](#)").

United States Plywood Corp., 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970) (listing fifteen factors the court may consider, which are commonly referred to as the "Georgia-Pacific factors."), *modified and aff'd*, 446 F.2d 295, 296 (2d Cir. 1971)).

At the Damages Hearing on December 17, 2014, Sonoco presented two witnesses to testify regarding Sonoco's reasonable royalty damages. Sonoco presented the testimony of Adam Wood, who is the Vice President of Sonoco Alcore Europe. Sonoco also presented the testimony of Brian Napper, an expert retained by Sonoco to offer an opinion as to Sonoco's reasonable royalty damages. Both Mr. Wood and Mr. Napper were qualified by the Court as experts under the Federal Rules of Evidence.

Mr. Wood offered testimony as to [\*24] the trade secrets used in Sonoco's tubes and cores business, as well as testimony regarding the international tubes and cores market. He also offered credible expert testimony on the amount of estimated sales and revenues derived by Konfida, as well as estimated costs and margin derived by Konfida.<sup>6</sup> Mr. Wood, who was also admitted

as an expert in the international tubes and cores market, testified that it would take ten (10) years to acquire adequate information to establish a viable business in that market without using Sonoco's trade secrets. Mr. Wood's testimony makes clear that the trade secrets have been accumulated over many years by Sonoco and that the use of these trade secrets gives Sonoco a competitive edge by allowing Sonoco to produce products with lower failure rates than its competitors.

Mr. Wood's testimony demonstrated the decreased volume and profitability of its products caused by Güven's misappropriation. [\*26] Mr. Wood further explained how Güven's misappropriation allowed Konfida to experience an unexpected and unusually swift speed to market by way of the head start created by using the proprietary information that Sonoco spent years developing.<sup>7</sup> According to Mr. Wood, this head start has had a disruptive impact on the market that other competitors in Turkey have taken advantage of, to Sonoco's detriment.

Brian Napper offered testimony as to the amount of the reasonable royalty derived from the trade secret. Mr. Napper is a highly qualified expert on issues relating to reasonable [\*27] royalty damages. Mr. Napper is a Senior Managing Director at FTI Consulting. His background is in accounting, finance, and economics. Mr. Napper has over 25 years of experience in the evaluation and quantification of damages arising from intellectual property disputes, including those involving trade secrets. Mr. Napper has testified as an expert in numerous cases throughout the country on the terms of a reasonable royalty and the calculation of reasonable royalty damages, including high profile matters such as *Lucent v. Gateway*, *Uniloc v. Microsoft*, *Finisar v.*

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<sup>6</sup> Güven had the opportunity to provide information regarding Konfida's actual sales and expenses but refused to do so despite orders requiring him to produce such information. See ECF Nos. 80, 95. As set forth above, Güven also had notice of the hearing and the opportunity to cross-examine Sonoco's witnesses at the hearing, but Güven did not appear. Mr. Wood testified that the estimated revenue [\*25] and sales data of Konfida was based on preexisting information and documents created by Sonoco in the ordinary course of business, not in documents created for this litigation. Mr. Napper testified that these types of documents are used by businesses and are appropriate to rely upon. Further, Mr. Wood testified that the data was audited and if there was any doubt as to whether a sale went to Konfida, that sale was not considered as a Konfida sale. The Court finds that the estimated sales and expense data, and Sonoco's use of such data in calculating the reasonable royalty is reasonable, appropriate, and in accordance with the law. See, e.g., U.S.A. Famous Original Ray's Licensing Corp. v. Famous Ray's Pizza Buffet Inc., 2013 U.S. Dist. LEXIS 138615, 2013 WL 5363777, at \*5 (S.D.N.Y. Sept. 26, 2013) adopted, 2013 U.S. Dist. LEXIS 150140, 2013 WL 5664058 (S.D.N.Y. Oct. 17, 2013) (finding the plaintiff's estimation of a trademark infringer's sales and method of calculating the infringer's profits "to be reasonable in light of [the defendant's] refusal to provide evidence to the contrary"); Phat Fashions LLC v. Blue Max Corp., 2005 U.S. Dist. LEXIS 9689, 2005 WL 1221838, at \*2 (S.D.N.Y. May 2, 2005) ("In the absence of any information from [the defendant] on costs, and because [the defendant] has not cooperated in discovery, the

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Court finds that these estimated sales are a fair indicator of profits").

<sup>7</sup> See, e.g., Uhlig v. Shirley, C.A. No. 6:08-cv-01208-JMC, 2012 U.S. Dist. LEXIS 99387 (D.S.C. July 17, 2012) (finding that the information at issue "was economically valuable because it represented a collective view of specific customer relationships that would allow someone to immediately compete for the customer's business without having to spend a significant amount of time researching the customer needs, preferences, and pricing tolerances"); Sunbelt Rentals, Inc. v. Head and Engquist Equip., LLC, 174 N.C. App. 49, 620 S.E.2d 222, 229 (N.C. App. 2005) (holding that the occurrence of the new company's significant profit and concurrent decrease in plaintiff's business "alone is circumstantial evidence of the defendants' use and disclosure of [plaintiff's] trade secret information").



*DirecTV*, *3Com v. Realtek*, and *CSIRO v. Toshiba*.

Mr. Napper explained that the key determination is what Sonoco and Güven would have agreed is a reasonable payment or royalty specifically for the claimed Sonoco trade secrets in an arms-length negotiation. The *Georgia-Pacific* factors are designed to reach this determination. Mr. Napper considered all the *Georgia-Pacific* factors to calculate the reasonable royalty. Mr. Napper focused on the commercial relationship between the parties as competitors, the established profitability of the trade secrets by Sonoco and years of development that went into Sonoco's development of the trade [\*28] secrets, the established policy and marketing program of Sonoco to maintain its control over the trade secret by not licensing others to use it, the lost sales and profitability that Sonoco has lost to Konfida as a result of the misappropriation, and the head start benefits that Güven and Konfida obtained through the use of the claimed trade secrets.

Based on Mr. Napper's analysis, Mr. Napper testified that, in an arms-length transaction between Sonoco and Güven, the reasonable royalty rate negotiated by them would be six percent (6%) of Konfida sales. Mr. Napper validated this percentage by considering the *Georgia-Pacific* factors. When that rate is applied to estimated gross sales from 2010 through the end of 2013, the reasonable royalty amount for that time period is \$1,991,146. Mr. Napper testified that this number was actually less than the head start advantage that was gained by Güven and his company, Konfida, of \$2.1 million, thus corroborating the accuracy of his 6% reasonable royalty rate. Mr. Napper also testified that, in his opinion, the reasonable royalty rate should extend through 2017. Mr. Napper testified that the reasonable royalty damages from 2014 through 2017, discounting [\*29] to present value damages from the hearing to 2017, are \$2,800,892. Mr. Napper testified that the total reasonable royalty damages would therefore be \$4,792,052. Mr. Napper testified that the evidence considered and the method of calculation was appropriate to determine a reasonable royalty rate and the reasonable royalty damages for Sonoco to be assessed against Güven. Mr. Napper testified that all of his opinions on reasonable royalty were held by him to a reasonable degree of certainty based on his experience and training.

The Court finds, based on the credible evidence in the record, that reasonable royalty damages on Sonoco's claim for misappropriation of trade secrets should be imposed against Güven in the amount of \$4,792,052.00.

## 2. Breach of Duty of Loyalty.

A plaintiff is entitled to collect all damages proximately resulting from the breach of duty of loyalty. See *Lowndes Prods. Inc.*, 259 S.C. at 335, 191 S.E.2d at 768; see also *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467, 473 (S.C. Ct. App. 2004). The plaintiff also is entitled to a disgorgement of the profits that the wrongdoer received as a result of his disloyalty. See *Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 144, 382 S.E.2d 915, 917 (1982); see also *United States v. Bowen*, 290 F.2d 40, 44 (5th Cir. 1961). In addition, the South Carolina Supreme Court has indicated that an employer is entitled to recover wages paid to an employee during periods where the employee has been [\*30] disloyal. See *Futch v. McAllister Towing*, 335 S.C. 598, 612 n. 7, 518 S.E.2d 591, 598 n. 7 (1999) (citing *Chelsea Industries, Inc. v. Gaffney*, 389 Mass. 1, 449 N.E.2d 320, 326-28 (Mass. 1983) (indicating disloyal employee may be required to pay back compensation received during periods of disloyalty); *Simulation Systems Technologies, Inc. v. Oldham*, 269 N.J. Super. 107, 634 A.2d 1034, 1037 (N.J. Super. Ct. App. Div. 1993) (same); *Fidelity Fund, Inc. v. Di Santo*, 347 Pa. Super. 112, 500 A.2d 431, 439-40 (Pa. Super. Ct. 1985) (same)). "The general rule is that an employee is not entitled to any compensation for services performed during the period he engaged in activities constituting a breach of his duty of loyalty even though part of those services may have been properly performed." *Futch*, 335 S.C. at 607-08, 518 S.E.2d at 596. In particular, if the employee's "conduct constitutes a willful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned." *Id.* at 608 n. 4, 518 S.E.2d at 596 n. 4.

Sonoco has requested reimbursement of the compensation that Sonoco paid Güven while he was acting in breach of his duty of loyalty. Sonoco presented evidence at the hearing that Güven officially became half owner of Konfida on May 16, 2007. Sonoco's well-pleaded allegations, which are deemed admitted by Güven, establish that Konfida was secretly founded for the purposes of competing with Sonoco Turkey, and was formed using Sonoco's Protected Information. Further, Güven used Sonoco's sales formulas, pricing strategies, customer lists, and business relationships [\*31] in setting up and operating Konfida. After forming Konfida, and while still employed by Sonoco, Güven solicited employees of Sonoco Turkey. All of this conduct was willful. Consequently, the Court

finds that Güven willfully breached his duty of loyalty to Sonoco starting in May 2007, and, therefore, Sonoco is entitled to reimbursement of the compensation it paid to Güven from May 16, 2007 through April 5, 2010. Sonoco presented the testimony of Jimmy Shelley, the Manager of Base Compensation for Sonoco, who is in charge of handling all the compensation for Sonoco's expatriate employees, such as Güven, and who presented the Court with the calculations of the compensation that Sonoco paid Güven during this time period. According to Mr. Shelley, this amounted to \$611,548.51. The Court finds, based on credible evidence in the record, that Sonoco is entitled to \$611,548.51 in damages on its claim for breach of Güven's duty of loyalty.

### **B. Exemplary Damages for Violation of the South Carolina Trade Secrets Act.**

[South Carolina Code section 39-8-40](#) provides that "[u]pon a finding of willful, wanton, or reckless disregard of the plaintiff's rights, the court may award separate exemplary damages in an amount not exceeding twice any award" [\*32] of actual damages. [S.C. Code § 39-8-40](#). The Court finds that Sonoco is entitled to an award of exemplary damages pursuant to [South Carolina Code Section 39-8-40](#) in an amount of twice the reasonable royalty. As stated above, the Court accepts Sonoco's well-pleaded allegations as true, including its allegation that Güven's misappropriation was "willful." See Complaint at ¶69; [RBC Bank \(USA\) v. Epps, No.: 4:11-cv-00124-RBH, 2013 U.S. Dist. LEXIS 966, at \\*4 \(D.S.C. Jan. 2, 2013\)](#) (awarding treble damages pursuant to [S.C. Code Ann. § 39-5-140](#) where "[b]y virtue of the entry of default, the allegations of the Plaintiff's well-pleaded Complaint are deemed admitted, including the allegations that the Defendants' violations were willful."); see also [Adriana Intern. Corp., 913 F.2d at 1414-15](#) (affirming the district court's award of punitive damages following entry of a default judgment).

The well-pleaded allegations of the Complaint, which, under federal law, the Court must accept as true, further establish that, prior to his employment with Sonoco, Güven had no experience or knowledge of the industrial products business. As an employee of Sonoco, Sonoco entrusted Güven with "a high level of management autonomy and information." While employed by Sonoco, Güven used Sonoco's protected trade secrets and proprietary information, as well as its resources and supplies, to secretly [\*33] form and operate Konfida in direct competition with Sonoco. Konfida manufactures

its products using the same formulas, designs, machines, equipment and supplies as Sonoco Turkey. Konfida's manufacturing operations are virtually identical to that of Sonoco Turkey. The manufacturing processes and formulas used by Sonoco Turkey are part of Sonoco's Protected Information. Moreover, prior to leaving Sonoco, Güven collected tangible information relating to Sonoco's customers to use at Konfida, including product specifications and pricing lists, which are part of Sonoco's Protected Information. In addition, Güven engaged in bad faith during the litigation by disobeying the Court's orders and refusing to produce information regarding Konfida. See ECF. No. 124. This is a clear case of a willful and wanton disregard of Sonoco's rights.

Consequently, the Court finds that Sonoco is entitled to an award of exemplary damages in the amount of \$9,584,076, which represents two times Sonoco's actual damages for its misappropriation of trade secrets claim (see Damages Hearing Exhibit 3).

### **C. Attorneys' Fees Under the South Carolina Trade Secrets Act.**

A successful trade secrets plaintiff is entitled to an [\*34] award of reasonable attorneys' fees if a "willful misappropriation exists." [S.C. Code Ann. § 39-8-80](#) ("If . . . willful misappropriation exists, the court may award reasonable attorney's fees to the prevailing party."). The Court finds that Sonoco is entitled to an award of reasonable attorneys' fees pursuant to [South Carolina Code Section 39-8-80](#). Sonoco is the "prevailing party" in this litigation. Further, as stated above, the Court accepts Sonoco's well-pleaded allegations as true, including its allegation that Güven's misappropriation was "willful." See Complaint at ¶69; [Epps, 2013 U.S. Dist. LEXIS 966, at \\*4](#).

Sonoco seeks attorneys' fees in the amount of \$573,785.28 in this action.<sup>8</sup> The Court's determination of the reasonableness of a fee award begins with the Court's calculation of the lodestar figure, which "is calculated by multiplying a reasonable hourly rate by the reasonable time expended." *Layman v. State*, 376 S.C.

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<sup>8</sup> This amount includes the fees of \$39,896.02 related solely to Sonoco pursuing sanctions against the Defendant for his failure to comply with the [\*35] discovery orders of this Court. It also includes the application of a 15% long-term client discount specific to Sonoco.

434, 458, 658 S.E.2d 320, 332-33 (2008) (citing [Dennis v. Columbia Colleton Med. Ctr., Inc.](#), 290 F.3d 639, 652 (4th Cir. 2002)); see also [Liberty Mut. Ins. Co. v. Emp. Res. Mgmt., Inc.](#), 176 F.Supp.2d 510, 532 (D.S.C. 2001). "Using this [lodestar figure] as a starting point for reasonableness, a court may consider other factors justifying an enhancement of the lodestar figure with a 'multiplier' before arriving at a final amount." [Layman](#), 376 S.C. at 458, 658 S.E.2d at 332-33 (citing [Edmonds v. United States](#), 658 F.Supp. 1126, 1148 (D.S.C. 1987)).

The Fourth Circuit has adopted a twelve-factor test for making a lodestar determination:

- (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorney's fees awards in similar cases.

[Emp. Res. Mgmt., Inc.](#), 176 F.Supp.2d at 532. There is no strict manner in which these twelve factors are to be considered and applied. See [id. at 532](#). "Likewise, a district court is under no obligation to go through the inquiry of those factors that do not fit the circumstances of the particular case [\*36] for which fees are sought." [Id.](#) The Court applies these factors as follows:

#### **1. Time and labor expended.**

Sonoco has submitted the affidavit of Mr. William C. Boyd from Haynsworth Sinkler Boyd (ECF No. 133-1), which has acted as Sonoco's counsel in this matter. According to Mr. Boyd's Affidavit, Sonoco's attorneys have expended 2,255.1 hours of attorney and paralegal time in connection with this matter. Sonoco's attorneys began representation in July 2010 and this lawsuit was commenced on June 20, 2011. Sonoco was required to respond to a motion to dismiss on the grounds of forum non-conveniens, as well as challenges as to the subject matter jurisdiction of the Court, and the appropriateness

of maintaining this litigation in this Court. Sonoco was successful in defeating those challenges.

In addition, this case involved lengthy disputes over the Defendant's discovery responses and obligations, including many failed attempts to voluntarily resolve those disputes. Sonoco pursued discovery from Güven for over a year and a half before Güven ultimately refused to produce the information despite the Court's orders. As part of Sonoco's pursuit, after several letters and efforts to obtain the information, [\*37] Sonoco filed and briefed its motion to compel and reply in support thereof, as well as its opposition to Güven's motion for reconsideration of the Court's order granting the motion to compel. In addition, Sonoco filed and briefed two motions for sanctions when Güven refused to produce the information Sonoco sought.

#### **2. The novelty and difficulty of the questions raised.**

This case involved trade secrets of a highly technical nature. It also involved complicated legal and procedural questions involving a Turkish National and analysis of the law of Turkey.

#### **3. The skill required to properly perform the legal services rendered.**

The highly technical trade secrets and international procedural issues in this case require a high degree of skill and knowledge.

#### **4. The attorney's opportunity costs in pressing the instant litigation.**

As noted above, Sonoco's counsel has documented over 2,255.1 hours of attorney and paralegal time in connection with this matter. Such a time commitment represents a significant opportunity cost in terms of other cases that could have been handled during the same period.

#### **5. The customary fee for like work.**

The Affidavit of Mr. Boyd states that the litigation team on this matter [\*38] includes shareholders H. Sam Mabry, III; J.W. Matthews, III, and John M. Florence, Jr. Mr. Mabry's billing rate is \$400 per hour, Mr. Matthews' billing rate is \$310 per hour, and Mr. Florence's rate is \$325 per hour. Mr. Boyd's rate is \$475 per hour.



According to Mr. Boyd's Affidavit, Associate Attorneys and paralegals were relied upon heavily to help lessen the costs to Sonoco. The Associates were billed between \$155 and \$250 per hour, and paralegals were billed between \$160 and \$180 per hour. See ECF No. 133-1 ¶¶10-14. The Court notes that a 15% discount was applied.

Mr. Boyd's Affidavit attaches portions of *The Survey of Law Firm Economics* conducted and published by Incisive Legal Group for 2011, 2012 and 2013, and compares the South Carolina rates in *The Survey of Law Firm Economics* to the rates charged in this matter. The comparison reveals that the hours charged in litigating this matter are lower than the 9th Decile rate listed in *The Survey of Law Firm Economics* for the years 2011, 2012 and 2013. See ECF No. 133-1 ¶¶18-20.

The Court finds that the rates charged to Sonoco in this matter are fair and reasonable for like work. See also *Layman*, 376 S.C. at 460, 658 S.E.2d at 334 (approving rates of \$500-\$600); [\*Savani v. URS Prof'l Solutions LLC\*, C.A. No.: 1:06-cv-02805-JMC, 2014 U.S. Dist. LEXIS 5092 \(D.S.C. Jan. 15, 2014\) \[\\*39\]](#) (quoting the declaration of Professor John Freeman that the customary rate for services by experienced counsel is in the range of \$500-\$650 per hour in an ERISA case); [\*Palmetto Health Credit Union v. Open Solutions Inc.\*, C.A. No. 3:08-cv-3848-CMC, 2011 U.S. Dist. LEXIS 692, at \\*17 \(D.S.C. Jan. 4, 2011\)](#) (approving rate of \$385 for partner).

#### **6. The attorney's expectations at the outset of the litigation.**

The Court finds that this factor does not affect the attorney's fee in this case.

#### **7. The time limitations imposed by the client or circumstances.**

The Court finds that this factor does not affect the attorney's fee in this case.

#### **8. The amount in controversy and the results obtained.**

As indicated above, Sonoco sought, and recovered, actual damages of \$5,403,600.61, including \$4,792,052

for the Misappropriation of Trade Secrets claim.<sup>9</sup>

#### **9. The experience, reputation and ability of the attorney.**

The Affidavit of William C. Boyd establishes that Sonoco's litigation team is composed of highly experienced, reputable, and able attorneys. See ECF No. 133-1 ¶¶10-13. The Court finds that the hours spent on this case by Sonoco's attorneys are commensurate and reasonable in light of their respective levels of experience as compared to those that would have been spent by other attorneys of comparable experience.

#### **10. The undesirability of the case.**

While this was a complex case, it was not per se undesirable. Thus, this factor will be deemed a neutral factor that will not affect the award of fees in this case.

#### **11. The nature and length of the professional relationship between attorney and client.**

The Affidavit of Mr. Boyd establishes that he and his firm have a longstanding relationship with Sonoco. Based on that relationship, Sonoco has already imposed a 15% discount on its fees. The Court finds that this longstanding relationship does not warrant a downward adjustment, and, even if it did, the discount more than satisfies any such adjustment. If anything, the fact that Sonoco has previously paid these [\*41] rates weighs in favor of a finding that the fees are reasonable. See [\*Employee Res. Mgmt., Inc.\*, 176 F.Supp.2d at 538](#) ("when an attorney has performed work for a client in the past, and the client has previously paid the same customary rates charged by the attorney, that evidence weighs in favor of a finding that the fees sought are reasonable.").

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<sup>9</sup>Furthermore, the Court finds that the claim for misappropriation of trade secrets is interrelated with the claims for breach of fiduciary duty and breach of contract such that the work on the trade secrets claim cannot be separated out. See [\*Uhlig, LLC v. Shirley\*, 895 F. Supp. 2d 707, 711 n. 3 \(D.S.C. 2012\)](#) (finding that attorneys' fees awarded under claim for misappropriation of trade secrets were interrelated with claims for breach of fiduciary duty and [\*40] breach of contract); see also [\*Hensley v. Eckerhart\*, 461 U.S. 424, 435, 103 S. Ct. 1933, 76 L. Ed. 2d 40 \(1983\)](#).

January 8, 2015

Greenville, South Carolina

**12. Attorney's fees awards in similar cases.**

The Court finds that the requested fee award is in line with fee awards in similar cases. See [\*Super Duper, Inc. v. Mattel, Inc.\*, C.A. No. 6:05-cv-1700-HFF-WMC, 2009 U.S. Dist. LEXIS 28421, 2009 WL 866463 \(D.S.C. Mar. 31, 2009\)](#) (finding a request for fees in the amount of \$2,643,844.15 appropriate in a complex trademark and patent infringement case litigated over more than three years and involving experienced in-state and out-of-state counsel); *GTR Rental, LLC v. DalCanton*, 547 F. Supp. 2d 510, 524 (D.S.C. 2008) (awarding fees of \$550,000 in case involving claims of breach of fiduciary duty, fraud, conversion, misappropriation of trade secrets, and unfair trade practices); [\*Palmetto Health Credit Union\*, 2011 U.S. Dist. LEXIS 692, at \\*17](#) (awarding attorney's fees of \$748,703.38 in case involving claims of breach of contract, fraud, and unfair trade practices).

Applying these factors, the Court finds that an award of attorney's fees in the amount of \$573,785.28 is reasonable. The Court notes that this is the amount billed and actually paid by Sonoco [\*42] with the 15% discount given to Sonoco. The Court is not using a multiplier to increase the award of attorney's fees, which the Court would have discretion to do.

**CONCLUSION**

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment be entered in this action in favor of Plaintiff Sonoco Products Company against Defendant Levent Güven for:

1. the sum of \$4,792,052.00 as actual damages for misappropriation of trade secrets;
2. the sum of \$611,548.51 as actual damages for breach of the duty of loyalty;
3. the sum of \$9,584,076.00 as exemplary damages for Güven's willful, wanton, or reckless misappropriation of Sonoco's trade secrets; and
4. the sum of \$573,785.28 as attorneys' fees under [section 39-8-80](#) of the South Carolina Trade Secrets Act.

**IT IS SO ORDERED.**

/s/ Bruce Howe Hendricks

United States District Judge

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**STATE OF SOUTH CAROLINA  
BEAUFORT COUNTY**

**IN THE COURT OF COMMON PLEAS  
CIVIL ACTION NO. 2016-CP-07-2541**

Forum Benefits, LLC,

Plaintiff,

v.

Brian Bannon and Assured Partners, NL

Defendants.

**PLAINTIFF'S RESPONSE TO  
DEFENDANTS' FOURTH MOTION FOR  
SUMMARY JUDGMENT**

Plaintiff Forum Benefits, LLC provides the following Response to Defendants' Fourth Motion for Summary Judgment. Defendants' Fourth Motion for Summary Judgment raises many of the same arguments previously rejected by the Court in Defendants' First Motion for Summary Judgment, and as before, genuine disputes of material fact exist for each cause of action to preclude summary judgment.

**I. Introduction**

The present litigation involves claims between a former employer (Forum Benefits), its former employee (Defendant Brian Bannon), and his current employer (Defendant Assured Partners, NL). Forum Benefits and Assured Partners are competitors in the field of benefits administration, and each company services clients by identifying and tailoring insurance coverage to meet the individual needs of their respective clients. Forum Benefits employed Bannon as a W-2 employee from 2009 to 2013, and from 2013 until November 15, 2016, Bannon provided services to Forum Benefits as an independent contractor. Unbeknownst to Forum Benefits, Bannon signed an employment agreement with Assured Partners on October 4, 2016, while still providing services to Forum Benefits and having access to Forum Benefits' confidential information and proprietary trade secrets.

During the 6-week overlap when Bannon was providing services to Forum Benefits and employed by Assured Partners, Bannon and Assured Partners used Bannon's passwords and clients credentials to secretly download and copy thousands of Forum Benefits' files containing confidential information and proprietary trade secrets. Bannon and Assured Partners then used these misappropriated trade secrets to mimic Forum Benefits' services to entice clients to switch from Forum Benefits to Assured Partners. As a result, Forum Benefits has asserted claims against both Defendants for violation of the S.C. Trade Secrets Act and interference with a contractual relationship and against Bannon for breach of contract, conversion, and breach of fiduciary duty.

Substantial admissible evidence exists in the pleadings, discovery responses, and deposition testimony that undercuts Defendants' arguments and demonstrates disputed facts regarding the existence of a signed employment agreement between Forum Benefits and Bannon and that the thousands of files misappropriated by Bannon and Assured Partners contain proprietary trade secrets. Defendants' wrongful actions have damaged Forum Benefits by causing it to lose \$200K in annual revenue, diminishing the value of its business by at least \$550K and arguably substantially more. Therefore, Forum Benefits respectfully requests denial of Defendants' present Motion in its entirety.

## **II. Material Facts**

### **A. Undisputed Material Facts**

#### **1. Bannon was an employee of Assured Partners employee while still holding himself out as Forum Benefits' agent of record.**

The parties do not dispute Bannon's employment history with Forum Benefits. Bannon was employed by Forum Benefits as a W2 employee from 2009 to 2013. Answer, ¶ 5. On April 30, 2013, Bannon ceased being an W2 employee and became an independent contractor for

Forum Benefits. *Id.* Bannon continued to be paid as an independent contractor for Forum Benefits through November 11, 2016. Ex. A, Prelim. Inj. Tr., pp. 79-80. Bannon testified that he never notified Forum Benefits that he became an employee of Assured Partners for fear that Forum Benefits would immediately terminate his access to Forum Benefits' SharePoint server. *Id.*, at 76.

The parties also do not dispute that, while still holding himself out as Forum Benefits' insurance agent, Bannon became an employee of Assured Partners at least as early as October 15, 2016. Assured Partners first approached Bannon about employment in late July-August of 2016. *Id.*, at 74-75. Assured Partners extended an employment offer to Bannon on September 15, 2016. Ex. B, 9/15/16 Letter. According to the offer, Bannon's first day of employment would be October 15, 2016. *Id.* Bannon accepted the employment offer on October 4, 2016. Ex. C, Acceptance.

**2. Bannon downloaded Forum Benefits' files while employed by Assured Partners**

The parties do not dispute that Bannon downloaded files from Forum Benefits beginning in October and continuing right up until November 15, 2016, when Brian Stritt learned that Bannon was employed by Assured Partners. Forum Benefits has produced a log file showing that between October 1, 2016 and November 14, 2016, Bannon downloaded 2,107 files from Forum Benefits' SharePoint server. Ex. D, Bannon Log File. Bannon has admitted that he downloaded all of these files to his desktop and laptop computers. Ex. A, Prelim. Inj. Tr., p. 72; Ex. E, Bannon Dep. Tr., pp. 43-45.

**3. Bannon assisted Assured Partners to copy files from Forum Benefits' Employee Navigator system.**

The parties also do not dispute that Bannon assisted Assured Partners in copying files from Forum Benefits' Employee Navigator system. Beginning at least as early as October 27,

2016, Bannon began providing Assured Partners with the usernames and passwords for Forum Benefits' clients that would allow Assured Partners to take screenshots of files from Forum Benefits' Employee Navigator system. Ex. F, Emails. In contemporaneous emails, Bannon and Assured Partners both acknowledged the urgency of copying the Employee Navigator files while Bannon still had access credentials to the files so Assured Partners could create client reports that mimic Forum Benefits' work. Ex. G, Emails; see Ex. K, Ward Dep. Tr., pp. 57-59, 85.

**4. Forum Benefits restricted access to its confidential and proprietary information.**

The parties do not dispute that Forum Benefits restricted access to the SharePoint server and Employee Navigator system to authorized users with password credentials. Specifically, Stritt, Forum Benefits' owner, testified that Forum Benefits uses passwords to protect access to the SharePoint server, and only authorized employees and agents of Forum Benefits receive password credentials. Ex. H, Stritt Dep. Tr., p. 76. Forum Benefits similarly provides usernames and passwords to clients to restrict access to the Employee Navigator system. *Id.*, at 48, 80-81.

As Defendants discuss in the present Motion, Forum Benefits previously demonstrated the effectiveness of its efforts to restrict access to its confidential and proprietary information when Assure South ceased being an authorized agent of Forum Benefits. Mem. in Supp., p. 5. Specifically, Assure South previously had a relationship with Forum Benefits, and when Assured Partners purchased Assure South, Forum Benefits promptly terminated all access Assure South had to the SharePoint server and Employee Navigator system. *Id.*

Bannon and Assured Partners recognized the effectiveness of the password protection by secretly downloading and copying all files from the SharePoint server and Employee Navigator

system before Forum Benefits learned that Bannon was employed by Assured Partners and revoked the necessary credentials. Ex. A, Prelim. Inj. Tr., p. 76; Ex. G, Emails.

**B. Disputed Material Facts**

**1. Bannon signed an employment agreement with Forum Benefits.**

The parties dispute whether Bannon ever signed an employment agreement with Forum Benefits. Bannon acknowledged that he was required to sign an employment agreement with his previous employer. Ex. E, Bannon Dep. Tr., p. 30. Bannon also acknowledged that he was required to sign an employment agreement with Assured Partners. Ex. A, Prelim. Inj. Tr., p. 75. However, Bannon denies that he ever signed an employment agreement with Forum Benefits. Ex. A, Prelim. Inj. Tr., 55-56; Ex. E, Bannon Dep. Tr., p. 30.

In contrast, Stritt testified that he engaged David Wyatt of the Gleaton Wyatt law firm to prepare an employment agreement for Bannon. Ex. H, Stritt Dep. Tr., pp. 98-100. Stritt further testified that he personally delivered the employment agreement to Bannon, that Bannon signed the employment agreement before receiving his first paycheck, and that Stritt placed the signed employment agreement in Bannon's employment file. Ex. H, Stritt Dep. Tr., p. 145; Ex. A, Prelim. Inj. Tr., pp. 24-28. Stritt discovered that the signed employment agreement, along with Bannon's entire employment file, was missing on November 15, 2016 when he received new Agent of Record letters indicating that Bannon was then employed by Assured Partners. Ex. H, Stritt Dep. Tr., p. 101.

**2. The information that Bannon downloaded/copied/shared with Assured Partners constitutes trade secrets.**

The parties dispute whether the files that Bannon and Assured Partners downloaded and copied from Forum Benefits' SharePoint server and Employee Navigator system contain trade secrets. Defendants summarily argue that none of the 2,107 files that Bannon downloaded from



the SharePoint server and none of the files copied from the Employee Navigator system include any information that qualifies as a trade secret under the S.C. Trade Secret Act, despite the urgent efforts Defendants exercised to surreptitiously obtain these files.

In contrast, Forum Benefits has produced many examples of the files misappropriated by Defendants, and Stritt has testified repeatedly and extensively about the formulas, compilations, processes, designs, etc. included in the misappropriated materials that constitute proprietary trade secrets. *See, e.g.*, Ex. A, Prelim. Inj. Tr., pp. 36-37; Ex. H, Stritt Dep. Tr., pp. 69-72, 83, 85-87, 96, 114-116, 129. As a specific example of a particularly sensitive file copied by Bannon, Stritt has described in detail the enormous volume of proprietary formulas incorporated into 31 different tabs of an excel spreadsheet that forms the basis for Forum Benefits' renewal presentation for clients. Ex. H., Stritt Dep. Tr., p. 229; Ex. I, Renewal Spreadsheet.<sup>1</sup>

### **3. Forum Benefits can prove damages proximately resulting from Defendants' conduct.**

The parties also dispute whether Forum Benefits sustained any damages as a result of Defendants' conspiratorial actions to steal Forum Benefits' trade secrets. Defendants wrongfully assert that Plaintiff did not suffer any damages and even suggest that Defendants' actions increased Forum Benefits' profitability.

Forum Benefits has identified multiple ways to calculate damages caused by Defendants' actions. For example, Stritt explained that Defendants' actions caused a loss in annual revenue of \$200,232. Ex. H, Stritt Depo. Tr., pp. 148-151, Ex. 1; Ex. L, Forum Benefits 30(b)(6) Dep. Tr., pp. 100-106, Ex. 7. Stritt explained that companies generally apply a multiplier to annual revenue to calculate the present value the stream of revenue. For example, Mac Ward, a current

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<sup>1</sup> When printed as a pdf, as done for Ex. I, the cells containing the proprietary formulas are filled with shading to prevent disclosure of the proprietary formulas. *See, e.g.*, Ex. I, Renewal Spreadsheet, p. 64. Forum Benefits can provide the native excel spreadsheet for the Court's review *in camera*.

employee of Assured Partners, testified that in 2016 Assured Partners used a multiplier of 2.75 to calculate the present value of Assure South's annual stream of revenue. Ex. K, Ward Dep. Tr., pp. 8-9, 11, 14-17. Stritt testified that in 2016 the purchaser of Forum Benefits used a multiplier of 4.25 to calculate the present value of Forum Benefits' annual stream of revenue. Ex. H, Stritt Dep. Tr., pp. 148-151. Alternately, Stritt testified that in 2016 the purchaser of Forum Benefits reduced the purchase price paid to Stritt based on the anticipated loss in annual revenue caused by Defendants' actions. *Id.*, at 14-15. Therefore, competent evidence supports a jury award of actual damages in this case ranging from \$550K (according to Ward's testimony) to the reduction in the purchase price paid during the purchase of Forum Benefits in 2016.

### III. Analysis

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." S.C. R. Civ. P. 56(c). The moving party has the burden of establishing the absence of any genuine issue as to a material fact. *Id.*; *Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing, and Regulation*, 337 S.C. 476 (Ct. App. 1999). "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." *Osborne v. Adams*, 346 S.C. 4, 7 (2001). "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Carolina Alliance*, 337 S.C. at 485; *see also Holloman v. McAllister*, 289 S.C. 183, 186 (1986) (explaining that summary judgment is "an extreme remedy to be cautiously invoked.")

In this case, Defendants fail to establish the absence of a genuine dispute as to any material fact. Accordingly, the Court should deny the present Motion in its entirety.

**A. A Genuine Dispute of Fact Exists Regarding the Existence of a Signed Employment Agreement and the Confidential Obligations Included in the Employment Agreement**

**1. The Statute of Frauds does not bar the breach of contract claim against Bannon.**

Defendants first argue that the statute of frauds bars the breach of contract claim against Bannon because Forum Benefits cannot produce a copy of the employment agreement signed by Bannon. Mem. in Supp., pp. 12-14. The existence of a signed employment agreement is a disputed question of fact.

As an initial point, at the hearing on Defendants' first motion for summary judgment, Defendants argued that they did not assert the statute of frauds as an affirmative defense because Defendants did not realize that Forum Benefits could not produce a signed employment agreement. While Assured Partners may not have known if Bannon signed an employment agreement, Bannon certainly knew whether or not he signed an employment agreement. Bannon's failure to assert the statute of frauds defense until after Forum Benefits was unable to produce a signed employment agreement is evidence that Bannon signed the employment agreement and was surprised to learn that Forum Benefits no longer had a copy of the signed employment agreement.

In any event, when the existence of a contract is disputed and the evidence creates more than a reasonable inference of its existence, the question is one for the jury. *Kumpf v. United Tel. Co. of the Carolinas*, 311 S.C. 533 (Ct. App. 1993). In the present case, Bannon acknowledged that he was required to sign an employment agreement with his previous employer and, more recently, with Assured Partners, his current employer. Ex. E, Bannon Dep. Tr., p. 30; Ex. A, Prelim. Inj. Tr., p. 75. Although he acknowledged that he knew Forum Benefits was preparing an employment agreement for his signature, Bannon denies that he ever signed an employment

agreement with Forum Benefits. Ex. A, Prelim. Inj. Tr., pp. 55-56; Ex. E, Bannon Dep. Tr., p. 30.

Stritt's testimony directly contradicts Bannon's testimony. Stritt testified that he engaged David Wyatt of the Gleaton Wyatt law firm to prepare an employment agreement for Bannon. Ex. H, Stritt Dep. Tr., pp. 98-100. Stritt explained that he "would not have started an office [in Charleston] with hundreds of thousands of dollars without one." *Id.* Stritt further testified that he personally delivered the employment agreement to Bannon, that Bannon signed the employment agreement before receiving his first paycheck, and that Stritt placed the signed employment agreement in Bannon's employment file. *Id.*, at 145; Ex. A, Prelim. Inj. Tr., pp. 24-28.

During discovery, Forum Benefits identified that David Wyatt will "testify that Plaintiff engaged him for the specific purpose of preparing an employment agreement for Brian Bannon," and Wyatt's testimony corroborates Stritt's testimony. *See* Ex. J, Pl.'s Disc. Resp.

Stritt discovered that the signed employment agreement, along with Bannon's entire employment file, was missing on November 15, 2016 when he received new Agent of Record letters indicating that Bannon was then employed by Assured Partners. Ex. H, Stritt Dep. Tr., p. 101. As soon as Stritt received new Agent of Record letters indicating that Bannon was employed by Assured Partners, Stritt went to retrieve Bannon's employment file stored in Stritt's office. It was at this time, nearly seven years after Bannon signed his employment agreement, that Stritt discovered Bannon's entire employment file was missing. *Id.*, at 100-106, 112-113. Stritt suspects someone took Bannon's employment file from his office. *Id.*, at 100-101, 103, 111.

Bannon admits that he never informed Forum Benefits that he had been working for Assured Partners, a direct competitor of Forum Benefits, for four weeks while Bannon continued to represent Forum Benefits as an insurance agent. Ex. E, Bannon Dep. Tr., pp. 28-29. During this four-week overlap (from October 15, 2016 until November 15, 2016), Bannon attended meetings at Forum Benefits' office discussing clients who subsequently transferred their business to Assured Partners. Bannon's secretive efforts to hide his employment relationship with Assured Partners for four weeks, while working at Forum Benefits' office and downloading 2,107 files without permission, is substantial proof to support Stritt's suspicion that Bannon removed his employment file. The suspicious nature of Bannon's "lost" employment agreement and entire employment file supports a reasonable inference that Bannon removed the file from Stritt's office.

Bannon's testimony that he signed an employment agreement with every other employer except Forum Benefits, Stritt's testimony that Bannon signed an employment agreement with Forum Benefits, and the sudden disappearance of Bannon's entire employee file creates a number of possible inferences for a jury to resolve. *Kumpf v. United Tel. Co. of the Carolinas*, 311 S.C. 533, 429 S.E.2d 869 (Ct. App. 1993) (If the existence of a contract is disputed and the evidence creates more than one reasonable inference, the question is one for the jury). Therefore, the evidence demonstrates a genuine dispute regarding whether Bannon signed an employment agreement with Forum Benefits, precluding summary judgment for this claim based on the statute of frauds.

**2. The covenant not to use or disclose trade secrets is unlimited in time.**

Defendants also argue that even if Forum Benefits could produce a signed employment agreement, Bannon's obligations under the employment agreement expired before any alleged breach occurred. Mem. in Supp., p. 15. According to Defendants, the employment agreement

only applied during the “employment relationship” and any restrictive covenants expired two years after Bannon ceased being Forum Benefits’ employee in 2013. *Id.* Therefore, Defendants assert that Bannon’s actions in 2016 cannot breach any covenant in the employment agreement. Defendants’ arguments fail to acknowledge that the employment agreement included a covenant not to disclose trade secrets that was unlimited in time. Ex. M, Employment Agreement, Ex. A to Compl.

Paragraph 12(a) of the employment agreement specifically acknowledges that Forum Benefits “has information that is confidential and constitutes trade secrets which [Forum Benefits] uses in its business, and which is essential to its continued ability to compete and be successful in the industry.” *Id.* Paragraphs 12(b)-(c) incorporate the definition of “trade secrets” provided in the S.C. Trade Secret Act, as amended. *Id.* Paragraphs 12(d)-(e) provide specific examples of Forum Benefits’ trade secrets, including many of the items Bannon downloaded and shared with Assured Partners. *Id.* Paragraph 12(f) specifically provides that

Employee [Bannon] covenants and agrees that during Employee’s [Bannon’s] employment **and at all times thereafter**, Employee [Bannon] **shall not use any Trade Secrets** of the Company [Forum Benefits], except as an employee of the Company [Forum Benefits] with the consent of the Company [Forum Benefits]. Employee [Bannon] further covenants and agrees that during Employee’s [Bannon’s] employment **and at all times thereafter**, Employee [Bannon] **shall not use or disclose any Trade Secrets** of the Company [Forum Benefits] to any firm, company, corporation, association or other entity, for any reason or purpose whatsoever, except as an employee of the Company [Plaintiff] with the consent of the Company [Forum Benefits].

*Id.* (emphasis added).

The clear and unambiguous language of the employment agreement prohibits Bannon from ever copying and sharing Forum Benefits’ confidential information and trade secrets without permission. The S.C. Trade Secret Act provides that this obligation not to use or

disclose trade secrets “**must not** be considered void or unenforceable or against public policy for lack of a durational or geographical limitation.” S.C. Code § 39-8-30(D) (emphasis added). Therefore, Bannon’s contractual obligations not to disclose or use Forum Benefits’ trade secrets without its consent is not limited in duration and is enforceable.

The parties do not dispute that Bannon used and shared Forum Benefits’ trade secrets without consent. Defendants admit that Bannon “downloaded everything from Plaintiff’s SharePoint system that was in his clients’ files.” Mem. in Supp., p. 6. The uncontested evidence establishes that Bannon actually downloaded 2,107 files from Forum Benefits’ SharePoint server. Ex. D, Bannon Log File. Bannon admitted that he downloaded these files to both his desktop and laptop computers. Ex. A, Prelim. Inj. Tr., p. 72; Ex. E, Bannon Dep. Tr., pp. 43-45. Defendants also admit that obtaining this information saved them time and resources. Mem. in Supp., p. 7. Most disturbingly is the undisputed fact Bannon downloaded and shared Forum Benefits’ confidential information and trade secrets while employed by Assured Partners and simultaneously representing Forum Benefits as a broker.

Viewing the evidence in the light most favorable to Forum Benefits, Defendants have failed to establish the absence of a material fact as to whether or not Bannon breached the covenants not to use or disclose Plaintiff’s trade secrets as contained within paragraph 12 of the employment agreement. Accordingly, Defendants’ arguments premised on a durational time limit should be denied.

**B. Forum Benefits Has Identified Substantial Evidence of Violation of the S.C. Trade Secrets Act**

In shotgun fashion, Defendants again make multiple arguments to refute Forum Benefits’ claim of trade secret misappropriation. Defendants previously raised most of these same arguments in their first motion for summary judgment. As before, Defendants’ arguments



contradict the S.C. Trade Secrets Act and ignore substantial evidence that Bannon and Assured Partners surreptitiously downloaded and copied thousands of files containing formulas, compilations, processes, designs, etc. that constitute proprietary trade secrets before Forum Benefits learned that Bannon was employed by Assured Partners and terminated his password credentials.

**1. Bannon maintained a confidential relationship with Forum Benefits as an independent contractor.**

In a new argument, Defendants urge that Forum Benefits must establish a confidential relationship with Bannon to pursue a claim for trade secret misappropriation under the S.C. Trade Secrets Act. Mem. in Supp., pp. 15-16. Defendants' new argument is misplaced for two reasons.

First, Defendants ignore the fact Bannon was an employee of Forum Benefits from 2009 until April 30, 2013, and Bannon signed an employment agreement at the outset of this employment relationship. Notably, his employment agreement established a fiduciary relationship not to use or disclose Forum Benefits' trade secrets "*at all times thereafter.*" To the extent a confidential relationship is required to maintain a cause of action for violation of the S.C. Trade Secrets Act, which Plaintiff denies, Bannon's execution of the employment agreement in 2009 satisfies this requirement.

Second, the S.C. Trade Secrets Act does not require a plaintiff to establish either an employer-employee or confidential relationship to assert a claim for trade secret misappropriation. To the contrary, the S.C. Trade Secret Act provides "A person aggrieved by a misappropriation, wrongful disclosure, or wrongful use of his trade secrets may bring a civil action to recover damages incurred as a result of the wrongful acts and to enjoin its appropriation, disclosure, use, or wrongful acts pertaining to the trade secrets." S.C. Code § 39-

8-30(C) (emphasis added). Similarly, section 39-8-40(A) authorizes a “complainant” to recover actual damages for misappropriation of trade secrets. “To succeed on a [trade secret misappropriation] claim, a plaintiff must show that it has a trade secret and that the defendant misappropriated the trade secret. S.C. Code Ann. § 39-8-30(C).” *Vessel Medical, Inc. V. Elliott*, 2015 WL 5437173 (D.S.C. 2015). The S.C. Trade Secret Act does not, and never has, required that a “person aggrieved” or a “complainant” must establish an employment or confidential relationship as argued by Defendants. To inject such a requirement would permit businesses like Assured Partners to misappropriate trade secrets from competitors with impunity.

Defendants rely on *Computer Prods. v. Jem Rest. Group, Inc.*, Charleston County Court of Common Pleas, Case No. 04-CP-10-301 (2005) to argue that an independent contractor cannot misappropriate trade secrets under the S.C. Trade Secrets Act. With due respect to Judge Goodstein, nothing in the S.C. Trade Secrets Act limits trade secret misappropriation to employees, and the South Carolina Court of Appeals avoided the issue by ruling that the plaintiff had failed to preserve the issue of whether the S.C. Trade Secrets Act is applicable to independent contractors. *Computer Prods. v. Jem Rest. Group, Inc.*, 2007 S.C. App. Unpub. LEXIS 150, at \*2 (Ct. App. 2007). Rather than limiting liability for trade secret theft to only employees, as Defendants suggest, S.C. Code section 39-8-30(B) enlarges an employee’s obligations to his or her employer “independently of and in addition to any written contract of employment.” The S.C. Trade Secrets Act contains no requirement for a plaintiff to establish an employee-employer or confidential relationship.

**2. Forum Benefits has provided substantial evidence that Defendants misappropriated Forum Benefits’ trade secrets.**

As in the first motion for summary judgment, Defendants again argue that Forum Benefits cannot show misappropriation of a trade secret. According to Defendants, Forum

Benefits cannot establish that any of the files and information downloaded by Defendants qualify as a trade secret. Mem. in Supp., pp. 21-22. Defendants alternately argue that Forum Benefits failed to take any steps to protect any trade secrets. *Id.*, at 18-20. Defendants alternately argue that no misappropriation occurred because Forum Benefits provided Bannon with access to Forum Benefits' trade secrets and Bannon was free to download, use, and share those trade secrets with Assured Partners. *Id.*, at 17-18.

Defendants again argue that Forum Benefits cannot establish that any of the files and information downloaded by Defendants qualify as a trade secret. *Id.*, at 21-22. The S.C. Trade Secret Act provides the operative definition of a trade secret, as follows:

(a) information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code that:

(i) 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

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(b) A trade secret may consist of a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy. The collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.

S.C. Code § 39-8-20(5) (emphasis added).

As previously discussed, paragraphs 12(b)-(c) of the employment agreement incorporate the definition of "trade secrets" provided in the S.C. Trade Secret Act. Ex. M, Employment Agreement, Ex. A to Compl. Paragraphs 12(d)-(e) provide specific examples of Plaintiff's trade

secrets, including many of the items Bannon downloaded and shared with Assured Partners. Stritt has testified repeatedly and extensively that the misappropriated files contain formulas, compilations, processes, designs, etc. that constitute proprietary trade secrets. *See, e.g.*, Ex. A, Prelim. Inj. Tr., pp. 36-37; Ex. H, Stritt Dep. Tr., pp. 69-72, 83, 85-87, 96, 114-116, 129. As a specific example of a particularly sensitive file copied by Bannon, Stritt has described in detail the enormous volume of proprietary formulas incorporated into 31 different tabs of the excel spreadsheet that forms the basis for Forum Benefits' renewal presentation for clients. *Id.*, at 229; Ex. I, Renewal Spreadsheet. The formulas, compilations, processes, designs, etc. identified by Stritt fall squarely within the statutory definition of a trade secret and the examples provided in the employment agreement.

Stritt's testimony also describes the substantial cost and time Assured Partners saved by taking screenshots of the Employee Navigator files so Assured Partners could quickly mimic Forum Benefits' design and appearance of client reports. Ex. H, Stritt Dep. Tr., pp. 44, 87. While the raw client data itself is not a trade secret, Forum Benefits' design of templates that organize and present client data in the Employee Navigator system constitutes a protectable trade secret. The undisputed evidence establishes that Bannon provided client credentials to Assured Partners so Assured Partners could take "screenshots" of Forum Benefits' templates in the Employee Navigator system so Assured Partners could then duplicate those templates for clients transferring to Assured Partners. Ex. E, Bannon Dep. Tr., pp. 43-46, 61, 67-69, 73-74. The urgent efforts Defendants exercised to secretly obtain these files demonstrates the economic value of these trade secrets. *See* Ex. K, Ward Dep. Tr., pp. 85-86. Therefore, Forum Benefits has more than adequately established a genuine dispute that the files misappropriated by

Defendants contain trade secrets as defined by the S.C. Trade Secrets Act and Bannon's employment agreement.

Defendants alternately argue that even if the misappropriated files contain trade secrets, Forum Benefits failed to take any steps to protect any trade secrets. Mem. in Supp., pp. 18-20. Referring again to the statute, the S.C. Trade Secrets Act requires "efforts that are reasonable under the circumstances to maintain" the secrecy of the trade secrets. S.C. Code § 39-8-20(5)(a)(ii) (emphasis added). It is undisputed that Forum Benefits uses passwords to protect access to files on the SharePoint server and Employee Navigator system. Ex. H, Stritt Dep. Tr., pp. 48, 76, 80-81. It is also undisputed that only authorized employees and agents of Forum Benefits receive password credentials for either system. *Id.*

Forum Benefits has previously demonstrated the effectiveness of its measures to protect its trade secrets from unauthorized access. As Defendants discuss in the present Motion, Assure South previously had a relationship with Forum Benefits, and when Assured Partners purchased Assure South, Assure South was no longer an authorized agent of Forum Benefits. Mem. in Supp., p. 5. As a result, Forum Benefits promptly terminated all access Assure South had to the SharePoint server and Employee Navigator system. *Id.* Assure South and Assured Partners subsequently filed a lawsuit against Forum Benefits (approximately three years later) claiming that Forum Benefits' actions improperly prevented Assure South and Assured Partners from accessing information on the SharePoint server and Employee Navigator system. Although Forum Benefits denies that it did anything improper, neither Assure South nor Assured Partners can dispute the effectiveness of Forum Benefits' efforts to protect access its proprietary trade secrets stored on the SharePoint server and Employee Navigator system.

Based on Assured South's and Assured Partners' previous experience with Forum Benefits, Bannon and Assured Partners definitely recognized the effectiveness of Forum Benefits' protections of trade secrets by attempting to download and copy all files from the Sharepoint server and Employee Navigator system before Forum Benefits learned that Bannon was employed by Assured Partners and revoked the necessary credentials. *See*, Ex. A, Prelim. Inj. Tr., p. 76; Ex. G, Emails. Forum Benefits immediately revoked Bannon's password credentials once Stritt learned that Bannon was an employee of Assured Partners. Therefore, Forum Benefits' password protections and Defendants' secretive efforts to circumvent those password protections at least demonstrate a question of fact regarding the reasonableness of Forum Benefits' efforts to protect its trade secrets.

Defendants suggest Forum Benefits' efforts to protect its trade secrets are insufficient based upon the district court's reasoning in *Sonoco Products*, 2015 U.S. Dist. LEXIS at 1906 (D.S.C. Jan. 8, 2015) and *Industries Packaging Supplies v. Davidson*, No. 6:18-0651-TMC, 2018 U.S. Dist. LEXIS 234771. Mem. in Supp., pp. 20-21. Neither court required the use of multiple passwords, policies within an employee handbook, or agreements with customers or independent contractors as Defendants suggest. Nor does the S.C. Trade Secret Act require such measures. Instead, the S.C. Trade Secret Act simply requires "efforts that are reasonable under the circumstances," and Forum Benefits had previously demonstrated with Assure South and Assured Partners that its password credentials adequately protected unauthorized access to Forum Benefits' trade secrets.

Lastly, Defendants alternately argue that no misappropriation occurred because Forum Benefits provided Bannon with access to Forum Benefits' trade secrets and Bannon was free to download, use, and share those trade secrets with Assured Partners. Mem. in Supp., pp. 17-18.

This argument completely ignores overwhelming and undisputed evidence that Bannon and Assured Partners used improper means to misappropriate Forum Benefits' trade secrets.

The S.C. Trade Secret Act defines "improper means" to include "theft, . . . breach or inducement of a breach of a duty to maintain secrecy, duties imposed by the common law, statute, contract." S.C. Code Ann. § 39-8-20(1). The S.C. Trade Secret Act further defines "misappropriation" as follows:

- (a) acquisition of a trade secret of another by a person by improper means;
- (b) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (c) disclosure or use of a trade secret of another without express or implied consent by a person who:
  - (i) used improper means to acquire knowledge of the trade secret; or
  - (ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:
    - (A) derived from or through a person who had utilized improper means to acquire it;
    - (B) acquired by mistake or under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
    - (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
  - (iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

S.C. Code Ann. § 39-8-20(2).

Bannon readily admitted that he secretly downloaded thousands of files from the SharePoint server and passed credentials for the Employee Navigator system to Assured



Partners, and this undisputed evidence demonstrates theft of Forum Benefits' trade secrets. As previously discussed, the clear and unambiguous language of the employment agreement prohibits Bannon from ever copying and sharing Forum Benefits' confidential information and trade secrets without permission. By doing so, Bannon violated contractual, fiduciary, and statutory duties to not disclose Forum Benefits' confidential and proprietary information, further demonstrating improper means to misappropriate Forum Benefits' trade secrets. Defendants completely ignore compelling and undisputed evidence that their secretive efforts to copy everything they wanted before Forum Benefits learned that Bannon was an employee of Assured Partners constitute multiple acts of trade secret misappropriation as defined by the S.C. Trade Secret Act. At the very least, a genuine issue of material fact exists as to whether or not Bannon and Assured Partners misappropriated Forum Benefits' trade secrets.

**C. Bannon Breached His Fiduciary Duties to Forum Benefits by Misappropriating Proprietary Trade Secrets**

Defendants take the position that Bannon was an independent contractor and therefore owed no fiduciary duty to Forum Benefits. Mem. in Supp. of MSJ, pp. 23-25. This argument ignores the undisputed facts of this case and once again mischaracterizes precedent.

It is well-settled and often-quoted that a "confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Davis v. Greenwood Sch. Dist.* 50, 365 S.C. 629 (2005) (citing *Hendricks v. Clemson Univ.*, 353 S.C. 449 (2003)); *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599 (Ct. App. 1987). Defendants do not dispute that Bannon was an employee of Forum Benefits from 2009 to 2013 and then an independent contractor from 2013 to 2016. A genuine dispute of material fact exists as to whether or not Bannon signed an employment agreement with Forum

Benefits. As previously discussed, that employment agreement prohibited Bannon from ever disclosing or using Forum Benefits' trade secrets without consent. It is undisputed that Forum Benefits entrusted Bannon with password credentials to Forum Benefits' proprietary trade secrets while Bannon was an employee and later an agent for Forum Benefits. Ex. H, Stritt Dep. Tr., p. 76. Bannon's receipt, protection, and use of these password credentials – for over seven years – demonstrates a fiduciary relationship between Bannon and Forum Benefits that required Bannon to “act in good faith and with due regard to the interests” of Forum Benefits.

It is also undisputed that between October 15 and November 14, 2016, when Bannon was both Forum Benefits' agent and Assured Partners' employee, Bannon secretly used his password credentials to download 2,107 files from Forum Benefits' Sharepoint server. Ex. A, Prelim. Inj. Tr., p. 72; Ex. E, Bannon Dep. Tr., pp. 43-45. Bannon demonstrated that he knew that his actions were contrary to Forum Benefits' interests by keeping his employment with Assured Partners a secret from Forum Benefits for fear of having his password credentials revoked. Ex. A, Prelim. Inj. Tr., p. 76. Bannon and Assured Partners both acknowledged the urgency of copying the proprietary trade secrets while Bannon still had password credentials to the files. Ex. G, Emails. This intentional and conscious disregard for his fiduciary obligations to Forum Benefits provides more than adequate evidence to support Forum Benefits' claim that Bannon breached his fiduciary duties, requiring denial of Defendants' present Motion with respect to the breach of fiduciary duty claim.

Defendants once again mischaracterize the holding in *Computer Products*.<sup>2</sup> On appeal to the South Carolina Court of Appeals, Computer Products argued that Valmus owed a duty of

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<sup>2</sup> As an unpublished decision, the opinion has no precedential value and should not be cited or relied on as precedent in any proceeding.

loyalty because Valmus was its agent/employee. The Court of Appeals summarily dismissed this argument because Computer Products had conceded at trial that Valmus was an independent contractor, not its employee. *Computer Prods. v. Jem Rest. Group, Inc.*, 2007 S.C. App. Unpub. LEXIS 150, at \*2 (Ct. App. 2007). Therefore, Defendants' statement that the "South Carolina Court of Appeals has specifically ruled that a fiduciary duty/duty of loyalty does not exist under common law in an independent contractor relationship" is simply not accurate.

**D. Defendants Interfered with Forum Benefits' Contractual Relationships by Misappropriating Proprietary Trade Secrets**

As in the first motion for summary judgment, Defendants again argue that Forum Benefits has produced no evidence that Bannon or Assured Partners improperly obtained or used Forum Benefits' trade secrets to interfere with its clients. Mem. in Supp., of MSJ, pp. 23-25. As previously discussed, Forum Benefits has identified substantial evidence that Defendants secretly stole Forum Benefits' trade secrets and confidential information to entice clients to shift business from Forum Benefits to its competitor Assured Partners.

It is uncontradicted that during a four-week period (October 15, 2016 to November 15, 2016) Bannon hid his employment with Assured Partners while continuing to act as a broker for Forum Benefits. While Bannon hid his employment with Assured Partners, Bannon admitted that he used his password credentials to download 2,107 files from Forum Benefits' Sharepoint server. Ex. D, Bannon Log File; Ex. A, Prelim. Inj. Tr., p. 72; Ex. E, Bannon Dep. Tr., pp. 43-45.

During this same time, Bannon also provided Assured Partners with the usernames and passwords for Forum Benefits' clients to allow Assured Partners to take screenshots of Forum Benefits' templates from the Employee Navigator system. Ex. F, Emails. In contemporaneous emails, Bannon and Assured Partners both acknowledged the urgency of copying the Employee

Navigator files while Bannon still had password credentials to the Employee Navigator system. Ex. G, Emails. Bannon described how this information was used to “build” profiles that mimic Forum Benefit’s design and appearance of client reports. Ex. E, Bannon Dep. Tr., pp. 20-23; Pl. Ex. 13. Stritt described the substantial time and benefit Assured Partners gained by using this information to quickly mimic Forum Benefits’ design and appearance of client reports to entice clients to transfer their business from Forum Benefits to Assured Partners. Ex. H, Stritt Dep. Tr., pp. 44, 87.

During this same four-week period, Bannon coordinated Agency of Record changes with clients to prevent Forum Benefits from even knowing that he was already an employee of Assured Partners and taking business away from Forum Benefits.

Defendants rely upon Bannon’s status as an independent contractor to argue that he had unrestricted access to Forum Benefits’ proprietary trade secrets. According to Defendants, Bannon did nothing improper when he used his credentials to provide a competitor access to copy Forum Benefits’ templates from the Employee Navigator system. Mem. in Supp., p. 24. Defendants’ argument fails to acknowledge that Bannon was contractually bound not to use or disclose Forum Benefits’ trade secrets. Moreover, Defendants ignore the statutory protections provided by the S.C. Trade Secret Act to prevent persons or entities from misappropriating, wrongfully using, and/or wrongfully disclosing another’s trade secrets.

Finally, Defendants argue there is no evidence to establish that Assured Partners obtained or used any of Forum Benefits’ information, and therefore, this claim should be dismissed against Assured Partners. Memo. in Supp., p. 24-25. This argument completely ignores the substantial evidence previously discussed. Specifically, the uncontradicted evidence establishes that Assured Partners not only received client password credentials, but Assured Partners used

those credentials to take screenshots of Forum Benefits' templates in the Employee Navigator system.

While clients are certainly free to select their preferred benefit provider, the undisputed evidence is that Bannon and Assured Partners misappropriated Forum Benefits' proprietary trade secrets so Defendants could duplicate Forum Benefits' work in far less time than it would take Defendants to perform the work themselves. These intentional acts of trade secret theft enabled Defendants to interfere with existing contracts between Forum Benefits and its clients. Therefore, Defendants have failed to establish a basis for summary judgment, and the Court should deny the present Motion with respect to the claim for interference with contractual relationship.

**E. Forum Benefits Has Identified Substantial Evidence that Bannon Misappropriated Trade Secrets for his Own Benefit**

Defendants argue that the conversion claim against Bannon fails because Bannon returned Forum Benefits' tangible property (after being ordered to do so), and no legal basis exists for a conversion claim based upon intangible property, *i.e.*, Forum Benefits' trade secrets downloaded from the SharePoint server and Employee Navigation system. Memo. in Supp., pp. 25-26. Defendants also argue that the conversion claim against Bannon fails because Bannon merely copied Forum Benefits' traded secrets, without altering or deleting the trade secrets, and Bannon ultimately lost all access to the pirated trade secrets when his laptop broke. *Id.*, at 27. Once again, Defendants' arguments are misplaced.

**1. Bannon's misappropriation of Forum Benefits' intangible property constitutes actionable conversion.**

Defendants first argue that intangible property cannot be the subject of a claim for conversion. *Id.*, at 25-26. The South Carolina Supreme Court has defined conversion as "the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels

belonging to another to the exclusion of the owner's rights.” *Gignilliat v. Gignilliat, Savitz & Bettis, LLP*, 385 S.C. 452, 465 (2009). As the South Carolina Supreme Court explained, “An action for conversion ordinarily lies only for personal property that is tangible, or to intangible property that is merged in, or identified with, some document.” *Id.* The court specifically concluded that the tort of conversion applies to “intangible property rights that are identified with some document.” *Id.*

The claim for conversion against Bannon not only applies to the computer that Bannon has since returned, but it also applies to the trade secrets (e.g., formulas, compilations, processes, designs, spreadsheets) that Bannon misappropriated. Compl., ¶ 26. This information is precisely the type of intangible property contemplated by the court in *Gignilliat* in that it is “merged in, or identified with, some document.” *Id.* All of the trade secrets stolen by Bannon and then transferred to Assured Partners constitute electronic copies of actual documents.

Although South Carolina courts do not appear to have discussed whether electronic versions of documents may be subject to claims of conversion, in *Integrated Direct Mktg., LLC v. Drew May & Merkle, Inc.*, 2016 Ark. 281 (2016), the Arkansas Supreme Court was asked to answer a certified question from the District Court for the Eastern District of Virginia: “Under Arkansas’s tort of conversion, can intangible property such as electronic data, standing alone and not deemed a trade secret, be converted?” The Arkansas Supreme Court answered in the affirmative, stating “There is simply no reasonable basis for allowing a claim for conversion of paper documents but not for their electronically stored counterparts. *Id.*”

The decision in *Integrated Direct Marketing* is persuasive authority, consistent with the South Carolina Supreme Court’s rationale in *Gignilliat*, to allow a conversion claim for intangible property “merged in or identified with some document.” The intangible trade secrets

misappropriated by Bannon are indistinguishable from the files allegedly stolen in *Integrated Direct Marketing*. Therefore, Bannon's misappropriation of Forum Benefits' trade secrets constitutes actionable conversion.

**2. Bannon's misappropriation of Forum Benefits' trade secrets deprived Forum Benefits' of the exclusive use of its trade secrets.**

Defendants also argue that the claim for conversion fails because Bannon merely copied Forum Benefits' trade secrets, without altering or deleting the trade secrets, and he ultimately lost all access to the pirated trade secrets when his laptop broke. Memo. in Supp., p. 27. Defendants too narrowly apply the definition of "conversion" to exclude Bannon's unauthorized copying and use of Forum Benefits' trade secrets.

"Conversion is defined as the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights." *Moseley v. Oswald*, 376 S.C. 251, 254 (S.C. 2008); *SSI Med. Servs. v. Cox*, 301 S.C. 493, 498 (1990). As the court in *Moseley* stated, the issue in a conversion action is whether the person accused of conversion exercised unauthorized control over the converted property. *Id.* In the context of trade secrets, it is axiomatic that the owner of a trade secret has the right to control the use and secrecy of the trade secret. As previously discussed, Bannon's covert efforts during the four-week overlap when he was an employee of Assured Partners and an agent of Forum Benefits demonstrate that he knew he was not authorized to download and transfer Forum Benefits' trade secrets to Assured Partners. Bannon's misappropriation of Forum Benefits' trade secrets destroyed Forum Benefits' exclusive right to control the use and secrecy of its trade secrets. Bannon no doubt parlayed his conversion of Forum Benefits' trade secrets to obtain favorable employment terms with Assured Partners, and it is of no consequence that Bannon



ultimately lost all of the converted trade secrets when his laptop broke. Therefore, Bannon's conversion of Forum Benefits' trade secrets for his own use constitutes actionable conversion.

**F. Forum Benefits has Provided Substantial Evidence of Damages**

As previously asserted in Defendants' Third Motion for Summary Judgment, which Defendants subsequently withdrew, Defendants again argue that Forum Benefits cannot prove actual damages. Memo. in Supp., pp. 27-30. Defendants acknowledge that Defendants' actions negatively impacted the value of Forum Benefits, but argue the purchaser of Forum Benefits mitigated any damages by reducing the purchase price for Forum Benefits based on the anticipated negative impact. Defendants alternately argue that any damages are speculative, ostensibly because Forum Benefits has not retained an expert witness for use at trial.

**1. The purchasers' reduction of the purchase price and imposition of an earn-out clause provides credible evidence of damages caused by Defendants' actions.**

Defendants argue that Forum Benefits has no damages because, although the purchaser reduced the purchase price for Forum Benefits, the reduction in the purchase price was allocated to an earn-out clause that Stritt ultimately received. *Id.*, at 28. This argument ignores the decreased value that the purchaser and Stritt agreed approximated the damages caused by Defendants in an arms-length transaction. It also confuses Stritt's ability to satisfy the requirements of the earn-out clause with mitigation of Forum Benefits' damages.

As Defendants correctly identify, the purchaser assessed the damages caused by Defendants' actions and reduced the purchase price paid to Stritt by an equal amount. *Id.* The reduction in the purchase price, in an arms-length negotiation between the purchaser and Stritt, provides persuasive evidence of actual damages directly caused by Defendants' actions.

As Defendants further correctly describe, the purchaser allocated the reduction in the purchase price to an earn-out clause that Stritt, not Forum Benefits, could earn if Stritt increased

Forum Benefits' profitability by a specified percentage. As Defendants acknowledge, Stritt implemented significant new measures to ensure that Forum Benefits' profitability exceeded the specified percentage, and Stritt received the full earn-out. *Id.* However, the earn-out payment to Stritt was the result of increased profitability that Stritt accomplished through cost-cutting measures, reduced or deferred compensation, and new business. The earn-out payment to Stritt provided no relief to Forum Benefits for the damages caused by Defendants' actions. Therefore, contrary to Defendants' arguments, the reduction in the purchase price and allocation of that reduction to the earn-out clause provides probative evidence of Forum Benefits' actual damages, not any mitigation of damages.

## **2. Plaintiff's damages are not speculative.**

Defendants alternately argue that any damages are speculative, ostensibly because Forum Benefits has not retained an expert witness for use at trial. *Id.*, at 28-30. Defendants' argument ignores multiple sources of evidence that establish Forum Benefits' actual damages without the need for expert testimony.

It is well-established that the amount of damages must be established with reasonable certainty or accuracy. *Whisenant v. James Island Corp.* 277 S.C. 10, 13 (1981). "While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required." *Id.* "The problematic nature of proving damages for loss of profits in a tort action will not prevent recovery where . . . the plaintiff can present evidence from which the court can make 'fair and reasonable approximation of them.'" *Petty v. Weyerhaeuser Co.*, 288 S.C. 349, 355 (Ct. App. 1986). A plaintiff may recover lost prospective profits from the tortious conduct of a defendant when "he can prove: (1) it is reasonably certain that such profits would have been realized except for the tort; and (2) such lost profits can be ascertained and measured from the evidence

produced with reasonable certainty.” *Id.*; *Vortex Sports & Entm’t, Inc. v. Ware*, 378 S.C. 197, 208 (Ct. App. 2008).

Forum Benefits has identified multiple ways to calculate damages caused by Defendants’ actions. For example, Stritt explained that Defendants’ actions caused a loss in annual revenue of \$200,232. Ex. H, Stritt Depo. Tr., pp. 148-151, Ex. 1; Ex. L, Forum Benefits 30(b)(6) Dep. Tr., pp. 100-106, Ex. 7. Stritt explained that companies generally apply a multiplier to annual revenue to calculate the present value of the stream of revenue. For example, Ward, a current employee of Assured Partners, testified that in 2016 Assured Partners used a multiplier of 2.75 to calculate the present value of Assure South’s annual stream of revenue. Ex. K, Ward Dep. Tr., pp. 8-9, 11, 14-17. Stritt testified that in 2016 the purchaser of Forum Benefits used a multiplier of 4.25 to calculate the present value of Forum Benefits’ annual stream of revenue. Ex. H, Stritt Dep. Tr., pp. 148-151. Alternately, Stritt testified that in 2016 the purchaser of Forum Benefits reduced the purchase price paid to Stritt based on the anticipated loss in annual revenue caused by Defendants’ actions. *Id.*, at 14-15. Therefore, Forum Benefits has identified competent evidence to establish actual damages with reasonable certainty, and those actual damages range from \$550K (according to Ward’s testimony) to the reduction in the purchase price paid during the purchase of Forum Benefits in 2016.

Defendants’ argument that expert testimony is required to prove Forum Benefits’ actual damages attempts to overstate the difficulty in calculating a stream of revenue and ignores the substantial, competent testimony previously discussed. Neither the S.C. Trade Secrets Act nor the common law of this state require the use of expert testimony to prove damages in a civil lawsuit. Rule 702 of the South Carolina Rules of Evidence permits the introduction of expert testimony when it will assist the trier of fact to understand the evidence or determine a fact in

issue. As discussed above, Forum Benefits will establish its actual damages to a reasonable certainty through the substantial, competent evidence identified above, and any expert testimony would unnecessarily parrot this evidence without assisting the trier of fact. Accordingly, Defendants' motion for summary judgment on the basis that Forum Benefits' actual damages are speculative should be denied.

#### **IV. Conclusion**

Forum Benefits respectfully asserts that Defendants have once again failed to demonstrate the absence of a genuine dispute of material fact for any of the causes of action. Therefore, the Court should deny Defendants' Fourth Motion for Summary Judgment in its entirety.

Respectfully submitted,

s/Steven R. LeBlanc  
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***Attorneys for Plaintiff Forum Benefits, Inc.***

**CERTIFICATE OF SERVICE**

I certify that on June 7, 2020, I filed under seal **PLAINTIFF'S RESPONSE TO DEFENDANTS' FOURTH MOTION FOR SUMMARY JUDGMENT** to be served on all counsel of record by means of the Court's Notice of Electronic Filing and email.

Respectfully submitted,

\_\_\_\_\_  
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***Attorneys for Plaintiff Forum Benefits, Inc.***

**STATE OF SOUTH CAROLINA**

**BEAUFORT COUNTY**

**IN THE COURT OF COMMON PLEAS**

**CIVIL ACTION NO. 2016-CP-07-2541**

Forum Benefits, Inc.,

Plaintiff,

v.

Brian Bannon and Assured Partners, NL

Defendants.

# Exhibit A

| Page 1 |                                                  | Page 3 |                                            |
|--------|--------------------------------------------------|--------|--------------------------------------------|
| 1      | IN THE COURT OF COMMON PLEAS                     | 1      | DOCUMENTARY EVIDENCE                       |
| 2      | FOURTEENTH JUDICIAL CIRCUIT                      | 2      | NUMBER DESCRIPTION PAGE                    |
| 3      | STATE OF SOUTH CAROLINA                          | 3      |                                            |
| 4      | COUNTY OF BEAUFORT                               | 4      | EX-A Affidavit of Service dated 12-2-16 4  |
| 5      | FORUM BENEFITS, INC.,                            | 5      | EX-B Affidavit of Service dated 12-5-16 4  |
| 6      | Plaintiff,                                       | 6      | EX-C Printout of client files 22           |
| 7      |                                                  | 7      |                                            |
| 8      |                                                  | 8      |                                            |
| 9      |                                                  | 9      |                                            |
| 10     | vs. CIVIL ACTION NUMBER                          | 10     | REPORTER'S NOTE: EXHIBIT C WAS RETAINED BY |
| 11     | 2016-CP-07-2541                                  | 11     | PLAINTIFF'S COUNSEL.                       |
| 12     |                                                  | 12     |                                            |
| 13     |                                                  | 13     |                                            |
| 14     |                                                  | 14     |                                            |
| 15     | BRIAN BANNON AND ASSURED PARTNERS, NL,           | 15     |                                            |
| 16     | Defendants.                                      | 16     |                                            |
| 17     | -----/                                           | 17     |                                            |
| 18     | The proceedings before The Honorable             | 18     |                                            |
| 19     | Marvin H. Dukes, III, Master-In-Equity in the    | 19     |                                            |
| 20     | above-entitled cause, taken before Cathy M.      | 20     |                                            |
| 21     | Knoettner, Certified Court Reporter and Notary   | 21     |                                            |
| 22     | Public, at the Beaufort County Government        | 22     |                                            |
| 23     | Center, Marsh Road, Beaufort, South Carolina, on | 23     |                                            |
| 24     | the 8th day of December, 2016, commencing at or  | 24     |                                            |
| 25     | about the hour of 2:30 p.m.                      | 25     |                                            |
| Page 2 |                                                  | Page 4 |                                            |
| 1      | APPEARANCES OF COUNSEL:                          | 1      | THE COURT: Good afternoon. We're           |
| 2      | FOR THE PLAINTIFF:                               | 2      | here on 16-CP-07-2541. This is Forum       |
| 3      | DEAN S. HASKELL, ESQUIRE                         | 3      | Benefits, Incorporated versus Bannon       |
| 4      | Jones, Simpson & Newton, P.A.                    | 4      | and Assured, and all three parties are     |
| 5      | 18 Pope Avenue                                   | 5      | represented. Mr. Harvey represents         |
| 6      | Hilton Head, South Carolina 29928                | 6      | both defendants. This matter comes to      |
| 7      | 843-842-6111                                     | 7      | me pursuant to a summons and complaint     |
| 8      | FOR THE DEFENDANTS:                              | 8      | heretofore filed and a TRO I previously    |
| 9      | WILLIAM B. HARVEY, III, ESQUIRE                  | 9      | granted back on the 1st. Today is the      |
| 10     | Harvey & Battey, P.A.                            | 10     | 8th. In that TRO it scheduled today's      |
| 11     | 1001 Craven Street                               | 11     | hearing for 2:30 and everyone is here,     |
| 12     | Beaufort, South Carolina 29901                   | 12     | and I'm happen to hear from you, sir.      |
| 13     | 843-524-3109                                     | 13     | MR. HASKELL: Your Honor, I'd like          |
| 14     | ALSO PRESENT: Brian P. Stritt                    | 14     | to introduce an Affidavit of Service       |
| 15     | Brian F. Bannon                                  | 15     | for the complaint, the motion for the      |
| 16     | ---                                              | 16     | temporary restraining order, the TRO       |
| 17     | INDEX                                            | 17     | itself and the motion that we're here      |
| 18     | PAGE                                             | 18     | before the Court on today, which is the    |
| 19     | EXHIBIT INDEX ----- 3                            | 19     | motion for preliminary injunction which    |
| 20     | OPENING REMARKS ----- 4                          | 20     | will be marked as Exhibits A and B.        |
| 21     | OPENING STATEMENT:                               | 21     | (Whereupon, Exhibits A and B               |
| 22     | By Mr. Haskell ----- 4                           | 22     | were marked for identification.)           |
| 23     | By Mr. Harvey ----- 7                            | 23     | MR. HASKELL: That's the service            |
| 24     | BRIAN P. STRITT:                                 | 24     | on Assured Partners, and this is the       |
| 25     | By Mr. Haskell ----- 15                          | 25     | Affidavit of Service of those pleadings    |
|        | By Mr. Harvey ----- 30                           |        |                                            |
|        | By Mr. Haskell ----- 46                          |        |                                            |
|        | By Mr. Harvey ----- 51                           |        |                                            |
|        | BRIAN F. BANNON:                                 |        |                                            |
|        | By Mr. Harvey ----- 52                           |        |                                            |
|        | By Mr. Haskell ----- 70                          |        |                                            |
|        | By Mr. Harvey ----- 83                           |        |                                            |
|        | CLOSING REMARKS ----- 84                         |        |                                            |
|        | CERTIFICATE ----- 95                             |        |                                            |



|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p style="text-align: right;">Page 21</p> <p>1 confidential information of Forum Benefits?</p> <p>2 A Absolutely.</p> <p>3 MR. HASKELL: Your Honor, I would</p> <p>4 like to introduce an exhibit which is a</p> <p>5 printout -- it's on an Excel</p> <p>6 spreadsheet, the information that he's</p> <p>7 referring to. This is a printout of</p> <p>8 the information he's looking at and</p> <p>9 contains the files that Mr. Bannon has</p> <p>10 accessed and gives the dates that he</p> <p>11 accessed these files.</p> <p>12 THE COURT: Let me ask you this:</p> <p>13 Do these have HIPAA information,</p> <p>14 because otherwise I don't know if it's</p> <p>15 appropriate for an exhibit without</p> <p>16 redacting all the personal information.</p> <p>17 THE WITNESS: Those do not. Those</p> <p>18 do not. Those are the names of the</p> <p>19 files. The HIPAA data is underneath.</p> <p>20 THE COURT: Let Mr. Harvey see it.</p> <p>21 (Whereupon, Mr. Haskell tenders</p> <p>22 document.)</p> <p>23 MR. HARVEY: Go ahead.</p> <p>24 MR. HASKELL: Your Honor, I would</p> <p>25 like to introduce that as Exhibit C.</p>                                                                                                                                                         | <p style="text-align: right;">Page 23</p> <p>1 Q Would you also look through Exhibit C</p> <p>2 and see if you can determine if clients other</p> <p>3 than the clients that Mr. Bannon was servicing</p> <p>4 while employed for you were -- that information</p> <p>5 was also downloaded?</p> <p>6 A Correct. There was a number of -- I</p> <p>7 believe you have the summaries. There are a</p> <p>8 number of clients that Mr. Bannon had nothing to</p> <p>9 do with, that he methodically went down and got</p> <p>10 information from them as well. Let's see,</p> <p>11 Marathon Automotive, New Foundations, Family</p> <p>12 Services, Performa Limited, Poly-Med, Smith</p> <p>13 Engineering.</p> <p>14 And then the groups that he accessed</p> <p>15 with the monthly claims versus the premium is a</p> <p>16 bit longer. Do you want me to read those?</p> <p>17 Q Yes, for the record.</p> <p>18 A A &amp; E Engineering, Anesthesia</p> <p>19 Associates, Current Tools, Carolina Youth</p> <p>20 Development, Freshwater Systems, Greenville</p> <p>21 Office Supply, Grove Medical, Hilton Display,</p> <p>22 ILJIN USA, ILJIN Alabama, JEM, Komet,</p> <p>23 Landscapers Supply, MSI Viking Gage, New</p> <p>24 Foundations, Ostrem, PMC, PRTC, Premier</p> <p>25 Logistics, RCS Grading, South Carolina Legal</p> |
| <p style="text-align: right;">Page 22</p> <p>1 MR. HARVEY: I don't have any</p> <p>2 problem with that.</p> <p>3 (Whereupon, Exhibit C was marked</p> <p>4 for identification.)</p> <p>5 BY MR. HASKELL:</p> <p>6 Q Mr. Stritt, I would like you to look at</p> <p>7 Exhibit C, and can you look at that exhibit and</p> <p>8 advise the Court what kind of information,</p> <p>9 samples of information that are being accessed?</p> <p>10 A Sure. So you've got a history of which</p> <p>11 plan designs people on, rates that they're</p> <p>12 paying for each client. You've got in some</p> <p>13 cases the master apps; in some case you've got</p> <p>14 individual apps. It just depends on the company</p> <p>15 and all the paperwork that goes with it. Most</p> <p>16 of these are company related. Some of them are</p> <p>17 internal documents that we use that are outside</p> <p>18 of individual companies. We use them for</p> <p>19 actuarial basis. We use them, for example, as</p> <p>20 user guides for our benefit admin portal.</p> <p>21 Basically all of our good stuff is on this list</p> <p>22 in one way, shape or form.</p> <p>23 Q Do you feel that that information would</p> <p>24 be readily accessible from other sources?</p> <p>25 A Absolutely not, none.</p> | <p style="text-align: right;">Page 24</p> <p>1 Services, Southern First, Sunset Management,</p> <p>2 Group, The Greenery, The Marley Lilly, Travinia</p> <p>3 Italian Kitchen, Treatment Centers Holding</p> <p>4 Company, Tumeq, and Wholesale Boutique.</p> <p>5 Q All those companies you just listed</p> <p>6 were not clients of Brian Bannon?</p> <p>7 A A few were. MSI Viking is the only one</p> <p>8 that jumps out. Wholesale Boutique, I think.</p> <p>9 Q Did you hire Mr. Bannon initially?</p> <p>10 A Yes.</p> <p>11 Q When you met with him, did you present</p> <p>12 him with an employment agreement?</p> <p>13 A Yes.</p> <p>14 Q Was that employment agreement</p> <p>15 substantially in the form of the one that's</p> <p>16 attached as Exhibit A to the complaint that's</p> <p>17 been filed?</p> <p>18 A Yes.</p> <p>19 Q Did Mr. Bannon sign that agreement?</p> <p>20 A Yes.</p> <p>21 Q You witnessed him signing the</p> <p>22 agreement?</p> <p>23 A Yes.</p> <p>24 Q Did he protest signing the agreement?</p> <p>25 A No.</p>                                                                                                                                                                                                                                                                          |



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1 Q Did he advise you that he had a bad  
2 taste in his mouth for the employment agreement?

3 A Well, we probably talked about his bad  
4 taste for his former employer. I don't recall  
5 the employment agreement being the large one,  
6 but it's a standard practice in our industry.

7 Q What is a standard practice?

8 A To have an employment agreement and a  
9 non piracy. Particularly if you're going to  
10 write a check for \$5,000 a month to somebody,  
11 you want to make sure that you're not paying  
12 them to take business elsewhere.

13 MR. HASKELL: I'd like to  
14 introduce Exhibit D.

15 MR. HARVEY: I object to this,  
16 Your Honor.

17 THE COURT: What's the objection?

18 MR. HARVEY: First of all, it's  
19 hearsay. This witness didn't prepare  
20 this and there's nothing to indicate --  
21 there's no signed agreement. I mean,  
22 how can you, again, graph into  
23 existence something that doesn't exist.

24 MR. HASKELL: Your Honor, I think  
25 I can get this into the business

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1 records exception to the hearsay rule.

2 THE COURT: The business is Forum  
3 Benefits, right?

4 MR. HASKELL: Right.

5 THE COURT: This is Palmetto --

6 THE WITNESS: Palmetto Benefit  
7 Management. That was our former name.

8 THE COURT: Go ahead and lay a  
9 foundation. Go ahead, you can ask him  
10 about it.

11 BY MR. HASKELL:

12 A Mr. Stritt, can you identify Exhibit D,  
13 please.

14 A Yes. This is we approached Smith Moore  
15 Leatherwood to establish a Charleston office as  
16 a separate L.L.C., and they went through that  
17 process with us, fairly lengthy. We probably  
18 spent a little bit of money for them to set up  
19 the office there in Charleston.

20 Q And would you look at the first page of  
21 Exhibit D, on the third entry, and read that,  
22 please.

23 A Review noncompete agreements for Brian  
24 Bannon and Rhonda Rhodes, correspondence to and  
25 from client regarding same.

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1 Q And would you look at the third page of  
2 Exhibit D, please, and read the third entry on  
3 that for the record.

4 A Review proposed employment agreement  
5 with Brian Bannon and proposed operating  
6 agreement for Palmetto Benefit Management of  
7 Charleston. Discuss with Eric Newsome.

8 Q Did you use the employment agreement  
9 that was prepared by Smith Moore Leatherwood for  
10 Mr. Bannon to sign?

11 A Did not. We used Pfeiffer, Gantt,  
12 Gleaton & Wyatt.

13 Q Would you look at the last page of the  
14 statement, please, and read the first entry.

15 A Under services?

16 Q Yes.

17 A Conference with client prepared from  
18 the agreement, conference with client regards  
19 agreement, David Wyatt.

20 Q And was the employment agreement that  
21 was attached as Exhibit 1 to the complaint the  
22 employment agreement that was prepared by  
23 Pfeiffer, Gantt, Gleaton & Wyatt?

24 A Correct.

25 Q And it's your testimony that Mr. Bannon

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1 signed a form of that agreement?

2 A Correct.

3 Q And you witnessed that signature?

4 A Correct.

5 MR. HASKELL: Your Honor, I'd like  
6 to introduce this as Exhibit D under  
7 the business exception -- business  
8 records exception to the hearsay rule.

9 MR. HARVEY: Your Honor, my  
10 objection to that is that this witness  
11 has just testified that they did not  
12 use Smith Moore Leatherwood for the  
13 employment agreement; he just testified  
14 to that. And the statement of services  
15 rendered by Pfeiffer which may be the  
16 form that was used, which is his  
17 testimony, doesn't say anything about  
18 my client. Again, I don't understand  
19 how you can just --

20 THE COURT: Yeah, I guess I'm  
21 trying to figure out relevance and  
22 everything else.

23 MR. HASKELL: Well, it's Mr.  
24 Bannon's affidavit that no employment  
25 agreement was presented to him and that



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1 are his clients, all but that one page?

2 A They're clients he worked with;  
3 correct.

4 MR. HARVEY: Your Honor, do you  
5 see where I'm talking about?

6 THE COURT: I'm on the page on  
7 October 25th.

8 BY MR. HARVEY:

9 Q On October 25th, starting with  
10 Poly-Med, those are the only clients that are  
11 not his; correct, in this whole list?

12 A Not necessarily. So inside the  
13 internal documents are other clients; but it's  
14 spelled out separately, yes, that would be  
15 correct.

16 Q Okay. So out of these 2,100 entries,  
17 you have a third of one page that are not his  
18 clients; correct?

19 A Once again, I'd say it differently, no,  
20 because there are other clients that are hidden  
21 in the internal --

22 Q I'm talking about the 2,100 entries on  
23 this page.

24 A So there wouldn't be 2,100 entries if  
25 you subtracted out the ones that are internal is

1 Q CYBC is his client?

2 A Sales rep on it; agreed.

3 Q Internal Carrier is his client?

4 A No.

5 Q Alpha Genesis is his client?

6 A (Nods head in the affirmative.)

7 Q Yes?

8 A Yes.

9 Q Berenyi is his client?

10 A Who?

11 Q Berenyi Engineering.

12 A Yes.

13 Q Charleston Glass is his client?

14 A Yes.

15 Q Henry Stuhr is his client?

16 A Yeah.

17 Q Now, if these clients were to go to  
18 Blue Cross Blue Shield and ask for download  
19 history, rates, all that other information,  
20 could they get all this information from Blue  
21 Cross Blue Shield?

22 A No. They could get most of it, but  
23 they couldn't get the internal work we did on  
24 it.

25 Q Okay. But most of the work on this

Page 34

Page 36

1 my point. So I don't know. I haven't went and  
2 counted it but --

3 Q Well, you testified 2,100 --

4 A Were files; correct.

5 Q Are files, okay.

6 A Yes. And some of them are internal,  
7 and those internal documents have different  
8 clients within them.

9 Q Can you tell me that those internal  
10 clients on this page have anything different  
11 than what's on the other pages?

12 A As far as clients?

13 Q Yeah, as far as information; as far as  
14 files.

15 A Yes, much more.

16 Q Well, how do you know?

17 A Because I know what's in the files; I  
18 built them. So we have a claims loss data that  
19 has all the large clients and all the large  
20 claims. That is on one file that encompasses  
21 50 -- I don't know how many.

22 Q Okay. MSI Viking Gage is his client?

23 A He's a sales rep on it; agreed.

24 Q Polaris is his client?

25 A He's a sales rep on it.

1 sheet, they could get from Blue Cross Blue  
2 Shield?

3 A Some of it they can, absolutely.

4 Q Okay. And the internal work would be  
5 the spreadsheets, right?

6 A Correct.

7 Q And the spreadsheets are just  
8 spreadsheets put together from the work  
9 information you get from Blue Cross Blue Shield;  
10 correct?

11 A And our own internal knowledge on  
12 pricing.

13 Q But they're put together by Mr. Bannon?

14 A No, they are not.

15 Q For his clients?

16 A They are not. They're put together by  
17 an account manager.

18 Q Okay. And what is the spreadsheet that  
19 they use; it's just an Excel spreadsheet?

20 A Correct.

21 Q Okay. What other proprietary  
22 information is there on that spreadsheet?

23 A We have demographic figures that match  
24 up and try to figure out whether the carrier is  
25 right on their adjustments. We do scatter



1 graphs which combine all the clients and tell  
2 them where they fit in that mode. All of the  
3 compliance work is done by us and that's  
4 independent. The carriers have nothing to do  
5 with that; we monitor that. Those are at the  
6 end of those spreadsheets. The other math, hit  
7 rate histories, things like that.

8 Q Compliance work is done by the sales  
9 agent, right?

10 A No, the account managers.

11 Q The account manager?

12 A Yeah.

13 Q Mr. --

14 A Mr. Bannon is not an account manager.

15 Q Okay. What does Mr. Bannon add to that  
16 spreadsheet?

17 A Nothing.

18 Q Okay. But the information on the  
19 spreadsheet can be gathered from other sources?

20 A Some of it, not all of it. Not the  
21 stuff I'm concerned about.

22 Q You went to your attorneys, obviously,  
23 Smith Leatherwood and Moore, and Pfeiffer,  
24 Gantt, Gleaton & Wyatt; you went to them?

25 A Correct.

1 Q And they didn't have a signed  
2 agreement?

3 A Correct; I didn't return it. We had it  
4 in an internal file.

5 Q Okay. And I'm talking about the,  
6 quote, "employment agreement" that you're  
7 talking about.

8 A Correct.

9 Q Your attorneys didn't have it?

10 A Correct. They had what they sent us;  
11 they didn't have the returned copy.

12 Q They don't have a signed copy?

13 A Correct.

14 Q You don't have a signed copy?

15 A Perhaps. We're still looking.

16 Q Well, you allege and you sought to  
17 enjoin my client based upon a signed copy;  
18 correct?

19 A No, I signed -- I intended to enjoin  
20 your client for the proprietary data that was  
21 taken while he was working for a competitor and  
22 pretended he was working for me and still showed  
23 up at my Monday meetings while working for a  
24 direct competitor.

25 Q Is there any document that says that

1 client list that you have attached to your  
2 complaint is proprietary?

3 A Is there any --

4 Q I mean, is there any document that says  
5 that that's a trade secret?

6 A I think that's pretty much -- yes, I  
7 believe there is.

8 Q What document is that?

9 A I'm not an attorney; I don't know. But  
10 a client list is proprietary if it has data  
11 other than a client list. It's not a name of a  
12 company. If it has the carrier; if it has  
13 formulas in it; if it has information that makes  
14 somebody's life easier to compete against, then  
15 that's proprietary. If it's just a name on a  
16 billboard, I get it, but that's not what this  
17 stuff is.

18 MR. HARVEY: Your Honor, may I  
19 have a minute with my client?

20 THE COURT: Yeah, go ahead,  
21 please.

22 (Whereupon, a short break  
23 ensued.)

24 BY MR. HARVEY:

25 Q Mr. Stritt, Exhibit C is -- I believe

1 you said was accessed any time those files were  
2 accessed, right?

3 A Correct.

4 Q Is there any document that says that  
5 Mr. Bannon downloaded anything?

6 A The only way I can find out is if I had  
7 access to the computer that we own, which has  
8 not been returned. That would tell us whether  
9 those files were copied.

10 Q Do you have any documents, sitting here  
11 today, that says he downloaded anything?

12 A No.

13 Q No, okay. Now, your, quote, "verified  
14 complaint", paragraph ten, it says, Prior to  
15 October 19th, upon information and belief,  
16 Bannon utilized confidential and proprietary  
17 information. What do you have to allege upon  
18 information and belief?

19 THE WITNESS: What -- information  
20 and belief.

21 MR. HASKELL: I can't help you.

22 THE WITNESS: Repeat it.

23 BY MR. HARVEY:

24 Q Paragraph ten says, Upon information  
25 and belief -- you don't say that he did; you



1 Property and Casualty health insurance agency,  
2 and I worked for them for about seven and a half  
3 years in Charleston.

4 **Q And while you were working with**  
5 **Commonwealth, you were doing this same type of**  
6 **work?**

7 A Yes.

8 **Q And you had an employment agreement**  
9 **with Commonwealth?**

10 A I did.

11 **Q And when you left Commonwealth that**  
12 **employment agreement became an issue; correct?**

13 A It was. I couldn't bring any of my  
14 clients with me for a period of two years. I  
15 couldn't talk with them and I could not solicit  
16 business from them for a period of two years.

17 **Q What did you do in between Commonwealth**  
18 **and Forum?**

19 A I had struck a deal with somebody that  
20 helped me open up my own Nationwide agency, and  
21 then the financing fell through about six months  
22 after I left Commonwealth, maybe eight months  
23 after --

24 **Q You need to speak up.**

25 A I left Commonwealth and I entered an

1 employment agreement with a guy. Basically he  
2 was going to try to help me open up a Nationwide  
3 agency or to finance buying a Nationwide agency;  
4 and when the economy went south back then, the  
5 financing dried up and it didn't work out.

6 **Q And you then landed with Forum?**

7 A That's correct, yeah. Brian and I had  
8 known each other for several years. We were  
9 friends socially and he found out that I was  
10 unemployed and asked me, you know, hey, would  
11 you be interested in coming to work for me, and  
12 my first response was no because I don't want to  
13 work for anybody. But if I were to do that  
14 again, I'd work for myself.

15 **Q Okay. And did an issue of an**  
16 **employment agreement come up in that**  
17 **conversation?**

18 A Yeah. I brought it up and told him I  
19 had one with Commonwealth and, you know, that  
20 was a nonstarter. I would never sign a  
21 noncompete again and I wasn't interested in  
22 working with him or for him if I didn't have  
23 some kind of limited partnership.

24 **Q All right. And did you-all form sort**  
25 **of a partnership?**

1 A No, it was handshake agreement. We  
2 agreed that we were going to split any new  
3 business that I brought in. We were going to  
4 have 50/50 split where I was going to own  
5 percent of the business, he was going to own 50  
6 percent of the business. We went back and forth  
7 several times, hey, you know, where's the  
8 paperwork. I'll get you some paperwork; we'll  
9 get something signed. We never got anything  
10 signed.

11 **Q Did you ever sign any employment**  
12 **agreement or any document pretending to have**  
13 **employment agreement language with with the**  
14 **plaintiff Forum?**

15 A No, absolutely not. Our agreement was  
16 a gentleman's handshake agreement. Neither one  
17 of us had anything in writing.

18 **Q And from the initiation of that**  
19 **employment, for a period of time you were a W-2**  
20 **employee?**

21 A I was for a little over five years.

22 **Q Okay. And then you became an**  
23 **independent contractor?**

24 A That is correct.

25 **Q And for the last three years you were**

1 **an independent contractor?**

2 A Last three and a half years, uh-huh  
3 (affirmative).

4 **Q Okay. Again, as an independent**  
5 **contractor you had no employment agreement with**  
6 **with the plaintiff Forum?**

7 A Correct. All that happened is I was  
8 terminated from W-2 employment and my commission  
9 checks, you know, I no longer had retirement and  
10 no longer had health insurance benefits, wasn't  
11 getting paid any vacation time, and my  
12 commission checks were strictly a 1099 statement  
13 I got every month. Forum retained 60 percent of  
14 commission; I get paid 40 percent commission  
15 from my clients.

16 **Q And at any point in time up until your**  
17 **separation with Forum did you have any**  
18 **employment agreement?**

19 A No.

20 **Q Now, tell us about the clients that you**  
21 **served at Forum. You had, I think -- on the**  
22 **exhibit to the complaint, I think there are like**  
23 **16 of them.**

24 A Uh-huh (affirmative).

25 **Q Were there others?**



1 folders that were in my folders, and there were  
2 some -- I found my files in clients that weren't  
3 my -- in client folders that weren't my clients.  
4 So I'm looking for like renewal info for a  
5 client and I'm, like, where's 2016's renewal  
6 info, and I start clicking through it, and I'm,  
7 like, how did it get in that folder over there.  
8 So, you know, people accidentally sometimes, you  
9 know, they save it to the wrong folder.

10 **Q Have there been other account**  
11 **representatives with Forum who have left this**  
12 **year?**

13 A Sales brokers.

14 **Q Brokers, like you?**

15 A Yes, absolutely.

16 **Q Who are they?**

17 A Mac Ward and Steve Epps.

18 **Q And did either one of them have**  
19 **employment agreements?**

20 A No, not to my knowledge.

21 **Q And does one of them work for Assured**  
22 **Partners?**

23 A Both of them do.

24 **Q Both of them do?**

25 A Uh-huh (affirmative).

1 **Q And they both worked for Forum as well?**

2 A Correct; they both previously worked  
3 for Forum.

4 **Q And they left this year?**

5 A They left in April.

6 **Q Okay. And they went over to Assured**  
7 **Partners?**

8 A Correct.

9 **Q And as far as you know, neither of**  
10 **them had employment agreements?**

11 A No.

12 **MR. HARVEY: That's all.**

13 **THE COURT: Mr. Haskell.**

14 **CROSS-EXAMINATION**

15 **BY MR. HASKELL:**

16 **Q Mr. Epps, and what was the other name?**

17 A Mac Ward.

18 **Q How do you know they didn't have**  
19 **employment agreements?**

20 A I asked them.

21 **Q And they told you?**

22 A Yes.

23 **Q When you referred to "my files", whose**  
24 **property are the files that you're looking at?**  
25 **Are they your property?**

1 A Yeah.

2 **Q Why do you think they are your**  
3 **property?**

4 A Because I'm representing the carrier on  
5 the account, whether it's Blue Cross or an  
6 ancillary carrier.

7 **Q And who are you employed by? Who were**  
8 **you employed by when you were looking at these**  
9 **accounts?**

10 A I was a 1099 employee. I was an  
11 independent contractor.

12 **Q And before that you were a --**

13 A Before that I was a W-2 employee.

14 **Q And would your files be your property**  
15 **back when you were a W-2 employee?**

16 A Yes.

17 **Q Not the property of Forum Benefits?**

18 A Yes, I'm required to keep copies of any  
19 insurance transactions I have with clients for  
20 up to seven years. So I make copies of all my  
21 files at every place I've ever worked.

22 **Q Are those requirements pricing**  
23 **formulas, too? Are you required by law to keep**  
24 **pricing formulas of Forum Benefits for your**  
25 **files?**

1 A No.

2 **Q Did you keep copies of Forum's pricing**  
3 **policies --**

4 A No.

5 **Q -- for your files?**

6 **Did you review them?**

7 A Did I review what?

8 **Q Did you review --**

9 A Did I review my files?

10 **Q Files containing pricing policies.**

11 A I hit the folder. I looked at the  
12 document. If it was a renewal document or it  
13 was something that we used in the renewal to  
14 present, I downloaded it.

15 **Q So you did download files that are on**  
16 **Exhibit C?**

17 A For my clients, only my clients.

18 **Q But you did download files that are on**  
19 **Exhibit C?**

20 A Only for my clients.

21 **Q That's your testimony; yes or no, did**  
22 **you download files that are on Exhibit C?**

23 A Yes.

24 **Q Okay, thank you.**

25 **You testified that you were a W-2**



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1 employee; correct?

2 A I used to be.

3 Q And then you became a 1099 employee?

4 A Yes.

5 Q Explain to me the circumstances of why  
6 you switched.

7 A It was after the healthcare law was  
8 passed and, to be honest, I wasn't really having  
9 a whole lot of fun. I wasn't enjoying working  
10 with Brian at the time. It was a difficult time  
11 because it was difficult to get into accounts,  
12 get people to meet with us, and I just -- you  
13 know, I said to myself, you know, is this what I  
14 want, do I want to continue to do this, or do I  
15 maybe want to try and diversify my income. So I  
16 have a friend who is a battalion chief at a --  
17 what do you call it, fire department. He said,  
18 hey, we're going to be hiring some guys. If  
19 you'd like, you'll get really good benefits;  
20 it's one day on, two or three days off; you can  
21 still do your insurance thing on the side. So  
22 that's why I approached Brian and asked him, you  
23 know, said, hey, I will become a W-2 and we'll  
24 do a 60/40 commission split; and, you know, I'll  
25 work insurance on days that I'm not at the fire

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1 department.

2 Q But it was your request to change from  
3 a W-2 to a 1099 employee; is that correct?

4 A Yeah.

5 Q How long did you stay as a fireman in  
6 Charleston?

7 A Oh, it wasn't in Charleston. It was  
8 actually in Bluffton.

9 Q Well, as a fireman.

10 A Yeah. It was, I think, that from the  
11 point training started to the point I resigned  
12 was four to five months.

13 Q And thereafter you continued as a 1099  
14 employee?

15 A Yeah, I was back full time as a 1099.

16 Q Explain to me, if you would, the facts  
17 surrounding your employment by Assured Partners.  
18 When did you become employed by them?

19 A When did I start?

20 Q Yes.

21 A I think it was November 14th, I think.

22 Q And when did you approach -- did you  
23 approach Assured Partners about going to work  
24 for them.

25 A No, they approached me through a couple

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1 of people I knew.

2 Q And when was that?

3 A Late July-August.

4 Q Do you have an employment agreement  
5 with Assured Partners?

6 A I do.

7 Q Why did you have no problem with  
8 signing an employment agreement with Assured  
9 Partners and you had, according to your  
10 testimony, a problem with signing one with --

11 A A lot has changed since Obamacare. You  
12 used to be able to work out of your house and  
13 write business and make pretty good money doing  
14 it, and now the commissions don't go as far. We  
15 need to service the accounts a lot more. We've  
16 got offer technology and we didn't use to have  
17 to pay for it. It's all very expensive, and  
18 really the safest part of the market is the  
19 50-plus market; and for me, in order to work  
20 with them, there's no way you're going to go to  
21 a firm like that without signing a noncompete,  
22 an ironclad agreement. And they have offered  
23 stock options, they made it well worth my while  
24 in terms of my compensation and my ability to go  
25 out and write new business there; it's a lot

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1 easier, it's a lot easier prospect there. They  
2 made it worth my while, and there was no way I  
3 was going to work for them or any other  
4 consulting firm like them without signing a  
5 noncompete.

6 Q So it's your testimony that Assured  
7 fronted your original cost for starting the  
8 operation with them?

9 A They didn't front me any costs, no, not  
10 until I started working for them.

11 Q When did you notify Forum Benefits that  
12 you were leaving their employment?

13 A I didn't.

14 Q Why?

15 A Because I knew that if I did, Brian  
16 would shut off the share drive, he would lock me  
17 out of all my accounts, and they would call up  
18 all of my accounts and probably do something  
19 like this, you know, tell them that I was --  
20 call them up and tell them I had a noncompete  
21 that I signed, that I didn't; scare them all to  
22 death and they wouldn't want to come with me  
23 because they would be scared.

24 Q So is it your testimony that you  
25 delayed advising or you didn't advise Forum



1 **Benefits that you were leaving so that you could**  
2 **continue to access their data?**

3 A No.

4 **Q Why didn't you -- tell me again why you**  
5 **didn't tell them that you were leaving --**

6 A Why I didn't tell Forum?

7 **Q Yeah.**

8 A Because I didn't want them calling my  
9 clients telling them I had signed a noncompete  
10 or I was a bad guy or -- you know. When Mac and  
11 Steve left, there was a lot of bad stuff that  
12 went on between Forum and them and they warned  
13 me, you know, just FYI, this is coming, people  
14 are going to be contacting your accounts,  
15 they're going to be saying all kinds of stuff,  
16 you know, you better be ready for it. So that's  
17 why I didn't give anybody a heads-up that I was  
18 leaving.

19 **Q But you accessed all those files so you**  
20 **could be prepared?**

21 A My client files.

22 **Q Yes.**

23 A (Nos head in the affirmative.)

24 **Q Even though you know you were leaving**  
25 **and going over to Assured Partners?**

1 A Correct.

2 **Q If you would look at the complaint that**  
3 **was filed in this case -- I'll provide you a**  
4 **copy -- and it is Exhibit B to the complaint.**

5 A Okay.

6 **Q What's the date of that letter?**

7 A October 19th.

8 **Q And when did you present that to Forum**  
9 **Partners?**

10 A To Assured Partners on November 14th.

11 **Q Why did you hold off so long?**

12 A Because I was trying to meet with all  
13 of my clients and turn them all in, turn the  
14 agent of record letters in at the same time. I  
15 didn't want to piecemeal it, because once Forum  
16 knew that I was contacting my clients and I was  
17 bringing them with me, they were going to  
18 contact my clients and they were going to try  
19 and do damage control.

20 **Q But in October you were soliciting**  
21 **business from Alpha Genesis; is that correct?**

22 A Correct.

23 **Q And you were still an employee of Forum**  
24 **Benefits at the time?**

25 A I was a 1099.

1 **Q Were you getting paid by Forum Benefits**  
2 **in October?**

3 A Yes.

4 **Q Did you get paid by them in November?**

5 A No.

6 **Q At all?**

7 A I'm not sure if my last commission  
8 check was October 1st or November 1st.

9 **Q Did you provide Assured Partners with**  
10 **access to Forum Benefits employee navigator**  
11 **updates?**

12 A Updates?

13 **Q Yes.**

14 A No. What I did was we logged into the  
15 employee navigator website and we made a copy of  
16 the data, the client data, and then we took it  
17 and we retained it, the client data; name,  
18 gender, date of birth, enrollment.

19 **Q Is all that public information?**

20 A It's private information between the  
21 client and me.

22 **Q And who were you working for at the**  
23 **time?**

24 A I was a 1099 employee.

25 **Q Who were you a 1099 employee by?**

1 A I was a 1099 employee by Forum  
2 Benefits.

3 **Q And you were getting paid by them**  
4 **consideration, I think, is the word you used?**

5 A Yes, up until at least October 1st.

6 **Q Would it refresh your memory if I**  
7 **advised you it was November 11th; would you have**  
8 **any reason to doubt that as the date of last**  
9 **payment?**

10 A Okay, I don't -- that sounds correct.

11 **Q You reference in your affidavit that**  
12 **the client list, which is Exhibit 1 to the**  
13 **complaint, Exhibit 1 to the motion that we're**  
14 **here today for, you can obtain that publicly**  
15 **through the ReferenceUSA website?**

16 A Yeah, there's several different ways to  
17 find it. It's not the only way.

18 **Q So I can go on the ReferenceUSA website**  
19 **and find that client list that's Exhibit A?**

20 A You can find the clients.

21 **Q I could find the client list that's**  
22 **Exhibit A?**

23 A You could run a list by county. You  
24 could run a list for the entire state and just  
25 about every single one of our clients that are

**STATE OF SOUTH CAROLINA**  
**BEAUFORT COUNTY**

**IN THE COURT OF COMMON PLEAS**  
**CIVIL ACTION NO. 2016-CP-07-2541**

Forum Benefits, Inc.,

Plaintiff,

v.

Brian Bannon and Assured Partners, NL

Defendants.

# Exhibit B



September 15, 2016

Brian F. Bannon  
395 Wellington Loop  
Ridgeland, South Carolina 29936

Re: Employment Offer & Terms

Dear Brian:

AssuredPartners, Inc. (the "Company") is pleased to extend you this offer of employment. This letter sets forth the general terms of the offer, which, if you accept, will govern your employment, provided that in the event of any conflict between this letter and the terms of your Employment Agreement with the Company referred to below, the Employment Agreement will govern. Nothing in the following paragraphs can be interpreted to guarantee a term of employment. This offer is subject to the return of a cleared background check and your execution of our standard Employment Agreement.

You will be employed in the position of an Employee Benefits Producer. Your first day of employment will be as mutually agreed upon, and is tentatively set as October 15, 2016. Your responsibilities will be as outlined in your job description.

You will be paid a monthly draw in the amount of Seven Thousand Five Hundred Dollars (\$7,500.00) less appropriate taxes, FICA and other withholdings payable in accordance with the Company's standard payroll practices and subject to periodic review and possible adjustment. Your first draw payment will be on or about November 15, 2016. A copy of the AssuredPartners Producer Compensation System outlines the Company's current commission structure and is attached for your reference.

All benefits will be the same as those provided to all full-time employees as group benefits (subject to the terms and conditions governing eligibility for and payment of those benefits). Please refer to the AssuredPartners Employee Handbook for a detailed account of the benefits.

By signing below, you not only accept the terms and conditions of this offer, but also represent to us that you are under no obligation or agreement that would prevent you from becoming an employee of the Company or adversely impact your ability to perform the expected services.

Upon your acceptance, this letter, together with the Employment Agreement will contain the entire agreement and understanding between you and the Company and supersedes any prior or contemporaneous agreements, understandings, communications, offers, representations, warranties or commitments by or on behalf of the Company (oral or written). The terms of your employment in the future may be amended, but only through a written document which is signed by you and, on behalf of the Company, by a duly authorized representative. Your employment with the Company



is on an “at will” basis and may be terminated by either party with or without cause and with or without notice at any time.

If these terms are agreeable to you, please sign and date this letter below. We look forward to you accepting this offer and joining our team in this vital role in our growing Company.

Sincerely,

**AssuredPartners, Inc.**

By: \_\_\_\_\_  
Name:  
Title:

Enclosures

**Agreed & Accepted:**

\_\_\_\_\_  
Brian F. Bannon

Date: \_\_\_\_\_

**STATE OF SOUTH CAROLINA**

**BEAUFORT COUNTY**

**IN THE COURT OF COMMON PLEAS**

**CIVIL ACTION NO. 2016-CP-07-2541**

Forum Benefits, Inc.,

Plaintiff,

v.

Brian Bannon and Assured Partners, NL

Defendants.

# Exhibit C





## Producer Wedge Commitment Form

As a Producer of Assured Neace Lukens, I commit to adopt and exclusively utilize the teachings of the Wedge sales process. I will attend all CRISP meetings and will be there on time and prepared with a completed Pre-Call Strategy worksheet, my "ticket" to get into the meeting. I will utilize Wedge sales tactics during prospect meetings. I will pre-qualify prospects according to the Pre-Call Strategy, CRISP process and use the Perfect Sales Call to avoid wasting my time as well as my company's staff and resources. I will login to the iWin system first thing in the morning, just as I do my Outlook, to update suspects and prospects with notes. I will memorize a minimum of 10 Wedges from my specialty and five from the other specialties to insure I am ready to deliver our message. If I'm not polished in my delivery, I will ask my Sales Leader as well as other Producers in the office to role play with me until I can smoothly deliver the wedge to a prospect.

I will focus my time on my top 5 money making activities:

- 1.) Over serve my top 20%
- 2.) Leverage relationships for Red Hot Introductions
- 3.) Pre-Call Strategy
- 4.) Sell
- 5.) Cross-Sell / Round-Out

If I do these things, I will be successful.

BRIAN BANNON

Printed

[Signature]

Signed

10/4/16

Date



is on an "at will" basis and may be terminated by either party with or without cause and with or without notice at any time.

If these terms are agreeable to you, please sign and date this letter below. We look forward to you accepting this offer and joining our team in this vital role in our growing Company.

Sincerely,

**AssuredPartners, Inc.**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Enclosures

**Agreed & Accepted:**

A handwritten signature in black ink, appearing to read 'Brian F. Bannon', is written over a horizontal line.

Brian F. Bannon

Date: 10/4/16



**STATE OF SOUTH CAROLINA**

**BEAUFORT COUNTY**

**IN THE COURT OF COMMON PLEAS**

**CIVIL ACTION NO. 2016-CP-07-2541**

Forum Benefits, Inc.,

Plaintiff,

v.

Brian Bannon and Assured Partners, NL

Defendants.

# Exhibit D

#9

| Date             | IP address   | User                      | Item                                                          | Group               |
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| 11/4/2016 14:24 76.3.97.70  | bbannon@forumbenefits.com | Ameritas Renewal.pdf                                          | J. Henry Stuhr      |
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| 11/4/2016 14:20 76.3.97.70  | bbannon@forumbenefits.com | Silver 3500 HD SBC.pdf                                        | Magnolia Plantation |
| 11/4/2016 14:20 76.3.97.70  | bbannon@forumbenefits.com | Silver 3500 HD SBC.pdf                                        | Magnolia Plantation |
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| 11/4/2016 14:20 76.3.97.70  | bbannon@forumbenefits.com | Magnolia Revised Dental Renewal.PDF                           | Hoffman & Hoffman   |
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| 11/4/2016 14:20 76.3.97.70  | bbannon@forumbenefits.com | Magnolia Plantation Silver 3500 HSA POS Rates Summary SBC.pdf | Magnolia Plantation |
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| 11/4/2016 14:18 76.3.97.70  | bbannon@forumbenefits.com | Magnolia Plantation cancellation.pdf                          | Magnolia Plantation |
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| 11/4/2016 14:18 76.3.97.70  | bbannon@forumbenefits.com | Magnolia Coventry Cancellation Letter - Signed.pdf            | Magnolia Plantation |

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| 11/4/2016 13:42 76.3.97.70 | bbannon@forumbenefits.com | 2016 - St. Andrews Renewal Letter.doc                             | St. Andrews       |
| 11/4/2016 13:41 76.3.97.70 | bbannon@forumbenefits.com | 2016 - St. Andrews Large Claims Summary.doc                       | St. Andrews       |
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| 11/4/2016 13:41 76.3.97.70 | bbannon@forumbenefits.com | 2016 - St. Andrews Current Renewal Rates.xls                      | St. Andrews       |
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| 11/4/2016 13:40 76.3.97.70 | bbannon@forumbenefits.com | 2016 - REVISED4 St. Andrews Current Renewal Rates FINAL.xls       | St. Andrews       |
| 11/4/2016 13:40 76.3.97.70 | bbannon@forumbenefits.com | 2016 - REVISED4 St. Andrews Current Renewal Rates FINAL.xls       | St. Andrews       |
| 11/4/2016 13:37 76.3.97.70 | bbannon@forumbenefits.com | BCBS 60 par rates NEW.pdf                                         | Premier Logistics |
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| 11/4/2016 13:37 76.3.97.70 | bbannon@forumbenefits.com | BCBS 60 par rates NEW.pdf                                         | Premier Logistics |
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| 11/4/2016 13:37 76.3.97.70 | bbannon@forumbenefits.com | Coventry HRA Option Contribution Analysis.xlsx                    | Premier Logistics |
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| 11/4/2016 13:36 76.3.97.70 | bbannon@forumbenefits.com | Coventry Renewal 4.1.16.pdf                                       | Premier Logistics |
| 11/4/2016 13:36 76.3.97.70 | bbannon@forumbenefits.com | Coventry Renewal 4.1.16.pdf                                       | Premier Logistics |
| 11/4/2016 13:36 76.3.97.70 | bbannon@forumbenefits.com | Coventry Renewal 4.1.16.pdf                                       | Premier Logistics |
| 11/4/2016 13:36 76.3.97.70 | bbannon@forumbenefits.com | GLIC Renewal 4.1.16.pdf                                           | Premier Logistics |
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| 11/4/2016 13:35 76.3.97.70 | bbannon@forumbenefits.com | Medical Rate Comparison.xlsx                                      | Premier Logistics |
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| 11/4/2016 13:35 76.3.97.70 | bbannon@forumbenefits.com | Premier Logistics 4.1.2016 Renewal Presentation - PowerPoint.pptx | Premier Logistics |
| 11/4/2016 13:35 76.3.97.70 | bbannon@forumbenefits.com | Premier Logistics 4.1.2016 Renewal Presentation - PowerPoint.pptx | Premier Logistics |
| 11/4/2016 13:34 76.3.97.70 | bbannon@forumbenefits.com | Premier Logistics Renewal Spreadsheet.xlsx                        | Premier Logistics |
| 11/4/2016 13:34 76.3.97.70 | bbannon@forumbenefits.com | Premier Logistics Renewal Spreadsheet.xlsx                        | Premier Logistics |
| 11/4/2016 13:34 76.3.97.70 | bbannon@forumbenefits.com | Updated Contribution Analysis 3.9.16.xlsx                         | Premier Logistics |



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| 11/4/2016 13:34 76.3.97.70 | bbannon@forumbenefits.com | Updated Contribution Analysis BCBS Traditional 3.14.16.xlsx | Premier Logistics |
| 11/4/2016 13:34 76.3.97.70 | bbannon@forumbenefits.com | Updated Contribution Analysis BCBS Traditional 3.14.16.xlsx | Premier Logistics |
| 11/4/2016 13:28 76.3.97.70 | bbannon@forumbenefits.com | BCBS Renewal 2016.pdf                                       | Polaris           |
| 11/4/2016 13:28 76.3.97.70 | bbannon@forumbenefits.com | BCBS Renewal 2016.pdf                                       | Polaris           |
| 11/4/2016 13:27 76.3.97.70 | bbannon@forumbenefits.com | Renewal Spreadsheet 2016 - MSI.xlsx                         | MSI Viking Gage   |
| 11/4/2016 13:27 76.3.97.70 | bbannon@forumbenefits.com | Renewal Spreadsheet 2016 - MSI.xlsx                         | MSI Viking Gage   |
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| 11/4/2016 13:27 76.3.97.70 | bbannon@forumbenefits.com | Renewal Spreadsheet 2016 - MSI.xlsx                         | MSI Viking Gage   |
| 11/4/2016 13:27 76.3.97.70 | bbannon@forumbenefits.com | Renewal Spreadsheet 2016 - MSI.xlsx                         | MSI Viking Gage   |
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| 11/4/2016 13:26 76.3.97.70 | bbannon@forumbenefits.com | Renewal Spreadsheet 10.2016 - MSI.xlsx                      | MSI Viking Gage   |
| 11/4/2016 13:26 76.3.97.70 | bbannon@forumbenefits.com | Renewal Presentation 2016.pdf                               | MSI Viking Gage   |
| 11/4/2016 13:26 76.3.97.70 | bbannon@forumbenefits.com | Renewal Presentation 2016.pdf                               | MSI Viking Gage   |
| 11/4/2016 13:25 76.3.97.70 | bbannon@forumbenefits.com | Renewal Presentation 10.1.16 - MSI.pptx                     | MSI Viking Gage   |
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| 11/4/2016 13:25 76.3.97.70 | bbannon@forumbenefits.com | Pre-Renewal Presentation - MSI.pptx                         | MSI Viking Gage   |
| 11/4/2016 13:25 76.3.97.70 | bbannon@forumbenefits.com | Pre-Renewal Presentation - MSI.pptx                         | MSI Viking Gage   |
| 11/4/2016 13:24 76.3.97.70 | bbannon@forumbenefits.com | NOTES on 2016 Renewal.pdf                                   | MSI Viking Gage   |
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| 11/4/2016 13:24 76.3.97.70 | bbannon@forumbenefits.com | NOTES on 2016 Medical Renewal.pdf                           | MSI Viking Gage   |
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| 11/4/2016 13:24 76.3.97.70 | bbannon@forumbenefits.com | Notes for 1.1 Renewal while I was out.pdf                   | MSI Viking Gage   |
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| 11/4/2016 13:24 76.3.97.70 | bbannon@forumbenefits.com | Delta Dental Renewal.pdf                                    | MSI Viking Gage   |
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| 11/4/2016 13:23 76.3.97.70 | bbannon@forumbenefits.com | BCBS Revised Renewal for 12 months & Alternates.pdf         | MSI Viking Gage   |
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| 11/4/2016 13:16 76.3.97.70 | bbannon@forumbenefits.com | Reliance Standard Dental.docx                             | Magnolia Plantation |
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| 11/4/2016 13:10 76.3.97.70 | bbannon@forumbenefits.com | Renewal Presentation.pptx                                 | J. Henry Stuhr      |
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| 11/4/2016 13:09 76.3.97.70 | bbannon@forumbenefits.com | Dental Census.xlsx                                        | J. Henry Stuhr      |
| 11/4/2016 13:09 76.3.97.70 | bbannon@forumbenefits.com | Blue Choice Metallic Proposal.pdf                         | J. Henry Stuhr      |
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| 11/3/2016 14:52 76.3.97.70 | bbannon@forumbenefits.com | Total Cost Summary.xlsx                                          | Charleston Local  |
| 11/3/2016 14:52 76.3.97.70 | bbannon@forumbenefits.com | Charleston Local Development Corp Renewal Presentation 2016.pptx | Charleston Local  |

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| 10/27/2016 12:31 76.3.97.70     | bbannon@forumbenefits.com | Mutual of Omaha - Waiting Period Change 10.1.2014.pdf  | CYDC               |
| 10/27/2016 12:31 76.3.97.70     | bbannon@forumbenefits.com | CYDC 2015 Renewal.xlsx                                 | CYDC               |
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| 10/27/2016 12:30 76.3.97.70     | bbannon@forumbenefits.com | CYDC Renewal Spreadsheet 2016.xlsx                     | CYDC               |
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| 10/25/2016 18:13 76.3.102.242   | bbannon@forumbenefits.com | AlwaysCare AOR Letter.pdf                              | Smith Engineering  |
| 10/25/2016 18:13 23.101.139.185 | bbannon@forumbenefits.com | AlwaysCare Quote.pdf                                   | New Foundations    |
| 10/25/2016 18:13 23.101.139.185 | bbannon@forumbenefits.com | AlwaysCare SOLD Renewal Alternates 10.1.2015.pdf       | Poly Med           |
| 10/25/2016 18:13 76.3.102.242   | bbannon@forumbenefits.com | AlwaysCare AOR Letter.pdf                              | Smith Engineering  |
| 10/25/2016 18:12 76.3.102.242   | bbannon@forumbenefits.com | AlwaysCare SOLD Renewal Alternates 10.1.2015.pdf       | Poly Med           |
| 10/25/2016 18:12 76.3.102.242   | bbannon@forumbenefits.com | AlwaysCare Quote.pdf                                   | New Foundations    |
| 10/25/2016 18:12 104.45.155.154 | bbannon@forumbenefits.com | AlwaysCare Performa Limited Benefit Summary.pdf        | Performa           |
| 10/25/2016 18:12 76.3.102.242   | bbannon@forumbenefits.com | AlwaysCare Performa Limited Benefit Summary.pdf        | Performa           |
| 10/25/2016 18:12 23.101.140.188 | bbannon@forumbenefits.com | AlwaysCare Field Underwriting Form.pdf                 | Poly Med           |
| 10/25/2016 18:12 76.3.102.242   | bbannon@forumbenefits.com | AlwaysCare Field Underwriting Form.pdf                 | Poly Med           |
| 10/25/2016 18:11 76.3.102.242   | bbannon@forumbenefits.com | Ameritas.docx                                          | Internal - Carrier |

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| 10/25/2016 9:38 76.3.102.242  | bbannon@forumbenefits.com | CYDC - Contract and Schedule A - 10.1.2014.pdf | CYDC           |
| 10/25/2016 9:38 76.3.102.242  | bbannon@forumbenefits.com | CYDC - Contract and Schedule A - 10.1.2014.pdf | CYDC           |
| 10/25/2016 9:37 76.3.102.242  | bbannon@forumbenefits.com | Always Care Dental Summary.pdf                 | CYDC           |
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| 10/25/2016 9:37 76.3.102.242  | bbannon@forumbenefits.com | Always Care Policy Cert.pdf                    | CYDC           |
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| 10/25/2016 9:19 76.3.102.242  | bbannon@forumbenefits.com | 2016 J Henry Stuhr Renewal Spreadsheet.xlsx    | J. Henry Stuhr |
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| 10/25/2016 9:18 76.3.102.242  | bbannon@forumbenefits.com | Renewal Presentation.pptx                      | J. Henry Stuhr |
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| 10/25/2016 9:18 76.3.102.242  | bbannon@forumbenefits.com | BCBS Renewal - Detail.pdf                      | J. Henry Stuhr |
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| 10/24/2016 14:42 76.3.102.242 | bbannon@forumbenefits.com | BCBS SBC 2016.pdf                              | J. Henry Stuhr |
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| 10/24/2016 14:41 76.3.102.242 | bbannon@forumbenefits.com | Dental Census.xlsx                             | J. Henry Stuhr |
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| 10/24/2016 14:40 76.3.102.242 | bbannon@forumbenefits.com | Renewal Presentation.pptx                      | J. Henry Stuhr |
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| 10/24/2016 14:39 76.3.102.242 | bbannon@forumbenefits.com | 2016 J Henry Stuhr Renewal Spreadsheet.xlsx    | J. Henry Stuhr |
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| 10/24/2016 14:39 76.3.102.242 | bbannon@forumbenefits.com | BCBS Renewal - Detail.pdf                      | J. Henry Stuhr |

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| 10/24/2016 14:38 | 76.3.102.242 | bbannon@forumbenefits.com | BCBS Renewal - Detail.pdf                              | J. Henry Stuhr |
| 10/24/2016 13:49 | 76.3.102.242 | bbannon@forumbenefits.com | Renewal Spreadsheet 2016.xlsx                          | Alpha Genesis  |
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| 10/24/2016 12:16 | 76.3.102.242 | bbannon@forumbenefits.com | BCBS Alpha Genesis Renewal Package 2017.pdf            | Alpha Genesis  |
| 10/24/2016 12:16 | 76.3.102.242 | bbannon@forumbenefits.com | Companion Renewal.pdf                                  | Alpha Genesis  |
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| 10/20/2016 17:48 76.3.102.242 | bbannon@forumbenefits.com | Alternate Medical Plans.pdf                           | Wholesale     |
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**COLOR KEY:**  
**HIPAA DATA**  
**INTELLECTUAL DATA**  
**GROUPS THAT ARE NOT BANNON'S**

**STATE OF SOUTH CAROLINA**

**BEAUFORT COUNTY**

**IN THE COURT OF COMMON PLEAS**

**CIVIL ACTION NO. 2016-CP-07-2541**

Forum Benefits, Inc.,

Plaintiff,

v.

Brian Bannon and Assured Partners, NL

Defendants.

# Exhibit E

## HASKELL - BANNON (DIRECT EXAMINATION)

11

1 Group Division.

2 And after, I can't remember the period  
3 of time, a year or two, I qualified for an  
4 internal marketing position with one of their  
5 subsidiary companies. They are called Blue  
6 Choice HealthPlan now, but they were Companion  
7 Healthcare at the time.

8 And after that I was hired by a  
9 brokerage, health insurance brokerage in  
10 Charleston to be a producer.

11 A year later I was recruited to work  
12 for a Health Insurance/Property & Casualty  
13 brokerage, and I worked there for a little over  
14 seven years.

15 I left there, attempted to open up a  
16 Nationwide office, didn't go well. And a few  
17 months after that it was financially a failure.

18 A few months after that I became  
19 employed with Brian Stritt as a W-2 employee.

20 And then after that I ended up at  
21 Assured Partners, my current position.

22 Q When you became employed by Brian  
23 Stritt, do you mean you became employed by Forum  
24 Benefits?

25 A Well, they were Palmetto Benefit

## HASKELL - BANNON (DIRECT EXAMINATION)

12

1 Management at the time.

2 Q Yes.

3 Your educational background, you went  
4 to Clemson?

5 A I did. I have got a Bachelor of Arts  
6 in Political Science. I graduated in 1996,  
7 December of 1996.

8 Q You graduated early?

9 A I graduated late. I graduated high  
10 school in '91.

11 Q Do you know Jon Taylor?

12 A I do.

13 Q How did you first hear Mr. Taylor's  
14 name?

15 A From Ben Taylor.

16 Q And who is Ben Taylor?

17 A Ben Taylor was -- still is the owner of  
18 AssureSouth.

19 Q Did Mr. Taylor -- did Ben Taylor call  
20 you?

21 A I think I called Ben.

22 Q And why did you call Ben Taylor?

23 A I think Mack Ward told me that if I was  
24 interested in possibly another position with an  
25 insurance agency I should talk to Ben. Ben

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## HASKELL - BANNON (DIRECT EXAMINATION)

20

1 Partners?

2 A Initially it was via Email and  
3 telephone. I met her in person in Louisville,  
4 Kentucky and probably haven't had any contact  
5 with her -- I haven't had any contact with her  
6 in months.

7 Q And what was the nature of the contact  
8 that you had with her?

9 A She is trying to get me on board to  
10 make sure I was being taken care of. If I had  
11 any questions I was free to reach out and ask  
12 her. Basically just trying to get help in  
13 getting situated when I started.

14 Q Does she have HR functions?

15 A I don't think so, no.

16 Q Who is Holly Schardine  
17 S-c-h-a-r-d-i-n-e?

18 A I recognize the name. I am not sure  
19 who she is or what she does.

20 Q Have you ever contacted her?

21 A Maybe.

22 Q But you don't recall specifically?

23 A I don't recall.

24 Q Do you know what Mr. Brady does for

25 Benesolv?

## HASKELL - BANNON (DIRECT EXAMINATION)

21

1           A    I believe he is the director of  
2           Benesolv, and he is in charge of the day-to-day  
3           operations.

4           Q    And what does Benesolv do?

5           A    They are the company that we use to  
6           implement and administer clients' benefit  
7           administration systems.

8           Q    Do you recall what interaction you had  
9           with Mr. Brady in October of 2016?

10          A    Yeah. I was trying to get my Employee  
11          Navigator clients on board to Benesolv.

12          Q    What do you mean on board?

13          A    I was trying to make sure that the  
14          clients who had Employee Navigator with Forum  
15          would also have Employee Navigator through  
16          Assured Partners with the same functionality.  
17          They wanted to keep the on-line benefit  
18          administration system.

19          Q    And how did you do that?

20          A    I asked the client for their user name  
21          and password. I asked for permission to use it.  
22          I told them for what purposes we were going to  
23          use it and told them we were going to make a  
24          copy of all their information, and we were going  
25          to use that copy to then dump all the

## HASKELL - BANNON (DIRECT EXAMINATION)

22

1 information in our system; and then, you know,  
2 they would have access to Employee Navigator  
3 through Assured Partners.

4 Q And did you pass that information onto  
5 Mr. Brady?

6 A I did.

7 Q Are those user ID's and passwords  
8 public information?

9 A No, I don't believe they are. The user  
10 ID's and passwords, there are two different  
11 kinds. There is an administrator user ID and  
12 password where the insurance brokerage controls.  
13 They can go in and look at all the client's data  
14 and manipulate the data and build the system.

15 And then there is a user ID and  
16 password that is given to the client. So the  
17 client can go in and add and delete and  
18 terminate employees. So the password that I was  
19 given was the client user name and a password.

20 Q And what was the other ID?

21 A The administrator password.

22 Q And how does one get the administrator  
23 password?

24 A You have to be the broker.

25 So Benesolv, we set up our own

## HASKELL - BANNON (DIRECT EXAMINATION)

23

1 administrative password that only Jim Brady and  
2 his people can use. The client can't use that.

3 Q Did Forum Benefits have administrative  
4 passwords?

5 A They must have.

6 Q Did you have access to those?

7 A No.

8 Q Who would have access to those  
9 administrative passwords?

10 A Where?

11 Q At Forum Benefits?

12 A I don't know. Not me, not producers.

13 Q Are the client passwords -- I think you  
14 testified to this, but let me just make sure,  
15 are the client passwords public information?

16 A No, that is the client's private  
17 information.

18 MR. HASKELL: Here we go with  
19 exhibits.

20 (Whereupon, Plaintiff's Exhibit  
21 Number 1 was marked for  
22 identification.)

23 BY MR. HASKELL:

24 Q I show you what has been marked as  
25 Exhibit 1.

## HASKELL - BANNON (DIRECT EXAMINATION)

27

1 employee for Forum Benefits, is that correct?

2 A Yes.

3 Q When did you cease representing Forum  
4 Benefits?

5 A I believe when I sent in the agent of  
6 record letters. The date that I started sending  
7 them in is when I stopped representing Forum  
8 Benefits.

9 Q And what agent of record letters are we  
10 referring to?

11 A The ones that I sent in to Blue  
12 Cross/Blue Shield.

13 Q And what were the dates of those?

14 A I don't know. I believe they were  
15 sometime in November.

16 Q So it is your testimony that you ceased  
17 representation of Forum Benefits sometime in  
18 November, is that correct?

19 A Well, I was a 1099 employee, so I was  
20 an independent contractor. I was simply running  
21 my benefits, business through Forum. I wasn't  
22 an employee of Forum Benefits, so I was  
23 representing myself.

24 Q Were you soliciting business for Forum  
25 Benefits --

## HASKELL - BANNON (DIRECT EXAMINATION)

28

1 A No --

2 Q -- As a 1099 employee?

3 A No, at the time that I left I wasn't.

4 I had stopped soliciting business a

5 year earlier.

6 Q So you sopped soliciting business -- is

7 it your testimony that you stopped soliciting

8 business for Forum Benefits in 2015?

9 A Yes, November.

10 Q November of 2015, is that correct?

11 A Yes.

12 Q Did you generate any business for Forum

13 Benefits post November of 2015?

14 A I can't recall.

15 Q How did you notify Forum Benefits that

16 you had accepted a position at their competitor

17 Assured Partners?

18 A I didn't.

19 Q Why didn't you?

20 A Because I had a sneaky suspicion that

21 Brian Stritt was attempting to steal my entire

22 block of business and sell it to somebody else;

23 and I knew that if I told him what I was doing

24 he was going to shut me out and approach all of

25 my clients, and attempt to subterfuge my ability

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## HASKELL - BANNON (DIRECT EXAMINATION)

29

1 to bring my clients with me.

2 Q When were you first employed by Forum  
3 Benefits -- excuse me, by Assured Partners?

4 A It was either October -- I think  
5 October 15, 2016.

6 Q After October 15, 2016 did you visit  
7 any client while holding yourself out as a  
8 representative of Forum Benefits?

9 A No.

10 Q That would have been wrong, correct?

11 MR. HARVEY: Objection to form.

12 THE WITNESS: When I approached my  
13 clients after October 15 any  
14 conversations, I was very transparent  
15 and clear about what was going on. I  
16 was leaving Forum Benefits. I was  
17 going to Assured Partners, and they had  
18 a choice; they could either stay or  
19 come with me.

20 BY MR. HASKELL:

21 Q Thank you.

22 I believe it is your testimony that you  
23 stopped soliciting business for Forum Benefits  
24 in November of 2015, is that correct?

25 A I stopped trying to bring new clients

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## HASKELL - BANNON (DIRECT EXAMINATION)

30

1 on to Forum in November of 2015.

2 Q Did you notify Forum Benefits at that  
3 time that you were stopping those actions?

4 A No, I was waiting on the employment  
5 contract that Brian Stritt said he was going to  
6 deliver to me.

7 Q And when was that?

8 A That was in November of 2015, I think.

9 Q Did you have an employment agreement  
10 with Forum Benefits?

11 A No.

12 Q Did you have an employment agreement  
13 with your prior employer?

14 A I did.

15 Q Were you hesitant in signing an  
16 employment agreement with Forum Benefits?

17 A Sure.

18 Q Why was that?

19 A Because once you sign an employment  
20 agreement they are enforceable.

21 Q And what kind of provisions are  
22 enforceable that would trouble you?

23 A Typically there is something call a  
24 non-compete and nonsolicitation from my previous  
25 employer, and if they give you a certain amount

## HASKELL - BANNON (DIRECT EXAMINATION)

31

1 of -- it is my understanding if they give you a  
2 certain amount of consideration and you sign it,  
3 under my previous agreement I was unable to  
4 contact or solicit business from any of my  
5 previous clients for a period of I think it was  
6 24 months once I left my previous employer.

7 So I in no way, shape or form intended  
8 on signing another employment agreement.

9 Q But didn't you just testify in November  
10 of 2015 you were waiting for an employment  
11 agreement from Brian Stritt?

12 A And he was said he was going to deliver  
13 one. I didn't agree to sign it. He just said  
14 he was going to deliver it. I said I would  
15 review it. I would have my attorney look at it  
16 and I would send it back to him.

17 Q So the reason why you didn't notify --  
18 is it your testimony that the reason why you  
19 didn't notify Forum Benefits in November of 2015  
20 that you were stopping solicitation of new  
21 clients for them was because you were waiting  
22 for an employment agreement from Brian Stritt at  
23 the time?

24 A I wanted to see what was in it.

25 Q Yes or no?

## HASKELL - BANNON (DIRECT EXAMINATION)

32

1 A I was waiting to see what was in it.

2 MR. HASKELL: Read the question  
3 back, please.

4 (Whereupon, the record  
5 was read back as requested.)

6 THE WITNESS: I hadn't agreed to  
7 sign anything, so yes, that is correct.

8 BY MR. HASKELL:

9 Q Thank you.

10 MR. HASKELL: Let us go with  
11 Number 2.

12 (Whereupon, Plaintiff's Exhibit  
13 Number 2 was marked for  
14 identification.)

15 BY MR. HASKELL:

16 Q Could you identify Number 2, Exhibit 2.

17 A The subject is Brian Bannon. The  
18 attachment is Assured Partners NL, LLC,  
19 employment agreement doc.

20 Q And could you read the body of the  
21 Email?

22 A "Hey Brian. Review and more to come.  
23 Thanks, John."

24 Q Did you receive an employment agreement  
25 from Mr. Taylor on August -- from Mr. Taylor of

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HASKELL - BANNON (DIRECT EXAMINATION)

33

1 Assured Partners on August 29, 2016?

2 A It appears so.

3 (Whereupon, Plaintiff's Exhibit

4 Number 3 was marked for

5 identification.)

6 BY MR. HASKELL:

7 Q Okay?

8 A Okay.

9 Q I refer you to the second page of  
10 Exhibit 3, the bottom of the page. It is an  
11 Email from Jon Taylor to Walt Konetzka  
12 K-o-n-e-t-z-k-a and Louis Berman. Subject,  
13 Brian Bannon. It begins: "Hey Walt."  
14 Do you see this next page, this second  
15 paragraph?

16 MR. HARVEY: Objection to the  
17 form. He is not part of this Email.

18 MR. HASKELL: I understand that.

19 THE WITNESS: I do.

20 BY MR. HASKELL:

21 Q Would you read that, please.

22 A The second paragraph?

23 Q Yes.

24 A "He's planning to BOR his book over to  
25 us, somewhere between \$200 and \$250,000 and we

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## HASKELL - BANNON (DIRECT EXAMINATION)

43

1 Q Did you place that business with those  
2 clients with Forum Benefits?

3 A They were already clients.

4 Q Had you placed that business with Forum  
5 Benefits at the time?

6 MR. HARVEY: Objection to form.  
7 Placed business? You need to  
8 define that term.

9 THE WITNESS: I don't know what  
10 you mean.

11 MR. HARVEY: You need to define  
12 that term.

13 MR. HASKELL: Okay.

14 BY MR. HASKELL:

15 Q Prior to October 15, 2016 had you  
16 secured clients that were Forum Benefits'  
17 customers?

18 A I had clients. They were being  
19 serviced through Forum Benefits.

20 Q Thank you.

21 (Whereupon, Plaintiff's Exhibit  
22 Number 6 was marked for  
23 identification.)

24 BY MR. HASKELL:

25 Q Did you ever download files or copy

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## HASKELL - BANNON (DIRECT EXAMINATION)

44

1 files from the Forum Benefits' SharePoint  
2 system?

3 A Yes.

4 Q How many of those files did you  
5 download or copy?

6 A I don't remember.

7 Q Could it have been 2000?

8 A It could have been.

9 Q And where would you have downloaded  
10 those to?

11 A There was a desktop that I returned to  
12 Brian Stritt, and I also had a laptop that I  
13 would have downloaded those to my personal  
14 laptop.

15 Q And what happened to that personal  
16 laptop?

17 A The hard drive malfunctioned, physical  
18 malfunction about two weeks -- maybe two weeks  
19 into the job starting with Assured Partners.  
20 There was some kind of physical damage to it.

21 Q Would it be your testimony that your  
22 laptop crashed the end of October, the first of  
23 November of 2016?

24 A Yeah, it was sometime around there.

25 Q And did that laptop contain the

## HASKELL - BANNON (DIRECT EXAMINATION)

45

1 information that you had downloaded from the  
2 SharePoint system?

3 A That would be accurate.

4 Q All 2000 files?

5 A I believe some of those files were on  
6 the desktop that was returned back to Brian  
7 Stritt.

8 Q And did you transfer those files to  
9 anybody else?

10 A No.

11 MR. HARVEY: You need to answer  
12 yes or no.

13 THE WITNESS: No.

14 BY MR. HASKELL:

15 Q What kind of information was in those  
16 files?

17 A Client information; demographic  
18 information, meaning Social Security numbers,  
19 dates of birth; dependent information,  
20 addresses, zip codes; client policy info,  
21 medical carrier, dental carrier.

22 You know, anything else pertaining to  
23 their employee benefit plans, like Section 125,  
24 Federal HOA info, payroll deductions, that type  
25 of stuff.

## HASKELL - BANNON (DIRECT EXAMINATION)

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1 Q Were there pricing structures that were  
2 in that information that you downloaded?

3 A Their rates, their insurance rates were  
4 included in that information, that is correct;  
5 and the payroll deductions.

6 Q Were there Forum Benefits' pricing  
7 policies that were in that information that you  
8 downloaded?

9 A I don't understand what you mean by  
10 Forum Benefits' pricing policies.

11 Q Were there user benefits that you  
12 downloaded from Forum Benefits SharePoint  
13 system?

14 A I don't know.

15 The only recollection I have of a user  
16 guide is when you brought it up in depositions.  
17 I have never laid my eyes on one before.

18 Q Going back to Exhibit 6, have you read  
19 that?

20 A Yes, I have.

21 Q Would you look at number -- the third  
22 page, please.

23 What is that? Is that a letter on  
24 Assured Partners' letterhead to you?

25 A It is.

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## HASKELL - BANNON (DIRECT EXAMINATION)

61

1 A It says denied.

2 Q During the period January of 2016  
3 through November 15, 2016 you deny accessing,  
4 copying, or downloading files from Forum  
5 Benefits' computer systems that included  
6 Employee Navigator Guides, is that correct?

7 A I downloaded my clients' files.

8 Q Did you download those from Assured  
9 Partners' computer systems -- I mean excuse me,  
10 Forum Benefits' computer systems?

11 A Not intentionally. If they were in a  
12 client file, I did have a dump of the client  
13 file. My client file data dumped everything in  
14 it.

15 Q Could they have included Employee  
16 Navigator Guides?

17 A I can't say.

18 Like I said, I am not familiar with the  
19 Employee Navigator Guide.

20 Q I refer you back to Exhibit 8, the  
21 first sentence.

22 A Okay.

23 Q What does that say?

24 A Once Benesolv has confirmed they have  
25 copied the Employee Navigator website's over

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## HASKELL - BANNON (DIRECT EXAMINATION)

67

1 Q So does that have more value  
2 transferring it by electronics?

3 MR. HARVEY: Objection to form.  
4 Value to whom?

5 BY MR. HASKELL:

6 Q Does it have more value to Forum  
7 Benefits if you transferred information --  
8 excuse me, Assured Partners?

9 A I wouldn't say it has more value. I  
10 mean it is the same information. It is just  
11 easier to do electronically.

12 Q Is it more efficient to do it  
13 electronically?

14 A You can say that. If it weren't more  
15 efficient we would still be using paper. We  
16 wouldn't be using Ben Admin systems.

17 (Whereupon, Plaintiff's Exhibit  
18 Number 11 was marked for  
19 identification.)

20 BY MR. HASKELL:

21 Q What is a screen shot?

22 A I don't know. I have heard it referred  
23 to. You know, you take a picture with your  
24 camera or your cell phone I guess.

25 Q Would you read the Email from Jim

## HASKELL - BANNON (DIRECT EXAMINATION)

68

1 Brady, which is the second Email on Exhibit 11.

2 A Which sentence do you want we to read  
3 there?

4 Q The whole Email?

5 MR. HARVEY: You mean right here?

6 MR. HASKELL: The second one. It  
7 starts with Brian, the first page, the  
8 second Email from Jim Brady.

9 THE WITNESS: November 8, 2016 at  
10 6:33 p.m. "Brian, they are working. We  
11 have downloaded all current enrollment  
12 details. We are next going to take  
13 screen shots and build the plans in the  
14 next couple of days. To confirm, we  
15 are only building the two sites for  
16 premier and Carolina Youth. The other  
17 site we don't have any details for and  
18 will not be able to build. Thanks, Jim  
19 Brady."

20 BY MR. HASKELL:

21 Q What did you think Mr. Brady was  
22 referring to when he said we are going to take  
23 screen shots?

24 A I assumed that means he is making a  
25 copy of all their plan -- their plan

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## HASKELL - BANNON (DIRECT EXAMINATION)

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1 information, the existing data.

2 Q Why do you need screen shots to build a  
3 plan?

4 A You would have to ask Jim the  
5 vernacular. You would have to ask Jim that. I  
6 am not an expert on that. I took that as making  
7 copies. That is not my vernacular.

8 Q Do you know what Mr. Brady meant when  
9 he referred to build the plans?

10 A I don't.

11 Q You didn't question Mr. Brady? You  
12 didn't get this Email and say what the devil  
13 does he mean?

14 A I mean I am assuming he means set up.

15 Q How long does it take to build a plan?

16 A I have heard that we can do it in as  
17 little as 48 hours, and it can take as long as  
18 90 days.

19 Q Is that for each customer?

20 A It is mutually exclusive. It just  
21 depends on the customer. You know, how big they  
22 are, how much they have got going on, how much  
23 we have got going on internally.

24 Q How long did it take to build the  
25 Premier and Carolina Youth plans?

## HASKELL - BANNON (DIRECT EXAMINATION)

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1 Q Would you assume that to be Jim is  
2 taking the lead on screen shooting?

3 A That is plausible, yes.

4 (Whereupon, Plaintiff's Exhibit  
5 Number 13 was marked for  
6 identification.)

7 MR. HARVEY: Can we take a short  
8 break?

9 (Whereupon, a short break was  
10 taken.)

11 BY MR. HASKELL:

12 Q Mr. Bannon, would you look at Exhibit  
13 13, please.

14 A Sure.

15 Q And that first Email, is that an Email  
16 from you to Michelle Fralix who is now known as  
17 Michelle Cofield?

18 A It appears to be.

19 Q And what is the date of that Email?

20 A November 30, 2016.

21 Q And would you read the first sentence  
22 of that.

23 A "Michelle, my hard drive broke and I no  
24 longer have available info for these guys."

25 Q And what device are you referring to as

## HASKELL - BANNON (DIRECT EXAMINATION)

74

1 the hard drive?

2 A My personal laptop.

3 Q Is that the laptop that you used to  
4 download information from Forum Benefits?

5 A Yes.

6 Q When did that hard drive break?

7 A November 30 or thereabouts. Probably  
8 within a day I mean, you know.

9 Q Had you sent information -- strike  
10 that.

11 I believe it was your testimony that  
12 you had downloaded information from Forum?

13 A From the Share Drive Partners.

14 Q From the Share Drive to your hard  
15 drive?

16 A Right.

17 Q Had you uploaded or transferred that  
18 information to Assured Partners or any of that  
19 information?

20 A No.

21 Q You are sure of that?

22 A Oh, I am positive.

23 Q Okay.

24 A It is not something I planned.

25 (Whereupon, Plaintiff's Exhibit

**Dean Haskell**

---

**From:** Brian Bannon <Brian.Bannon@assuredptrnl.com>  
**Sent:** Wednesday, November 30, 2016 4:02 PM  
**To:** Michelle Fralix  
**Subject:** FW: Renewal

Michelle,

My hard drive broke and I no longer have renewal info. for these guys.

Have we been sent copies of their 1/1 renewal stuff yet?

Brian

---

**From:** Paula Gant [mailto:accounting@alphagenesisinc.com]  
**Sent:** Wednesday, November 30, 2016 10:53 AM  
**To:** Brian Bannon <Brian.Bannon@assuredptrnl.com>  
**Subject:** RE: Renewal

Hi Brian,

Next week for me is full. Is the 15<sup>th</sup> or 16<sup>th</sup> too late?

Also, how do I sign up employees now. Who do I need to send new enrollee information?

**Paula Gant**

Accounting and Human Resources

**To:** Brian

888-789-MONK (6665)  
 843-589-5190 ext.26 (office)  
 843-589-5290 (fax)  
[www.AlphaGenesisInc.com](http://www.AlphaGenesisInc.com)

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*Please consider the environment before printing this e-mail.*

---

**From:** Brian Bannon [mailto:Brian.Bannon@assuredptrnl.com]  
**Sent:** Wednesday, November 23, 2016 10:45 AM  
**To:** Paula Gant (accounting@alphagenesisinc.com) <accounting@alphagenesisinc.com>  
**Subject:** Renewal

Hi Paula,

Let me know how you'd like to proceed re: your 1/1 renewal. Also, please send me a few dates that work for you for the renewal meeting.....we're almost in December.

The first week of December maybe?

Have a Happy Thanksgiving!

**Brian Bannon, PAHM**

Senior Vice President

**AssuredPartners NL**

8860 Faber Place Drive, Suite 400

North Charleston, SC 29405

C 843.860.1291 P 843.706.2438

F 843.569.7209

[Brian.Bannon@assuredptrnl.com](mailto:Brian.Bannon@assuredptrnl.com)

[www.assuredptrnl.com](http://www.assuredptrnl.com)

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**STATE OF SOUTH CAROLINA**  
**BEAUFORT COUNTY**

**IN THE COURT OF COMMON PLEAS**  
**CIVIL ACTION NO. 2016-CP-07-2541**

Forum Benefits, Inc.,

Plaintiff,

v.

Brian Bannon and Assured Partners, NL

Defendants.

# Exhibit F

**Dean Haskell**

**From:** Jim Brady <jim.brady@benesolv.com>  
**Sent:** Friday, November 11, 2016 7:36 AM  
**To:** Brian Bannon  
**Cc:** Jon Taylor; Kelly Hagan; Mack Ward  
**Subject:** RE: Introducing Brian Bannon

Brian, the three groups listed below are built in our EE Nav and all data has been collected. We have not taken all the screen shots yet as we wanted to get everything copied over ASAP. The plans and documents are all built in our system and read for enrollment. We copied over EEs/Deps/Beneficiaries/enrollment information. Everything is built and we can setup call with the groups for next week to review their new sites.

In the meantime we will be going back in to collect screenshots but we built them side by side. Thanks

**Groups**

Premier Logistics

Carolina Youth

St Andrews

We did not build Alpha Genesis as there is nothing to build. Thanks

Dean Haskell

**JIM BRADY | DIRECTOR**

BeneSolv, an ASSURED PARTNERS company  
 895 Central Ave. Suite 1000, Cincinnati, OH 45202  
 O 513-250-3035 | F 513.624.1732 | E [jim.brady@benesolv.com](mailto:jim.brady@benesolv.com)  
[www.BeneSolv.com](http://www.BeneSolv.com)

**Disclosure**

**From:** Brian Bannon [mailto:bbannon1996@gmail.com]  
**Sent:** Wednesday, November 09, 2016 9:34 AM  
**To:** Jim Brady  
**Cc:** Jon Taylor; Kelly Hagan; Mack Ward  
**Subject:** Re: Introducing Brian Bannon

*Some groups from  
docs please*

Jim,

That's incorrect. I sent you an email yesterday from my Assured Partners email for another client (St. Andrews Public Service District. That brings the total to three (3).

Thanks,

Brian Bannon

Sent:

On Tue, Nov 8, 2016 at 6:33 PM, Jim Brady <[jim.brady@benesolv.com](mailto:jim.brady@benesolv.com)> wrote:

Brian, they are working, we have downloaded all current enrollment details, we are next going to take screenshots and build the plans in the next couple of days. TO confirm, we are only building the two sites for Premier and Carolina Youth. The other site we don't have any details for an will not be able to build. Thanks





Employer User ID: tmcclam0806

Password: sydney0806#

**Premier Logistics Solutions**

Employer User ID: morteraa

Password: Premier904?

**Alpha Genesis** - They're only signed up for Navigator's 1094/1095 filing service, but not actively enrolling. They haven't been given userID/Password.

Please let me know if you need anything else.

Brian Bannon  
(843) 860-1291

On Mon, Oct 31, 2016 at 11:25 AM, Brian Bannon <[bbannon1996@gmail.com](mailto:bbannon1996@gmail.com)> wrote:

I'm on it....will get back to you. Brian

On Mon, Oct 31, 2016 at 11:21 AM, Jim Brady <[jim.brady@benesolv.com](mailto:jim.brady@benesolv.com)> wrote:

Brian, we tried to login as both of these people listed below over the weekend and we are not able to login, both had a password invalid error returned. We copied and pasted directly from the below so I am not sure why they wouldn't work. Can you check and see if they work for your team or the group? Thanks

**JIM BRADY | DIRECTOR**

**BeneSolv**, an **ASSUREDPARTNERS** company  
895 Central Ave. Suite 1000, Cincinnati, OH 45202

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Disclosure

**From:** Brian Bannon [mailto:bbannon1996@gmail.com]  
**Sent:** Thursday, October 27, 2016 1:05 PM  
**To:** Jon Taylor; Kelly Hagan; Jim Brady  
**Cc:** Holly Schardine; Mack Ward  
**Subject:** Re: Introducing Brian Bannon

**Jim/Kelly,**

Please use the attached info. to make copies of the Employee Navigator websites for the following clients that are moving with me to Assured Partners/NL:

**Carolina Youth Development Center**

**Carriers:** BCBS of SC, AlwaysCare, Mutual of Omaha

**Renewal Dates:** 10/1

**1095/1094 filing service:** No

**Employer Actively using EN:** No (under construction to actively enroll employees)

**Employees Actively using EN:** No (under construction)

**Employer User ID:** tmcclam0806

**Password:** Sydney0806#

**Premier Logistics Solutions**

**Carriers:** BCBS of SC, Guardian

**Renewal Dates:** 4/1

**1094/1095 filing service:** Yes

**Employer Actively using EN:** Yes

**Employees Actively using EN:** Yes

**Employer User ID:** Morteraa

**Password:** Premier904?

**Alpha Genesis**

**Carriers:** BCBS of SC, Guardian, Companion Life

**Renewal Dates:** 1/1

1094/1095 filing service: No

Employer Actively using EN: No

Employees Actively using EN: No

Employer User ID: None

Employer Password: None

(Alpha Genesis has signed up 1094/1095 filing service only. Currently using ADP for payroll)

\*Premier Logistics is priority as their employees are actively using EN for enrollments/changes. If at all possible I'd like for them to enrollment capability ASAP and prior to 1/1.

Carolina Youth Development Center, and Alpha Genesis are fine with going live on EN on 1/1.

If you have any trouble with UserID/Passwords please let me know.

Thanks for your help,

Brian Bannon  
(843) 860-1291

On Tue, Sep 13, 2016 at 10:13 PM, Jon Taylor <[Jon.Taylor@assuredptrnl.com](mailto:Jon.Taylor@assuredptrnl.com)> wrote:

Hey Jim / Holly,

I've cc'd Brian Bannon.

Brian works with the same agency "Forum" that Mack Ward worked with and needs to understand the system only solution for his clients that he's moving over to our Charleston office.

Hey Jim

If you would, share your contact info with Brian and you guys connect to outline a plan to roll this business over. What timeline is realistic, etc.

**STATE OF SOUTH CAROLINA**  
**BEAUFORT COUNTY**

**IN THE COURT OF COMMON PLEAS**  
**CIVIL ACTION NO. 2016-CP-07-2541**

Forum Benefits, Inc.,

Plaintiff,

v.

Brian Bannon and Assured Partners, NL

Defendants.

# Exhibit G



**Dean Haskell**

**From:** Mack Ward <Mack.Ward@assuresouth.com>  
**Sent:** Wednesday, November 09, 2016 10:37 AM  
**To:** holly.schardine@benesolv.com  
**Subject:** FW: Employee Navigator Password (s)  
**Importance:** High

Hey Holly,

Just wanted to make sure you got this and knew screen shooting data is a big priority!

Thanks,  
 Mack

Mack Ward  
 Employee Benefits Advisor  
**AssureSouth, Inc.**  
 An AssuredPartners Company  
 291 South Pine Street  
 PO Box 1713  
 Spartanburg, SC 29302/29304  
 P 800.277.6724 F 864.542.0723 Direct 864.541.0179  
 M 864.237.3643  
[Mack.Ward@assuresouth.com](mailto:Mack.Ward@assuresouth.com)  
[www.assuresouth.com](http://www.assuresouth.com)



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**From:** Brian Bannon [<mailto:Brian.Bannon@assuredptrnl.com>]  
**Sent:** Tuesday, November 08, 2016 3:00 PM  
**To:** Jim Brady; Kelly Hagan  
**Cc:** Jon Taylor; Mack Ward; Holly Schardine  
**Subject:** Employee Navigator Password (s)  
**Importance:** High

Hi Jim,

Please find the attached Employee Navigator information for St. Andrews PSD. Also, please see the previous 2 emails below re: Carolina Youth Development Center and Premier Logistics (EE Navigator clients).



**St. Andrews Public Service District**

- Carriers: BCBS of SC/Medical and Dental. Guardian Vision. Companion Life Life/AD&D and Vol. Life
- Renewal Dates: BCBS (7/1), Guardian (7/1), Companion (7/1)
- 1094/1095 filing service: Yes
- Is the employer actively using EN: Yes
- Are the employees actively using EN: Yes
- Employer User ID: [jpayne@standrewspsd.org](mailto:jpayne@standrewspsd.org)
- Password: Joanne2016!

Please try to make copies of all 3 groups as quickly as possible as I'm Agent of Record lettering them and am waiting on confirmation that everything has been copied over. I need to submit AOR's by the end of this week (11/11).

If you have any questions or need anything else let me know. I appreciate your assistance.

Sincerely,  
 Brian Bannon  
 (843) 860-1291

Forwarded message -----

From: **Brian Bannon** <[bbannon1996@gmail.com](mailto:bbannon1996@gmail.com)>

Date: Mon, Nov 7, 2016 at 2:49 PM

Subject: Re: Introducing Brian Bannon

To: Jim Brady <[jim.brady@benesolv.com](mailto:jim.brady@benesolv.com)>

Cc: Jon Taylor <[Jon.Taylor@assuredptrnl.com](mailto:Jon.Taylor@assuredptrnl.com)>, Kelly Hagan <[Kelly.Hagan@assuredptrnl.com](mailto:Kelly.Hagan@assuredptrnl.com)>, Mack Ward <[mack.ward@assuresouth.com](mailto:mack.ward@assuresouth.com)>

Jim/Kelly,

I hope you guys are doing well.

Forwarded:

Please confirm that the updated Pass/UserID's for EE Navigator I sent you on 11/2 are working (see previous email for the Carolina Youth Development, and Premier Logistics).

On Wed, Nov 2, 2016 at 3:08 PM, Brian Bannon <[bbannon1996@gmail.com](mailto:bbannon1996@gmail.com)> wrote:  
 Jim/Kelly

Please find the correct Employee Navigator userID/passwords. I've logged into and have verified they're both working.

**Carolina Youth Development Center**

Employer User ID: tmcclam0806

Password: sydney0806#

**Premier Logistics Solutions**

Employer User ID: morteraa  
Password: Premier904?

**Alpha Genesis** - They're only signed up for Navigator's 1094/1095 filing service, but not actively enrolling. They haven't been given userID/Password.

Please let me know if you need anything else.

Brian Bannon  
(843) 860-1291



**STATE OF SOUTH CAROLINA**

**BEAUFORT COUNTY**

**IN THE COURT OF COMMON PLEAS**

**CIVIL ACTION NO. 2016-CP-07-2541**

Forum Benefits, Inc.,

Plaintiff,

v.

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Defendants.

# Exhibit H

1 A. Two.

2 Q. And they live at home?

3 A. No, they're both -- they're both out. One in Columbia,  
4 one in Charlotte.

5 Q. Okay. Do you have any relatives in Beaufort County?

6 A. I do not.

7 Q. By blood or by marriage?

8 A. None.

9 Q. Okay. Tell me a little bit about Forum Benefits, Inc.

10 A. So Forum Benefits was actually started in 1999 under the  
11 name Palmetto Benefit Management. Started out a house,  
12 grew it slowly. Over the next few years we rebranded to  
13 Forum in, I think about 2012. We are an employee  
14 benefit firm only. We provide medical, dental,  
15 disability, any sort of employee benefits to  
16 corporations.

17 Q. Okay. Was Palmetto Benefits a corporation?

18 A. Yeah.

19 Q. And you are the incorporator?

20 A. Correct. So it was S Corp.

21 Q. Are you the sole shareholder?

22 A. Correct.

23 Q. Are you the sole shareholder of Forum Benefits?

24 A. Forum Benefits as it existed, yes. We have since merged  
25 in December of 2016. Now, I'm a managing partner for

1       Alera.

2       Q.    Okay. We'll talk about that. Is Forum Benefit still an  
3       active corporation?

4       A.    It's active in the sense that there's still some  
5       residual monies flowing out and in, but it is not active  
6       as far as being a benefit company under my name. Forum  
7       Benefits, LLC has been formed for Alera, and that is  
8       active.

9       Q.    Forum Benefits, Inc. is currently an inactive  
10      corporation?

11      A.    Define "inactive." So we aren't putting -- we aren't  
12      putting business through there, but there's clearly  
13      expenses going out of that entity and the taxes are not  
14      finished.

15      Q.    Do you still own stock of Forum Benefits, Inc.?

16      A.    I don't know how exactly that the sale went down. We  
17      transferred all of the shares. There are -- there are  
18      two companies that it got transferred to, so I can't --  
19      I can't tell you exactly that answer. I believe all of  
20      the -- all of the shares were transferred to Forum  
21      Benefits, LLC.

22      Q.    And when did Forum Benefits, LLC begin operation?

23      A.    December 30th, 2016.

24      Q.    Okay. And who formed Forum Benefits, LLC?

25      A.    It was formed by attorneys out of New York in

1 A. I don't have the exact figures for the entire group. I  
2 can estimate it, but --

3 Q. Okay. And that check was written to Brian Stritt?

4 A. Well, not the entire amount, of course. The private  
5 equity company involved, we had to put 40 percent of  
6 ownership back into the existing entity, so we got --  
7 it's a leveraged deal, so the number comes out -- it's  
8 generally a 60/40 split. The way the taxes work it came  
9 -- ended up being a little higher than that, but -- so  
10 the 60 percent came, and then beyond that we also had a  
11 special arrangement because of Mr. Bannon's actions in  
12 which Genstar came back to the group and put an earn out  
13 on anybody that was in my position. I was the only one  
14 who qualified for that earn out based on -- on what  
15 happened. So they actually withheld 1.497 million of  
16 that purchase price depending on other parameters and  
17 factors that I had to meet to retain that part of the  
18 purchase price.

19 Q. Okay. That was a long statement.

20 A. Okay. I'll break it -- do you want me to break it down  
21 for you?

22 Q. Yeah.

23 A. Okay. So 8.68 million was the purchase price.

24 Q. Uh-huh.

25 A. We got cash of -- of the 40 percent -- or the 40 percent

1 figure, two and 60 percent figure, 40 percent of it went  
2 back it. And these -- the way leverage money works the  
3 math doesn't work out perfectly. So regardless out of  
4 the remaining five somewhat million, then I had 1.497  
5 million subtracted, and I was the only member who had  
6 that happen.

7 Q. And why was 1.49 million subtracted?

8 A. Because of Mr. Bannon's actions. He left and without  
9 notifying anybody, and they saw business going out the  
10 door. The buyer obviously got pretty nervous, so they  
11 put parameters if -- if somebody went and took business  
12 right before the sale, we had a special qualification to  
13 retain those earnings. And in my case I had to grow the  
14 entire block by five percent, and that includes the  
15 business that walked out the door to retain that amount.

16 Q. Are you seeking to recover that amount of money in this  
17 Action?

18 A. Possibly. Is that an answer?

19 MR. HARVEY:

20 Counsel, how in the world can that be confidential if  
21 that's the position that we're taking -- that he is  
22 taking?

23 MR. LEBLANC:

24 I think that question you just asked might not be  
25 confidential, but the question that was confidential

Benefit Administration system prior to that to build it out. All of the information that we get when we build out a client Employee Navigator file comes from two sources. It comes from payroll and it comes from the contracts. So everyone that we've build, and we've build hundreds, we've never had to go into somebody's system to take any data. What they're actually doing behind the scenes then is asking for the password so they can take screenshots. And the screenshots are not of the day-to-day Johnny's got single coverage, Mary's got family, it's to copy the build out, and that's the complex part of what we do. Employee Navigator, as I said, is a self-service module. Laurie Winston in our office is as proficient as anyone in the country, and is clearly better than anyone in the state. She serves on both our board for BAN, our board for Alera, and Employee Navigator has a conference once a year in which she serves on a special board for them, because of her knowledge of the system. That is what AP is taking, that they should not be taking. They should build that and do their own work.

Q. But there's nothing to restrict the client from getting that to AP or anyone --

A. To a --

Q. -- else?



1 accept that." Would you really accept somebody's  
2 password for a product from a competitor? It's bizarre  
3 that this is even a question. I would never even think  
4 about doing it, nor would I respect anybody that would  
5 do it.

6 Q. What steps have you taken to prevent that from  
7 happening?

8 A. A username and password.

9 Q. Okay.

10 A. That's the whole purpose of it is to not -- it's not  
11 public information. And I certainly wouldn't have given  
12 it to one of my competitors. That's the purpose of it.

13 Q. What if the HR director at Alpha Genesis decides they  
14 want to take that information and do with it whatever  
15 they want? What prevents that?

16 A. My issue is not with Alpha Genesis, my issue is with AP  
17 accepting the information. You're saying if somebody  
18 knows the information's stolen, they're off the hook  
19 because they didn't actually steal it. If you're a  
20 fence does that mean that, "Hey, that --

21 Q. Well, what --

22 A. -- "that information's" -- it's, I didn't steal it  
23 before --

24 Q. What if ---

25 A. -- it's okay?

1 A. We do. We put it together. We do the consulting work.

2 Q. Where as the information? Was this the Employee  
3 Navigator information?

4 A. No, this is our renewal spreadsheet. Be glad to go  
5 through it point by point if you like, it's our Renewal  
6 Package. It's been built over 15 years by my agency.  
7 Mostly by me, with input from our camp management staff.  
8 It is what makes us, us.

9 Q. How long had Magnolia been your client?

10 A. Three years, four years, something like that.

11 Q. Okay. So the Renewal Package contains what?

12 A. It contains all formulas. It contains numbers of  
13 marketing. It contains in some cases experience. It  
14 contains reporting on the Affordable Care Act and  
15 compliance issues. It's a number of things.

16 Q. The Affordable Care Act reporting is material that can  
17 be derived anywhere; correct?

18 A. If you have knowledge of it.

19 Q. Okay. Are you saying that Forum's knowledge of it is  
20 proprietary?

21 A. I'm saying it's better than what existed at  
22 AssuredPartners or with Brian Bannon, absolutely.

23 Q. In your opinion?

24 A. Sure.

25 Q. The information itself is obtainable through other

1 sources?

2 A. No. So, some of it is. Our calculations were done  
3 internally, so that was -- that was made by us. So --

4 Q. Calculations are done with numbers from the carrier; is  
5 that correct?

6 A. Not always. So some of our formulas, for example, we  
7 match up against the carriers to -- to make sure that  
8 their numbers are correct.

9 Q. Uh-huh. And your formulas, what are you talking about?

10 A. So what -- there's -- there's a number of them. So we  
11 analyze everything from demographics of our clients, and  
12 match that up against what the carrier's coming out with  
13 to our -- our -- our calculations on affordability to  
14 all kinds of -- of different things. What we think the  
15 risk tolerance is. Where we think the loss ratio should  
16 be. The credit we give for high claimants versus what  
17 the carrier does. So you put all of these two -- these  
18 things together and you match it up against what the --  
19 what the carrier's giving as a renewal, and that's kind  
20 of your basis of negotiation.

21 And whether or not we think their -- their offer is --  
22 is legitimate or not.

23 Q. And you prepare that and put that into a document?

24 A. Correct.

25 Q. Okay. And you give that to a client?

1 A. The output; correct. They don't see the formulas.

2 They've got no --

3 Q. Okay. Well, you give the document to the client?

4 A. The output; correct.

5 MR. WARD:

6 Sorry.

7 Q. Is there any restriction on what the client can do with  
8 that?

9 A. No.

10 Q. The client can do with it whatever the client wants?

11 A. The out -- the output, you're absolutely correct.

12 Q. Okay. And the document, is that what you say Marlene  
13 Gray had?

14 A. She had the entire Renewal Packet.

15 Q. Okay. And that Renewal Packet is what we're talking  
16 about?

17 A. Well, it's a component of it.

18 Q. Okay.

19 A. Yeah. Correct.

20 Q. And the Renewal Packet can -- that's a client document;  
21 correct?

22 A. Sure.

23 Q. Client can do whatever the --

24 A. Sure.

25 Q. -- client wants with the Renewal Packet?

1 A. Sure.

2 Q. The client can go give that to Brian Bannon, couldn't  
3 they?

4 A. Sure.

5 Q. Could go give it to AssuredPartners, couldn't they?

6 A. They could.

7 Q. Okay. And what's wrong with that?

8 A. The issue is not whether they give it, it's the issue of  
9 Brian Bannon passing off our work as AssuredPartners.  
10 He cannot represent Assured -- he can't be employed by  
11 AssuredPartners and use our labor to renew a client for  
12 himself.

13 Q. We're going to get into that.

14 A. Okay.

15 Q. I'm talking about the document itself, the Renewal  
16 Packet --

17 A. Correct.

18 Q. -- that you give to the client --

19 A. Correct.

20 Q. -- the client can do whatever ---

21 A. Sure.

22 Q. It's the client's document --

23 A. Sure. Sure.

24 Q. -- at that point?

25 A. Sure.

1 Q. Okay? Correct?

2 A. -- your point is what?

3 Q. Well, but the client can do whatever they want with the  
4 document; correct?

5 A. Well, so -- I'm not sure I understand what you're  
6 saying. We only do work for clients. Amazingly we  
7 choose not to do work for non-clients. This was a non-  
8 client at the time, and neither the group nor Brian  
9 Bannon, who was behind all of this, had told us that.

10 So we were still doing labor on behalf of somebody who  
11 had already indicated they were leaving, and nobody  
12 bothered to tell us, so we could do labor for  
13 AssuredPartners.

14 Q. Okay. Where are your formula kept?

15 A. In a variety of spreadsheets, systems. Formulas would  
16 all -- I assume would all be in Excel.

17 Q. Is there any document or other protection of those  
18 formulas?

19 A. There are passwords to get to the formulas.

20 Q. Okay. And who has access to those passwords?

21 A. Well, your password gets you into our Share Point  
22 system.

23 Q. And who has access to the Share Point?

24 A. Strictly employees, and those who we think are  
25 employees, or representing Forum.



1 use it internally.

2 Q. Okay. You try to get your clients on Employee  
3 Navigator?

4 A. Absolutely.

5 Q. And do you have to physically sign them up?

6 A. No.

7 Q. Do they become licensees for Employee Navigator?

8 A. No, it is our license.

9 Q. Okay. But they are the customer of Employee Navigator?

10 A. No, we are the customer of Employee Navigator. There's  
11 no contract between Employee Navigator and the client,  
12 it's between Employee Navigator and us, Forum.

13 Q. Uh-huh. Do you have any document, or is there any  
14 agreement that you have a client sign to gain access to  
15 Employee Navigator?

16 A. No.

17 Q. Why not?

18 A. What do we need it for?

19 Q. Okay. You create a password -- an access for the  
20 client?

21 A. Uh-huh (Affirmative).

22 Q. Correct? How do you do that?

23 A. Yeah, for H -- for HR, or -- once again that -- that  
24 would be a question probably in Laurie's sphere, but you  
25 -- you figure out who needs the access. It's generally

1 the HR person. Sometimes it's payroll. Sometimes, in  
2 -- in rare cases it may be the CFO, but usually it's HR  
3 and payroll --

4 Q. Uh-huh.

5 A. -- want to have access to it.

6 Q. Okay. And when you create an access you give their  
7 username and password?

8 A. Correct.

9 Q. And what do they have access to?

10 A. They've got access to -- great question, but mostly it's  
11 adds, deletes. They can run reports. Here's how many  
12 employees have this coverage. Here -- here's how many  
13 employees have this coverage. If employees don't elect  
14 on a time frame it will tell them who still needs to --  
15 to do things. It's an overall management system of --  
16 of their Ben Admin portal.

17 Q. Can they print what is on their portal?

18 A. They can print reports; correct. So they -- they can  
19 run a report saying how many people have this, how many  
20 people have that, absolutely.

21 Q. Okay. And is there anything to prevent the customer,  
22 the client --

23 A. Uh-huh.

24 Q. -- from giving that password and access to others?

25 A. Is there anything to prevent them from doing that?

1 Q. Let's just say if you give it to the HR person --

2 A. Okay.

3 Q. -- okay, is there anything to prevent the HR person from  
4 giving that to somebody else within the client company?

5 A. No.

6 Q. Okay. Is there anything to prevent the HR person from  
7 giving that access to a competitor?

8 A. Correct; the Trade Secrets Act.

9 Q. So you're saying the Trade Secrets Act prevents the HR  
10 person from giving that information to one of your  
11 competitors?

12 A. Correct; our build. And I want to make sure that we --  
13 we clarify the difference between what they're giving  
14 and what they're saying.

15 Q. Well, I'm just talking --

16 A. Those are two separate things.

17 Q. -- about --

18 A. Yeah.

19 Q. -- what the client has access to with the username and  
20 password --

21 A. Correct.

22 Q. -- you're saying that the Trade Secrets Act prevents  
23 that client from giving that information to your client  
24 -- to your competitor?

25 A. Define that -- that information.

1 Q. I've never been --

2 A. So -- so --

3 Q. -- been on Employee --

4 A. -- so -- so I'll put it -- I'll put it this way.

5 Q. -- never -- Employee Navigator.

6 A. I'll put it this way. I'll put it this way. So the  
7 output they can do whatever they want. I'm -- I'm not  
8 concerned about the output. If you want a report of how  
9 many people are on this coverage, how many people, what  
10 your deductions are, fine, we'll gladly give it to you.  
11 That's -- that's not the issue. My issue is with the  
12 client being told one thing, that that's what we're  
13 preventing them from doing, and please let me finish.  
14 And giving them access to where they can copy our build,  
15 which is extremely labor intensive, and expertise  
16 intensive, and that's the reason your client,  
17 AssuredPartners, is going after it, because it's  
18 difficult work, and it cost a lot of time.

19 Q. Mr. Stritt, I'm not talking about what the client is  
20 told. Every time we talk about the difference between  
21 what the client has, and what the client may be --

22 A. So --

23 Q. -- giving access to a competitor, you talk about --

24 A. Okay.

25 Q. -- being told by the competitor. I'm not talking about

1           what the client's being told. I'm talking about if the  
2           client elects to give the -- whatever the client has  
3           access to on Employee Navigator to whomever the client  
4           wants, a competitor, or a non-competitor, or Joe Shmoe  
5           on the street, does a client have the right to do that?

6           A.    No, not all information.

7           Q.    All right. What --

8           A.    So they definitely -- they can -- let me finish.

9           Q.    Okay.

10          A.    -- they can give the output, that's fine. The output's  
11               fine.

12          Q.    Okay.

13          A.    You can do whatever you want.

14          Q.    What prevents the client from giving that information to  
15               others?

16          A.    What are you talking about?

17          Q.    I'm talking about everything --

18          A.    So the output --

19          Q.    -- that's on the Employee Navigator --

20          A.    Right.

21          Q.    -- website --

22          A.    Right.

23          Q.    -- that the client has access to. Everything. What  
24               prevents the client from giving that information, or  
25               access to that information to whomever the client wants?

1 A. We don't have any agreement with the client to -- to  
2 judge or restrict what they do.

3 Q. Okay. So then from your answer, the client then has the  
4 right because of the access to do with what is on  
5 Employee Navigator whatever the client wants to do?

6 A. No. So once again there's a difference between the  
7 input and the output. I'll put it to you this way: If  
8 I give a client this spreadsheet, they're -- they're  
9 free to give this spreadsheet to whoever -- whoever they  
10 want. I don't like it. I think it's unethical, but  
11 whatever. People do that. My issue is the formulas  
12 behind that that we built, you cannot give that to a  
13 competitor, nor can the competitor take it. That is  
14 what we do. We are in the intellectual property  
15 business. You can't give our intellectual property to a  
16 competitor.

17 Q. Does the client have access to your formulas?

18 A. Usually not; correct.

19 Q. All right. So then the username and password would not  
20 give a competitor the access to your formulas --

21 A. Correct.

22 Q. -- on --

23 A. On Excel, that is correct.

24 Q. Okay. So, again, just so I'm -- I'm trying to dumb it  
25 down so I can understand it. All of the information

1 that Alpha Genesis -- or let's just say an Alpha Genesis  
2 client --

3 A. Uh-huh. Uh-huh.

4 Q. -- has on -- with their username and password on  
5 Employee Navigator, does that include proprietary  
6 information?

7 A. It -- it includes a build out that is proprietary in  
8 knowledge. So our expertise, absolutely. We don't  
9 think our competitors can do as good a job as we do on  
10 the build out.

11 Q. All right. And that build out is -- does a client have  
12 access to that with the username and password?

13 A. Normally not, unless they're advised to take  
14 screenshots, and then the company simply copies our  
15 work.

16 Q. You talk about advised by whom?

17 A. By your client, AssuredPartners. I've read the Emails,  
18 Bill. They said "Take screenshots."

19 Q. I'm talking generically. I'm not talking about  
20 AssuredPartners.

21 A. Okay.

22 Q. I'm talking about the information on Employee Navigator.

23 A. Right.

24 Q. Let's just say Employee -- the client wants to take  
25 screenshots --



1 A. Okay.

2 Q. -- if the client wants to take screenshots of Employee  
3 Navigator, does the client have access to that?

4 A. They could do that.

5 Q. Okay. And can the client do with those screenshots  
6 whatever the client wants?

7 A. Nothing to prevent them.

8 Q. Okay. And so your beef is the acceptance of that by a  
9 competitor?

10 A. It's the solicitation and direction -- don't shake your  
11 head.

12 Q. Okay.

13 A. This is -- this is -- this is my issue. Your clients  
14 specifically go to an Alpha Genesis and say, "We want  
15 you to either give us the password," which is normally  
16 the case, "Because mean old Forum won't give you your  
17 information," then they go in and take screenshots and  
18 rebuild what we've taken sometimes a week to do in an  
19 hour and a half. That's my issue. And at our level of  
20 expertise.

21 Q. Okay. But the information is the client's information?

22 A. Built on our expertise.

23 Q. Okay.

24 A. There's a reason --

25 Q. Does the information belong to the client?

1 the client?

2 A. Yeah, I could. Yeah.

3 Q. You don't protect that with any understanding?

4 A. So if we're doing, for example, a Claim's Report,  
5 absolutely we would give that to the client. Saying,  
6 "Here's your -- here's your high-dollar claimants,  
7 here's the prognosis, here's what we think," yeah.

8 Q. Okay.

9 A. That -- that we work on behalf of the client; correct.

10 Q. Okay. And once you give that to the client, that  
11 becomes the client information?

12 A. Yeah, they can -- they can --

13 Q. They can do whatever -- with it whatever they want?

14 A. Sure.

15 Q. The client owns that work product, the report itself?

16 A. Well, I don't know if they own it. I -- I would say we  
17 owe it, if we produced it, but they certainly get a copy  
18 of it. And, once again, it's the -- the output that  
19 they get, not the input, but, yeah.

20 Q. What did you do to prepare for this deposition?

21 A. I tried -- I tried -- I tried to go over some -- some of  
22 the old notes and remember the dates. Met with Steve on  
23 Tuesday and we went over a short period of stuff, and,  
24 you know, "Here's what you can expect," things like  
25 that. Fortunately I had already sat through a couple of

1 think it was a Nationwide agent. I can't remember. But  
2 he tried to open an office, and that didn't work out.  
3 He was unemployed and Jennifer Lowrance, who was our  
4 mutual friend said that he -- he ought to get together  
5 with me and discuss if -- if we could do something down  
6 in Charleston for him. So we started an office in -- I  
7 can't remember the month. But I think it was -- it was  
8 in 2009, we -- I agreed to start up the office for him.  
9 We paid him a draw of -- a non-refundable draw of  
10 \$60,000 while he was kind of getting on his feet so he  
11 could pay his bills and not worry about stuff, then kind  
12 of went from there. We had an agreement drawn up by  
13 Smith Moore Leatherwood for the Charleston office. It  
14 was a separate LLC at the time. And the long-term plan  
15 was to get him some equity in that location when he  
16 produced. And then I also went to Ganton -- Gantt  
17 Gleaton Wyatt, and I hope I've got those names in the  
18 correct order, and they performed the -- the non-compete  
19 and Employee Agreement for Bannon.

20 Q. You talked about --

21 A. I think that was --

22 Q. -- an Employee Agreement with Leatherwood?

23 A. No, no, Leatherwood was the -- established the company.  
24 They did the -- the corporate work. The LLC for -- it  
25 was Palmetto Benefit Management of Charleston, I think.

1 Yeah.

2 Q. That was at the same time you were starting your  
3 business?

4 A. No, I started mine in '99. This is 2009.

5 Q. Okay. So it was Palmetto Benefits of Charleston was set  
6 up --

7 A. As a separate LLC.

8 Q. Separate LLC?

9 A. Yeah.

10 Q. Okay. And was Mr. Bannon a partner in that?

11 A. He was not, but it was set up to give him future  
12 interest in it.

13 Q. Did he have future interest in?

14 A. Had -- had he produced, yeah. But he didn't -- he never  
15 produced to that level.

16 Q. Okay. So he never got interest --

17 A. Correct.

18 Q. -- in that?

19 A. That is correct.

20 Q. And who paid Mr. Bannon?

21 A. Palmetto Benefit --

22 Q. Did Charleston LLC or --

23 A. No, Palmetto Benefit Management. So it was really an  
24 inactive company that we were looking to expand and --  
25 and split off when it -- when we had all these grand

1 plans of it succeeding wildly.

2 Q. Okay. Leatherwood did not prepare any Employment  
3 Agreement?

4 A. That's correct.

5 Q. It's your testimony that Gantt prepared an Employment  
6 Agreement?

7 A. Yeah, it was David Wyatt's office, but, yeah.

8 Q. Huh?

9 A. David -- yeah, David Wyatt was the attorney.

10 Q. All right. And it is your testimony that Mr. Bannon  
11 signed an Employment Agreement?

12 A. Correct.

13 Q. But you can't find it?

14 A. Correct.

15 Q. One doesn't exit here today?

16 A. His entire employee file is missing, that is correct.

17 Q. So you don't have any terms that he agreed to?

18 A. I -- I've got the document, I just don't have the signed  
19 document; correct.

20 Q. And is it your basis -- and you know that Mr. Brannon --  
21 that Bannon says, "I never signed one"?

22 A. Correct.

23 Q. So it's your basis in this lawsuit that a signed  
24 Employment Agreement existed?

25 A. Correct.

1 Q. Even though you can't produce it?

2 A. That is correct.

3 Q. And it's your testimony under oath that an Employment  
4 Agreement exists?

5 A. Existed; correct.

6 Q. Existed?

7 A. Correct. Absolutely. I would not have started an  
8 office with hundreds of thousands of dollars without  
9 one.

10 Q. And when did you discover that one didn't exist?

11 A. When I got the -- the Agent of Records from the  
12 carriers. When they told me what Bannon was doing, we  
13 -- we then obviously went and looked for it. When we --  
14 when we filed the temporary injunction, and could not  
15 locate it, or anything related to Mr. Bannon.

16 Q. And where do you believe his personnel file is?

17 A. Oh, I believe it's been -- I believe it's been taken.

18 Q. Well, you think he took it?

19 A. I think somebody took it, and I would suspect that, but  
20 --

21 Q. So you believe he took his own personnel file?

22 A. I believe it was taken; correct.

23 Q. But you have no evidence of that?

24 A. That is correct.

25 Q. Mr. Bannon for a period of time worked as an employee?

- 1 A. **Correct.**
- 2 Q. Did he have benefits?
- 3 A. Correct.
- 4 Q. Did you pay employee taxes?
- 5 A. Correct.
- 6 Q. Employer taxes?
- 7 A. Correct.
- 8 Q. All of the requirements of being a W-2 employee?
- 9 A. Correct.
- 10 Q. Did he have a retirement plan?
- 11 A. Yeah, I believe we -- I believe we did have one at that
- 12 time.
- 13 Q. For employees?
- 14 A. Yeah. Correct.
- 15 Q. And he had health insurance?
- 16 A. I don't know if he covered it through us.
- 17 Q. He had the ability --
- 18 A. He had the ability. Sure he was eligible --
- 19 Q. -- as an employee --
- 20 A. Sure.
- 21 Q. -- to access your health insurance?
- 22 A. Sure.
- 23 Q. Does Forum provide its employees with health insurance?
- 24 A. Correct; we do.
- 25 Q. And did it at the time?



1 A. Yes.

2 Q. I'm talking about in --

3 A. 20 -- yeah.

4 Q. -- before 2016?

5 A. I mean, I can't remember if he was on it, but, yes, we  
6 absolutely had a benefit plan.

7 Q. And it's your testimony that his entire personnel file  
8 is gone?

9 A. Correct.

10 Q. Who was in charge of maintaining that file?

11 A. It was in my office.

12 Q. How did you report Mr. Bannon as an employee on your  
13 company records when he was a W-2 employee?

14 A. How did I report him?

15 Q. Yeah, I mean, as a W-2 employee?

16 A. Yeah, he was a W-2 employee.

17 Q. Okay. And then at some point in time he became an  
18 independent contractor?

19 A. Correct. So Bannon came to me and -- and I can't  
20 remember the exact date, but at some point his income  
21 wasn't where he needed it. His production was not oing  
22 well, and he wanted to become a fireman. So he needed  
23 to become a fireman and a W-2 employee at the Bluffton  
24 Fire Department. He could no longer be an employee also  
25 with us, so we made him a 1099 employee. I restructured

1 his compensation downwards slightly, and obviously a  
2 1099 he was eligible for no benefits with us, and was  
3 eligible through the Bluffton Fire Department.

4 Q. As a 1099 he was an independent contractor?

5 A. Yeah, he was a 1099. He was representing us, but  
6 ineligible for benefits, so.

7 Q. How do you say he's a 1099 employee?

8 A. He -- so --

9 Q. You can't be a 1099 --

10 A. So -- so he --

11 Q. -- employee.

12 A. -- he's representing Forum Benefits solely, so.

13 Q. He was an independent contractor?

14 A. If -- if that's what you want to call it, fine. He was  
15 1099, he was no longer W-2. Sure. He had the same --  
16 he had ever -- he had ever access --

17 Q. I understand what you're saying.

18 A. -- of every -- of any other employee.

19 Q. But he is an independent contractor --

20 A. Yeah, I --

21 Q. -- at that point in time?

22 A. -- I -- I concede he's 1099; correct.

23 Q. Okay. Do you know the difference between an employee  
24 and an independent contractor?

25 A. Clarify which -- which differences.

1 Q. Do you know the difference?

2 A. So, yeah. Sure.

3 Q. Okay. And you know that an employee has obligations  
4 that are different than a subcontractor or an  
5 independent contractor?

6 A. Some, yes.

7 Q. What in your personnel records did you do to change him  
8 from an independent -- from an employee to an  
9 independent contractor?

10 A. Just changed the status.

11 Q. Okay. And how did that status change in your company  
12 records?

13 A. Well, so we stopped paying him through payroll, and we  
14 paid him through a monthly check, I believe, and took  
15 him off our -- obviously we weren't paying employment  
16 taxes, or anything like that.

17 Q. Okay. It was straight commission?

18 A. Yeah, which was --

19 Q. He paid his own --

20 A. -- he was really already on straight commission at -- at  
21 that time, yeah.

22 Q. He paid his own insurance?

23 A. I don't know how he obtained that. I assume that came  
24 through his wife.

25 Q. But he paid it?

1 A. I don't -- he -- he was off our -- he was off our plan.  
2 He was no longer eligible for -- I don't know if he was  
3 ever on our plan, but he was ineligible after that.

4 Q. Okay. He was no longer eligible for any benefits --

5 A. Correct.

6 Q. -- at all?

7 A. Retirement; correct.

8 Q. Whatever was required with the Department of Revenue, he  
9 paid?

10 A. Sure, but I'm assuming.

11 Q. And other than what's in his -- was in his personnel  
12 file, which you said is gone, are there any records to  
13 reflect how you changed his status?

14 A. Just payroll.

15 Q. Sitting here today is there any document that sets forth  
16 in writing the duties, or responsibilities, rights, and  
17 obligations of Mr. Bannon that he had as an employee of  
18 Forum?

19 A. As of when -- when he was an employee?

20 Q. When he was an employee.

21 A. Just the Employment Agreement we had --

22 Q. Other than that?

23 A. No documents on duties. I -- I -- I don't know. I  
24 would have to go back and see if I could put something  
25 together, but if it was together it would be

1 Q. Okay. None of them you considered employees?

2 A. So -- so for my perspective I can -- are you talking  
3 about legally, or do I --

4 Q. I'm talking about legally.

5 A. Okay. No, if -- if you're a 1099 you're not --

6 Q. You're not an employee?

7 A. -- an employee; right.

8 Q. Okay. But yet you considered Brian Bannon to be a 1099  
9 employee legally?

10 A. I don't know where you're -- you're getting that. I  
11 considered Brian Bannon -- he -- he -- I absolutely  
12 concede he was 1099. We're going over this again and  
13 again. I get it, he's 1099. He was representing Forum  
14 Benefits solely, and we considered him part of the  
15 company. He had access just like an employee. He had a  
16 business card that said Forum. He was on our website.  
17 He was part of Forum, as is Rick Wiley, who is a 1099  
18 person, but he's with us. I considered him part of  
19 Forum, but he doesn't work full time, therefore, he's  
20 not eligible for benefits. We've got other agencies  
21 like the former AssureSouth, where we had Management  
22 Agreements with their books. And we've got a number of  
23 those individuals across the country. It just depends  
24 on the situation and how we structure things. But  
25 Bannon I considered him part of the company, although he

1 was technically and paid for on a 1099 basis.

2 Q. But you took --

3 A. I understand that.

4 Q. -- efforts to make sure that Mr. Wiley had a Non-  
5 Solicitation Agreement?

6 A. The Non-Solicit -- yeah, that -- that is correct, but  
7 the Non-Solicitation with Mr. Wiley also had to do with  
8 the buy down under the buyout of Alera.

9 Q. When you made Mr. Bannon -- or Mr. Bannon became an  
10 independent contractor --

11 A. Uh-huh.

12 Q. -- it's my understanding that you did not take any extra  
13 steps to protect Forum from an independent contractor?

14 A. No.

15 Q. In the sale to Alera, did you report that Mr. Bannon was  
16 an independent contractor?

17 A. Yeah, they knew that.

18 Q. Did you report that there was no agreement concerning  
19 Brian Bannon?

20 A. I reported that there was an agreement and it couldn't  
21 be located, and what was suspected.

22 Q. How did you report that, in Emails?

23 A. Probably -- I don't know. Mostly probably by phone. It  
24 might have been an Email or two, mostly it was via  
25 phone, I think. That was kind of eleventh hour stuff.

1 Q. What steps does Forum take to protect what it considers  
2 to be trade secrets?

3 A. Passwords. We only check passwords that are from the  
4 cloud to systems, to -- and they're only given to people  
5 who are authorized access to it. HIPAA secured Emails,  
6 et cetera.

7 Q. Did Mr. Bannon have passwords to the file system?

8 A. Yes.

9 Q. Did he have all of your passwords?

10 A. No.

11 Q. What did he not have access to?

12 A. He did not have access to Employee Navigator. There are  
13 certain -- I don't even know at the time if we had  
14 things stratified with -- with access, but he had access  
15 to the cloud. I do not believe he had access to CRN,  
16 but I -- don't quote me on that.

17 Q. C what?

18 A. CRN. It's our Agency Management system.

19 Q. What is on the cloud?

20 A. A lot of files. So all of our work with clients, our  
21 meetings, our sales process, our prospects. Pretty much  
22 everything that runs an agency and is Forum.

23 Q. And how long did Mr. Bannon have access to the cloud?

24 A. Since we started it, until we found out that he had  
25 started -- started working for another company, so I



1 think we turned that off. I think we found out on the  
2 15th of November. And I can't remember when -- when we  
3 went to the Share Point cloud versus having things done  
4 internally with our ACT system.

5 Q. You said he did not have access to Employee Navigator?

6 A. Correct.

7 Q. That was a client-driven access?

8 A. He wouldn't -- he wouldn't know what to do. So -- so  
9 that was -- that was between the client and account  
10 management staff, so he was never given a password to  
11 that. He wouldn't know what to do with it.

12 Q. Okay. Other than passwords, does Forum do anything to  
13 protect its trade secrets?

14 A. Secure Email. We send -- we'll send documents in pdf  
15 versus Excel if there's formulas involved, or -- or  
16 things like that, but mostly pin and passwords, is how  
17 you protect things.

18 Q. Does Rick Wiley have access to the cloud?

19 A. That would be a good question for Laurie. I believe  
20 he's got a license, and I don't know what his license  
21 allows him access to.

22 Q. "License," what do you mean?

23 A. So you have to have -- you have to have a license for  
24 Microsoft, and there's different levels of it. And  
25 different levels would determine your access to

1 different areas. It really has to do with utilization  
2 versus anything else.

3 Q. Do you give trade secrets to independent contractors?

4 A. They have access to everything from a client  
5 perspective. And, once again, you -- you can't say  
6 blanket independent contractors, it depends on who it  
7 is. So in a case like Bannon or Stewart Perry they're  
8 -- as far as I'm concerned they're representing Forum.  
9 They think they're representing Forum. They've got  
10 access to your information to -- to help clients and --  
11 and, you know, our stuff is their stuff.

12 Q. Do you believe your renewal comparisons contain trade  
13 secrets?

14 A. Sure.

15 Q. Do you give those to clients?

16 A. The output, not the input.

17 Q. I understand. The output, do you believe the output  
18 contains trade secrets?

19 A. I think the output is -- is a result of -- of our work,  
20 which is a trade secret. So if we -- if we build a  
21 formula, and that formula spits out a number, yeah,  
22 that's -- that's our work.

23 Q. Is the output a trade secret?

24 A. It's after the question. So it's a result of the input,  
25 which is a trade secret, so I would assume so. And,

1 once again, it depends on -- on the spreadsheet and the  
2 number we're trying to get to. So it -- it's not --  
3 it's not as if -- if I copy a number from a carrier's  
4 spreadsheet, that's clearly not a trade secret. If we  
5 develop a number that we used to compare up against a  
6 carrier and we build that internally, yeah, absolutely.  
7 That's who we are.

8 Q. Do you do anything to protect the output as a trade  
9 secret that you give to the client?

10 A. We'll give them -- no, we'll give them the output. They  
11 can -- they can look at the output --

12 Q. So the output --

13 A. -- all they want.

14 Q. -- is not a trade secret?

15 A. Once again, not necessarily, because -- I wouldn't  
16 necessarily agree with you because it's build with an  
17 internal formula, so.

18 Q. Well, I guess --

19 A. I'm -- I'm not --

20 Q. -- I'm trying --

21 A. -- I'm not an attorney, so I don't -- I don't know where  
22 to come with that question, but there's a trade secret  
23 involved whether the output's a trade secret, I'll let  
24 -- I'll let you guys litigate during -- during the court  
25 case. I don't know that.

1 Q. I'm trying to determine what you consider to be a trade  
2 secret. If you consider the Comparison Report that you  
3 give to a client --

4 A. Uh-huh.

5 Q. -- to be a trade secret, I want to know that.

6 A. Okay.

7 Q. Do you consider that to be a trade secret?

8 A. Yeah, pretty much if it's our number. I would say  
9 "yes."

10 Q. Okay. And you give that to a client?

11 A. Correct.

12 Q. Do you protect that in giving that to a client in any  
13 manner?

14 A. The output would do that.

15 Q. Okay. And if the client then takes that output and does  
16 what he wants with it, do you believe the client has  
17 violated your trade secret?

18 A. My issue has nothing to do with the client.

19 Q. I'm not asking you whether it's your issue --

20 A. And I'm answering --

21 Q. -- Mr. Stritt.

22 A. -- the -- and I'm answering the question.

23 Q. I'm asking you --

24 A. I'm answering the question the way I choose to answer  
25 the question. You're leading me down a path which is

1 Q. Either one.

2 A. Okay.

3 Q. You're saying Employee Navigator is your information?

4 A. I'm saying we built that system; correct.

5 Q. And you say you own the access to --

6 A. We own the build; correct.

7 Q. Okay. And you provide that to the clients?

8 A. Correct.

9 Q. You do not protect that with the clients in any way?

10 A. With a password we most certainly do.

11 Q. And the clients with the password has access to their  
12 information? It becomes their information, because you  
13 give the clients access to it --

14 A. That's -- that's --

15 Q. -- correct?

16 A. -- that's your statement.

17 Q. Well, what does the client have that lets them know that  
18 that's not their information on employee data -- on  
19 Employee Navigator?

20 A. They can have the output, that's perfectly fine. If  
21 somebody asked you for a password to a competing  
22 product, wouldn't you go, "Wait a minute, what's the  
23 issue here"? When -- when in your life has anybody  
24 asked to use somebody else's password? That's the point  
25 of a password. A password is to protect information.

1 Agreement?

2 A. We went through not only everything in our office, but  
3 we had 35 boxes offsite in storage, and had every box  
4 delivered back to our office, and had employees and  
5 myself spend quite a bit of time going through every  
6 box.

7 Q. If there was an Employment Agreement, why is there not  
8 an Email or some other document other than the signed  
9 agreement that references that?

10 A. Define that again. So why isn't there a -- an Email --

11 Q. Saying, "Brain, you have an Employment Agreement"?

12 A. Not sure you would need one. I drove down to Charleston  
13 to meet with Bannon, have him sign the piece of paper,  
14 and hand him the check for 5,000, which was his first  
15 monthly premium. That was in my car. Got to my car,  
16 put it in the employment file. Like all these things  
17 with all of our employees you put it in the file and you  
18 hope to never have to open it again.

19 Q. Did you read these responses before your attorney sent  
20 them?

21 A. I don't know that I read them. I think I sent them.  
22 This looks -- this looks -- this is definitely LegalEze.  
23 I didn't write this verbatim, but.

24 Q. But you read them before they were approved?

25 A. I believe so.

1 A. No.

2 Q. Do you have anything from which Reed Wilson says what he  
3 found?

4 A. All he did was -- all -- all PTG could do was pull down  
5 -- pull down the files that were downloaded, which is  
6 the twenty-four hundred files, so they gave us that  
7 listing. That would -- that's really the extent of what  
8 they can do.

9 Q. So you don't have a report from them?

10 A. No.

11 Q. Do you anticipate having any experts in this case?

12 A. I'm asking you to define "expert." I would say --

13 Q. Expert witnesses? People who testify that they're not  
14 fact witnesses?

15 A. So if -- if Liberty would qualify as an expert witness,  
16 I would say that clearly.

17 Q. Okay. Anyone else? Any damage witnesses? Any people  
18 -- CPAs?

19 A. Certainly we would probably get somebody from MarshBerry  
20 involved on the value of the cases that were taken, but  
21 I haven't gone down that road to figure out who that  
22 would be.

23 Q. Who is MarshBerry?

24 A. MarshBerry is a -- the largest consultant for insurance  
25 agencies, based in Cleveland, Ohio.



1 Q. Were they involved in your buyout?

2 A. Correct. They would ---

3 Q. How were they involved then?

4 A. They put it together.

5 Q. They put --

6 A. They're a M and A. They do M and A and consulting work.

7 Q. And you would have them testify as to what?

8 A. The value of the business that was taken.

9 Q. Value of the business to whom?

10 A. To the market.

11 Q. And business taken, you mean the business that moved  
12 over with Brian Bannon?

13 A. With our information; correct.

14 Q. And that's the hundred and twenty-five thousand dollars  
15 a year?

16 A. The one twenty-five plus the other -- the other AP  
17 cases, so it's not just Bannon. It's all of AP.

18 Q. These --

19 A. Correct.

20 Q. -- Exhibit One?

21 A. Correct.

22 Q. Two hundred thousand?

23 A. Correct.

24 Q. Is that the value that you're talking about, or is it  
25 the value --

1 A. That's the -- that's the revenue. That's the annual  
2 revenue, is all that number is, and/or revenue.

3 Q. What is the difference between that and the value of the  
4 business?

5 A. Well, the value would be a multiple based on that  
6 number.

7 Q. And what would that multiple be?

8 A. That's a great question. So our -- our multiple was --

9 MR. LEBLANC:

10 Now, we might be getting into confidential information  
11 here.

12 MR. WARD:

13 If I need -- if I need to leave, I can do that too.

14 MR. LEBLANC:

15 Okay.

16 MR. WARD:

17 After the break -- you-all just talk.

18 MR. HARVEY:

19 Uh-huh. Don't go downstairs.

20 MR. WARD:

21 What?

22 MR. HARVEY:

23 Don't go downstairs.

24 MR. WARD:

25 I'm not. I'm here (leaves the room).

1 A. So you can either do it on a multiple EBITDA or revenue.

2 I believe what AP testified their value was 2 -- I

3 thought it was 2 -- 2.25 or 2.75, our value was 4.25,

4 but using that same factor.

5 Q. Okay. So you're saying that the damages in this case

6 are 4.25 times 200,000?

7 A. That would certainly be -- be my purchase price, but I'm

8 not sure that's the open market value of it.

9 Q. More or less?

10 A. Probably less. Probably in the middle somewhere.

11 Q. Any other expert witnesses besides somebody with

12 MarshBerry and Liberty Digital, Michael Scholz?

13 A. No, not that I can think of.

14 Q. What other witnesses would -- do you anticipate calling

15 if this case goes to trial?

16 A. Assuming Laurie probably would be there. Heather

17 Edwards may be called. I don't know. To be perfectly

18 honest I haven't sat down and thought about witnesses at

19 this point.

20 Q. Any others?

21 A. Not that I can think of.

22 Q. Okay.

23 A. I assume I can -- I can modify that if something pops

24 up, but --

25 Q. Well, you haven't listed them yet, so I'm --

1 MR. LEBLANC:

2 Oh, if you want, yeah.

3 A. This is -- this is a copy of our spreadsheet with all --  
4 we have 30 different -- 31 different tabs of renewal  
5 which calculate everything from contribution  
6 requirements to basic stuff like life and health rates,  
7 to disability requirements by state to Teledoc, to you  
8 name it. All proprietary, and each one of our clients  
9 has these. When you download the spreadsheet, that's  
10 where all the formulas are, so this doesn't have  
11 formulas that are visible, but this is the output for  
12 them.

13 MR. LEBLANC:

14 Okay. And we'll mark this as Plaintiff's Exhibit Four.  
15 (Thereupon the court reporter marked the pertinent  
16 document as PLAINTIFF'S EXHIBIT-NUMBER-FOUR.)

17 MR. HARVEY:

18 You done?

19 MR. LEBLANC:

20 No, put that back on there. Here if you're done.

21 Q. It's your understanding that Mr. Bannon downloaded  
22 Plaintiff's Exhibit Four while he was still an  
23 independent contractor representing Forum Benefits?

24 A. Correct.

25 Q. And Forum Benefits considers the information contained

1 in Plaintiff's Exhibit Four to be trade secret?

2 A. Absolutely.

3 Q. It's not publicly available outside of Forum Benefits?

4 A. Correct.

5 Q. Okay. You had a meeting list there, can I see that?

6 MR. LEBLANC:

7 And we're designating Plaintiff's Exhibit One through  
8 Four here as confidential. All of the testimony is  
9 confidential. We'll mark the transcript when we get it.  
10 I think we'll mark this as Plaintiff's Five.

11 (Thereupon the court reporter marked the pertinent  
12 document as PLAINTIFF'S EXHIBIT-NUMBER-FIVE.)

13 Q. Can you describe what is shown in Plaintiff's Exhibit  
14 Five?

15 A. Yeah, during one of the -- the Interrogatories Bannon  
16 claimed that he did not attend any of our meetings past  
17 or on/around -- I think he said on/around October 1st.  
18 And we pulled the record where he was at meetings, and  
19 he actually spoke, so we all heard him speak.

20 Q. Okay.

21 A. It's just a record of him logging onto our Monday  
22 morning meeting.

23 Q. So what's the software that generated Plaintiff's  
24 Exhibit Five?

25 A. That is a Go To Meeting Report.

| Account Name                             | AM           | Total Emps | Covered Emps | Total Revenue  | AOR            |
|------------------------------------------|--------------|------------|--------------|----------------|----------------|
| Alpha Genesis, Inc.                      | Hildreth, Sa | 85         | 70           | 24,974         | 24,974         |
| Berenyi, Inc.                            | Hildreth, Sa | 10         | 6            | 2,264          | 2,264          |
| Carolina Youth Development Center        | Hildreth, Sa | 51         | 42           | 15,602         | 15,602         |
| Charleston Glass & Mirror Company        | Hildreth, Sa | 34         | 31           | 16,130         | 16,130         |
| Charleston Local Development Corporation | Hildreth, Sa | 4          | 4            | 1,404          | 1,404          |
| Hecox Goodwin                            | Hildreth, Sa | 8          | 8            | 2,688          |                |
| Hoffman & Hoffman, CPA, P.A.             | Hildreth, Sa | 5          | 5            | 1,363          |                |
| Jordan Construction of Hilton Head       | Hildreth, Sa | 14         | 17           | 7,073          | 7,073          |
| Magnolia Plantation                      | Hildreth, Sa | 23         | 36           | 8,972          | 8,972          |
| Premier Logistics Solutions              | Hildreth, Sa | 67         | 46           | 21,045         | 21,045         |
| St. Andrews Public Service District      | Hildreth, Sa | 75         | 55           | 13,949         | 13,949         |
| Strategy Plastics                        |              |            |              | 10,976         | 10,976         |
| Interim Healthcare                       |              |            |              | 73,792         | 73,792         |
|                                          |              |            |              | <b>200,232</b> | <b>196,181</b> |

**DEFENDANT'S  
EXHIBIT**

2/22/18

**STATE OF SOUTH CAROLINA**

**BEAUFORT COUNTY**

**IN THE COURT OF COMMON PLEAS**

**CIVIL ACTION NO. 2016-CP-07-2541**

Forum Benefits, Inc.,

Plaintiff,

v.

Brian Bannon and Assured Partners, NL

Defendants.

# Exhibit I



# 31 TABS OF FORMULA'S

## Inputs

| Plan Type |
|-----------|
| EE        |

| Premium Share     |     |
|-------------------|-----|
| Employer %        | 80% |
| Employee %        |     |
| Employer fixed \$ |     |
| Employee fixed \$ |     |

| Dependent Premium Share |     |
|-------------------------|-----|
| Employer %              | 80% |
| Employee %              |     |
| Employer fixed \$       |     |
| Employee fixed \$       |     |

| Payroll Frequency |
|-------------------|
| Monthly           |
| 12                |

| Frequency    |    |
|--------------|----|
| Weekly       | 52 |
| Bi-Weekly    | 26 |
| Semi-Monthly | 24 |
| Monthly      | 12 |
| Quarterly    | 4  |
| Yearly       | 1  |

| Plans              |          |
|--------------------|----------|
| Current            | HD4      |
| Negotiated Renewal | HD4      |
| New Prop 1         | Gold 3   |
| New Prop 2         | Silver 7 |
| New Prop 3         | Silver 8 |
| New Prop 4         | Bronze 3 |

| # of Employees |
|----------------|
| 30             |

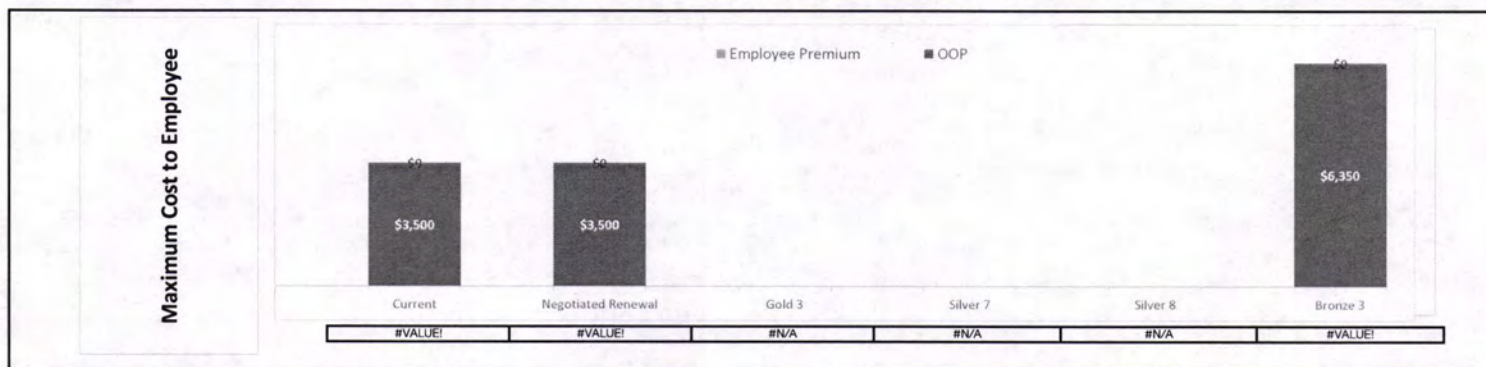
|    |   |
|----|---|
| EE | 0 |
| ES | 0 |
| EC | 0 |
| F  | 0 |

## Employee

Frequency Monthly

## Plan Comparison

|                                   |           | Current        | Negotiated Renewal | New Proposal 1 | New Proposal 2 | New Proposal 3 | New Proposal 4 |
|-----------------------------------|-----------|----------------|--------------------|----------------|----------------|----------------|----------------|
|                                   |           | HD4            | HD4                | Gold 3         | Silver 7       | Silver 6       | Bronze 3       |
|                                   |           | 2600, 1, 2600, | 2600, 1, 2600,     | #N/A           | #N/A           | #N/A           | 0              |
| Premiums                          |           |                |                    |                |                |                |                |
| EE Rate                           | Age Rated | Age Rated      |                    | #N/A           | #N/A           | #N/A           | Age Rated      |
| ES Rate                           | \$0.00    | \$0.00         |                    | #N/A           | #N/A           | #N/A           | \$0.00         |
| EC Rate                           | \$0.00    | \$0.00         |                    | #N/A           | #N/A           | #N/A           | \$0.00         |
| F Rate                            | \$0.00    | \$0.00         |                    | #N/A           | #N/A           | #N/A           | \$0.00         |
| Plan Cost Per Employee Per Period |           |                |                    |                |                |                |                |
| Cost to Employee                  | #VALUE!   | #VALUE!        | #VALUE!            | #VALUE!        | #N/A           | #N/A           | #N/A           |
| Cost to Employer                  | #VALUE!   | #VALUE!        | #VALUE!            | #VALUE!        | #N/A           | #N/A           | #N/A           |
| Total                             | #VALUE!   |                | #VALUE!            | #N/A           | #N/A           | #N/A           | #VALUE!        |
| Coverage                          |           |                |                    |                |                |                |                |
| Deductible                        | \$3,500   | \$3,500        |                    | #N/A           | #N/A           | #N/A           | \$4,000        |
| Covrs.                            | 100%      | 100%           |                    | #N/A           | #N/A           | #N/A           | 80%            |
| Max OOP                           | \$3,500   | \$3,500        |                    | #N/A           | #N/A           | #N/A           | \$6,350        |



OOP  
Employee Premium

OOP  
Employee Premium

# Plan Comparison

Employer

Frequency: Monthly

|                                 | Current                     | Negotiated Renewal          | New Proposal 1 | New Proposal 2 | New Proposal 3 | New Proposal 4 |
|---------------------------------|-----------------------------|-----------------------------|----------------|----------------|----------------|----------------|
|                                 | HD4                         | HD4                         | Gold 3         | Silver 7       | Silver 8       | Bronze 3       |
|                                 | Deductible/Deductible 1/1/1 | Deductible/Deductible 1/1/1 | #N/A           | #N/A           | #N/A           | 0              |
| Employer Cost                   | #VALUE!                     | #VALUE!                     | #N/A           | #N/A           | #N/A           | #VALUE!        |
| Premiums                        |                             |                             |                |                |                |                |
| Total Employee Cost per Period  | #VALUE!                     | #VALUE!                     | #N/A           | #N/A           | #N/A           | #VALUE!        |
| Total Employer Cost per Period  | #VALUE!                     | #VALUE!                     | #N/A           | #N/A           | #N/A           | #VALUE!        |
| Total Cost Per Pay Period       | #VALUE!                     | #VALUE!                     | #N/A           | #N/A           | #N/A           | #VALUE!        |
| Change from Current Plan Cost   | \$0                         | #VALUE!                     | #N/A           | #N/A           | #N/A           | #VALUE!        |
| Yearly Plan Costs               |                             |                             |                |                |                |                |
| EE only cost to employee        | #VALUE!                     | #VALUE!                     | #N/A           | #N/A           | #N/A           | #VALUE!        |
| EE only cost to employer        | #VALUE!                     | #VALUE!                     | #N/A           | #N/A           | #N/A           | #VALUE!        |
| Employee only Plan Yearly Costs | #VALUE!                     | #VALUE!                     | #N/A           | #N/A           | #N/A           | #VALUE!        |
| Family Cost to employee         | \$0                         | \$0                         | #N/A           | #N/A           | #N/A           | \$0            |
| Family Cost to employer         | \$0                         | \$0                         | #N/A           | #N/A           | #N/A           | \$0            |
| Family Plan Yearly Costs        | \$0                         | \$0                         | #N/A           | #N/A           | #N/A           | \$0            |

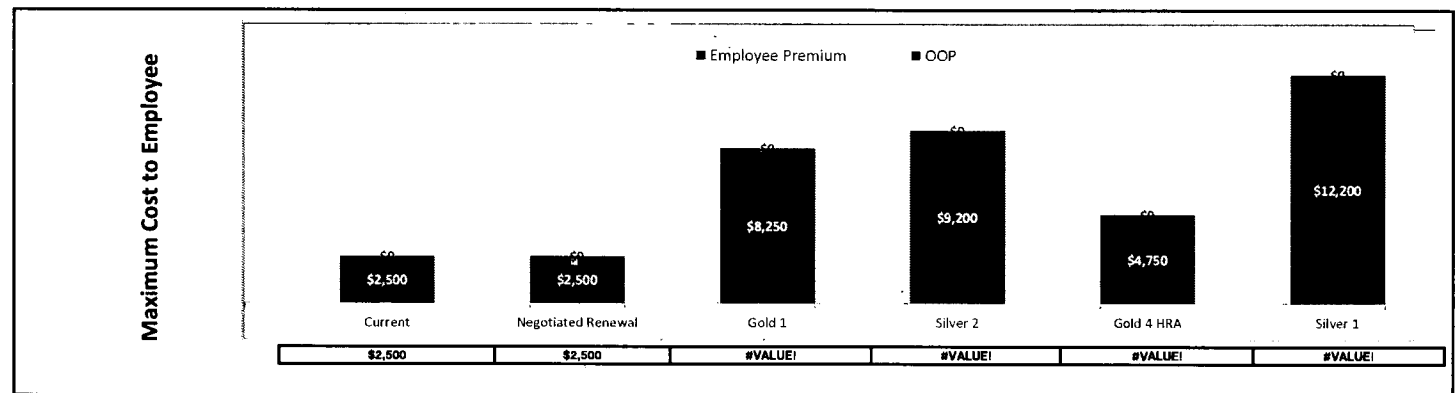
|                       |                     |                    |                |                     |                |                |
|-----------------------|---------------------|--------------------|----------------|---------------------|----------------|----------------|
| Yearly Employer Costs | ■ Cost To Employees |                    |                | ■ Cost to Employers |                |                |
|                       | \$0                 | \$0                |                |                     |                | \$0            |
|                       | Current             | Negotiated Renewal | New Proposal 1 | New Proposal 2      | New Proposal 3 | New Proposal 4 |
|                       | #VALUE!             | #VALUE!            | #N/A           | #N/A                | #N/A           | #VALUE!        |

# Plan Comparison

## Inputs

|                                |            |
|--------------------------------|------------|
| <b>Plan Type</b>               |            |
| F                              |            |
| <b>EE Premium Share</b>        |            |
| Employer %                     | 80%        |
| Employee %                     |            |
| Employer fixed \$              |            |
| Employee fixed \$              |            |
| <b>Dependent Premium Share</b> |            |
| Employer %                     | 80%        |
| Employee %                     |            |
| Employer fixed \$              |            |
| Employee fixed \$              |            |
| <b>Payroll Frequency</b>       |            |
| Monthly                        | 12         |
| <b>Frequency</b>               |            |
| Weekly                         | 52         |
| Bi-Weekly                      | 26         |
| Semi-Monthly                   | 24         |
| Monthly                        | 12         |
| Quarterly                      | 4          |
| Yearly                         | 1          |
| <b>Plans</b>                   |            |
| Current                        | True Blue  |
| Negotiated Renewal             | True Blue  |
| New Prop 1                     | Gold 1     |
| New Prop 2                     | Silver 2   |
| New Prop 3                     | Gold 4 HRA |
| New Prop 4                     | Silver 1   |
| <b># of Employees</b>          |            |
| 0                              |            |
| EE                             | 0          |
| ES                             | 0          |
| EC                             | 0          |
| F                              | 0          |

|                                   | Current                                               |  | Negotiated Renewal            |  | New Proposal 1                  |  | New Proposal 2                 |  | New Proposal 3  |  | New Proposal 4                  |  |
|-----------------------------------|-------------------------------------------------------|--|-------------------------------|--|---------------------------------|--|--------------------------------|--|-----------------|--|---------------------------------|--|
|                                   | True Blue                                             |  | True Blue                     |  | Gold 1                          |  | Silver 2                       |  | Gold 4 HRA      |  | Silver 1                        |  |
|                                   | 1000, 0.8, \$1,500 OOP / MOOP = \$2,500, 20/365/30/60 |  | MOOP = \$2,500, 20/365/30/60  |  | 1200, 0.8, 4200, 15/3010/35/100 |  | 0, 0.5, 6000, 30/6030/60/Coin. |  | 0               |  | 2000, 0.8, 6360, 30/6015/40/100 |  |
| Premiums                          |                                                       |  |                               |  |                                 |  |                                |  |                 |  |                                 |  |
| EE Rate                           | \$0.00                                                |  | \$0.00                        |  | Age Rated                       |  | Age Rated                      |  | Age Rated       |  | Age Rated                       |  |
| ES Rate                           | \$0.00                                                |  | \$0.00                        |  | \$0.00                          |  | \$0.00                         |  | \$0.00          |  | \$0.00                          |  |
| EC Rate                           | \$0.00                                                |  | \$0.00                        |  | \$0.00                          |  | \$0.00                         |  | \$0.00          |  | \$0.00                          |  |
| F Rate                            | \$0.00                                                |  | \$0.00                        |  | \$0.00                          |  | \$0.00                         |  | \$0.00          |  | \$0.00                          |  |
| Plan Cost Per Employee Per Period |                                                       |  |                               |  |                                 |  |                                |  |                 |  |                                 |  |
| Cost to Employee                  | \$0 #DIV/0!                                           |  | \$0 #DIV/0!                   |  | #VALUE! #VALUE!                 |  | #VALUE! #VALUE!                |  | #VALUE! #VALUE! |  | #VALUE! #VALUE!                 |  |
| Cost to Employer                  | \$0 #DIV/0!                                           |  | \$0 #DIV/0!                   |  | \$0 #DIV/0!                     |  | \$0 #DIV/0!                    |  | \$0 #DIV/0!     |  | \$0 #DIV/0!                     |  |
| Total                             | \$0                                                   |  | \$0                           |  | \$0                             |  | \$0                            |  | \$0             |  | \$0                             |  |
| Coverage                          |                                                       |  |                               |  |                                 |  |                                |  |                 |  |                                 |  |
| Deductible                        | \$3,000                                               |  | \$3,000                       |  | \$2,350                         |  | \$0                            |  | \$4,750         |  | \$3,800                         |  |
| Coin.                             | 80%                                                   |  | 80%                           |  | 80%                             |  | 60%                            |  | 100%            |  | 80%                             |  |
| Max OOP                           | \$2,600                                               |  | \$2,600                       |  | \$8,250                         |  | \$9,200                        |  | \$4,750         |  | \$12,200                        |  |
| Coins                             |                                                       |  |                               |  |                                 |  |                                |  |                 |  |                                 |  |
| Office Visits                     | \$20/\$35                                             |  | \$20/\$35                     |  | \$15/\$30                       |  | \$30/\$60                      |  | \$0.00          |  | \$30/\$60                       |  |
| Prescription                      | \$8/\$30/\$60/10% up to \$200                         |  | \$8/\$30/\$60/10% up to \$200 |  | \$10/\$35/\$100/200             |  | \$30/\$60/\$Coin./Coin.        |  | 0               |  | \$15/\$40/\$100/10% up to \$200 |  |

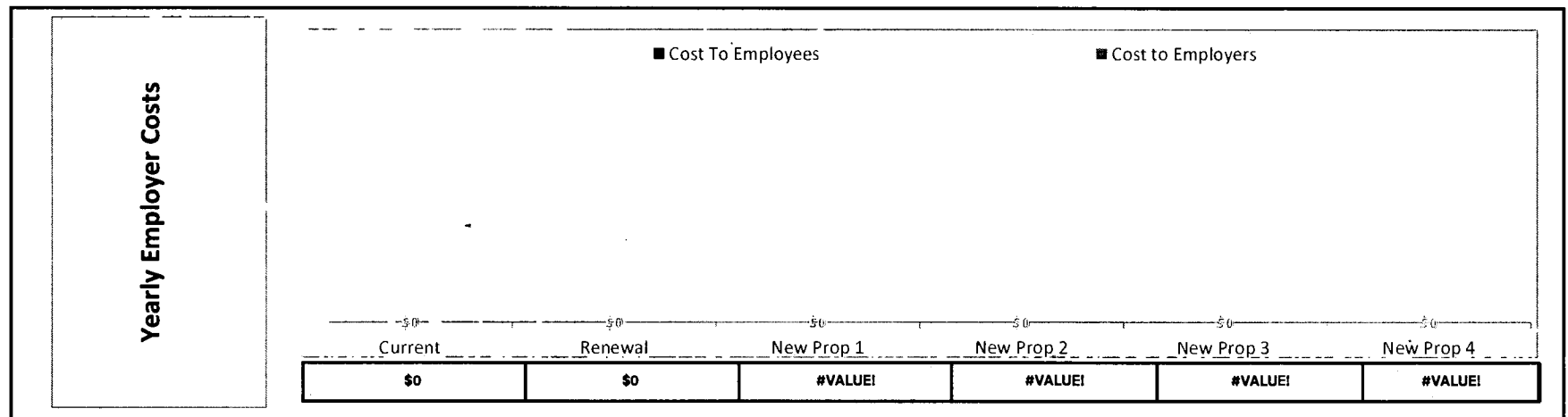


|                  |         |                    |         |          |            |          |
|------------------|---------|--------------------|---------|----------|------------|----------|
| OOP              | \$2,600 | \$2,600            | \$8,250 | \$9,200  | \$4,750    | \$12,200 |
| Employee Premium | \$0     | \$0                | #VALUE! | #VALUE!  | #VALUE!    | #VALUE!  |
|                  | Current | Negotiated Renewal | Gold 1  | Silver 2 | Gold 4 HRA | Silver 1 |
| OOP              | \$2,500 | \$2,500            | \$8,250 | \$9,200  | \$4,750    | \$12,200 |
| Employee Premium | \$0     | \$0                | #VALUE! | #VALUE!  | #VALUE!    | #VALUE!  |

# Plan Comparison

Employer

|                                 | Current                                                  | Negotiated Renewal                                       | New Proposal 1                     | New Proposal 2                    | New Proposal 3 | New Proposal 4                     |
|---------------------------------|----------------------------------------------------------|----------------------------------------------------------|------------------------------------|-----------------------------------|----------------|------------------------------------|
|                                 | True Blue                                                | True Blue                                                | Gold 1                             | Silver 2                          | Gold 4 HRA     | Silver 1                           |
|                                 | 1000, 0.8, \$1,500 OOP / MOOP<br>= \$2,500, 20/358/30/60 | 1000, 0.8, \$1,500 OOP /<br>MOOP = \$2,500, 20/358/30/60 | 1200, 0.8, 4200,<br>15/3010/35/100 | 0, 0.5, 6000,<br>30/6030/60/Coin. | 0              | 2000, 0.8, 6350,<br>30/6015/40/100 |
| Employer Cost / Period          | \$0                                                      | \$0                                                      | #VALUE!                            | #VALUE!                           | #VALUE!        | #VALUE!                            |
| Premiums                        |                                                          |                                                          |                                    |                                   |                |                                    |
| Total Employee Cost per Period  | \$0                                                      | \$0                                                      | #VALUE!                            | #VALUE!                           | #VALUE!        | #VALUE!                            |
| Total Employer Cost per Period  | \$0                                                      | \$0                                                      | #VALUE!                            | #VALUE!                           | #VALUE!        | #VALUE!                            |
| Total Cost Per Pay Period       | \$0                                                      | \$0                                                      | #VALUE!                            | #VALUE!                           | #VALUE!        | #VALUE!                            |
| Change from Current Plan Cost   | \$0                                                      | \$0                                                      | #VALUE!                            | #VALUE!                           | #VALUE!        | #VALUE!                            |
| Yearly Plan Costs               |                                                          |                                                          |                                    |                                   |                |                                    |
| EE only cost to employee        | \$0                                                      | \$0                                                      | #VALUE!                            | #VALUE!                           | #VALUE!        | #VALUE!                            |
| EE only cost to employer        | \$0                                                      | \$0                                                      | #VALUE!                            | #VALUE!                           | #VALUE!        | #VALUE!                            |
| Employee only Plan Yearly Costs | \$0                                                      | \$0                                                      | #VALUE!                            | #VALUE!                           | #VALUE!        | #VALUE!                            |
| Family Cost to employee         | \$0                                                      | \$0                                                      | \$0                                | \$0                               | \$0            | \$0                                |
| Family Cost to employer         | \$0                                                      | \$0                                                      | \$0                                | \$0                               | \$0            | \$0                                |
| Family Plan Yearly Costs        | \$0                                                      | \$0                                                      | \$0                                | \$0                               | \$0            | \$0                                |



# 0

## 2015 Carrier Participation Guidelines

|             |                        |             | Valid Waiver? |          |          |                     |            |            |          |          |
|-------------|------------------------|-------------|---------------|----------|----------|---------------------|------------|------------|----------|----------|
| Carrier     | Par after Valid Waiver | Par Minimum | Other ER Plan | Medicare | Medicaid | Military or Veteran | Individual | Short Term | Mini Med | Exchange |
| BCBS        | 70%                    | None        | X             | X        | X        | X                   |            |            |          |          |
| Blue Choice | 70%                    | None        | X             | X        | X        | X                   |            |            |          |          |
| Coventry    | 75%                    | None        | X             | X        | X        | X                   |            |            |          |          |
| UHC         | 75%                    | 50%         | X             | X        | X        | X                   | X          |            |          | X        |

Participation Guidelines | forum

## 0

## Mandated DI States

| State/Territory                                           | Benefit Calculation     | Min. Benefit                                                             | Max. Benefit                                                                                  | Elim. Period                                                                  | Max Duration                                                  | Max EE Contribution                                                                                              |
|-----------------------------------------------------------|-------------------------|--------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------|---------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------|
| <b>California</b><br>State Disability Insurance           | ~55% of weekly income   | \$50                                                                     | \$1,075                                                                                       | 7 Days                                                                        | 52 weeks for disability.<br>6 weeks for paid family leave.    | 1% of first \$101,636.<br>Includes paid family leave.                                                            |
| <b>Hawaii</b><br>Temporary Disability Benefits Law        | 58% of weekly income    | If weekly benefits is less than \$26, then weekly benefit, down to \$14. | \$535                                                                                         | 7 Days                                                                        | 26 Weeks                                                      | .5 premium cost, but no more than .5% average weekly income. Weekly max of \$4.61                                |
| <b>New Jersey</b><br>Temporary Disability Benefits Law    | 66.66% of weekly income | \$96                                                                     | \$596                                                                                         | 7 Days. Retroactive to the first day after 22 consecutive days of disability. | 26 weeks of disability.<br>6 weeks of family leave insurance. | Disability: .36% of first \$30,900, \$111.24 max.<br>Family leave insurance: .1% of first \$30,900, \$30.90 max. |
| <b>New York</b><br>Disability Benefits Law                | 50% of weekly income    | \$20 if income is less than \$20                                         | \$170                                                                                         | 7 Days                                                                        | 26 Weeks                                                      | .5% weekly income, \$.60 max                                                                                     |
| <b>Puerto Rico</b><br>Disability Benefits Act             |                         | \$12                                                                     | \$113 (\$55 for agricultural workers)                                                         | 7 Days unless hospitalized                                                    | 26 Weeks                                                      | .6% of income up to \$9,000 or \$54 per year.                                                                    |
| <b>Rhode Island</b><br>Temporary Disability Insurance Act | 60% of weekly income    | \$72                                                                     | \$752.<br>Additional child benefit of greater of \$10 or 7% of benefit rate. Up to 5 children | 7 Days. Retroactive to the first day after 7 consecutive days of disability.  | 30 Weeks                                                      | 1.2% of first \$60,000                                                                                           |

Mandated DI States | forum



# 0

## Group Term Life Reporting

### IRS Ruling

The cost for an employee's group-term life insurance up to \$50,000 of coverage can be excluded from the wages of an insured employee.

Any employee with coverage over \$50,000 must add the cost of the additional coverage, less the amount that the employee paid for it, to the employee's total salary.

#### Example:

A 45 year old employee receives \$200,000 of group life coverage and pays \$100 per year. To calculate the amount to be included, subtract \$50,000 from the \$200,000 total. The yearly cost of the remaining \$150,000 is \$270 (\$0.15 X 150 X 12). The \$100 that the employee pays is subtracted from this amount, giving a total of \$170. \$170 should be added onto the employee's salary.

To calculate the monthly cost of insurance to be included, use the following table:

Cost per \$1,000 of coverage per month

| Age          | Cost   |
|--------------|--------|
| Under 25     | \$0.05 |
| 25-29        | 0.06   |
| 30-34        | 0.08   |
| 35-39        | 0.09   |
| 40-44        | 0.10   |
| 45-49        | 0.15   |
| 50-54        | 0.23   |
| 55-59        | 0.43   |
| 60-64        | 0.66   |
| 65-69        | 1.27   |
| 70 and older | 2.06   |

### W-2 Example

**W-2 Wage and Tax Statement** 2014

Department of the Treasury - Internal Revenue Service  
For Privacy Act and Paperwork Reduction Act Notice, see the separate instructions.  
Form W-2 to the Social Security Administration; photocopies are not acceptable.  
Do Not Cut, Fold, or Staple Forms on This Page

Groups under 250 lives dont have to report

The included amount of group-term life coverage (coverage over \$50,000) should be included in box 1, 3, and 5.

This amount should also be shown in box 12 with code C.

The amount that the employer paid towards the employee's health care cost should be shown in box 12 with code DD.



| STD                       | Current | Renewal |     |     |     |     |
|---------------------------|---------|---------|-----|-----|-----|-----|
| Benefits Begin            |         |         |     |     |     |     |
| Percentage                |         |         |     |     |     |     |
| Weekly Maximum            |         |         |     |     |     |     |
| Duration                  |         |         |     |     |     |     |
| Pre-Existing Condition    |         |         |     |     |     |     |
| Gross Up                  |         |         |     |     |     |     |
| Rate per \$10 of coverage |         |         |     |     |     |     |
| Volume                    |         |         |     |     |     |     |
| Monthly Premium           | \$0     | \$0     | \$0 | \$0 | \$0 | \$0 |
| Annual Premium            | \$0     | \$0     | \$0 | \$0 | \$0 | \$0 |
| Rate Lock                 |         |         |     |     |     |     |

| LTD                        | Current | Renewal |     |     |     |     |
|----------------------------|---------|---------|-----|-----|-----|-----|
| EP                         |         |         |     |     |     |     |
| Percentage                 |         |         |     |     |     |     |
| Monthly Maximum            |         |         |     |     |     |     |
| Duration                   |         |         |     |     |     |     |
| Pre-Existing Condition     |         |         |     |     |     |     |
| Gross Up                   |         |         |     |     |     |     |
| Rate per \$100 of coverage |         |         |     |     |     |     |
| Volume                     |         |         |     |     |     |     |
| Monthly Premium            | \$0     | \$0     | \$0 | \$0 | \$0 | \$0 |
| Annual Premium             | \$0     | \$0     | \$0 | \$0 | \$0 | \$0 |
| Rate Lock                  |         |         |     |     |     |     |

| Basic Life      | Current   | Renewal |     |     |     |     |
|-----------------|-----------|---------|-----|-----|-----|-----|
| Amount          | \$10,000  |         |     |     |     |     |
| Life Rate       | \$0.090   | \$0.090 |     |     |     |     |
| AD&D Rate       | \$0.030   | \$0.030 |     |     |     |     |
| Volume          | \$303,000 |         |     |     |     |     |
| Monthly Premium | \$36      | \$36    | \$0 | \$0 | \$0 | \$0 |
| Annual Premium  | \$436     | \$436   | \$0 | \$0 | \$0 | \$0 |
| Rate Lock       |           |         |     |     |     |     |

| Voluntary Life | Current & Renewal | Plan                        |  |  |  |  |
|----------------|-------------------|-----------------------------|--|--|--|--|
| Below 20       |                   | EE = 5x Salary up to \$500K |  |  |  |  |
| 20-24          |                   | EE Increments = \$10K       |  |  |  |  |
| 25-29          |                   | EE GI = \$100K              |  |  |  |  |
| 30-34          |                   |                             |  |  |  |  |
| 35-39          |                   | SP = 50% of EE up to \$250K |  |  |  |  |
| 40-44          |                   | SP Increments = \$5K        |  |  |  |  |
| 45-49          |                   | SP GI = \$25K               |  |  |  |  |
| 50-54          |                   |                             |  |  |  |  |
| 55-59          |                   | CH = 10% of EE up to \$10K  |  |  |  |  |
| 60-64          |                   | CH Increments = \$1K        |  |  |  |  |
| 65-69          |                   | CH GI = \$10K               |  |  |  |  |
| 70-74          |                   |                             |  |  |  |  |
| 75-79          |                   |                             |  |  |  |  |
| 80-84          |                   |                             |  |  |  |  |
| Child Rate     |                   |                             |  |  |  |  |
| AD&D           |                   |                             |  |  |  |  |
| Rate Lock      |                   |                             |  |  |  |  |

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Vision Coverage

Vision Coverage

| Benefit Design                   | Recommendation          |                  |                    | Vision Coverage            |                            |                            |                           |                   | Vision Coverage          |                                     |
|----------------------------------|-------------------------|------------------|--------------------|----------------------------|----------------------------|----------------------------|---------------------------|-------------------|--------------------------|-------------------------------------|
|                                  | Current                 | Original Renewal | Negotiated Renewal | Ameritas                   | Delta Dental (Advantica)   | VSP Signature              | Guardian                  | Sunlife           | Companion                |                                     |
| Copay (Exam and Rx only)         | \$20                    |                  |                    | \$10                       | \$10                       | \$10                       | \$20                      | No Deductible     | Copay (Exam and Rx only) | \$10                                |
| Material Copay                   | \$20                    |                  |                    | \$25                       | \$20                       | \$25                       | \$20                      |                   | Copay (Materials)        | \$10                                |
| Frequency                        | Voluntary               |                  |                    | Voluntary                  | Voluntary                  | Voluntary                  | Voluntary                 |                   | Frequency                | Voluntary                           |
| Eye Exam                         | Once/12 months          |                  |                    | Once/12 months             | Once/12 months             | Once/12 months             | Once/12 months            | Once/12 months    | Eye Exam                 | Once/12 months                      |
| Frames                           | Once/24 months          |                  |                    | Once/24 months             | Once/24 months             | Once/24 months             | Once/24 months            | Once/12 months    | Frames                   | Once/24 months                      |
| Lenses                           | Once/12 months          |                  |                    | Once/12 months             | Once/12 months             | Once/12 months             | Once/12 months            | Once/12 months    | Lenses                   | Once/12 months                      |
| Contact                          | Once/12 months          |                  |                    | Once/12 months             | Once/12 months             | Once/12 months             | Once/12 months            | Once/12 months    | Contact                  | Once/12 months                      |
| Yearly Allowances                | VSP Signature / Non VSP |                  |                    | VSP Signature/Non VSP      | Advantica / Non Advantica  | VSP/Non VSP                | VSP/Non VSP               | Delta/Non Delta   | Yearly Allowances        | EyeMed/Non EyeMed                   |
| Eye Exam                         | Copay / Up to \$40*     |                  |                    | Copay / Up to \$52*        | Copay / Up to \$40*        | Copay / Up to \$35*        | Copay / Up to \$46*       | \$60 MD/\$50 O.D. | Eye Exam                 | \$10 Copay / Up to \$35*            |
| Frames                           | \$120* / Up to \$40*    |                  |                    | Up to \$120* / Up to \$45* | Up to \$150* / Up to \$60* | Up to \$130* / Up to \$45* | \$120* / Up to \$47*      | Up to \$60        | Frames                   | \$100 Allowance / Up to \$45*       |
| Single Vision Lens               | Copay / Up to \$40*     |                  |                    | Copay / Up to \$55*        | Copay / Up to \$20*        | Copay / Up to \$25*        | Copay / Up to \$40*       | Up to \$75        | Single Vision Lens       | \$10 Copay / Up to \$25*            |
| Bifocal Lens                     | Copay / Up to \$60*     |                  |                    | Copay / Up to \$75*        | Copay / Up to \$40*        | Copay / Up to \$40*        | Copay / Up to \$60*       | Up to \$90        | Bifocal Lens             | \$10 Copay / Up to \$40*            |
| Trifocal Lens                    | Copay / Up to \$80*     |                  |                    | Copay / Up to \$95*        | Copay / Up to \$60*        | Copay / Up to \$55*        | Copay / Up to \$85*       | Up to \$120       | Trifocal Lens            | \$10 Copay / Up to \$55*            |
| Monovision Lens                  | Copay / Up to \$120*    |                  |                    | Copay / Up to \$125*       | Copay / Up to \$100*       | Copay / Up to \$80*        | Copay / Up to \$125*      | Up to \$125       | Monovision Lens          | N/A                                 |
| Two Contact Lenses               | \$120 max / \$120 max   |                  |                    | Up to \$120 / Up to \$105  | Up to \$150* / Up to \$80* | Up to \$130 / Up to \$105  | Up to \$120 / Up to \$120 | Up to \$200       | Two Contact Lenses       | \$80 Allowance + 15%* / Up to \$64* |
| Contact Lenses Fitting           | 15% Discount            |                  |                    |                            | Up to \$40 / Not Covered   |                            |                           |                   | Contact Lenses Fitting   |                                     |
| Rates                            |                         |                  |                    |                            |                            |                            |                           |                   |                          |                                     |
| Employee Only                    |                         |                  |                    |                            |                            |                            |                           |                   | Employee Only            | \$8.17                              |
| Employee + Spouse                |                         |                  |                    |                            |                            |                            |                           |                   | Employee +1              | \$15.43                             |
| Employee + Child(ren)            |                         |                  |                    |                            |                            |                            |                           |                   | Employee +2              | \$22.60                             |
| Employee Family                  |                         |                  |                    |                            |                            |                            |                           |                   |                          |                                     |
| Total Monthly Cost               | \$0                     | \$0              | \$0                | \$0                        | \$0                        | \$0                        | \$0                       | \$0               |                          | \$0                                 |
| Total Annual Cost                | \$0                     | \$0              | \$0                | \$0                        | \$0                        | \$0                        | \$0                       | \$0               |                          | \$0                                 |
| Rate Lock                        | 1 Year                  |                  |                    |                            |                            |                            |                           |                   |                          |                                     |
| % from Current                   | #DIV/0                  | #DIV/0           | #DIV/0             | #DIV/0                     | #DIV/0                     | #DIV/0                     | #DIV/0                    | #DIV/0            | #DIV/0                   | #DIV/0                              |
| * After Copay                    |                         |                  |                    |                            |                            |                            |                           |                   |                          |                                     |
| Rates assuming effective date of |                         |                  |                    |                            |                            |                            |                           |                   |                          |                                     |
| Comparison created by forum™     |                         |                  |                    |                            |                            |                            |                           |                   |                          |                                     |

| List Values     | Recommendation | Guardian  | Sunlife   | Companion |
|-----------------|----------------|-----------|-----------|-----------|
| Not Competitive | Not Shown      | Not Shown | Not Shown | Not Shown |
| Not Shown       |                |           |           |           |
| Pending         |                |           |           |           |
| Decline         |                |           |           |           |
| Non-Compete     |                |           |           |           |

**STATE OF SOUTH CAROLINA  
BEAUFORT COUNTY**

**IN THE COURT OF COMMON PLEAS  
CIVIL ACTION NO. 2016-CP-07-2541**

Forum Benefits, Inc.,

Plaintiff,

v.

Brian Bannon and Assured Partners, NL

Defendants.

# Exhibit I



# Magnolia Plantation

Dental Coverage

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| Companion Life        |                  |                    | Recommendation | Dental Recommendation | Ameritas     | Delta Dental | Guardian |           | BCBS         |              | Mutual of Omaha |                | Sun Life     |              | The Standard | Companion    |              |              |              |              |                |
|-----------------------|------------------|--------------------|----------------|-----------------------|--------------|--------------|----------|-----------|--------------|--------------|-----------------|----------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|----------------|
| Current               | Original Renewal | Negotiated Renewal |                |                       |              | 10 min       | 100%     | 10 or 59% |              |              | 10 or 70%       | 10 or 75%      | 10 or 60%    |              | 20% min      | 20% min      |              |              |              |              |                |
| Benefit Design        |                  |                    |                |                       |              |              |          |           |              |              |                 |                |              |              |              |              |              |              |              |              |                |
| Plan Type             | Voluntary        |                    |                |                       | Voluntary    |              |          |           | Voluntary    | Voluntary    | ER-Paid         | Voluntary      | ER-Contrib   | ER-Contrib   | ER-Paid      | ER-Contrib   | ER-Contrib   | Voluntary    |              | Voluntary    | Voluntary      |
| Deductible            | \$100 per person |                    |                |                       | \$50         |              |          |           | \$50         | \$50         | \$0 / \$50      | \$0 / \$50     | \$50         | \$50         | \$50         | \$50         | \$50         | \$50         | \$50         | \$50         | \$100 Lifetime |
| Waived for Prev.      | Yes              |                    |                |                       | Yes          |              |          |           | Yes          | Yes          | Yes             | Yes            |              |              |              |              |              |              | Yes          | No           |                |
| Percentile            | 90th             |                    |                |                       | 90th         |              |          |           | 90th         | 90th         | Network / 90th  | Network / 90th | 90th         | 90th         | 90th         | 90th         | 90th         | 90th         | 90th         | 90th         | 90th           |
| Preventive Procedures | 100%             |                    |                |                       | 100%         |              |          |           | 100% / 100%  | 100% / 100%  | 100%            | 100%           | 100%         | 100%         | 100%         | 100%         | 100%         | 100%         | 100%         | 100%         | 100%           |
| Basic Procedures      | 80%              |                    |                |                       | 80%          |              |          |           | 80%          | 80%          | 100% / 80%      | 100% / 80%     | 80%          | 80%          | 80%          | 80%          | 80%          | 80%          | 80%          | 80%          | 80%            |
| Major Procedures      | 50%              |                    |                |                       | 50%          |              |          |           | 50%          | 50%          | 60% / 50%       | 60% / 50%      | # 50%        | # 50%        | 50%          | 50%          | 50%          | *50%         | *50%         | *50%         | *50%           |
| Endodontics           | 80%              |                    |                |                       | 80%          |              |          |           | 80%          | 80%          | 100% / 80%      | 100% / 80%     | 80%          | 80%          | 80%          | 80%          | 80%          | *50%         | 80%          | *50%         | *50%           |
| Periodontics          | 80%              |                    |                |                       | 80%          |              |          |           | 80%          | 80%          | 100% / 80%      | 100% / 80%     | 80%          | 80%          | 80%          | 80%          | 80%          | *50%         | 80%          | *50%         | *50%           |
| Extractions           | 80%              |                    |                |                       | 80%          |              |          |           | 80%          | 80%          | 100% / 80%      | 100% / 80%     | 80%          | 80%          | 80%          | 80%          | 80%          | *50%         | 80%          | *50%         | *50%           |
| Anesthesia            | 80%              |                    |                |                       | 80%          |              |          |           | 80%          | 80%          | 100% / 80%      | 100% / 80%     | 80%          | 80%          | 80%          | 80%          | 80%          | *50%         | 80%          | *50%         | *50%           |
| Annual Maximum        | \$1,500          |                    |                |                       | \$1,000      |              |          |           | \$1,000      | \$1,000      | \$1,500         | \$1,000        | \$2,000      | \$2,000      | \$1,000      | \$1,000      | \$1,000      | \$1,000      | \$1,500      | \$1,000      |                |
| Rollover:             | Not Included     |                    |                |                       | Not Included |              |          |           | Not Included | Not Included | Included        | Included       | Not Included | Not Included | Not Included | Not Included | Not Included | Not Included | Not Included | Not Included | Not Included   |
| Threshold             | n/a              |                    |                |                       | n/a          |              |          |           | n/a          | n/a          | \$700           | \$700          | n/a          | n/a          | n/a          | n/a          | n/a          | n/a          | n/a          | n/a          | n/a            |
| Amount                | n/a              |                    |                |                       | n/a          |              |          |           | n/a          | n/a          | \$350           | \$350          | n/a          | n/a          | n/a          | n/a          | n/a          | n/a          | n/a          | n/a          | n/a            |
| Max                   | n/a              |                    |                |                       | n/a          |              |          |           | n/a          | n/a          | \$1,250         | \$1,250        | n/a          | n/a          | n/a          | n/a          | n/a          | n/a          | n/a          | n/a          | n/a            |
| Orthodontia Coverage  | 50%              |                    |                |                       | None         |              |          |           | None         | None         | 50%             | 50%            | None         | # 50%        | None         | None         | None         | None         | 50%          | *50%         | *50%           |
| Adult Ortho           | No               |                    |                |                       | No           |              |          |           | No           | No           | No              | No             | No           | No           | No           | No           | No           | No           | No           | No           | No             |
| Orthodontia Life Max  | \$1,000          |                    |                |                       | None         |              |          |           | None         | None         | \$1,000         | \$1,000        | None         | \$1,000      | None         | None         | None         | None         | \$1,000      | \$1,000      |                |
| Rates                 |                  |                    |                |                       |              |              |          |           |              |              |                 |                |              |              |              |              |              |              |              |              |                |
| Employee Only         | \$35.41          |                    |                |                       | \$38.38      |              |          |           | \$36.96      |              |                 |                |              |              |              |              |              |              |              |              |                |
| Employee + 1          | \$67.30          |                    |                |                       | \$72.94      |              |          |           | \$70.23      |              |                 |                |              |              |              |              |              |              |              |              |                |
| Employee +2           | \$82.56          |                    |                |                       | \$89.47      |              |          |           | \$86.15      |              |                 |                |              |              |              |              |              |              |              |              |                |
| Employee + 3 or more  | \$110.07         |                    |                |                       | \$119.29     |              |          |           | \$114.87     |              |                 |                |              |              |              |              |              |              |              |              |                |
| Monthly Total         | \$986            |                    |                |                       | \$1,069      |              |          |           | \$1,029      | \$0          | \$0             | \$0            | \$0          | \$0          | \$0          | \$0          | \$0          | \$0          | \$0          | \$0          | \$0            |
| Annual Total          | \$11,831         |                    |                |                       | \$12,821     |              |          |           | \$12,348     | \$0          | \$0             | \$0            | \$0          | \$0          | \$0          | \$0          | \$0          | \$0          | \$0          | \$0          | \$0            |
| % from Current        |                  |                    |                |                       | 8.38%        |              |          |           | 4.36%        | -100.00%     | -100.00%        | -100.00%       | -100.00%     | -100.00%     | -100.00%     | -100.00%     | -100.00%     | -100.00%     | -100.00%     | -100.00%     | -100.00%       |

\*Indicates 12-month waiting period on procedures in this category / # Indicates 6-month waiting period on procedures in this category

Rates assuming effective date of 1/0/1900

Comparison created by forum<sup>SM</sup>

| List Values     | Recommendation | Ameritas  | Delta Dental | Guardian  | BCBS      | Mutual of Omaha | Sun Life  | The Standard | 0         |
|-----------------|----------------|-----------|--------------|-----------|-----------|-----------------|-----------|--------------|-----------|
| Not Competitive | Not Shown      | Not Shown | Not Shown    | Not Shown | Not Shown | Not Shown       | Not Shown | Not Shown    | Not Shown |
| Not Shown       |                |           |              |           |           |                 |           |              |           |
| Pending         |                |           |              |           |           |                 |           |              |           |
| Decline         |                |           |              |           |           |                 |           |              |           |
| Need Medical    |                |           |              |           |           |                 |           |              |           |
| Non-Compete     |                |           |              |           |           |                 |           |              |           |

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## Teladoc Utilization

### YTD Utilization

|              | Enrollment | Consultations | Utilization | Average call Back Time |
|--------------|------------|---------------|-------------|------------------------|
| Members      | 15         | 2             | 13%         | 38.5                   |
| Dependents   | 22         | 4             | 18%         | 19.0                   |
| <b>Total</b> | <b>37</b>  | <b>6</b>      | <b>16%</b>  | <b>25.5</b>            |

### Rx and Diagnoses

|                                    |          |
|------------------------------------|----------|
| # of Consultations with Rx         | 5        |
| % of Consultations with Rx         | 83%      |
| <b>Total Prescriptions Written</b> | <b>7</b> |

| Top 5 Prescriptions |
|---------------------|
| Flucicasone         |
| Amoxicilin          |
| Azithromcin         |
| Tamiflu             |
| xxxxxxxxxx          |

| Top 5 Diagnoses                    |
|------------------------------------|
| Accute Upper Respiratory Infection |
| Acute Bronchitis                   |
| Acute Pharyngitis                  |
| Acute Sinsuitis                    |
| Allergic Rhinitis                  |

### Services Avoided

|                            | # of Incidents | Cost              | Savings         |
|----------------------------|----------------|-------------------|-----------------|
| Primary Care Physician     | 5              | \$129.00          | \$645.00        |
| Specialist                 | 0              | \$193.00          | \$0.00          |
| Urgent Care                | 1              | \$161.00          | \$161.00        |
| Emergency Room             | 0              | \$1,456.00        | \$0.00          |
| <b>Total Consultations</b> | <b>6</b>       | <b>\$1,939.00</b> | <b>\$806.00</b> |

Teladoc Utilization | forum



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## Telemedicine

### Overview

| Quick and Easy                           | Reduces Claims Costs                     | Member Benefits                         |
|------------------------------------------|------------------------------------------|-----------------------------------------|
| 24-7-365 telephone and video access      | Automatically prescribe generic drugs    | Unlimited access for all family members |
| Average wait time less than 20 minutes   | 3% less prescribing frequency            | (regardless of coverage)                |
| 91% resolution rate for top 10 diagnoses | Average \$200 per consult claims savings | \$40 per consult copay                  |
|                                          | Claims outside of loss ratio             | Can be paid with HSA funds              |

### Top 10 Diagnoses

- |                                |                     |
|--------------------------------|---------------------|
| 1. Sinus Problems              | 6. Nasal Congestion |
| 2. Urinary Tract Infection     | 7. Allergies        |
| 3. Pink Eye                    | 8. Flu              |
| 4. Upper Respiratory Infection | 9. Cough            |
| 5. Bronchitis                  | 10. Ear Infection   |

# Teladoc<sup>+</sup>

### Pricing

| Group Size | Consult =\$45 Copay<br>Required for HSA Plan | Consult = \$0 Copay | Monthly Admin<br>Fee |
|------------|----------------------------------------------|---------------------|----------------------|
| 0-99       | \$3.00                                       | \$4.00              | \$15.00              |
| 100-249    | \$2.85                                       | \$3.65              | \$15.00              |
| 250-999    | \$2.35                                       | \$3.15              | \$0.00               |
| 1000-2499  | \$2.15                                       | \$2.95              | \$0.00               |

| Your Cost* |
|------------|
| \$180.00   |

\* Includes monthly billing fee of \$15

Telemedicine I forum

| Blue Cross Drug Cards |                  |                      |                      |  |                        |                        |                        |                        |                        |                         |
|-----------------------|------------------|----------------------|----------------------|--|------------------------|------------------------|------------------------|------------------------|------------------------|-------------------------|
|                       | Drug Card        | Senior Card          | Senior Card          |  | Senior Card 100        | Senior Green Card      | Basic Card             | Senior Card 100        | Basic Green Card       | Blue Cross Express      |
| Prescription Drugs    |                  | No Deductible        | No Deductible        |  | 100 (Single/\$120 Pmt) | 100 (Single/\$120 Pmt) | 100 (Single/\$120 Pmt) | 100 (Single/\$120 Pmt) | 100 (Single/\$120 Pmt) | Selected Card and Cases |
| Generics 1            | \$0              | \$10                 | \$10                 |  | \$10                   | \$10                   | \$10                   | \$10                   | \$10                   |                         |
| Preferred             | \$0              | \$45                 | \$45                 |  | \$45                   | Discount Card          | \$45                   | \$45                   | Discount Card          | Discount Card           |
| Non-Pre               | \$40             | \$75                 | \$75                 |  | \$75                   | Discount Card          | \$75                   | \$75                   | Discount Card          | Discount Card           |
| Specialty             | 10% to \$200 Mnt | 20% of 31 Day Supply | 20% of 31 Day Supply |  | 20% of 31 Day Supply   | Discount Card          | % of 31 Day Sup        | % of 31 Day Sup        | Discount Card          | Discount Card           |
| Mail Ord              | \$20/\$150       | \$20/\$150           | \$20/\$150           |  | \$20/\$150             | \$0                    | \$20/\$150             | \$20/\$150             | \$0                    | Discount Card           |



|                         |                       | Coventry                        |         | Alternate Plan Options       |                              |                              |                              |                              |                              |                              |  |
|-------------------------|-----------------------|---------------------------------|---------|------------------------------|------------------------------|------------------------------|------------------------------|------------------------------|------------------------------|------------------------------|--|
|                         |                       | Current                         | Renewal | Alternate 1                  | Alternate 2                  | Alternate 3                  | Alternate 4                  | Alternate 5                  | Alternate 6                  | Alternate 8                  |  |
| Benefit Design          |                       |                                 |         |                              |                              |                              |                              |                              |                              |                              |  |
| Plan Name               | Coventry: Silver 3500 | Coventry: Silver POS 2700 H.S.A |         | BCBS: Silver 8               | BCBS: Silver 9               | BCBS: Silver 14              | BCBS Bronze 3                | BCBS: Bronze 6               | Blue Choice: Silver 3500     | Blue Choice: Bronze 6000     |  |
| Network                 | Coventry              | Coventry                        |         | Blue Cross                   | Blue Cross                   | Blue Cross                   | Blue Cross                   | Blue Cross                   | Blue Choice                  | Blue Choice                  |  |
| Individual Deductible   | \$3,500               | \$2,700                         |         | \$2,300                      | \$3,600                      | \$4,000                      | \$5,000                      | \$6,850                      | \$3,500                      | \$6,000                      |  |
| Family Deductible       | \$7,000               | \$5,400                         |         | \$4,600                      | \$6,900                      | \$8,000                      | \$1,000                      | \$13,700                     | \$7,000                      | \$12,000                     |  |
| Deductible Type         | Aggregate             | Aggregate                       |         | Embedded                     | Embedded                     | Embedded                     | Embedded                     | Embedded                     | Embedded                     | Embedded                     |  |
| Coinurance              | 100%                  | 80%                             |         | 80%                          | 100%                         | 100%                         | 80%                          | 100%                         | 100%                         | 100%                         |  |
| MOOP Individual         | \$3,500               | \$5,700                         |         | \$5,000                      | \$3,600                      | \$4,000                      | \$6,350                      | \$6,850                      | \$3,500                      | \$6,000                      |  |
| MOOP Family             | \$7,000               | \$11,400                        |         | \$9,400                      | \$6,900                      | \$8,000                      | \$12,700                     | \$13,700                     | \$7,000                      | \$12,000                     |  |
| In-Patient Hospital     | Deductible            | Deductible/20%                  |         | Ded. + Coin.                 | Deductible                   | Deductible                   | Deductible                   | Deductible                   | Deductible                   | Deductible                   |  |
| Out-Patient Hospital    | Deductible            | Deductible/20%                  |         | Ded. + Coin.                 | Deductible                   | Deductible                   | Deductible                   | Deductible                   | Deductible                   | Deductible                   |  |
| Primary Care            | Deductible            | Deductible/\$10                 |         | Ded. + Coin.                 | Deductible                   | Deductible                   | Deductible                   | Deductible                   | Deductible                   | Deductible                   |  |
| Specialty Care          | Deductible            | Deductible/\$40                 |         | Ded. + Coin.                 | Deductible                   | Deductible                   | Deductible                   | Deductible                   | Deductible                   | Deductible                   |  |
| Out-Patient Lab Service | Deductible            | Deductible                      |         | Ded. + Coin.                 | Deductible                   | Deductible                   | Deductible                   | Deductible                   | Deductible                   | Deductible                   |  |
| Prescription Drugs      | Deductible            | Applies towards MOOP            |         | Applies towards MOOP         | Applies towards MOOP         | Applies towards MOOP         | Applies towards MOOP         | Applies towards MOOP         | Applies towards MOOP         | Applies towards MOOP         |  |
| Generic Drug            | 100%                  | Deductible/\$3                  |         | Ded. + Coin.                 | Deductible                   | Deductible                   | Ded. + Coin.                 | \$30                         | Ded. + Coin.                 | Ded. + Coin.                 |  |
| Preferred               | 100%                  | Deductible/\$10                 |         | Ded. + Coin.                 | Deductible                   | Deductible                   | Ded. + Coin.                 | \$60                         | Ded. + Coin.                 | Ded. + Coin.                 |  |
| Non-Preferred           | 100%                  | Deductible/\$30                 |         | Ded. + Coin.                 | Deductible                   | Deductible                   | Ded. + Coin.                 | Deductible                   | Ded. + Coin.                 | Ded. + Coin.                 |  |
| Wellness                | PPACA                 | PPACA                           |         | PPACA                        | PPACA                        | PPACA                        | PPACA                        | PPACA                        | PPACA                        | PPACA                        |  |
| Maternity               | Deductible            | Deductible                      |         | Ded. + Coin.                 | Deductible                   | Deductible                   | Ded. + Coin.                 | Deductible                   | Ded. + Coin.                 | Ded. + Coin.                 |  |
| Emergency Room          | Deductible            | Deductible/\$200                |         | Ded. + Coin.                 | Deductible                   | Deductible                   | Ded. + Coin.                 | \$300 then Deductible        | Ded. + Coin.                 | Ded. + Coin.                 |  |
| Urgent Care             | Deductible            | Deductible/\$75                 |         | Ded. + Coin.                 | Deductible                   | Deductible                   | Ded. + Coin.                 | Deductible                   | Ded. + Coin.                 | Ded. + Coin.                 |  |
| Pediatric Vision        | Not Covered           | Not Covered                     |         | Exam = \$25 / Glasses = \$50 | Exam = \$25 / Glasses = \$50 | Exam = \$25 / Glasses = \$50 | Exam = \$25 / Glasses = \$50 | Exam = \$25 / Glasses = \$50 | Exam = \$25 / Glasses = \$50 | Exam = \$25 / Glasses = \$50 |  |
| Pediatric Dental        | Not Covered           | Not Covered                     |         | Not Covered                  | Not Covered                  | Not Covered                  | Not Covered                  | Not Covered                  | Not Covered                  | Not Covered                  |  |
| Dental/Vision           | Not Covered           | Not Covered                     |         | Not Covered                  | Not Covered                  | Not Covered                  | Not Covered                  | Not Covered                  | Included                     | Included                     |  |

**Rates**

|                 |    |           |           |           |           |           |           |           |           |           |
|-----------------|----|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| Employee Only   | 28 |           |           |           |           |           |           |           |           |           |
| Employee Spouse | 0  |           |           |           |           |           |           |           |           |           |
| Employee Child  | 1  |           |           |           |           |           |           |           |           |           |
| Family          | 1  |           |           |           |           |           |           |           |           |           |
| Monthly Total   |    | \$14,471  | \$16,013  | \$16,396  | \$16,477  | \$16,099  | \$14,150  | \$14,022  | \$16,487  | \$14,107  |
| Annual Total    |    | \$173,652 | \$192,156 | \$196,754 | \$197,726 | \$193,189 | \$169,805 | \$168,269 | \$197,844 | \$169,280 |
| % from Current  |    |           | 10.66%    | 13.30%    | 13.86%    | 11.25%    | -2.20%    | -3.10%    | 13.93%    | -2.52%    |
| Annual Savings  |    |           |           |           |           |           |           |           | -\$5,688  | \$22,876  |

Rates assuming effective date of 1/1/2016  
Comparison created by forum<sup>SM</sup>

Individual Deductible // 3500, Deductible/Deductible 2700, 0.8, 5700, Deductible/\$10/1, //, //, //  
Primary Care/\$5 \$5 \$Deductible/\$Deductible \$Deductible/\$10/\$Deductible/\$4/ \$ \$5  
Generic Drug/Pres // 1/1/1/1 Deductible/\$3/Deductible/\$10/Dx //, //





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## Total Cost Summary

### Annual Employer Cost

|                              | Current           | Renewal         | Recommendation  | Recommendation Notes:                                        |
|------------------------------|-------------------|-----------------|-----------------|--------------------------------------------------------------|
| <b>Medical Plan</b>          | keep all the same |                 |                 |                                                              |
| HDHP - H.S.A Plan            | #VALUE!           | #VALUE!         | \$0.00          | <i>HSA Alternate 2 (90/50)</i>                               |
| Traditional Plan             | \$0.00            | \$0.00          | \$0.00          | <i>PPO Alternate 2 (80/40)</i>                               |
| Value Plan                   | \$0.00            | \$0.00          | \$0.00          |                                                              |
| Medicare Funding             | \$0.00            | \$0.00          | \$0.00          |                                                              |
| H.S.A Funding                | \$0.00            | \$0.00          | \$0.00          | <i>\$500 per EE (25)</i>                                     |
| <b>Sub-Total</b>             | <b>#VALUE!</b>    | <b>#VALUE!</b>  | <b>\$0.00</b>   |                                                              |
| <b>Administrative Fees</b>   |                   |                 |                 |                                                              |
| COBRA                        | \$0.00            | \$0.00          | \$0.00          | <i>Move to Benefit Coordinators (\$90 PEPM, \$50 min)</i>    |
| Section 125 / POP            | \$200.00          | \$150.00        | \$150.00        | <i>ve to Benefit Coordinators (\$200 set-up / \$120 annu</i> |
| FSA Fee's                    | \$0.00            | \$0.00          | \$0.00          | <i>\$5 PEPM / \$50 min</i>                                   |
| <b>Sub-Total</b>             | <b>\$200.00</b>   | <b>\$150.00</b> | <b>\$150.00</b> |                                                              |
| <b>Telemedicine</b>          | \$0.00            | \$180.00        | \$180.00        | <i>\$3.00 PEPM + \$15 monthly admin</i>                      |
| <b>Dental Plan</b>           | \$9,952.38        | \$10,387.20     | \$0.00          | <i>Make Voluntary</i>                                        |
| <b>Critical Illness Plan</b> | \$0.00            | \$0.00          | \$0.00          |                                                              |
| <b>Vision Plan</b>           | \$0.00            | \$0.00          | \$0.00          | <i>Keep Same 0%</i>                                          |
| <b>Basic Life</b>            | \$0.00            | \$0.00          | \$0.00          | <i>Keep Same 100%</i>                                        |
| <b>Disability</b>            |                   |                 |                 |                                                              |
| Short Term                   | \$0.00            | \$0.00          | \$0.00          | <i>Keep Same 100%</i>                                        |
| Long Term                    | \$0.00            | \$0.00          | \$0.00          | <i>Keep Same 0%</i>                                          |
| <b>Sub-Total</b>             | <b>\$0.00</b>     | <b>\$0.00</b>   | <b>\$0.00</b>   |                                                              |
| <b>Total Employer Cost</b>   | <b>#VALUE!</b>    | <b>#VALUE!</b>  | <b>\$330.00</b> |                                                              |
| <b>Change From Current</b>   |                   | <b>#VALUE!</b>  | <b>#VALUE!</b>  |                                                              |
|                              |                   | <b>#VALUE!</b>  | <b>#VALUE!</b>  |                                                              |

0-99\*  
100-249\*  
250-999  
1000-2499

0

## Total Cost Summary

### Employee Payroll Deduction

| Weekly                  | Current                     | Renewal | Change from Current |                         | Change from Current |
|-------------------------|-----------------------------|---------|---------------------|-------------------------|---------------------|
| <b>H.S.A Plan</b>       | <b>ER Cont: 100%/50%</b>    |         |                     | <b>ER Cont: 100%/0</b>  |                     |
| Employee Only           | #VALUE!                     | #VALUE! | #VALUE!             | \$0.00                  | #VALUE!             |
| Employee + Spouse       | #VALUE!                     | #VALUE! | #VALUE!             | \$0.00                  | #VALUE!             |
| Employee + Children     | #VALUE!                     | #VALUE! | #VALUE!             | \$0.00                  | #VALUE!             |
| Full Family             | #VALUE!                     | #VALUE! | #VALUE!             | \$0.00                  | #VALUE!             |
|                         |                             |         |                     |                         |                     |
| <b>Traditional Plan</b> | <b>ER Cont: \$250/\$200</b> |         |                     | <b>ER Cont: \$200/0</b> |                     |
| Employee Only           | \$0.00                      | \$0.00  | \$0.00              | \$0.00                  | \$0.00              |
| Employee + Spouse       | \$0.00                      | \$0.00  | \$0.00              | \$0.00                  | \$0.00              |
| Employee + Children     | \$0.00                      | \$0.00  | \$0.00              | \$0.00                  | \$0.00              |
| Full Family             | \$0.00                      | \$0.00  | \$0.00              | \$0.00                  | \$0.00              |
|                         |                             |         |                     |                         |                     |
| <b>Value Plan</b>       | <b>ER Cont: 50%/50%</b>     |         |                     | <b>ER Cont: \$200/0</b> |                     |
| Employee Only           | \$0.00                      | \$0.00  | \$0.00              | \$0.00                  | \$0.00              |
| Employee + Spouse       | \$0.00                      | \$0.00  | \$0.00              | \$0.00                  | \$0.00              |
| Employee + Children     | \$0.00                      | \$0.00  | \$0.00              | \$0.00                  | \$0.00              |
| Full Family             | \$0.00                      | \$0.00  | \$0.00              | \$0.00                  | \$0.00              |
|                         |                             |         |                     |                         |                     |
| <b>Dental Plan</b>      | <b>ER Cont: 50%/0</b>       |         |                     | <b>ER Cont: 0/0</b>     |                     |
| Employee Only           | \$0.00                      | \$0.00  | \$0.00              | \$0.00                  | \$0.00              |
| Employee + Spouse       | \$3.68                      | \$3.84  | \$0.16              | \$0.00                  | -\$3.68             |
| Employee + Children     | \$5.44                      | \$5.68  | \$0.24              | \$0.00                  | -\$5.44             |
| Full Family             | \$8.61                      | \$8.99  | \$0.38              | \$0.00                  | -\$8.61             |
|                         |                             |         |                     |                         |                     |
| <b>Vision Plan</b>      | <b>ER Cont: 50%/0</b>       |         |                     | <b>ER Cont: 0/0</b>     |                     |
| Employee Only           | \$0.00                      | \$0.00  | \$0.00              | \$0.00                  | \$0.00              |
| Employee + Spouse       | \$0.00                      | \$0.00  | \$0.00              | \$0.00                  | \$0.00              |
| Employee + Children     | \$0.00                      | \$0.00  | \$0.00              | \$0.00                  | \$0.00              |
| Full Family             | \$0.00                      | \$0.00  | \$0.00              | \$0.00                  | \$0.00              |
|                         |                             |         |                     |                         |                     |

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## Total Cost Summary

|              |    |
|--------------|----|
| Weekly       | 52 |
| Bi-Weekly    | 26 |
| Semi-Monthly | 24 |
| Monthly      | 12 |
| Quarterly    | 4  |

FILL IN INFORMATION HIGHLIGHTED IN YELLOW

Payroll Frequency

| PPO Plan ~ Current        |        |            | 100%       | 50%         |               |               |
|---------------------------|--------|------------|------------|-------------|---------------|---------------|
|                           |        | Total Cost | ER pays EE | ER pays Dep | Total ER pays | Total EE pays |
| 0                         | EE     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 0                         | ES     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 0                         | EC     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 0                         | Family | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| PPO Current Monthly       |        |            |            |             | \$0.00        | \$0.00        |
| PPO Current Annual        |        |            |            |             | \$0.00        | \$0.00        |
| PPO Plan ~ Renewal        |        |            | 100%       | 50%         |               |               |
|                           |        | Total Cost | ER pays EE | ER pays Dep | Total ER pays | Total EE pays |
| 0                         | EE     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 0                         | ES     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 0                         | EC     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 0                         | Family | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| PPO Renewal Monthly       |        |            |            |             | \$0.00        | \$0.00        |
| PPO Renewal Annual        |        |            |            |             | \$0.00        | \$0.00        |
| PPO Change from Current   |        |            |            |             | #DIV/0!       | #DIV/0!       |
| PPO Plan ~ Recommendation |        |            | 100%       | 0%          |               |               |
|                           |        | Total Cost | ER pays EE | ER pays Dep | Total ER pays | Total EE pays |
| 0                         | EE     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 0                         | ES     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 0                         | EC     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 0                         | Family | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |

0

## Total Cost Summary

|                            |  |  |  |        |        |
|----------------------------|--|--|--|--------|--------|
| PPO Recommendation Monthly |  |  |  | \$0.00 | \$0.00 |
| PPO Recommendation Annual  |  |  |  | \$0.00 | \$0.00 |

|                         |  |  |         |         |
|-------------------------|--|--|---------|---------|
| PPO Change from Current |  |  | #DIV/0! | #DIV/0! |
|-------------------------|--|--|---------|---------|

| HDHP Plan ~ Current  |        |            | 100%       | 50%         |               |               |
|----------------------|--------|------------|------------|-------------|---------------|---------------|
|                      |        | Total Cost | ER pays EE | ER pays Dep | Total ER pays | Total EE pays |
| 28                   | EE     | Age Rated  | #VALUE!    | \$0.00      | #VALUE!       | #VALUE!       |
| 0                    | ES     | \$0.00     | #VALUE!    | #VALUE!     | #VALUE!       | #VALUE!       |
| 1                    | EC     | \$0.00     | #VALUE!    | #VALUE!     | #VALUE!       | #VALUE!       |
| 1                    | Family | \$0.00     | #VALUE!    | #VALUE!     | #VALUE!       | #VALUE!       |
|                      |        |            |            |             |               |               |
| HDHP Current Monthly |        |            |            |             | #VALUE!       | #VALUE!       |
| HDHP Current Annual  |        |            |            |             | #VALUE!       | #VALUE!       |

| HDHP Plan ~ Renewal  |        |            | 100%       | 50%         |               |               |
|----------------------|--------|------------|------------|-------------|---------------|---------------|
|                      |        | Total Cost | ER pays EE | ER pays Dep | Total ER pays | Total EE pays |
| 28                   | EE     | Age Rated  | #VALUE!    | \$0.00      | #VALUE!       | #VALUE!       |
| 0                    | ES     | \$0.00     | #VALUE!    | #VALUE!     | #VALUE!       | #VALUE!       |
| 1                    | EC     | \$0.00     | #VALUE!    | #VALUE!     | #VALUE!       | #VALUE!       |
| 1                    | Family | \$0.00     | #VALUE!    | #VALUE!     | #VALUE!       | #VALUE!       |
|                      |        |            |            |             |               |               |
| HDHP Renewal Monthly |        |            |            |             | #VALUE!       | #VALUE!       |
| HDHP Renewal Annual  |        |            |            |             | #VALUE!       | #VALUE!       |

| HDHP Change from Current    |        |            |            |             | #VALUE!       | #VALUE!       |
|-----------------------------|--------|------------|------------|-------------|---------------|---------------|
|                             |        |            |            |             |               |               |
| HDHP Plan ~ Recommendation  |        |            | 100%       | 0%          |               |               |
|                             |        | Total Cost | ER pays EE | ER pays Dep | Total ER pays | Total EE pays |
| 28                          | EE     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 0                           | ES     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 1                           | EC     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 1                           | Family | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
|                             |        |            |            |             |               |               |
| HDHP Recommendation Monthly |        |            |            |             | \$0.00        | \$0.00        |
| HDHP Recommendation Annual  |        |            |            |             | \$0.00        | \$0.00        |

**STATE OF SOUTH CAROLINA**

**BEAUFORT COUNTY**

**IN THE COURT OF COMMON PLEAS**

**CIVIL ACTION NO. 2016-CP-07-2541**

Forum Benefits, Inc.,

Plaintiff,

v.

Brian Bannon and Assured Partners, NL

Defendants.

# Exhibit I



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## Total Cost Summary

|                                     |        |                   |                   |                    |                      |                      |
|-------------------------------------|--------|-------------------|-------------------|--------------------|----------------------|----------------------|
| <b>HDHP Change from Current</b>     |        |                   |                   |                    | #VALUE!              | #VALUE!              |
|                                     |        |                   |                   |                    |                      |                      |
| <b>Value Plan ~ Current</b>         |        |                   | 100%              | 50%                |                      |                      |
|                                     |        | <b>Total Cost</b> | <b>ER pays EE</b> | <b>ER pays Dep</b> | <b>Total ER pays</b> | <b>Total EE pays</b> |
| 0                                   | EE     | \$0.00            | \$0.00            | \$0.00             | \$0.00               | \$0.00               |
| 0                                   | ES     | \$0.00            | \$0.00            | \$0.00             | \$0.00               | \$0.00               |
| 0                                   | EC     | \$0.00            | \$0.00            | \$0.00             | \$0.00               | \$0.00               |
| 0                                   | Family | \$0.00            | \$0.00            | \$0.00             | \$0.00               | \$0.00               |
| <b>Value Current Monthly</b>        |        |                   |                   |                    | <b>\$0.00</b>        | <b>\$0.00</b>        |
| <b>Value Current Annual</b>         |        |                   |                   |                    | <b>\$0.00</b>        | <b>\$0.00</b>        |
|                                     |        |                   |                   |                    |                      |                      |
| <b>Value Plan ~ Renewal</b>         |        |                   | 100%              | 50%                |                      |                      |
|                                     |        | <b>Total Cost</b> | <b>ER pays EE</b> | <b>ER pays Dep</b> | <b>Total ER pays</b> | <b>Total EE pays</b> |
| 0                                   | EE     | \$0.00            | \$0.00            | \$0.00             | \$0.00               | \$0.00               |
| 0                                   | ES     | \$0.00            | \$0.00            | \$0.00             | \$0.00               | \$0.00               |
| 0                                   | EC     | \$0.00            | \$0.00            | \$0.00             | \$0.00               | \$0.00               |
| 0                                   | Family | \$0.00            | \$0.00            | \$0.00             | \$0.00               | \$0.00               |
| <b>Value Renewal Monthly</b>        |        |                   |                   |                    | <b>\$0.00</b>        | <b>\$0.00</b>        |
| <b>Value Renewal Annual</b>         |        |                   |                   |                    | <b>\$0.00</b>        | <b>\$0.00</b>        |
|                                     |        |                   |                   |                    |                      |                      |
| <b>Value Change from Current</b>    |        |                   |                   |                    | #DIV/0!              | #DIV/0!              |
|                                     |        |                   |                   |                    |                      |                      |
| <b>Value Plan ~ Recommendation</b>  |        |                   | 100%              | 0%                 |                      |                      |
|                                     |        | <b>Total Cost</b> | <b>ER pays EE</b> | <b>ER pays Dep</b> | <b>Total ER pays</b> | <b>Total EE pays</b> |
| 0                                   | EE     | \$0.00            | \$0.00            | \$0.00             | \$0.00               | \$0.00               |
| 0                                   | ES     | \$0.00            | \$0.00            | \$0.00             | \$0.00               | \$0.00               |
| 0                                   | EC     | \$0.00            | \$0.00            | \$0.00             | \$0.00               | \$0.00               |
| 0                                   | Family | \$0.00            | \$0.00            | \$0.00             | \$0.00               | \$0.00               |
| <b>Value Recommendation Monthly</b> |        |                   |                   |                    | <b>\$0.00</b>        | <b>\$0.00</b>        |
| <b>Value Recommendation Annual</b>  |        |                   |                   |                    | <b>\$0.00</b>        | <b>\$0.00</b>        |
|                                     |        |                   |                   |                    |                      |                      |
| <b>Value Change from Current</b>    |        |                   |                   |                    | #DIV/0!              | #DIV/0!              |

0

## Total Cost Summary

| Dental ~ Current              |        |            | 100%       | 50%         |               |               |
|-------------------------------|--------|------------|------------|-------------|---------------|---------------|
|                               |        | Total Cost | ER pays EE | ER pays Dep | Total ER pays | Total EE pays |
| 11                            | EE     | \$35.41    | \$35.41    | \$0.00      | \$35.41       | \$0.00        |
| 6                             | ES     | \$67.30    | \$35.41    | \$15.95     | \$51.36       | \$15.95       |
| 1                             | EC     | \$82.56    | \$35.41    | \$23.58     | \$58.99       | \$23.58       |
| 1                             | Family | \$110.07   | \$35.41    | \$37.33     | \$72.74       | \$37.33       |
| Dental Current Monthly        |        |            |            |             | \$829.37      | \$156.58      |
| Dental Current Annual         |        |            |            |             | \$9,952.38    | \$1,878.90    |
| Dental ~ Renewal              |        |            | 100%       | 50%         |               |               |
|                               |        | Total Cost | ER pays EE | ER pays Dep | Total ER pays | Total EE pays |
| 11                            | EE     | \$36.96    | \$36.96    | \$0.00      | \$36.96       | \$0.00        |
| 6                             | ES     | \$70.23    | \$36.96    | \$16.64     | \$53.60       | \$16.64       |
| 1                             | EC     | \$86.15    | \$36.96    | \$24.60     | \$61.56       | \$24.60       |
| 1                             | Family | \$114.87   | \$36.96    | \$38.96     | \$75.92       | \$38.96       |
| Dental Renewal Monthly        |        |            |            |             | \$865.60      | \$163.36      |
| Dental Renewal Annual         |        |            |            |             | \$10,387.20   | \$1,960.32    |
| Dental Change from Current    |        |            |            |             | 4.37%         | 4.33%         |
| Dental ~ Recommendation       |        |            | 100%       | 50%         |               |               |
|                               |        | Total Cost | ER pays EE | ER pays Dep | Total ER pays | Total EE pays |
| 11                            | EE     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 6                             | ES     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 1                             | EC     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 1                             | Family | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| Dental Recommendation Monthly |        |            |            |             | \$0.00        | \$0.00        |
| Dental Recommendation Annual  |        |            |            |             | \$0.00        | \$0.00        |
| Dental Change from Current    |        |            |            |             | -100.00%      | -100.00%      |
| Vision ~ Current              |        |            | 100%       | 50%         |               |               |

0

## Total Cost Summary

|                               |        | Total Cost | ER pays EE | ER pays Dep | Total ER pays | Total EE pays |
|-------------------------------|--------|------------|------------|-------------|---------------|---------------|
| 0                             | EE     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 0                             | ES     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 0                             | EC     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 0                             | Family | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
|                               |        |            |            |             |               |               |
| Vision Current Monthly        |        |            |            |             | \$0.00        | \$0.00        |
| Vision Current Annual         |        |            |            |             | \$0.00        | \$0.00        |
|                               |        |            |            |             |               |               |
| Vision ~ Renewal              |        |            | 100%       | 50%         |               |               |
|                               |        | Total Cost | ER pays EE | ER pays Dep | Total ER pays | Total EE pays |
| 0                             | EE     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 0                             | ES     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 0                             | EC     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 0                             | Family | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
|                               |        |            |            |             |               |               |
| Vision Renewal Monthly        |        |            |            |             | \$0.00        | \$0.00        |
| Vision Renewal Annual         |        |            |            |             | \$0.00        | \$0.00        |
|                               |        |            |            |             |               |               |
| Vision Change from Current    |        |            |            |             | #DIV/0!       | #DIV/0!       |
|                               |        |            |            |             |               |               |
| Vision ~ Recommendation       |        |            | 100%       | 50%         |               |               |
|                               |        | Total Cost | ER pays EE | ER pays Dep | Total ER pays | Total EE pays |
| 0                             | EE     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 0                             | ES     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 0                             | EC     | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
| 0                             | Family | \$0.00     | \$0.00     | \$0.00      | \$0.00        | \$0.00        |
|                               |        |            |            |             |               |               |
| Vision Recommendation Monthly |        |            |            |             | \$0.00        | \$0.00        |
| Vision Recommendation Annual  |        |            |            |             | \$0.00        | \$0.00        |
|                               |        |            |            |             |               |               |
| Vision Change from Current    |        |            |            |             | #DIV/0!       | #DIV/0!       |

**Benefit Coordinators Cost:**

|               |                                                            |
|---------------|------------------------------------------------------------|
| COBRA <100    | \$0.90 PEPM / \$50 monthly minimum / no set-up / no annual |
| COBRA 100-199 | \$0.90 PEPM / \$75 monthly minimum / no set-up / no annual |
| COBRA 200+    | \$0.85 PEPM / \$75 monthly minimum / no set-up / no annual |

|                           |
|---------------------------|
| POP 2-49 (TASC rollover)  |
| POP 50-99 (TASC rollover) |
| POP 100+ (TASC rollover)  |

|                                  |                                                        |
|----------------------------------|--------------------------------------------------------|
| <b>TelaDoc Pricing:</b>          | *groups less than 250 employees pay \$15 monthly admin |
| <i>Consult \$0 (Copay plans)</i> | <i>Consult \$45 (H.S.A. plans)</i>                     |
| \$4.00                           | \$3.00                                                 |
| \$3.65                           | \$2.85                                                 |
| \$3.15                           | \$2.35                                                 |
| \$2.95                           | \$2.15                                                 |

|             |
|-------------|
| POP 0-25    |
| POP 26-75   |
| POP 76-125  |
| POP 126-250 |
| POP 250+    |



Weekly

| Multiplier | Deduction |
|------------|-----------|
| 52         | \$0.00    |
| 52         | \$0.00    |
| 52         | \$0.00    |
| 52         | \$0.00    |
|            |           |
|            |           |
|            |           |
|            |           |
|            |           |
| Multiplier | Deduction |
| 52         | \$0.00    |
| 52         | \$0.00    |
| 52         | \$0.00    |
| 52         | \$0.00    |
|            |           |
|            |           |
|            |           |
|            |           |
|            |           |
|            |           |
|            |           |
| Multiplier | Deduction |
| 52         | \$0.00    |
| 52         | \$0.00    |
| 52         | \$0.00    |
| 52         | \$0.00    |



|                   |                  |
|-------------------|------------------|
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|                   |                  |
|                   |                  |
|                   |                  |
|                   |                  |
|                   |                  |
| <b>Multiplier</b> | <b>Deduction</b> |
| 52                | #VALUE!          |
| 52                | #VALUE!          |
| 52                | #VALUE!          |
| 52                | #VALUE!          |
|                   |                  |
|                   |                  |
|                   |                  |
|                   |                  |
|                   |                  |
| <b>Multiplier</b> | <b>Deduction</b> |
| 52                | #VALUE!          |
| 52                | #VALUE!          |
| 52                | #VALUE!          |
| 52                | #VALUE!          |
|                   |                  |
|                   |                  |
|                   |                  |
|                   |                  |
|                   |                  |
|                   |                  |
| <b>Multiplier</b> | <b>Deduction</b> |
| 52                | \$0.00           |
| 52                | \$0.00           |
| 52                | \$0.00           |
| 52                | \$0.00           |
|                   |                  |
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|-------------------|------------------|
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|                   |                  |
| <b>Multiplier</b> | <b>Deduction</b> |
| 52                | \$0.00           |
| 52                | \$0.00           |
| 52                | \$0.00           |
| 52                | \$0.00           |
|                   |                  |
|                   |                  |
|                   |                  |
|                   |                  |
| <b>Multiplier</b> | <b>Deduction</b> |
| 52                | \$0.00           |
| 52                | \$0.00           |
| 52                | \$0.00           |
| 52                | \$0.00           |
|                   |                  |
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|                   |                  |
|                   |                  |
| <b>Multiplier</b> | <b>Deduction</b> |
| 52                | \$0.00           |
| 52                | \$0.00           |
| 52                | \$0.00           |
| 52                | \$0.00           |
|                   |                  |
|                   |                  |
|                   |                  |
|                   |                  |
|                   |                  |

|                   |                  |
|-------------------|------------------|
|                   |                  |
|                   |                  |
| <b>Multiplier</b> | <b>Deduction</b> |
| 52                | \$0.00           |
| 52                | \$3.68           |
| 52                | \$5.44           |
| 52                | \$8.61           |
|                   |                  |
|                   |                  |
|                   |                  |
|                   |                  |
|                   |                  |
| <b>Multiplier</b> | <b>Deduction</b> |
| 52                | \$0.00           |
| 52                | \$3.84           |
| 52                | \$5.68           |
| 52                | \$8.99           |
|                   |                  |
|                   |                  |
|                   |                  |
|                   |                  |
|                   |                  |
|                   |                  |
|                   |                  |
| <b>Multiplier</b> | <b>Deduction</b> |
| 52                | \$0.00           |
| 52                | \$0.00           |
| 52                | \$0.00           |
| 52                | \$0.00           |
|                   |                  |
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| Multiplier | Deduction |
|------------|-----------|
| 52         | \$0.00    |
| 52         | \$0.00    |
| 52         | \$0.00    |
| 52         | \$0.00    |
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| Multiplier | Deduction |
| 52         | \$0.00    |
| 52         | \$0.00    |
| 52         | \$0.00    |
| 52         | \$0.00    |
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|            |           |
|            |           |
| Multiplier | Deduction |
| 52         | \$0.00    |
| 52         | \$0.00    |
| 52         | \$0.00    |
| 52         | \$0.00    |
|            |           |
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|            |           |
|            |           |

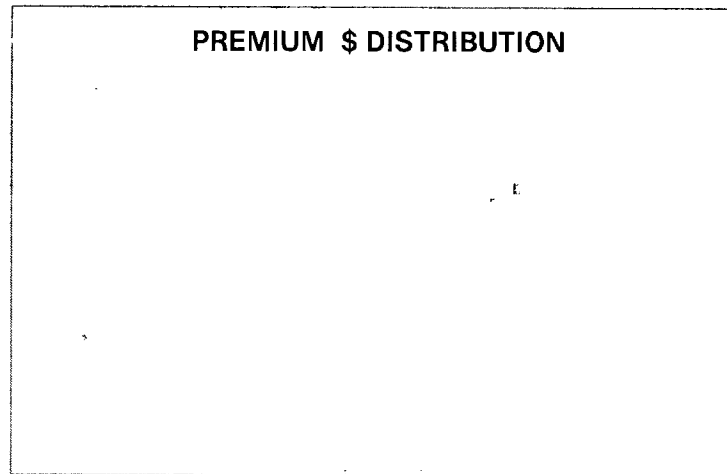
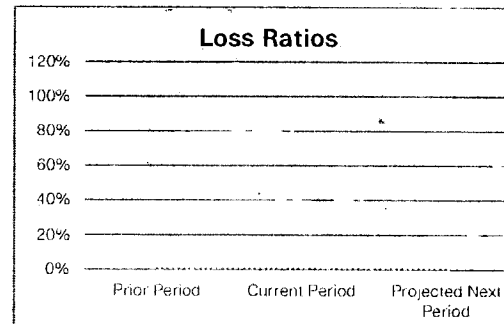
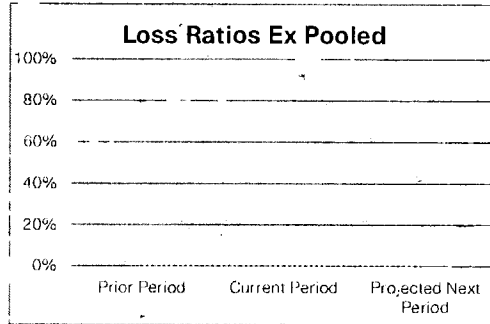
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## Experience & Rate Adjustments

**Loss Ratio Goal**  
80%

| Current Period Experience Factors |         |
|-----------------------------------|---------|
| Premiums Paid                     | \$ -    |
| Claims Incurred                   | \$ -    |
| Pooled Credits                    | \$ -    |
| Cost Per Employee                 | #DIV/0! |

| Prior Period Experience Factors |         |
|---------------------------------|---------|
| Premiums Paid                   | \$ -    |
| Claims Incurred                 | \$ -    |
| Pooled Credits                  | \$ -    |
| Cost Per Employee               | #DIV/0! |



Premium \$ Distribution

|                    |  |
|--------------------|--|
| Claims             |  |
| Admin Expenses     |  |
| ACA Taxes and Fees |  |

Loss Ratios Ex Pooled

|                       |         |
|-----------------------|---------|
| Prior Period          | #DIV/0! |
| Current Period        | #DIV/0! |
| Projected Next Period | #DIV/0! |

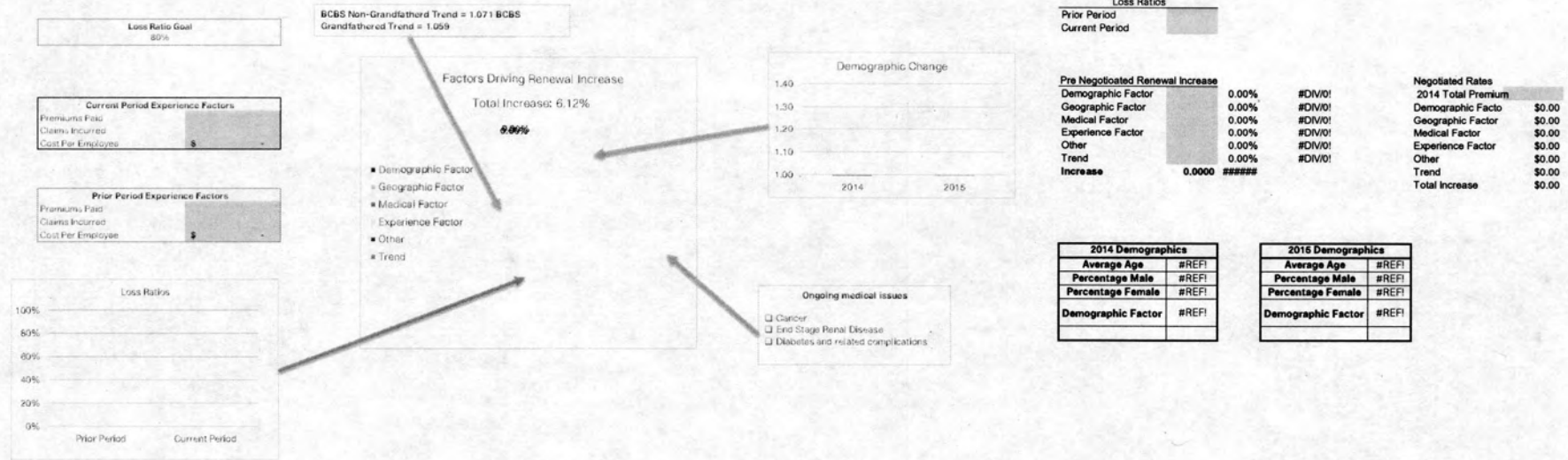
Loss Ratios

|                       |         |
|-----------------------|---------|
| Prior Period          | #DIV/0! |
| Current Period        | #DIV/0! |
| Projected Next Period | #DIV/0! |

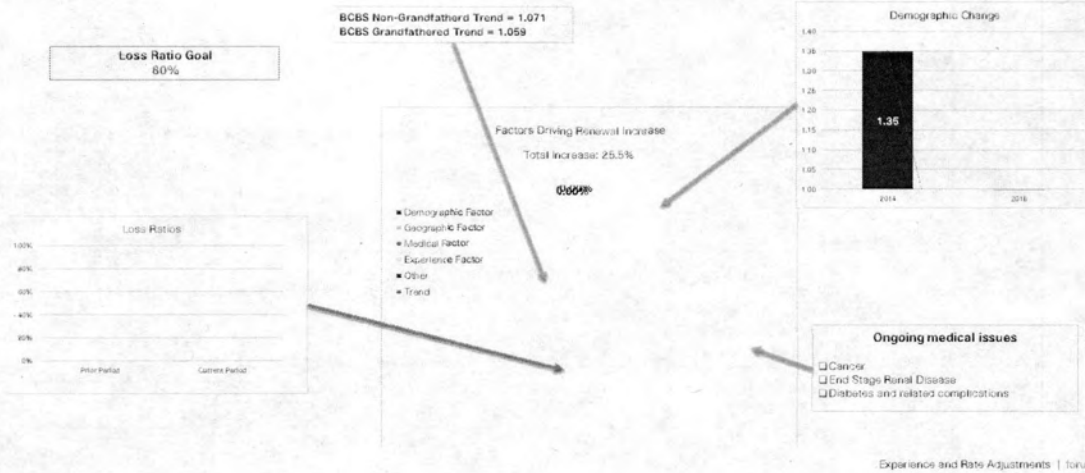
Experience and Rate Adjustments | forum

\*Be sure to only include relevant graphs

## # Experience and Rate Adjustments



## Experience and Rate Adjustments



## Premium \$ Distribution

## Claims

Admin Expenses \$ -  
ACA Taxes and Fees \$ -

## Loss Ratios

Prior Period  
Current Period

**Pre Negotiated Renewal Increase**

|                    |               |              |
|--------------------|---------------|--------------|
| Demographic Factor | 0.00%         | #DIV/0!      |
| Geographic Factor  | 0.00%         | #DIV/0!      |
| Medical Factor     | 0.00%         | #DIV/0!      |
| Experience Factor  | 0.00%         | #DIV/0!      |
| Other              | 0.00%         | #DIV/0!      |
| Trend              | 0.00%         | #DIV/0!      |
| <b>Increase</b>    | <b>0.0000</b> | <b>#####</b> |

**Negotiated Rates**

|                       |                     |
|-----------------------|---------------------|
| 2014 Total Premium    | \$100,000.00        |
| Demographic Factor    | \$0.00              |
| Geographic Factor     | \$0.00              |
| Medical Factor        | \$0.00              |
| Experience Factor     | \$0.00              |
| Other                 | \$0.00              |
| Trend                 | \$0.00              |
| <b>Total Increase</b> | <b>\$100,000.00</b> |

| 2015 Demographics  |      |
|--------------------|------|
| Average Age        | 44   |
| Percentage Male    | 75%  |
| Percentage Female  | 25%  |
| Demographic Factor | 1.35 |

| 2016 Demographics  |         |
|--------------------|---------|
| Average Age        | #DIV/0! |
| Percentage Male    | #DIV/0! |
| Percentage Female  | #DIV/0! |
| Demographic Factor | #DIV/0! |



\*\*\* To get data for this report ask Laurie Winston to pull from CRM. She'll say shes too busy, but just keep asking.

## 0 Historical Experience and Benchmarking

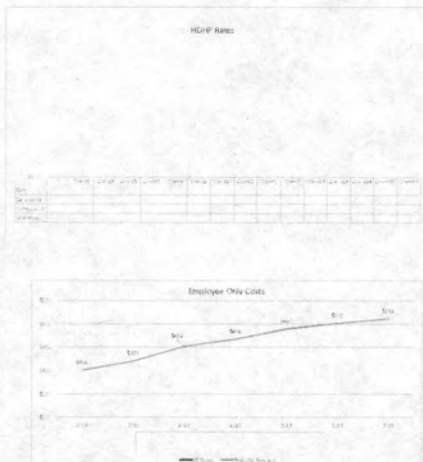
Information about what we are trying to draw the group's attention to. This tab needs to be customized for each group based on their particular situation.

- Consideration for when the graphs. Best ratio or related rate increases etc.)
- Could mention how national rates have increased by 5%, while the groups rates have increased by 1%.
- Good opportunity to mention the impact of plan design and carrier changes.



All Material Data from KFF 2014 Employer Health Benefits Survey

| Rate   | Amount | Reduction | Cost | HCWP Max | Rate | FF Growth Plan Cost Blue Plan | Scenario 2 |
|--------|--------|-----------|------|----------|------|-------------------------------|------------|
| Plan1  | 0      | 0         | 0    |          |      |                               |            |
| Plan2  |        |           |      |          |      |                               |            |
| Plan3  |        |           |      |          |      |                               |            |
| Plan4  |        |           |      |          |      |                               |            |
| Plan5  |        |           |      |          |      |                               |            |
| Plan6  |        |           |      |          |      |                               |            |
| Plan7  |        |           |      |          |      |                               |            |
| Plan8  |        |           |      |          |      |                               |            |
| Plan9  |        |           |      |          |      |                               |            |
| Plan10 |        |           |      |          |      |                               |            |
| Plan11 |        |           |      |          |      |                               |            |
| Plan12 |        |           |      |          |      |                               |            |
| Plan13 |        |           |      |          |      |                               |            |
| Plan14 |        |           |      |          |      |                               |            |
| Plan15 |        |           |      |          |      |                               |            |
| Plan16 |        |           |      |          |      |                               |            |



Experience and Rate Adjustments | Surin

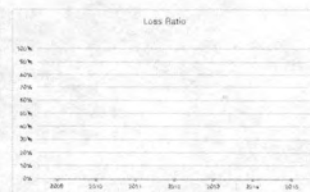
5 additional Rates

| Rate   | Amount | Reduction | Cost | HCWP Max | Rate | FF Growth Plan Cost Blue Plan | Scenario 2 |
|--------|--------|-----------|------|----------|------|-------------------------------|------------|
| Plan1  | 0      | 0         | 0    |          |      |                               |            |
| Plan2  |        |           |      |          |      |                               |            |
| Plan3  |        |           |      |          |      |                               |            |
| Plan4  |        |           |      |          |      |                               |            |
| Plan5  |        |           |      |          |      |                               |            |
| Plan6  |        |           |      |          |      |                               |            |
| Plan7  |        |           |      |          |      |                               |            |
| Plan8  |        |           |      |          |      |                               |            |
| Plan9  |        |           |      |          |      |                               |            |
| Plan10 |        |           |      |          |      |                               |            |
| Plan11 |        |           |      |          |      |                               |            |
| Plan12 |        |           |      |          |      |                               |            |
| Plan13 |        |           |      |          |      |                               |            |
| Plan14 |        |           |      |          |      |                               |            |
| Plan15 |        |           |      |          |      |                               |            |
| Plan16 |        |           |      |          |      |                               |            |

| Enrollment History |           |           |         |       |         |
|--------------------|-----------|-----------|---------|-------|---------|
|                    | #Enrolled | #Eligible | Avg Age | %Male | %Female |
| 2008               |           |           |         |       |         |
| 2009               |           |           |         |       |         |
| 2010               |           |           |         |       |         |
| 2011               |           |           |         |       |         |
| 2012               |           |           |         |       |         |
| 2013               |           |           |         |       |         |
| 2014               |           |           |         |       |         |



| Loss Ratio |            |
|------------|------------|
| Year       | Loss Ratio |
| 2008       |            |
| 2009       |            |
| 2010       |            |
| 2011       |            |
| 2012       |            |
| 2013       |            |
| 2014       |            |

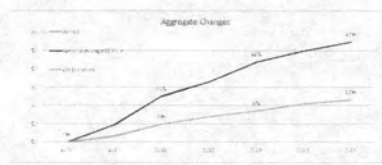


| EL Rates          |      |      |      |      |      |      |
|-------------------|------|------|------|------|------|------|
|                   | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 |
| Employee Only     |      |      |      |      |      |      |
| Employee + Spouse |      |      |      |      |      |      |
| Employee + Child  |      |      |      |      |      |      |
| Family            |      |      |      |      |      |      |
| Individual Total  |      |      |      |      |      |      |
| Annual Total      |      |      |      |      |      |      |
| YTD % Change      | 0%   | 0%   | 0%   | 0%   | 0%   | 0%   |
| Aggregate Change  | 0%   | 0%   | 0%   | 0%   | 0%   | 0%   |

\*\*Actual experience. This is to show how the rates we track in the past have changed that number.

| EL Rates         |       |       |       |       |       |       |
|------------------|-------|-------|-------|-------|-------|-------|
|                  | 2008  | 2009  | 2010  | 2011  | 2012  | 2013  |
| EL Rate          | \$400 | \$420 | \$440 | \$460 | \$480 | \$500 |
| YTD Change       | 0%    | 5%    | 5%    | 5%    | 5%    | 5%    |
| Aggregate Change | 0%    | 5%    | 10%   | 15%   | 20%   | 25%   |

| EL Rates         |         |         |         |         |         |         |
|------------------|---------|---------|---------|---------|---------|---------|
|                  | 2008    | 2009    | 2010    | 2011    | 2012    | 2013    |
| EL Rate          | \$1,115 | \$1,145 | \$1,175 | \$1,205 | \$1,235 | \$1,265 |
| YTD Change       | 0%      | 3%      | 3%      | 3%      | 3%      | 3%      |
| Aggregate Change | 0%      | 3%      | 6%      | 9%      | 12%     | 15%     |



## 0

## Overview of Wellness Programs

**Tobacco**

Employers can up-charge up to 50% for tobacco usage. (this amount does not count towards 9.5% calculation)

Tobacco Cessation programs and drugs are considered preventive, so are covered at 100% by the plan.

**Wellness Plans in Action**

Employer can up charge up to 30% for non participation. (this amount counts towards the 9.5% calculation)

Wellness programs can be as extensive or as simple as desired

80% of wellness plans Health Risk Assessments\*

63% involve physical exams and blood work\*

49% use an internet portal\*

67% offer incentives or rewards\*

Only 8% of groups with less than 25 employees offer wellness programs\*

\*according to UBA 2014 HealthPlan Survey

| Measuring Health                     | Reducing Risk                                                                | Delivering Solutions                                               |
|--------------------------------------|------------------------------------------------------------------------------|--------------------------------------------------------------------|
| Health Risk Assessments (HRA)        | Employer Focused Goals                                                       | Incentive/Disincentives to drive employee participation            |
| Biometric Screenings                 | Developing 3 to 5 year wellness strategy based on claims history             | Education and Communication campaign through the year              |
| Awareness                            | Targeted employee interventions based off of risk factors and disease states | Implement and monitor wellness program                             |
| Absenteeism                          | Health Coaching                                                              | Coordinate wellness program with direct business plan and strategy |
| Medical and prescription drug claims | Use carrier programs to engage employees                                     |                                                                    |
| Data analytics                       |                                                                              |                                                                    |
| Communication                        |                                                                              |                                                                    |

Wellness | forum



## Cadillac Tax

### Overview

| Summary                                                                                                             | Amount                                                                         | Who pays                                             | Includes                                                                     |
|---------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------|------------------------------------------------------|------------------------------------------------------------------------------|
| Tax on healthcare costs in excess of \$10,200 for individual coverage and \$27,500 for family coverage              | 40% of healthcare costs in excess of threshold amounts                         | Fully Insured - Employer calculates and Insurer pays | Rx Coverage, Wellness Programs, FSAs, ER pretax contributions to HSAs, HRAs. |
| Meant to reduce tax preferred treatment for employer provided health coverage and reduce excess healthcare spending | Includes contributions towards cost of coverage made by employer and employees | Self Funded - Calculated and paid by Employer        |                                                                              |

### Example

| Contributions and Enrollment                                                 | Total Costs                         | Taxable Amount / EE     | Tax / EE              | Total Tax       |
|------------------------------------------------------------------------------|-------------------------------------|-------------------------|-----------------------|-----------------|
| Employer pays \$8,000 towards EE only cost. EE pays \$4,000                  | Total Employee only cost - \$12,000 | Employee only - \$1,800 | Employee only - \$720 | \$28,800        |
| Employer pays \$19,000 towards Family coverage costs. Employee pays \$13,000 | Total Family Cost - \$32,000        | Family - \$4,500        | Family Cost - \$1,800 | \$18,000        |
| 50 Employees, 40 with EE only Coverage, 10 with Family                       |                                     |                         |                       | <b>\$46,800</b> |

Health Care Reform - Cadillac Tax | forum

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## Compliance Checklist

| Completed                             | Provision                                            | Compliance Date | Description                                                                                                                                                                                                                                                        | Potential Impact                                                                                                                                                                                                                                                                                                            |
|---------------------------------------|------------------------------------------------------|-----------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Healthcare Reform Requirements</b> |                                                      |                 |                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                             |
| ✓                                     | ACA Employer "Pay or Play" Mandate                   | 1/1/2015        | Employers with 50 or more employees will be required to offer "MEC" coverage to all F/T employees working more than 30 hours per week.                                                                                                                             | If an employer does not provide coverage and at least one F/T employee receives coverage through an exchange, the employer will incur a penalty of \$2,000 per year for each F/T employee.                                                                                                                                  |
| ✓                                     | Individual Mandate                                   | 1/1/2015        | Health care reform requires individuals to obtain "minimum essential coverage" for themselves and their dependents or pay monthly penalty tax or each month without coverage.                                                                                      | The dollar penalty in 2014 is \$95 per individual to a maximum of \$285 per family. The dollar penalty in 2015 is \$325 per individual to a maximum of \$985 per family. The dollar penalty in 2016 is \$695 per individual to a maximum of \$2,085 per family. In 2017 the dollar penalties will be indexed for inflation. |
| ✓                                     | Minimum Essential Coverage (MEC)                     | 1/1/2015        | Employers must offer 95% (70% in 2015) of FTEs and their biological/adopted children to satisfy Tier 1 of the "pay or play" employer mandate.                                                                                                                      | Failure to make an MEC offer to adequate FTEs and their children triggers a penalty of up to \$2,000 per year times all the FTEs.                                                                                                                                                                                           |
| ✓                                     | Minimum value (MV) coverage                          | 1/1/2015        | Coverage that is at least 60% actuarial value. Must offer to FTEs employee only coverage that is both MV and affordable to satisfy Tier 2 of the employer mandate.                                                                                                 | Failure to provide MV plan is a \$3,000 penalty per year for each employee who does not receive an offer of MV coverage.                                                                                                                                                                                                    |
|                                       | Affordable Coverage                                  | 1/1/2015        | Coverage is considered "affordable" under ACA mandate, if the employee is not asked to pay more than 9.5% of the household income for employee only coverage under the lowest MV option available. There are several safe harbors with this mandate for employers. | Failure to provide MV plan is a \$3,000 penalty per year for each employee who does not receive an offer of affordable coverage.                                                                                                                                                                                            |
|                                       | 6056 and 6055 Reporting                              | 1/1/2016        | Employers offering group health plans must fulfill two new IRS reporting requirements. Employers with 50 or more full-time employees must certify whether all F/T employees and their dependents were offered group health coverage.                               | \$250 fine per tax form with an annual cap of \$3,000,000                                                                                                                                                                                                                                                                   |
|                                       | State-based Exchanges                                | 1/1/2014        | Every state must establish a health insurance Exchange for use by the insured and small employers with 100 or less employees (although states may set the cap at 50 employees).                                                                                    |                                                                                                                                                                                                                                                                                                                             |
| ✓                                     | 90 day limit of Waiting Periods                      | 1/1/2014        | Group health plans may not impose a waiting period longer than 90 days for health care coverage.                                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                             |
|                                       | Elimination of all pre-existing condition exclusions | 1/1/2014        | Group health plans and individual policies are required to eliminate pre-existing condition exclusions completely.                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                             |

Health Care Reform - Compliance Checklist | forum

## Compliance Checklist

| Completed                             | Provision                                                   | Compliance Date | Description                                                                                                                                                                                                                                                                                                                                            | Potential Impact                                                                                          |
|---------------------------------------|-------------------------------------------------------------|-----------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------|
| <b>Healthcare Reform Requirements</b> |                                                             |                 |                                                                                                                                                                                                                                                                                                                                                        |                                                                                                           |
|                                       | Limit on small group deductibles and out-of-pocket maximums | 1/1/2014        | All non-grandfathered group health plans must limit out of pocket costs to \$6,250 for single coverage and \$12,500 for family coverage. Deductibles for small group plans can be no greater than \$2,000 for single coverage and \$4,000 for family coverage.                                                                                         |                                                                                                           |
|                                       | Modified Community Rating Rules                             | 1/1/2014        | Health insurance carriers providing individual or small group policies covering 100 employees or less must abide by strict community rating rules with premium variations allowed only for age (3:1); tobacco use (1.5:1), level of coverage, and geographic rating area.                                                                              |                                                                                                           |
|                                       | Increased Wellness Program Incentives                       | 1/1/2014        | Health Care Reform increases the wellness program incentive cap for outcome based wellness programs to 20% of the total cost of coverage to 30% (50% if a wellness program is established for the purpose of tobacco use prevention or reduction).                                                                                                     |                                                                                                           |
|                                       | Transitional Reinsurance Program Fee (TRF)                  | 2014-2016       | This fee applies to the 2014-16 plan years and is imposed on both fully-insured and self-funded group health plans. The fee applies on a per-member basis. The fee is intended to stabilize premiums in the individual markets. The fee is \$63 PMPY for 2014 and decreases to \$44 PMPY in 2015.                                                      |                                                                                                           |
|                                       | Patient-Centered Outcomes Research Institute (PCORI) Fee    | 2012-2019       | Employers sponsoring group health plans will be required to pay \$2.00 per participant through 2019. (Revenue from this fee will fund research to determine the effectiveness of various forms of medical treatment).                                                                                                                                  |                                                                                                           |
|                                       | Cadillac Tax                                                | 1/1/2018        | Health Care Reform imposes a non-deductible excise tax of 40% on the value of the health insurance benefits exceeding \$10,200 for single coverage and \$27,500 for family coverage. The tax appears to include all employer and employee amounts paid for medical (including pre-tax employee premiums and contributions made to FSA, HRAs and HSAs). |                                                                                                           |
|                                       | Automatic Enrollment                                        | Delayed         | Employers with more than 200 employee who maintain one or more group plans must automatically enroll all full-time employees as soon as they are eligible for coverage.                                                                                                                                                                                | DOL has not announced any new timeframe of when automatic enrollment will become mandatory for employers. |
|                                       | Small Business Health Care Tax Credit                       | 1/1/2014        | Health Care Reform includes a small business health care tax. Beginning in 2014, the maximum tax credit will go up to 50% of premium paid by eligible tax-exempt organizations for two years.                                                                                                                                                          |                                                                                                           |

Health Care Reform - Compliance Checklist | forum

**STATE OF SOUTH CAROLINA**  
**BEAUFORT COUNTY**

**IN THE COURT OF COMMON PLEAS**  
**CIVIL ACTION NO. 2016-CP-07-2541**

Forum Benefits, Inc.,

Plaintiff,

v.

Brian Bannon and Assured Partners, NL

Defendants.

# Exhibit I



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## Compliance Checklist

| Compliance Notices and Documents |                                                             |           |                                                                                                                                                                                                                                                                                               |                                                                |
|----------------------------------|-------------------------------------------------------------|-----------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------|
|                                  | Notice of Exchanges                                         | 10/1/2013 | Employers must provide existing and new employees on their hire date with information about the existence of state insurance exchanges, including information on employee eligibility for an exchange if the actuarial value of the plan is less than 60%.                                    |                                                                |
|                                  | Grandfathered Status or Disclosure Notice                   | 9/23/2010 | To maintain status as grandfathered health plan, employers must include a statement in any and all plan materials provided to a participant describing the benefits provided under the group health plan.                                                                                     |                                                                |
| ✓                                | Summary of Benefits and Coverage (SBCs)                     | 9/23/2012 | Employers must provide a SBC to all participants at the time of enrollment and each subsequent year during annual enrollment. SBC must be provided no later than the first day of each open enrollment.                                                                                       | Failure to comply will result in a \$1,000 fine per occurrence |
|                                  | Summary Plan Descriptions (SPDs)                            | Mandatory | Plan administrators must provide automatically to participants within 90 days of becoming covered by the plan (120 days after becoming subject to ERISA to distribute SPD).                                                                                                                   |                                                                |
|                                  | Women's Health and Cancer Right Acts                        | Mandatory | Plan administrators and insurers must provide notice upon open enrollment in the plan and annually thereafter. This notice states that group health plans provide coverage for mastectomy benefits.                                                                                           |                                                                |
|                                  | HIPAA Privacy and Security Notice                           | Mandatory | The plan administrators or insurer must provide the Notice of Privacy Practices when a participant enrolls, upon request and within 60 days of a material revision to the notice. At least once every three years must be notified about the availability of the Notice of Privacy Practices. |                                                                |
|                                  | Medicaid and the Children's Health Insurance Program (CHIP) | Mandatory | Plan administrators must provide this annual notice to employees; to notify that some states may offer eligible low-income children and their families a premium assistance subsidy to help pay for employer sponsored health coverage.                                                       |                                                                |
|                                  | Creditable and/or Non-Creditable Coverage Medicare D Notice | Mandatory | Plan administrators at a minimum must provide this annual notice during Medicare Part D annual election period which is October 15th through December 7th.                                                                                                                                    |                                                                |

Health Care Reform - Compliance Checklist | forum

## Compliance Checklist

| Compliance Notices and Documents |                                              |           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|----------------------------------|----------------------------------------------|-----------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                  | Newborns' and Mothers' Health Protection Act | Mandatory | Plan administrators must include a statement within the SPDs to include the requirements under federal law regarding length of hospital stay in connection with childbirth.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|                                  | Section 125 Pre-Tax (POP) Plan               | Mandatory | Section 125 is part of the IRS code that allows employees to convert taxable cash benefit (salary) into non-taxable benefits. A premium only plan (POP) is the building block of the Section 125 plan. It allows for certain employee paid group insurance premiums to be paid with pre-tax dollars.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|                                  | Wrap Plan                                    | Mandatory | Most benefit plans are subject to requirements under ERISA, which state a plan sponsor must have written documentation (normally a SPD) for each benefit plan to distribute to each plan participant. However, most insurers booklets or certificates of coverage while they describe the benefits, these documents do not contain all the elements that are required to satisfy under ERISA law for these SPDs. A "wrap" plan is a legal document that combines and incorporates all group insurance policies of that plan sponsor in a single plan. Wrap plans are an excellent tool to improve legal compliance and simplify administration of multiple benefit plans. A wrap plan can be customized so that the plan document can contain language that matches the employer's administrative practices and provisions, which help protect the employer from liability. |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|                                  | 5500 Reporting                               | Mandatory | Plan administrators with 100 or more eligible employees must file a Form 5500 to the DOL by the last day of the seventh month following the end of the plan year. (Calendar year plans would be due by 7/31).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Small Plan Filers. In the case of a plan with fewer than 100 participants at the beginning of the plan year (hereinafter small plan), the applicable penalty amount is \$10 per day for each day the annual report is filed after the date on which the annual report was due (without regard to any extensions), not to exceed \$750. In the case of a DFVCP submission relating to more than one delinquent annual report filing for the same plan, the maximum penalty amount is \$750 for each annual report, not to exceed \$1,500 per plan. |

Health Care Reform - Compliance Checklist | forum

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## Health Care Reform - Fees and Taxes

### Health Care Reform Taxes - Estimated Annual Costs by Year

| Tax Name                       | Purpose              | Description Multiplier |
|--------------------------------|----------------------|------------------------|
| PCORI / CERF                   | Research             |                        |
| Transitional Reinsurance Fee   | Individual High Risk |                        |
| Health Insurance Industry Fee  | Subsidies            |                        |
| Risk Adjustment Fee            | Stabilize Risk       |                        |
| <b>TOTAL GOVERNMENT TAXES:</b> |                      |                        |

### Taxes that affect Annual Trend Increases

| Tax Name               | Purpose     |  |
|------------------------|-------------|--|
| Medical Device Tax     | Research    |  |
| Pharmaceutical Mfg Fee | Finance HCR |  |

### Additional Taxes that may not affect you now

| Tax Name                        | Purpose        |  |
|---------------------------------|----------------|--|
| Exchange / Marketplace User Fee | Fund Exchanges |  |
| Excise Tax (Cadillac Tax) 2018  | Finance HCR    |  |

### Current Premium Numbers

|                        |           |
|------------------------|-----------|
| Annual Medical Premium | \$192,156 |
| Employees on Medical   | 0         |
| Members on Medical     | 0         |

### CALCULATIONS

Monthly Medical Premium  
Employees on Medical  
Members on Medical

|                    |
|--------------------|
| <b>\$16,013.00</b> |
| <b>0</b>           |
| <b>0</b>           |

|  |
|--|
|  |
|--|

| Description     | Annual Cost   | Applied to whom      | When Applied |
|-----------------|---------------|----------------------|--------------|
| \$2 PMPY        |               | GF & NGF & ASO       | Renewal 2012 |
| \$44 PMPY       |               | GF & NGF & ASO       | Renewal 2014 |
| 3-4% of Premium |               | GF & NGF & Den & Vis | Renewal 2014 |
| \$1 PEPY        |               | NGF Only             | Renewal 2014 |
|                 | <b>\$0.00</b> |                      |              |

|  |
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|  |
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| Description      | Annual Cost       | Applied to whom | When Applied |
|------------------|-------------------|-----------------|--------------|
| Premium Increase | increase in Trend | GF & NGF        | Renewal 2013 |
| Premium Increase | increase in Trend | GF & NGF        | Renewal 2013 |

|  |
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|  |
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| Description               | Annual Cost     | Applied to whom | When Applied |
|---------------------------|-----------------|-----------------|--------------|
| 3.5% of premium           | Individual Cost | NGF Only        | 1/1/2014     |
| 40% (\$10,200 / \$27,500) | n/a             | GF & NGF        | 1/1/2018     |

|  |
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## Health Care Reform - Fees and Taxes | forum

\*This is calculated by adding the "monthly" cost from the "Negotiated Renewal" column on the Traditional.

\*\*Delete the \$0.00 in t

, HDHP & Value medical tabs

0

## Health Care Reform - Fees and Taxes

### Health Care Reform Taxes - Estimated Annual Costs by Year

| Tax Name                       | Purpose              | Description     | Annual Cost       | Applied to whom      | When Applied |
|--------------------------------|----------------------|-----------------|-------------------|----------------------|--------------|
| PCORI / CERF                   | Research             | \$2 PMPY        | \$0.00            | GF & NGF & ASO       | Renewal 2012 |
| Transitional Reinsurance Fee   | Individual High Risk | \$44 PMPY       | \$0.00            | GF & NGF & ASO       | Renewal 2014 |
| Health Insurance Industry Fee  | Subsidies            | 3-4% of Premium | \$6,725.46        | GF & NGF & Den & Vis | Renewal 2014 |
| Risk Adjustment Fee            | Stabilize Risk       | \$1 PEPY        | \$0.00            | NGF Only             | Renewal 2014 |
| <b>TOTAL GOVERNMENT TAXES:</b> |                      |                 | <b>\$6,725.46</b> |                      |              |

### Taxes that affect Annual Trend Increases

| Tax Name               | Purpose     | Description      | Annual Cost       | Applied to whom | When Applied |
|------------------------|-------------|------------------|-------------------|-----------------|--------------|
| Medical Device Tax     | Research    | Premium Increase | increase in Trend | GF & NGF        | Renewal 2013 |
| Pharmaceutical Mfg Fee | Finance HCR | Premium Increase | increase in Trend | GF & NGF        | Renewal 2013 |

### Additional Taxes that may not affect you now

| Tax Name                        | Purpose        | Description               | Annual Cost     | Applied to whom | When Applied |
|---------------------------------|----------------|---------------------------|-----------------|-----------------|--------------|
| Exchange / Marketplace User Fee | Fund Exchanges | 3.5% of premium           | Individual Cost | NGF Only        | 1/1/2014     |
| Excise Tax (Cadillac Tax) 2018  | Finance HCR    | 40% (\$10,200 / \$27,500) | n/a             | GF & NGF        | 1/1/2018     |

### Current Premium Numbers

|                        |           |
|------------------------|-----------|
| Annual Medical Premium | \$192,156 |
| Employees on Medical   | 0         |
| Members on Medical     | 0         |

Health Care Reform - Fees and Taxes | forum

### CALCULATIONS

Monthly Medical Premium  
Employees on Medical  
Members on Medical

|                    |
|--------------------|
| <b>\$16,013.00</b> |
| 0                  |
| 0                  |

\*This is calculated by adding the "monthly" cost from the "Negotiated Renewal" column on t

\*\*Delete the \$0.00 in

he Traditional, HDHP & Value me



### ACA Payroll Cost Analysis

**Pay Frequency**

## Weekly

[illegible]

### ACA Payroll Cost Analysis

### Pay Frequency

## Weekly

[illegible]

### ACA Payroll Cost Analysis

|                      |               |
|----------------------|---------------|
| <b>Pay Frequency</b> | <b>Weekly</b> |
|----------------------|---------------|

[illegible]

|                  | <b>EE Only Deduction</b> |
|------------------|--------------------------|
| PPO              | \$0.00                   |
| HDHP             | #VALUE!                  |
| Value            | \$0.00                   |
| PPO - Renewal    | \$0.00                   |
| HDHP - Renewal   | #VALUE!                  |
| Value - Renewal  | \$0.00                   |
| PPO - Proposal   | \$0.00                   |
| HDHP - Proposal  | \$0.00                   |
| Value - Proposal | \$0.00                   |

| <b>Payroll Multiplier</b> |    |
|---------------------------|----|
| Weekly                    | 52 |
| Bi-Weekly                 | 26 |
| Semi-Monthly              | 24 |
| Monthly                   | 12 |
| Quarterly                 | 4  |

| <b>Frequency Multiplier</b> |      |
|-----------------------------|------|
| Hourly                      | 1560 |
| Salary                      | 1    |
| Weekly                      | 52   |
| Bi-Weekly                   | 26   |
| Semi-Monthly                | 24   |
| Monthly                     | 12   |
| Quarterly                   | 4    |

|  |                   |
|--|-------------------|
|  | EE Only Deduction |
|--|-------------------|

|  |                   |
|--|-------------------|
|  | EE Only Deduction |
|--|-------------------|



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## Health Care Reform - Fine Summary

|           |   |                |                       |
|-----------|---|----------------|-----------------------|
| Total FT  | 0 | Participating  | 0                     |
| Total PT  |   | Waiving        | 0                     |
| Total FTE | 0 | Waiting Period | FOM following 90 days |

### Healthcare Reform Fines (if over 50 FTE)

#### Annual Cost (Current contribution and participation)

|  | #VALUE! | #VALUE! | Real Cost after Deductibility assuming 35% tax bracket |
|--|---------|---------|--------------------------------------------------------|
|--|---------|---------|--------------------------------------------------------|

|                                |        |                |                                                                                                                 |
|--------------------------------|--------|----------------|-----------------------------------------------------------------------------------------------------------------|
| Fine for Dropping Health Plan: | \$0.00 | Exchange Fine: | \$3,000 per EE who enrolls through the Exchange if:<br>(1) you are over 50 EE's & don't offer a creditable plan |
|--------------------------------|--------|----------------|-----------------------------------------------------------------------------------------------------------------|

|                     |         |                                                                        |
|---------------------|---------|------------------------------------------------------------------------|
| Difference in Cost: | #VALUE! | (2) you are over 50 EE's & offer a plan, but it exceeds 9.5% of salary |
|---------------------|---------|------------------------------------------------------------------------|

#### Affordability

|                          |       |                                      |             |
|--------------------------|-------|--------------------------------------|-------------|
| EEs Violating 9.5% Rule: | 0     | Minimum Annual Salary for Compliance |             |
| Highest EE Percentage    | 0.00% | Current                              | Proposed    |
| EEs over 8%              | 0     | PPO Plan                             | \$0 \$0     |
|                          |       | HDHP Plan                            | #VALUE! \$0 |
|                          |       | Value Plan                           | \$0 \$0     |

\*if this plan does not apply to the client, hide th

\*if this plan does not apply to the client, hide th

\*if this plan does not apply to the client, hide th

### Employee Subsidy Calculation

#### Number of Employee's eligible for government Subsidy:

\*if this does not apply to the client, hide this se

#### Minimum Value

| Plan Name | Grandfathered Status | Actuarial Value* | Metal Tier          | Metal Tier / Actuarial Value |
|-----------|----------------------|------------------|---------------------|------------------------------|
| PPO Plan  | Non-Grandfathered    | 74.50%           | b/t Gold and Silver | Platinum 88% - 92%           |
| HDHP Plan | Grandfathered        | 79.00%           | Gold                | Gold 78% - 82%               |
|           |                      |                  |                     | Silver 68% - 72%             |
|           |                      |                  |                     | Bronze 58% - 62%             |

**\*\*DO NOT DELETE\*\***

Grandfathered

Non-Grandfathered

Unknown

\*If your plan falls outside of +/- 2% of the metal tier, you must adjust your plan by lowering/increasing benefits to match the metal tier. \*\*Disclaimer: the actuarial value and metal tier is based on the current CMS calculator for HCR that has been released thus far, these values may change as more information is released.

Health Care Reform - Fine Summary | forum



## 4 Types of Employees / ACA Reporting -Compliance

| Full-Time Employees                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Employer Reporting Obligations- <i>WHO?</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Full-Time -Employees who average at least 30 hours of service per week. The employer will need to categorize employees upon date of hire, for full time employee is reasonable to work at least 30 hours for extended period of time. An employer may use 130 hours per calendar month (1560 hours per year) as a substitute measure of full-time status, if it applies the alternative on a reasonable and consistent basis. Under final regulations "hours of service" are hours for which the employee is paid (including paid vacation and other</p>                                                                                                                                                                                                                                                                                                                          | <p>Employers providing self-funded coverage: Must report on anyone who had that coverage even for a single day.</p> <p>Employer subject to the employer "pay or play" mandate: Must report on coverage offers made to full-time employees and dependents of full-time employees. (These offers can disqualify the dependents from receiving tax credits).</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| Part-Time Employees                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Employer Reporting Obligations- <i>WHAT?</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| <p>Employees who as of their date of hire are reasonably expected to average fewer than 30 hours of service per week of an initial measurement period. An employer may use 120 days per year to calculate part-time employees which have guaranteed hours.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | <p>Provide annual statement (Form 1095-C) with individualized information to each full-time employee, even if they are eligible or covered. File those annual individual statements with IRS along with separate annual statement (Form 1094-C) regarding aggregate coverage offering.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| Variable Hour Employees                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | Employer Reporting Obligations- <i>WHEN?</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| <p>Those employees whose hours are expected to vary that they are undetermined and will vary from week to week. When making the assessment of whether or not an employee is variable hour, the employer is not allowed to take into account that the employee is in a temporary or "high turnover position and likely won't be employed during his or her entire initial measurement period. There are three variable hour tracking periods that employers must determine: 1) Measurement Period (anywhere from 3 to 12 month), 2) Stability Period, a time after measurement period which an employee is treated as full-time or part-time (this period is equal to 6 months or the duration of the measurement period whichever is greater), and 3) Administrative Period, period of time up to 90 days between measurement and stability periods to process the calculations.</p> | <p>Reporting is required for each calendar year shortly after year-end. Individualized statements to full-time and primary insured for 2015 must be provided by February 1, 2016. Employer-level report and transmittal on individual statements to the IRS is due February 29, 2016, or if electronic, no later than March 31, 2016.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| Seasonal Employees                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | Employer Reporting Obligations- <i>HOW?</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| <p>Seasonal employees are those employees working full-time hours, but are hired into a position for which the customary annual employment is six months or less during seasonal periods. "Customary" means the employment period should begin each calendar year in approximately the same part of the year, such as summer or winter.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | <p>Employers are subject to employer mandate use Form 1094-C and 1095-C for all reporting of employees. Employers will need to maintain multiple data elements to file 1095-C and track during 2015 plan year to report in 2016. For each employee, full calendar months for which he/she was:</p> <ul style="list-style-type: none"> <li>-Offered coverage and if so whether the Offered included MEC for spouse, at least MEC for biological children and adopted children, at least MEC for spouse and biological adopted children.</li> <li>-Offered MEC that was not on medical plan with or without option coverage for spouse and/or children)</li> <li>-Offered no coverage (or only non-MEC coverage or a partial month)</li> </ul> <p>-For each month that an employee was offered medical coverage the lowest monthly amount an employee would pay for self-only medical coverage</p> |

## 4 Types of Employees / ACA Reporting -Compliance

| Full-Time Employees                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Employer Reporting Obligations-WHO?                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Full-Time -Employees who average at least 30 hours of service per week. The employer will need to categorize employees upon date of hire, for full time employee is reasonable to work at least 30 hours for extended period of time. An employer may use 130 hours per calendar month (1560 hours per year) as a substitute measure of full-time status, if it applies the alternative on a reasonable and consistent basis. Under final regulations "hours of service" are hours for which the employee is paid (including paid vacation and other</p>                                                                                                                                                                                                                                                                                                                          | <p>Employers providing self-funded coverage: Must report on anyone who had that coverage even for a single day.</p> <p>Employer subject to the employer "pay or play" mandate: Must report on coverage offers made to full-time employees and dependents of full-time employees. (These offers can disqualify the dependents from receiving tax credits).</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Part-Time Employees                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Employer Reporting Obligations-WHAT?                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| <p>Employees who as of their date of hire are reasonably expected to average fewer than 30 hours of service per week of an initial measurement period. An employer may use 120 days per year to calculate part-time employees which have guaranteed hours.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | <p>Provide annual statement (Form 1095-C) with individualized information to each full-time employee, even if they are eligible or covered. File those annual individual statements with IRS along with separate annual statement (Form 1094-C) regarding aggregate coverage offering.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| Variable Hour Employees                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | Employer Reporting Obligations-WHEN?                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| <p>Those employees whose hours are expected to vary that they are undetermined and will vary from week to week. When making the assessment of whether or not an employee is variable hour, the employer is not allowed to take into account that the employee is in a temporary or "high turnover position and likely won't be employed during his or her entire initial measurement period. There are three variable hour tracking periods that employers must determine: 1) Measurement Period (anywhere from 3 to 12 month), 2) Stability Period, a time after measurement period which an employee is treated as full-time or part-time (this period is equal to 6 months or the duration of the measurement period whichever is greater), and 3) Administrative Period, period of time up to 90 days between measurement and stability periods to process the calculations.</p> | <p>Reporting is required for each calendar year shortly after year-end. Individualized statements to full-time and primary insured for 2015 must be provided by February 1, 2016. Employer-level report and transmittal on individual statements to the IRS is due February 29, 2016, or if electronic, no later than March 31, 2016.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| Seasonal Employees                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | Employer Reporting Obligations-HOW?                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| <p>Seasonal employees are those employees working full-time hours, but are hired into a position for which the customary annual employment is six months or less during seasonal periods. "Customary" means the employment period should begin each calendar year in approximately the same part of the year, such as summer or winter.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | <p>Employers are subject to employer mandate use Form 1094-C and 1095-C for all reporting of employees. Employers will need to maintain multiple data elements to file 1095-C and track during 2015 plan year to report in 2016. For each employee, full calendar months for which he/she was:</p> <ul style="list-style-type: none"> <li>-Offered coverage and if so whether the Offered included MEC for spouse, at least MEC for biological children and adopted children, at least MEC for spouse and biological adopted children.</li> <li>-Offered MEC that was no on medical plan with or without option coverage for spouse and/or children)</li> <li>-Offered no coverage (or only non-MEC coverage or a partial month)</li> </ul> <p>-For each month that an employee was offered medical coverage the lowest monthly amount an employee would pay for self-only medical coverage</p> |

**Subsidy Info Sheet**

1/0/1900

| <b>Last Name</b> | <b>First Name</b> | <b>Gender</b> | <b>DOB</b> | <b>Age</b> | <b>Tobacco</b> | <b>Marital Status</b> | <b>State</b> | <b>Zip Code</b> | <b>County</b> |
|------------------|-------------------|---------------|------------|------------|----------------|-----------------------|--------------|-----------------|---------------|
|------------------|-------------------|---------------|------------|------------|----------------|-----------------------|--------------|-----------------|---------------|

| Spouse Plan Offer Coverage | # people in family | Adults over 21 | Age of adult #1 | Tobacco of adult #1 | Age of adult #2 |
|----------------------------|--------------------|----------------|-----------------|---------------------|-----------------|
|----------------------------|--------------------|----------------|-----------------|---------------------|-----------------|

Subsi

Tobacco of adult #2   Age of adult #3   Tobacco of adult #3   # Children under 21   # Children using Tobacco

**STATE OF SOUTH CAROLINA**  
**BEAUFORT COUNTY**

**IN THE COURT OF COMMON PLEAS**  
**CIVIL ACTION NO. 2016-CP-07-2541**

Forum Benefits, Inc.,

Plaintiff,

v.

Brian Bannon and Assured Partners, NL

Defendants.

# Exhibit I

id Calculation is based on SILVER level plan where OOP can't be more than \$6,350

RESULTS ..... RESULTS ..... RESULTS

Total Household Income

Poverty Level %

Unsubsidized Annual Health Premium 2014



..... RESULTS ..... RESULTS ..... RESULTS ..... RESULTS ..... RESULTS ..... RESULTS ..... RESULTS ..... R  
Max % of income you pay for non-tobacco premium, if eligible for subsidy      Amount you pay for premium

DO

Tobacco  
Marital St

RESULTS ..... RESULTS ..... RESULTS ..... RESULTS ..... RESULTS

Government Tax Credit Subsidy of up to

Bronze Plan Cost

Bronze Plan % of Income

NOT DELETE

|         |        |
|---------|--------|
| Yes     | No     |
| Married | Single |

### Medical Demographic Breakdown

## 2015 Family Demographics

**Factors:**

|                      |     |
|----------------------|-----|
| Average Employee Age | 45  |
| Average Family Age   | 44  |
| Percentage Male      | 75% |
| Percentage Female    | 25% |
|                      |     |
| Employee Count       | 12  |
| Spouse Count         | 16  |
| Child Count          | 20  |

2015 Demographic Factor

1.35

### Change in Family Demographic Factor

## Current Location in Band

## 2016 Family Demographics

**Factors:**

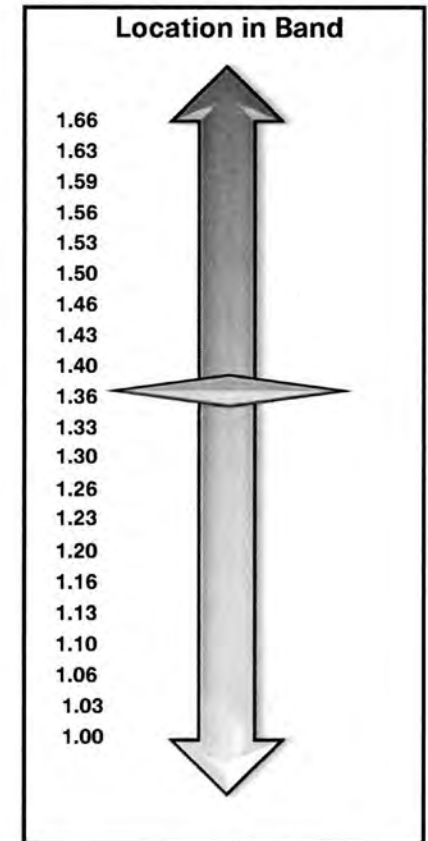
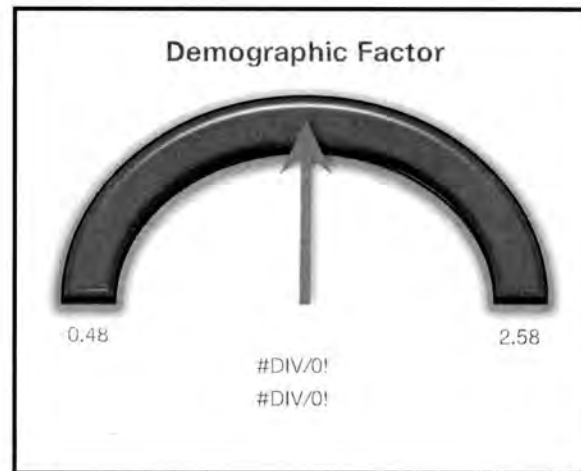
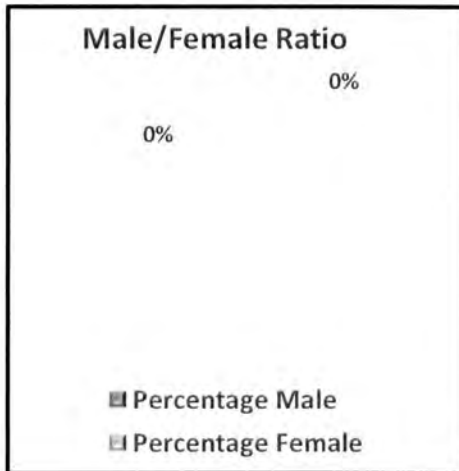
|                      |         |
|----------------------|---------|
| Average Employee Age | #DIV/0! |
| Average Family Age   | #DIV/0! |
| Percentage Male      | #DIV/0! |
| Percentage Female    | #DIV/0! |
|                      |         |
| Employee Count       | 0       |
| Spouse Count         | 0       |
| Child Count          | 0       |

2016 Demographic Factor

#DIV/0!

#DIV/0!

0%





0

## Census Parameter Illustration

THIS DOES NOT PRINT  
ONLY FOR INFO**2015 Employee Demographics**Average Age #DIV/0!  
Median Age #NUM!  
Modal Age #N/A  
Percentage Male #DIV/0!  
Percentage Female #DIV/0!**HDHP Medical**Employee Only 0  
Employee Spouse 0  
Employee Child 0  
Family 0**Traditional Medical**Employee Only 0  
Employee Spouse 0  
Employee Child 0  
Family 0**Value Medical**Employee Only 0  
Employee Spouse 0  
Employee Child 0  
Family 0

Waivers 0

Demographic Factor #DIV/0!

**2015 Total Family Demographics**Average Age #DIV/0!  
Median Age #NUM!  
Modal Age #N/A  
Percentage Male #DIV/0!  
Percentage Female #DIV/0!

|    | EMPLOYEE NAME |       | Medical<br>Tier | Medical<br>Plan | Dental<br>Tier | Vision<br>Tier | Gender | Employee<br>DOB | Employee<br>Age |
|----|---------------|-------|-----------------|-----------------|----------------|----------------|--------|-----------------|-----------------|
|    | LAST          | FIRST |                 |                 |                |                |        |                 |                 |
| 1  |               |       |                 |                 |                |                |        |                 |                 |
| 2  |               |       |                 |                 |                |                |        |                 |                 |
| 3  |               |       |                 |                 |                |                |        |                 |                 |
| 4  |               |       |                 |                 |                |                |        |                 |                 |
| 5  |               |       |                 |                 |                |                |        |                 |                 |
| 6  |               |       |                 |                 |                |                |        |                 |                 |
| 7  |               |       |                 |                 |                |                |        |                 |                 |
| 8  |               |       |                 |                 |                |                |        |                 |                 |
| 9  |               |       |                 |                 |                |                |        |                 |                 |
| 10 |               |       |                 |                 |                |                |        |                 |                 |
| 11 |               |       |                 |                 |                |                |        |                 |                 |
| 12 |               |       |                 |                 |                |                |        |                 |                 |
| 13 |               |       |                 |                 |                |                |        |                 |                 |
| 14 |               |       |                 |                 |                |                |        |                 |                 |
| 15 |               |       |                 |                 |                |                |        |                 |                 |
| 16 |               |       |                 |                 |                |                |        |                 |                 |
| 17 |               |       |                 |                 |                |                |        |                 |                 |
| 18 |               |       |                 |                 |                |                |        |                 |                 |
| 19 |               |       |                 |                 |                |                |        |                 |                 |
| 20 |               |       |                 |                 |                |                |        |                 |                 |
| 21 |               |       |                 |                 |                |                |        |                 |                 |
| 22 |               |       |                 |                 |                |                |        |                 |                 |
| 23 |               |       |                 |                 |                |                |        |                 |                 |
| 24 |               |       |                 |                 |                |                |        |                 |                 |
| 25 |               |       |                 |                 |                |                |        |                 |                 |
| 26 |               |       |                 |                 |                |                |        |                 |                 |
| 27 |               |       |                 |                 |                |                |        |                 |                 |
| 28 |               |       |                 |                 |                |                |        |                 |                 |
| 29 |               |       |                 |                 |                |                |        |                 |                 |
| 30 |               |       |                 |                 |                |                |        |                 |                 |
| 31 |               |       |                 |                 |                |                |        |                 |                 |
| 32 |               |       |                 |                 |                |                |        |                 |                 |
| 33 |               |       |                 |                 |                |                |        |                 |                 |
| 34 |               |       |                 |                 |                |                |        |                 |                 |
| 35 |               |       |                 |                 |                |                |        |                 |                 |
| 36 |               |       |                 |                 |                |                |        |                 |                 |
| 37 |               |       |                 |                 |                |                |        |                 |                 |
| 38 |               |       |                 |                 |                |                |        |                 |                 |
| 39 |               |       |                 |                 |                |                |        |                 |                 |

1/31/1900

EE Age

EE Auto Demo

Sp Auto Demo

[illegible]

RENEWAL DATE

Medical Type  
Traditional  
HDHP  
Value

Gender  
M  
F

Tier  
EE  
ES  
EC  
F  
W

|    | EMPLOYEE NAME |       |              |               |             |             | SEX* | Employee |
|----|---------------|-------|--------------|---------------|-------------|-------------|------|----------|
|    | LAST          | FIRST | Medical Tier | Med Plan Type | Dental Tier | Vision Tier |      | DOB      |
| 1  |               |       |              |               |             |             |      |          |
| 2  |               |       |              |               |             |             |      |          |
| 3  |               |       |              |               |             |             |      |          |
| 4  |               |       |              |               |             |             |      |          |
| 5  |               |       |              |               |             |             |      |          |
| 6  |               |       |              |               |             |             |      |          |
| 7  |               |       |              |               |             |             |      |          |
| 8  |               |       |              |               |             |             |      |          |
| 9  |               |       |              |               |             |             |      |          |
| 10 |               |       |              |               |             |             |      |          |
| 11 |               |       |              |               |             |             |      |          |
| 12 |               |       |              |               |             |             |      |          |
| 13 |               |       |              |               |             |             |      |          |
| 14 |               |       |              |               |             |             |      |          |
| 15 |               |       |              |               |             |             |      |          |
| 16 |               |       |              |               |             |             |      |          |
| 17 |               |       |              |               |             |             |      |          |
| 18 |               |       |              |               |             |             |      |          |
| 19 |               |       |              |               |             |             |      |          |
| 20 |               |       |              |               |             |             |      |          |
| 21 |               |       |              |               |             |             |      |          |



[illegible]

**STATE OF SOUTH CAROLINA**  
**BEAUFORT COUNTY**

**IN THE COURT OF COMMON PLEAS**  
**CIVIL ACTION NO. 2016-CP-07-2541**

Forum Benefits, Inc.,

Plaintiff,

v.

Brian Bannon and Assured Partners, NL

Defendants.

# Exhibit J

**STATE OF SOUTH CAROLINA**  
**BEAUFORT COUNTY**

**IN THE COURT OF COMMON PLEAS**  
**CIVIL ACTION NO. 2016-CP-07-2541**

Forum Benefits, Inc.,

Plaintiff,

v.

Brian Bannon and Assured Partners, NL

Defendants.

**PLAINTIFF'S SUPPLEMENTAL  
ANSWERS AND RESPONSES TO  
DEFENDANTS' FIRST SET OF  
INTERROGATORIES AND REQUESTS  
FOR PRODUCTION**

Pursuant to Rules 33 and 34 of the S.C. Rules of Civil Procedure, and subject to the General Objections previously asserted, Plaintiff Forum Benefits, Inc. supplements its previous responses to Defendants' First Set of Interrogatories and Requests for Production as follows.

**INTERROGATORY NO. 1:**

Give the names and addresses of person known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

**ANSWER TO INTERROGATORY NO. 1:**

In addition to those persons identified by any other party to this case, or where name appears in any documents produced in discovery, Plaintiff identifies the following:

- a. Brian Stritt, Heather Edwards, Laurie Winston, and Sarah Hildreth, Forum Benefits, Inc., 23 Cleveland Street, Suite A, Greenville, SC 29601.
- b. Reed Wilson PTG (Plaintiff's information/technology service), Greenville, South Carolina.
- c. Brian Bannon, 395 Wellington Loop, Ridgeland, SC 29936

No written or recorded statements have been taken.

**SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 1:**

Plaintiff identifies the following additional witnesses concerning the facts of the case:

- d. Nolan Zielinski, Palmetto Technology Group
- e. Michael Scholz, Liberty Business Associates, LLC
- f. Mac Ward, deposition taken
- g. James Brady
- h. Unidentified corporate representative of Blue Cross Blue Shield
- i. Unidentified corporate representative of Alpha Genesis
- j. Unidentified corporate representative of Magnolia Plantation
- k. Unidentified corporate representative of St. Andrews PSD

l. David Wyatt

**INTERROGATORY NO. 2:**

For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other parties of the important facts know to be observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

**ANSWER TO INTERROGATORY NO. 2:**

These witnesses are expected to testify regarding the allegations set forth in Plaintiff's Complaint.

**SUPPLEMENTAL ANSWER TO INTERROGATORY NO.2:**

The additionally identified witnesses are expected to provide testimony on the following matters:

- d. Nolan Zielinski is expected to testify regarding his forensic analysis of Sharepoint server access.

e. Michael Scholz is expected to testify regarding his forensic analysis of Brian Bannon's computer and Sharepoint server access.

f. Mac Ward is expected to testify consistent with his deposition testimony.

g. James Brady is expected to testify regarding actions he took to misappropriate Plaintiff's proprietary trade secrets from the Employee Navigator system.

h. Unidentified corporate representative of Blue Cross Blue Shield is expected to testify regarding the following topics:

- any policies at BCBS regarding the disclosure of client information to the client's Broker/Agent of Record;

- any policies at BCBS to maintain information provided by a client's Broker/Agent of Record to BCBS confidential; and

- any authority for Scott Naumoff to provide testimony on behalf of Blue Cross Blue Shield that information and data provided by a client's Broker/Agent of Record to BCBS concerning clients is not proprietary to or a trade secret of the client's Broker/Agent of Record.

i. Unidentified corporate representative of Alpha Genesis is expected to testify regarding the following topics:

- any policies at Alpha Genesis regarding the disclosure of information to the Broker/Agent of Record;

- any policies at Alpha Genesis to maintain information provided by a Broker/Agent of Record to Alpha Genesis confidential;

- any authority at Alpha Genesis for anyone at Alpha Genesis to provide the user account and password for Employee Navigator materials to the Broker/Agent of Record; and

- any authority for Paula Gant to provide testimony on behalf of Alpha Genesis that information and data provided by a Broker/Agent of Record to Alpha Genesis concerning Employee Navigator materials is not proprietary to or a trade secret of the Broker/Agent of Record.

j. Unidentified corporate representative of Magnolia Plantation is expected to testify regarding the following topics:

- any policies at Magnolia Plantation regarding the disclosure of information to the Broker/Agent of Record;

- any policies at Magnolia Plantation to maintain information provided by a Broker/Agent of Record to Magnolia Plantation confidential;

- any policies at Magnolia Plantation to safeguard access to Employee Navigator materials;

- any authority at Magnolia Plantation for anyone at Magnolia Plantation to provide the Magnolia Plantation user account and password for Employee Navigator materials to the Broker/Agent of Record; and

- any authority for Marlene Gray to provide testimony on behalf of Magnolia Plantation that information and data provided by a Broker/Agent of Record to Magnolia Plantation concerning Employee Navigator materials is not proprietary to or a trade secret of the Broker/Agent of Record.

k. Unidentified corporate representative of St. Andrews PSD is expected to testify regarding the following topics:

- any policies at St. Andrews PSD regarding the disclosure of information to the Broker/Agent of Record;

- any policies at St. Andrews PSD to maintain information provided by a Broker/Agent of Record to St. Andrews PSD confidential;

- any policies at St. Andrews PSD to safeguard access to Employee Navigator materials;

- any authority at St. Andrews PSD for anyone at St. Andrews PSD to provide the user account and password for Employee Navigator materials to the Broker/Agent of Record; and

- any authority for Christie Holderness to provide testimony on behalf of St. Andrews PSD that information and data provided by a Broker/Agent of Record to St. Andrews PSD concerning Employee Navigator materials is not proprietary to or a trade secret of the Broker/Agent of Record.

1. David Wyatt is expected to testify that Plaintiff engaged him for the specific purpose of preparing an employment agreement for Brian Bannon.

Respectfully submitted,

s/Steven R. LeBlanc  
 Steven R. LeBlanc (Fed. Id. #7000)  
 Steve LeBlanc, LLC  
 P.O. Box 9198  
 Greenville, S.C. 29604  
 Tel: (864) 902-4411  
 Steve@LeBlancLLC.com

***Attorneys for Plaintiff Forum Benefits, Inc.***



**CERTIFICATE OF SERVICE**

I certify that on April 3, 2018, I served a copy of PLAINTIFF'S SUPPLEMENTAL ANSWERS AND RESPONSES TO DEFENDANTS' FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION on all counsel of record by U.S. Mail with a courtesy copy by email.

Respectfully submitted,

s/Steven R. LeBlanc

Steven R. LeBlanc (Fed. Id. #7000)

Steve LeBlanc, LLC

P.O. Box 9198

Greenville, S.C. 29604

Tel: (864) 902-4411

Steve@LeBlancLLC.com

***Attorneys for Plaintiff Forum Benefits, Inc.***

STATE OF SOUTH CAROLINA  
BEAUFORT COUNTY

IN THE COURT OF COMMON PLEAS  
CIVIL ACTION NO. 2016-CP-07-2541

Forum Benefits, Inc.,

Plaintiff,

v.

Brian Bannon and Assured Partners, NL

Defendants.

**PLAINTIFF'S RESPONSES TO  
DEFENDANTS' SECOND SET OF  
INTERROGATORIES AND REQUESTS  
FOR PRODUCTION**

Pursuant to Rules 33 and 34 of the S.C. Rules of Civil Procedure, Forum Benefits, Inc. provides the following responses to Defendants' Second Set of Interrogatories and Requests for Production.

1. Itemize in detail each and every element of damage that the Plaintiff claims in this lawsuit. As to each element of damage, produce each and every document that Plaintiff contends supports such element of damage.

**Response:** Plaintiff claims the following damages in this lawsuit:

- a. Approximately \$200,000 per year in lost revenues. Plaintiff will produce for inspection and copying documents that identify the lost revenues.
- b. Approximately \$1,497,000 in diminished value of Forum Benefits during the purchase of Forum Benefits on November 30, 2016. Plaintiff will produce for inspection and copying documents that identify the diminished value of Forum Benefits.
- c. Amount to be determined by a jury to disgorge Defendants' unjust enrichment.
- d. Plaintiff's attorneys' fees and costs associated with this lawsuit.
2. Produce the sales or other agreement(s) pertaining to the sale of Forum Benefit, LLC to Alera Group.

**Response:** Plaintiff objects to this request as seeking documents that are not relevant to the subject matter of the litigation. Plaintiff will produce for inspection and copying the portion of

the agreement that identifies the diminished value of Forum Benefits during the purchase of Forum Benefits on November 30, 2016.

3. Produce the 2015, 2016 and 2017 tax returns of Forum Benefits, Inc.

**Response:** Plaintiff will produce for inspection and copying copies of the tax returns of Forum Benefits, LLC for 2015-2017.

4. Produce the Articles of Incorporation, and Bylaws, of Forum Benefits, LLC.

**Response:** Plaintiff will produce for inspection and copying copies of the Articles of Incorporation and Bylaws of Forum Benefits, LLC.

5. Produce all emails or other electronic communications by, to or copying Brian Stritt in connection with the sale of Forum Benefits, Inc. or Forum Benefits, LLC to Alera Group pertaining to, or in any way dealing with, Assured Partners or Brian Bannon.

**Response:** Plaintiff objects to this request as seeking documents that are not relevant to the subject matter of the litigation. In addition, identifying, collecting, and producing the requested documents is unreasonably burdensome and expensive considering the importance of the documents to the issues in the litigation.

6. Produce all documents in connection with the sale of Forum Benefits LLC to Alera Group that contain an earn-out clause applicable to Forum Benefits or Brian Stritt.

**Response:** Plaintiff will produce for inspection and copying the portion of the agreement that identifies the diminished value of Forum Benefits during the purchase of Forum Benefits on November 30, 2016.

7. Produce all emails or other electronic communications by, to or copying Brian Stritt pertaining to an earn-out clause applicable to Forum Benefits, LLC or Brian Stritt in the sale of Forum Benefits, LLC to Alera Group.

**Response:** Plaintiff will produce for inspection and copying copies of emails to Brian Stritt regarding the diminished value of Forum Benefits during the purchase of Forum Benefits on November 30, 2016.

8. Produce the license agreement between Forum Benefits, Inc. and Employee Navigator.

**Response:** Plaintiff will produce for inspection and copying copies of any license agreement between Forum Benefits, Inc. and Employee Navigator.

9. Produce all agreements that Forum Benefits, Inc. or Forum Benefits, LLC has with clients concerning the clients' data, employee and other information.

**Response:** Plaintiff will produce for inspection and copying all agreements that Forum Benefits, Inc. or Forum Benefits, LLC has with clients concerning the clients' data, employee and other information.

10. Produce all agreements or other documents that Forum Benefits, Inc. or Forum Benefits, LLC has with or gives to clients that deal with protection of alleged trade secrets of Forum Benefits.

**Response:** Plaintiff will produce for inspection and copying all documents that Forum Benefits, Inc. or Forum Benefits, LLC has with or gives to clients that deal with protection of alleged trade secrets.

11. Produce all trademarks, service marks, or other intellectual property registrations possessed by the Plaintiff in connection with any information claimed in this litigation to be a trade secret.

**Response:** Plaintiff objects to this request as being nonsensical. Plaintiff's trademarks identify the source of Plaintiff's goods and services and are not used to identify trade secrets. Plaintiff's copyrights in its proprietary trade secrets exist when the material is fixed in any tangible medium and do not require registration.

12. Produce all reports, records, emails or other communications by or between Michael Shultz/Liberty Digital Forensics pertaining to any forensic or other work performed for the Plaintiff or Brian Stritt.

**Response:** Plaintiff objects to producing emails or other communications by or between Michael Schulz/Liberty Digital Forensics pertaining to any forensic or other work performed for the Plaintiff or Brian Stritt as being protected from discovery as work product. Plaintiff has previously produced all reports and records from Michael Schulz/Liberty Digital Forensics pertaining to any forensic or other work performed for the Plaintiff or Brian Stritt.

13. Produce all reports, records, emails or other communications by or between Reid (Reed) Wilson pertaining to any forensic or other work performed for the Plaintiff or Brian Stritt.

**Response:** Plaintiff objects to producing emails or other communications by or between Reed Wilson pertaining to any forensic or other work performed for the Plaintiff or Brian Stritt as being protected from discovery as work product. Plaintiff has previously produced all reports and records from Reed Wilson pertaining to any forensic or other work performed for the Plaintiff or Brian Stritt.

14. Produce all report, records, emails or other communication by or between MarshBerry or its employees and Forum Benefits or its employees or Brian Stritt, pertaining to Assured Partners or Brian Bannon.

**Response:** Plaintiff objects to this request as seeking documents that are not relevant to the subject matter of the litigation. In addition, the requested documents are protected from discovery as work product.

15. Produce all reports, records, emails or other communications by or between MarshBerry or its employees and Forum Benefits or its employees or Brian Stritt, pertaining to any damages claimed in this litigation.

**Response:** Plaintiff objects to this request as seeking documents that are not relevant to the subject matter of the litigation. In addition, the requested documents are protected from discovery as work product.

16. Produce all checks, emails, correspondence, receipts, agreements or other documents pertaining to all payments made by the Plaintiff or Brian Stritt to Kent McKowen.

**Response:** Plaintiff objects to this request as seeking documents that are not relevant to the subject matter of the litigation.

Respectfully submitted,

\_\_\_\_\_  
s/Steven R. LeBlanc  
Steven R. LeBlanc (Fed. Id. #7000)  
Steve LeBlanc, LLC  
P.O. Box 9198  
Greenville, S.C. 29604  
Tel: (864) 902-4411  
Steve@LeBlancLLC.com

***Attorneys for Plaintiff Forum Benefits, Inc.***

**CERTIFICATE OF SERVICE**

I certify that on April 3, 2018, I served a copy of PLAINTIFF'S RESPONSES TO DEFENDANTS' SECOND SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION on all counsel of record by U.S. Mail with a courtesy copy by email.

Respectfully submitted,

s/Steven R. LeBlanc  
Steven R. LeBlanc (Fed. Id. #7000)  
Steve LeBlanc, LLC  
P.O. Box 9198  
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Tel: (864) 902-4411  
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***Attorneys for Plaintiff Forum Benefits, Inc.***

**STATE OF SOUTH CAROLINA**

**BEAUFORT COUNTY**

**IN THE COURT OF COMMON PLEAS**

**CIVIL ACTION NO. 2016-CP-07-2541**

Forum Benefits, Inc.,

Plaintiff,

v.

Brian Bannon and Assured Partners, NL

Defendants.

# Exhibit K



1 talked to?

2 A. Yeah.

3 Q. Did I miss that?

4 A. Yeah, I said that.

5 Q. Okay.

6 A. I did not talk with him Tuesday. I  
7 talked with him yesterday.

8 Q. And you discussed with him the  
9 questions he was asked at his deposition?

10 A. Yes.

11 Q. All right. Tell me a little bit about  
12 yourself. I'm sort of new to the case. I  
13 understand you used to work for Forum Benefits. Is  
14 that right?

15 A. That is incorrect.

16 Q. Okay. Clarify that. Correct me.

17 A. I was a minority owner of Assure South.  
18 We had an arrangement with Forum Benefits where we  
19 owned the business and they were the general agent,  
20 and they were also providing us the customer  
21 service, and we split everything 50/50. So it was  
22 a partnership.

23 Q. Between Assure South and Forum  
24 Benefits?

25 A. Yes.

1 Q. And when did that partnership exist?

2 A. It began in 2012.

3 Q. And it lasted until...

4 A. 2016.

5 Q. When in 2016?

6 A. The beginning of the winding down was  
7 in February, and I believe we had the -- it was a  
8 60-day contract that had run out, so February,  
9 March -- I guess it ended in April.

10 Q. Did you -- did that relationship end on  
11 good terms or --

12 A. No.

13 Q. Explain why it didn't end on good  
14 terms.

15 A. We were approached by your client at  
16 the end of 2015.

17 Q. Excuse me. When you say we, you  
18 mean --

19 A. Ben Taylor and myself, my partner at  
20 Assure South.

21 Q. Okay.

22 A. And basically at that meeting in  
23 Spartanburg, which was completely unknown to us  
24 what it was going to be about, Brain said, I've got  
25 to change the arrangement; we can't do 50/50

10

1 anymore; it's going to be -- I don't even remember  
2 what it was, what the commission was going to  
3 change to. Or he said, but we'll keep everything  
4 the same for a year, but I want the benefits book,  
5 and Mack comes to work for me.

6 Q. Okay. Brian is Brian Stritt?

7 A. Yes.

8 Q. So Brian Stritt said he owned the  
9 benefits book and Mack --

10 A. Within a year's period -- we'll keep  
11 everything the same for a year, and then a year  
12 later that he owned book, the new commission split  
13 would take effect, and that I would go to work for  
14 him in another year. And that was not a good deal.

15 Q. And that meeting took place when?

16 A. That meeting took place in late 2015.  
17 I don't remember if it was October or November.

18 Q. So then what happened?

19 A. I mean, I pretty much told Brian it was  
20 a laughable deal.

21 Q. And so you wound down the relationship  
22 between Assure South and Forum Benefits?

23 A. Well, we get calls all the time about  
24 national brokers wanting to sell to us and, you  
25 know, Ben had already talked to Assured Partners at

11

1 one time, and Ben said, you know what, we're going  
2 go to Assured Partners, and it's time that we  
3 entered into an arrangement with them.

4 Q. Tell me Ben's name again.

5 A. Ben Taylor.

6 Q. Is he related to John Taylor?

7 A. He's not. John wishes he were, but  
8 he's not.

9 Q. So you wound down your relationship  
10 between Assure South and Forum Benefits around  
11 April 2016?

12 A. Yeah. Beginning in February is when  
13 the contract termination began, and it ended in  
14 April.

15 Q. And beginning in April of 2016 you  
16 began a relationship with Assured Partners?

17 A. That's correct. It really started in  
18 March, was the asset purchase.

19 Q. What asset was purchased?

20 A. Our company's stock of Assure South.

21 Q. Who purchased it?

22 A. Assured Partners.

23 Q. How much did they purchase?

24 A. That's actually a good question. I  
25 don't know the answer to that. Ben Taylor would

1 have to give you the details of all that, because  
2 he was involved in all the financials. I was not.

3 Q. Do you know approximately what it was?

4 A. I don't without -- like I said, I  
5 wasn't part of that. It was a two-year  
6 arrangement. You'd really have to get that from  
7 him. I wasn't privy to any -- I've never seen the  
8 purchase -- I've never seen the sale agreement, so  
9 no, I couldn't answer that.

10 Q. It's your understanding that some share  
11 of Assure South was sold or -- sold to Assured  
12 Partners?

13 A. Yes.

14 Q. Do you know how much Assured Partners  
15 paid for that share?

16 A. I've got an approximate number, but  
17 once again, I'm really not at liberty to discuss  
18 that. That would be something you'd have to get  
19 from Ben.

20 Q. What's the approximate number you have?

21 A. Once again, I'm just not at liberty to  
22 disclose that information.

23 Q. I'm not sure what you mean by that.  
24 This is the time for me to ask questions and you to  
25 answer them. So if you're not -- let me finish

1 explaining the rules.

2 A. Sure.

3 Q. If you're not going to answer the  
4 question, then you need to seek assistance from the  
5 Court to protect your answer. I think there is a  
6 protective order in this case.

7 MR. LEBLANC: Is there?

8 MR. HARVEY: There is.

9 BY MR. LEBLANC:

10 Q. So we can designate your testimony as  
11 whatever is provided in the protective order.

12 MR. HARVEY: Confidential.

13 A. I -- there's some confidentiality I  
14 have with Ben Taylor that I cannot disclose, so  
15 you're going to have to depose him and get that  
16 information from him.

17 Q. That's not the way it works, with my  
18 understanding of the rules in court. This is my  
19 chance to ask you the question, and if you don't  
20 want to answer it, then I'll take it up with the  
21 Court, but usually, there is a problem then.  
22 Usually there's going to be some sort of penalty  
23 somebody pays because -- are you represented by  
24 counsel today?

25 MR. HARVEY: Yes. Well, Assured

1 Partners is represented by counsel.

2 MR. LEBLANC: Is...

3 MR. HARVEY: He's a --

4 MR. LEBLANC: Is Mack Ward represented  
5 by counsel today?

6 MR. HARVEY: He's an employee of  
7 Assured Partners.

8 BY MR. LEBLANC:

9 Q. Is that correct? Are you an employee

10 of Assured Partners?

11 A. Yes.

12 MR. LEBLANC: Well, do you need to talk  
13 with him? Because I think I'm entitled to an  
14 answer.

15 MR. HARVEY: May I?

16 MR. LEBLANC: Absolutely.

17 (After a recess, proceedings were  
18 continued as follows:)

19 (Whereupon, the deposition proceeded in  
20 confidential session.)

21

22

23

24

25



1 (Confidential Session)

2 BY MR. LEBLANC:

3 Q. Mr. Ward, do you remember the question  
4 I asked you?

5 A. What I think was the valuation from  
6 Assured Partners to Assure South?

7 Q. Sort of. It's my understanding that  
8 you testified that Assured Partners purchased a  
9 share of Assure South from you and Ben Taylor?

10 A. Yeah.

11 Q. And you're not sure how much the share  
12 was?

13 A. I'm really not. I could give you two  
14 numbers, but I'm really not.

15 Q. Two numbers would be good.

16 A. 85 percent and 100 percent.

17 Q. It's your understanding that Assured  
18 Partners purchased either 85 percent or 100 percent  
19 of Assured South?

20 A. Mm-hmm (affirmatively).

21 Q. And Assured Partners paid how much for  
22 that, whatever percent it was?

23 MR. HARVEY: Mark this as confidential.

24 A. It's my understanding, 2.75 times  
25 revenue.

1 Q. 2.75 times revenue over what period?

2 A. Two-year period.

3 Q. Beginning when and ending when?

4 A. Excuse me. Let me go back. It's 2.75  
5 up front, and then ending in -- and then  
6 additional -- 2.75 up front, to the best of my  
7 knowledge.

8 Q. 2.75 of what?

9 A. Of the amount of revenue that we have.

10 Q. Okay. The amount of revenue that  
11 Assure South had generated in what period of time?

12 A. From inception.

13 Q. When was the inception?

14 A. '40s or '50s, somewhere in there.

15 Q. 1940s or '50s?

16 A. Mm-hmm (affirmatively).

17 Q. So however much revenue Assure South  
18 generated from the 1940s or '50s, Assured Partners  
19 was going to pay you and Mr. Taylor 2.75 times that  
20 amount?

21 A. Yeah. Where it stands today, yeah.

22 Q. What do you mean, where it stands  
23 today?

24 A. Whatever the final revenue is of the  
25 company. The revenue was probably different in the

1 '80s than it is now, so whatever that final revenue  
2 is.

3 Q. Is it accumulative or annual revenue?

4 A. Annual revenue.

5 Q. Okay. So the annual revenue not added  
6 up for each of those years. It's just one year's  
7 revenue?

8 A. To the best of my knowledge.

9 Q. Take me through the math. I'm pretty  
10 good at math. I have no idea what you just  
11 described. Take me through the math to determine  
12 what payment Assured Partners will end up making to  
13 Assure South.

14 A. I can give you an estimated. That's  
15 all I can do.

16 Q. Okay. Take me through the math. 2.75  
17 times what?

18 A. Roughly \$2 million.

19 Q. \$2 million represents what?

20 A. The annual revenue. Call it annual  
21 revenue estimate. Let me take that back, Steve.  
22 It's more like 1.8.

23 Q. Okay. So Assured Partners is going to  
24 pay you and Mr. Taylor 2.7 times the annual revenue  
25 for this year?

1           A.    For the -- I'm assuming -- once again,  
2    I wasn't in on all the financials.  It was for --  
3    for whatever the income amount valuation that  
4    Assured Partners came up with for Assure South in  
5    terms of that revenue number.

6           Q.   Who determines the income amount  
7    valuation for Assure South?

8           A.    Assured Partners.

9           Q.    And when will they make that  
10   determination?

11          A.    They already did.

12          Q.    And you're just not sure what that  
13   determination was?

14          A.    I'm pretty sure it's 2.75 times the  
15   1.8 million in revenue, but once again, that's to  
16   the best of my knowledge.

17          Q.    When will that payment be made?

18          A.    The payment was made in April, May --  
19   excuse me -- March or April of 2016.

20          Q.    And that payment went to who?

21          A.    Ben Taylor.

22          Q.    And you owned half of Assure South at  
23   the time?

24          A.    No, I did not.

25          Q.    How much of Assure South did you own at

1           A.     Yes.  He's getting -- his Charleston  
2     office would pay the fee associated with Benesolv.  
3     It comes out of their profits center.  Each office  
4     has their own profits center.

5           Q.     Okay.  If you would, take a look at  
6     Page 4 of Exhibit 1.  The top of Page 4 looks like  
7     an October 27th email from Bannon to John Taylor,  
8     Kelly Hagan, Jim Brady, copying Holly Schardine and  
9     you.  Is that correct?

10          A.     Yes.

11          Q.     What's Brian Bannon telling Jim and  
12     Kelly?

13                 MR. HARVEY:  Object to the form.

14          A.     Please use the attached information to  
15     make copies of the employee navigator websites for  
16     the following clients that are moving with me to  
17     Assured Partners, NL.

18          Q.     So this email was sent on October 27th.  
19     Do you know what Brian Bannon's relationship with  
20     Forum Benefits was on October 27, 2016?

21          A.     I'm assuming he was still an  
22     independent contractor.

23          Q.     Do you know if Brian Bannon had any  
24     relationship with Assured Partners on October 27,  
25     2016?

1 A. Obviously, if he's sending this email  
2 on October 27, 2016.

3 Q. So he had a relationship with both  
4 Forum Benefits and Assured Partners on October 26,  
5 2016?

6 MR. HARVEY: Object to form.

7 A. When you say relationship, define it.

8 Q. I'll go back and ask the two questions  
9 again. What was your understanding of Brian  
10 Bannon's relationship with Forum Benefits on  
11 October 27, 2016?

12 A. I assume he was an independent  
13 contractor.

14 Q. So on October 27, 2016, Brian Bannon  
15 was an independent contractor that sold insurance  
16 policies and shared the revenues associated with  
17 those policies with Forum Benefits?

18 MR. HARVEY: Object to the form.

19 Q. Is that correct?

20 A. Say the question again.

21 Q. On October 27, 2016, Brian Bannon was  
22 an independent contractor who sold insurance  
23 policies and shared the revenues associated with  
24 those sales with Forum Benefits?

25 MR. HARVEY: Object to the form.

1 A. To the best of my knowledge.

2 Q. And on October 27, 2016, was Brian  
3 Bannon also an employee of Assured Partners?

4 A. That I don't know. It's in the  
5 employee agreement.

6 Q. Do you know when Brian Bannon became an  
7 employee of Assured Partners?

8 A. I don't.

9 Q. That would be in the employment  
10 agreement with Brian Bannon?

11 A. Correct.

12 Q. Do you have an employment agreement  
13 with Assured Partners?

14 A. That's a good question. I don't know  
15 if I do. I signed a noncompete, but I don't know  
16 if there was an employment agreement in there or  
17 not.

18 Q. Okay. Are you familiar with the  
19 Employee Navigator website that's referred to in  
20 this email?

21 A. Yes.

22 Q. What is that?

23 A. Employee Navigator is a company that  
24 has 5,000 licensees roughly nationwide, brokers.

25 Q. And what does Employee Navigator do?



1 Q. Quick meaning by the end of lunch or by  
2 the end of the week?

3 A. Call it a week.

4 Q. A week. So 40 hours, one person  
5 40 hours?

6 A. One person building it?

7 Q. Yes.

8 A. I have no idea how many people they've  
9 got building those things.

10 Q. Your impression is it would take about  
11 a week, but you're not sure how many people would  
12 be working on it?

13 A. Huh-uh (negatively).

14 Q. Earlier we had a discussion where --  
15 and I don't mean to misphrase it; this is what I  
16 got out of it -- when clients change broker firms  
17 from Forum Benefits say to Assured Partners in the  
18 industry, generally the clients agree to transfer  
19 all the data from the previous broker to the new  
20 broker; is that correct?

21 A. One more time.

22 Q. Earlier I think we had this  
23 discussion -- and I might be misstating it; I might  
24 be stating it in a manner that's not accurate --  
25 when a client changes brokers from say Forum

1 Benefits to Assured Partners --

2 A. Yes.

3 Q. -- the client usually allows the  
4 client's data to be copied, transferred,  
5 screenshotted, whatever, so that the new broker can  
6 use that data; is that correct?

7 A. The client would prefer it to be a  
8 smooth transition.

9 Q. So that would facilitate the  
10 transition?

11 A. What would?

12 Q. The client allowing the data to be  
13 copied from the previous broker's access to the  
14 current broker's access.

15 A. Yeah.

16 Q. Okay. Is that a normal practice? If  
17 Assured Partners got a client from Howard Einstein  
18 would that same process occur?

19 A. We got one from Einstein last year, and  
20 Einstein says, y'all got two weeks to get the data  
21 over. We told the client that, so we had two weeks  
22 to get that. But the client did not get their  
23 systems shut down when we picked that one up from  
24 Howard.

25 Q. What client did you get from Howard

**STATE OF SOUTH CAROLINA**  
**BEAUFORT COUNTY**

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v.

Brian Bannon and Assured Partners, NL

Defendants.

# Exhibit L

1 air. And so that was included as an element of  
2 damages; correct?

3 A Yeah. Is there a date on this? Am I missing it?

4 Q Yeah, it will be on the last page. It's the very last  
5 page. It was certified mail April 3, 2018.

6 A Okay.

7 Q So, I guess, as of that time period, were you still not  
8 quite sure on whether the earn out was met?

9 A Check wasn't -- check was not received.

10 Q Yeah. Until they sent you the check, you weren't going  
11 to take any chances; right?

12 A Correct. Correct.

13 Q But you had felt pretty confident because you -- you  
14 know, your EBITDA had been even, and well above the  
15 five percent?

16 A Yeah. The problem, Mr. Lehrer, becomes when somebody  
17 else is doing the math, you always kind of wonder. So  
18 ---

19 Q Yeah, I gotcha. And, so, you know we've got  
20 approximately \$200,000 a year in lost revenue, and  
21 that's probably based on, you know, the clients we  
22 looked at in, you know, Exhibit 6; right? You know,  
23 based on some different numbers that y'all ---

24 A Uh-huh. Yeah, yeah; correct.

25 Q Okay. All right. And then we've got -- so, you would

Page 101

1 agree that B is no longer an element of damages in this  
2 case? That 1-B is no longer an element of damages?

3 A I would -- yeah, I would agree that I've received that  
4 money from the original sale. That has been received.

5 Q Okay. And, so, there's no basis to seek that money  
6 from somebody else, since you've received it; right?

7 A That exact money, correct.

8 Q Okay. All right. So, we can mark B off as an element  
9 of damages. Are you good with that?

10 A It's been -- the money has been received.

11 Q Well ---

12 A I'm always curious ---

13 Q I'm not trying to trick you.

14 A --- when you kind of lead me down a road.

15 Q I'm not trying to trick you. And I think that, you  
16 know, we've already kind of established in some legal  
17 proceedings, but, you know, the earn out has been  
18 earned ---

19 A I've received the -- correct. Correct.

20 Q And there's nothing about that you're seeking, that you  
21 know of right now?

22 A Correct.

23 Q Okay. So, we're left with, you know, \$200,000 a year  
24 in lost revenue. You know, some amount in C, to be  
25 determined by a jury to disgorge defendant's unjust

1 enrichment. Do you know what that means?

2 A That looks like real attorney speak. So ---

3 Q Yeah, and so are you aware of a type of ---

4 A I don't know. Would that include interest? Would it  
5 include the fact that I didn't take commissions before  
6 in order to hit the 1.9? You know, the employees who  
7 didn't get raises? I don't know.

8 Q Yeah.

9 A This has been written by an attorney. I know that.

10 Q Sure, sure. That's why we hire attorneys. That's why  
11 you've got legal fees. And, you know, unfortunately, I  
12 can't put Mr. LeBlanc under oath and talk to him about  
13 it. You know, that would be a process that would make  
14 things a lot easier sometimes. But, you know, an  
15 unjust enrichment -- I'll just tell you, so we can  
16 maybe ask some questions about this.

17 A Okay. Okay.

18 Q Is the party, Bannon or Assured Partners, has been  
19 unjustly enriched. They got something of value they  
20 weren't entitled to. Okay? That's kind of what that  
21 goes to.

22 A Okay.

23 Q Are you aware of some value that Bannon got or that  
24 Assured Partners got, that they shouldn't have got?

25 A Yeah, they took 2,400 files. They've got everything we

1 have. They took our sales process. They took all our  
2 formulas. They took all our demographic work that had  
3 took me 20 years to figure out working at Blue Cross  
4 how to do that. There's absolutely value to that in  
5 the market place, if they know how to use it. So ---

6 Q Yeah, and that -- and it's kind of the -- "If they know  
7 how to use it" is a condition; right?

8 A Yeah.

9 Q And so do you have any way of putting a value on what  
10 that -- how that has enriched them, in terms of a  
11 dollar value?

12 A Pretty difficult. I mean, it's intellectual property.  
13 It's out there.

14 Q It would be -- for you to come up with a number, it  
15 would be just speculative?

16 A Yeah, correct. Absolutely.

17 Q And so, you know, some of the stuff -- and we'll get  
18 into some more of the details, but we talked a little  
19 bit about it. I mean, some of the information that was  
20 taken -- you know, let's just say like going back to  
21 the Employee Navigator, and that's -- my understanding,  
22 was acquired through the client given passwords.

23 A Correct.

24 Q Right? And, so, you go in and you take -- you copy  
25 that. The -- it's my under- -- and I think we've



1           talked about this. Most of that information could be  
2           created. It just would take time and effort to do it,  
3           and you're short circuiting that by doing the --  
4           getting the password ---

5    A    Correct.

6    Q    --- and going in and getting it; correct?

7    A    Correct. Correct.

8    Q    Okay. Do you have any idea on what the value of that  
9           time -- you know, how long it would have taken to  
10          recreate it versus, you know, not having to recreate  
11          it?

12   A    Yeah, so, I mean, we've -- we, here, anywhere from 2 to  
13          6 weeks to build the stuff out.

14   Q    Okay.

15   A    So it depends on the competitor. It depends on their  
16          level of expertise; all those sorts of things.

17   Q    Okay. So, it might ---

18   A    It's been -- that's per case; right. So ---

19   Q    Yeah, right. And it depends on how big the -- you  
20          know, how many clients we're talking about, how big the  
21          -- you know, how much information.

22   A    Well, that'd be -- yeah, that'd be per client, but it  
23          also would be complexity of the case. So, if you have  
24          multiple tax IDs, if you've got different plan designs,  
25          if -- there's different carriers, depending on

1 But it's very difficult to sit here and go, "I  
2 would sell it for this." We do some outside servicing  
3 of Navigator for other firms, and we sell it for \$5 per  
4 employee, per month on an ongoing fee to manage it.

5 Q Okay. That's to manage it. So, you know, have you  
6 ever had a situation where, you know, you sell a Book  
7 of business to somebody. You know, you're -- you know,  
8 you're selling them back their Book, and they get to  
9 walk away with their Book, you know.

10 A Uh-huh.

11 Q And therefore, they bought the Book, so you're going to  
12 give them inf- -- that -- give them information about  
13 that to take with them. Have you ever done that?

14 A No, no.

15 Q No. And, so, because of that, there's just really no  
16 way to know what the value of this information would be  
17 in the market place?

18 A Yeah, yeah. So, the value -- obviously, the value is  
19 it's a service that not everybody can provide. So ---

20 Q All right. Okay. And then we've got the attorneys'  
21 fees. We talked about that; correct?

22 A Yeah.

23 Q And, you know, so other than what we've got here on  
24 this, you know, Answer to Interrogatory 1, Exhibit 7,  
25 are you aware of any other damages that you're seeking

STATE OF SOUTH CAROLINA  
BEAUFORT COUNTY

IN THE COURT OF COMMON PLEAS  
CIVIL ACTION NO. 2016-CP-07-2541

Forum Benefits, Inc.,

Plaintiff,

v.

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Defendants.

**PLAINTIFF'S RESPONSES TO  
DEFENDANTS' SECOND SET OF  
INTERROGATORIES AND REQUESTS  
FOR PRODUCTION**

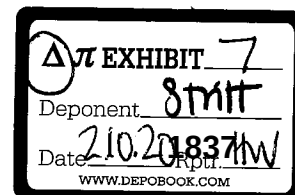
Pursuant to Rules 33 and 34 of the S.C. Rules of Civil Procedure, Forum Benefits, Inc. provides the following responses to Defendants' Second Set of Interrogatories and Requests for Production.

1. Itemize in detail each and every element of damage that the Plaintiff claims in this lawsuit. As to each element of damage, produce each and every document that Plaintiff contends supports such element of damage.

**Response:** Plaintiff claims the following damages in this lawsuit:

- a. Approximately \$200,000 per year in lost revenues. Plaintiff will produce for inspection and copying documents that identify the lost revenues.
- b. Approximately \$1,497,000 in diminished value of Forum Benefits during the purchase of Forum Benefits on November 30, 2016. Plaintiff will produce for inspection and copying documents that identify the diminished value of Forum Benefits.
- c. Amount to be determined by a jury to disgorge Defendants' unjust enrichment.
- d. Plaintiff's attorneys' fees and costs associated with this lawsuit.
2. Produce the sales or other agreement(s) pertaining to the sale of Forum Benefit, LLC to Alera Group.

**Response:** Plaintiff objects to this request as seeking documents that are not relevant to the subject matter of the litigation. Plaintiff will produce for inspection and copying the portion of



the agreement that identifies the diminished value of Forum Benefits during the purchase of Forum Benefits on November 30, 2016.

3. Produce the 2015, 2016 and 2017 tax returns of Forum Benefits, Inc.

**Response:** Plaintiff will produce for inspection and copying copies of the tax returns of Forum Benefits, LLC for 2015-2017.

4. Produce the Articles of Incorporation, and Bylaws, of Forum Benefits, LLC.

**Response:** Plaintiff will produce for inspection and copying copies of the Articles of Incorporation and Bylaws of Forum Benefits, LLC.

5. Produce all emails or other electronic communications by, to or copying Brian Stritt in connection with the sale of Forum Benefits, Inc. or Forum Benefits, LLC to Alera Group pertaining to, or in any way dealing with, Assured Partners or Brian Bannon.

**Response:** Plaintiff objects to this request as seeking documents that are not relevant to the subject matter of the litigation. In addition, identifying, collecting, and producing the requested documents is unreasonably burdensome and expensive considering the importance of the documents to the issues in the litigation.

6. Produce all documents in connection with the sale of Forum Benefits LLC to Alera Group that contain an earn-out clause applicable to Forum Benefits or Brian Stritt.

**Response:** Plaintiff will produce for inspection and copying the portion of the agreement that identifies the diminished value of Forum Benefits during the purchase of Forum Benefits on November 30, 2016.

7. Produce all emails or other electronic communications by, to or copying Brian Stritt pertaining to an earn-out clause applicable to Forum Benefits, LLC or Brian Stritt in the sale of Forum Benefits, LLC to Alera Group.

**Response:** Plaintiff will produce for inspection and copying copies of emails to Brian Stritt regarding the diminished value of Forum Benefits during the purchase of Forum Benefits on November 30, 2016.

8. Produce the license agreement between Forum Benefits, Inc. and Employee Navigator.

**Response:** Plaintiff will produce for inspection and copying copies of any license agreement between Forum Benefits, Inc. and Employee Navigator.

9. Produce all agreements that Forum Benefits, Inc. or Forum Benefits, LLC has with clients concerning the clients' data, employee and other information.

**Response:** Plaintiff will produce for inspection and copying all agreements that Forum Benefits, Inc. or Forum Benefits, LLC has with clients concerning the clients' data, employee and other information.

10. Produce all agreements or other documents that Forum Benefits, Inc. or Forum Benefits, LLC has with or gives to clients that deal with protection of alleged trade secrets of Forum Benefits.

**Response:** Plaintiff will produce for inspection and copying all documents that Forum Benefits, Inc. or Forum Benefits, LLC has with or gives to clients that deal with protection of alleged trade secrets.

11. Produce all trademarks, service marks, or other intellectual property registrations possessed by the Plaintiff in connection with any information claimed in this litigation to be a trade secret.

**Response:** Plaintiff objects to this request as being nonsensical. Plaintiff's trademarks identify the source of Plaintiff's goods and services and are not used to identify trade secrets. Plaintiff's copyrights in its proprietary trade secrets exist when the material is fixed in any tangible medium and do not require registration.

12. Produce all reports, records, emails or other communications by or between Michael Shultz/Liberty Digital Forensics pertaining to any forensic or other work performed for the Plaintiff or Brian Stritt.

**Response:** Plaintiff objects to producing emails or other communications by or between Michael Schulz/Liberty Digital Forensics pertaining to any forensic or other work performed for the Plaintiff or Brian Stritt as being protected from discovery as work product. Plaintiff has previously produced all reports and records from Michael Schulz/Liberty Digital Forensics pertaining to any forensic or other work performed for the Plaintiff or Brian Stritt.

13. Produce all reports, records, emails or other communications by or between Reid (Reed) Wilson pertaining to any forensic or other work performed for the Plaintiff or Brian Stritt.

**Response:** Plaintiff objects to producing emails or other communications by or between Reed Wilson pertaining to any forensic or other work performed for the Plaintiff or Brian Stritt as being protected from discovery as work product. Plaintiff has previously produced all reports and records from Reed Wilson pertaining to any forensic or other work performed for the Plaintiff or Brian Stritt.

14. Produce all report, records, emails or other communication by or between MarshBerry or its employees and Forum Benefits or its employees or Brian Stritt, pertaining to Assured Partners or Brian Bannon.

**Response:** Plaintiff objects to this request as seeking documents that are not relevant to the subject matter of the litigation. In addition, the requested documents are protected from discovery as work product.

15. Produce all reports, records, emails or other communications by or between MarshBerry or its employees and Forum Benefits or its employees or Brian Stritt, pertaining to any damages claimed in this litigation.

**Response:** Plaintiff objects to this request as seeking documents that are not relevant to the subject matter of the litigation. In addition, the requested documents are protected from discovery as work product.

16. Produce all checks, emails, correspondence, receipts, agreements or other documents pertaining to all payments made by the Plaintiff or Brian Stritt to Kent McKowen.

**Response:** Plaintiff objects to this request as seeking documents that are not relevant to the subject matter of the litigation.

Respectfully submitted,

s/Steven R. LeBlanc  
Steven R. LeBlanc (Fed. Id. #7000)  
Steve LeBlanc, LLC  
P.O. Box 9198  
Greenville, S.C. 29604  
Tel: (864) 902-4411  
Steve@LeBlancLLC.com

*Attorneys for Plaintiff Forum Benefits, Inc.*

**CERTIFICATE OF SERVICE**

I certify that on April 3, 2018, I served a copy of PLAINTIFF'S RESPONSES TO DEFENDANTS' SECOND SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION on all counsel of record by U.S. Mail with a courtesy copy by email.

Respectfully submitted,

s/Steven R. LeBlanc  
Steven R. LeBlanc (Fed. Id. #7000)  
Steve LeBlanc, LLC  
P.O. Box 9198  
Greenville, S.C. 29604  
Tel: (864) 902-4411  
Steve@LeBlancLLC.com

*Attorneys for Plaintiff Forum Benefits, Inc.*



**STATE OF SOUTH CAROLINA**  
**BEAUFORT COUNTY**

**IN THE COURT OF COMMON PLEAS**  
**CIVIL ACTION NO. 2016-CP-07-2541**

Forum Benefits, Inc.,

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Defendants.

# Exhibit M

# PALMETTO BENEFIT MANAGEMENT, INC. EMPLOYMENT AGREEMENT

THIS EMPLOYMENT AGREEMENT is made as of this the \_\_\_\_ day of \_\_\_\_\_, 2009 by and between Palmetto Benefit Management, Inc., a South Carolina corporation (the "Company") and:

Name: \_\_\_\_\_

Address: \_\_\_\_\_  
\_\_\_\_\_

SSN: \_\_\_\_\_ Telephone: \_\_\_\_\_

a citizen and resident of South Carolina (the "Employee").

**1. Employment:** The Employee shall be employed as follows:

- ☐ Full Time Salaried
- ☐ Full Time Commissioned
- ☐ Part Time Salaried
- ☐ Part Time Hourly: 0 - \_\_\_\_ hours per week

**2. Duties:** The Employee will perform the duties related to the following job, as set forth in Exhibit A hereto, as it may be amended from time to time, and with the instructions of the President of the Corporation and all senior executives or supervisory personnel, as the case may be and as may be given from time to time, consistent with the duties of loyalty and due care and with all applicable federal and state laws and regulations:

- ☐ Employment Benefits Sales: including but not limited to Health, Dental, Life, Disability, Accident, Supplemental and other ancillary policies
- ☐ Other: \_\_\_\_\_

**3. Location:** Employee shall be employed in Greenville, South Carolina with an unlimited Territory.

**4. Term:** This Agreement shall be effective upon successful completion of any medical check, drug screen and background check on Employee as Employer may deem prudent and appropriate, and shall continue until the Employee quits or is removed in accordance with this Agreement.

**5. Compensation:** As total compensation, the Employee shall receive:

- ☐ An initial annual nonrefundable draw of \_\_\_\_\_ United States Dollars per annum. Employee shall be credited a commission of 40% for all new business and 30% of renewal business. Once commission exceeds aforementioned draw amount, employee shall be straight commission at the levels expressed herein. Rights to receive commissions hereunder are earned through the date of employment and terminate with the termination of employment by either party. Commission structure can

Pfeiffer Gantt Gleaton Wyatt, PA  
935 South Main Street, Suite 203  
Greenville, SC 29601  
(864) 250-9780



# PALMETTO BENEFIT MANAGEMENT, INC.

## EMPLOYMENT AGREEMENT

be unilaterally modified by Company to adjust to market conditions. Commission changes made by Company shall take effect thirty days after notice is given to Employee.

- o An initial hourly pay rate of \_\_\_\_\_ United States Dollars per hour worked

to be paid in accordance with the general payroll policies of the Company as they exist from time to time.

6. **Benefits:** Salaried Employees shall receive the employee benefits as are in effect for all other salaried employees of the Company, if any. Such benefits are detailed in Exhibit B to this Agreement. If no Exhibit B is attached, then no such benefits are currently offered. Part Time Hourly Employees are not eligible for benefits or for paid vacation or paid sick leave, and are only paid for hours actually worked.
7. **Termination:** The Employee is an **employee at will** and the Company may terminate this Agreement and the Employee's employment for any reason or for no reason at any time. Concomitantly, the Employee may resign from employment at any time, for any reason or for no reason. Upon termination, the Company shall have no continuing financial obligation to the Employee, including the obligation to pay any subsequent commission, severance pay or accrued, unused vacation or sick leave pay. Termination by either party does not affect Employee's obligations in Paragraphs 12, 13, and 14 below. It is expressly agreed and understood that the business secured by employee, upon termination, stays with the Company.
8. **Assignment Prohibited:** This Agreement is personal to each of the parties hereto, and neither party may assign nor delegate any of its rights or obligations without first obtaining the written consent of the other party.
9. **Amendment:** No modification, amendment, or addition to this Agreement, nor waiver of any of its provisions, shall be valid or enforceable unless in writing and signed by all the parties.
10. **Binding Effect:** This Agreement, together with any amendments hereto, shall be binding upon the parties hereto, their heirs, successors and assigns. This Agreement is the entire agreement between the parties relating to the subject matter hereof, and supersedes any prior agreements relating hereto.
11. **Governing Law:** The laws of the State of South Carolina shall govern this Agreement. Both parties hereto agree to submit to the exclusive jurisdiction of the state courts of South Carolina for the purpose of adjudicating any dispute arising hereunder. In any litigation between the parties related to this Agreement, the prevailing party shall be entitled to recover all reasonable costs and attorney's fees.
12. **Covenant Not to Disclose Trade Secrets and Confidential Information:**
  - (a) Employee acknowledges that the Company has information that is confidential and constitutes trade secrets which the Company uses in its business, and which is essential to its continued ability to compete and be successful in the industry.
  - (b) The term "Trade Secret(s)", as used herein, shall be defined as set forth in the South Carolina "Uniform Trade Secrets" Act (South Carolina Code Ann. Section 39-8-1 (Supp. 1997)), which defines Trade Secrets as information, including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system or process, design, prototype, procedure or code that: (i) 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 (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Pfeiffer Gantt Gleaton Wyatt, PA  
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- (c) Employee expressly agrees that should the South Carolina Legislature change the definition of "trade secret" set forth in the Act described above, the Company may amend this Agreement to set forth the new statutory definition of trade secret and that such definition shall be binding upon Employee from the date of said amendment forward.
  - (d) Employee acknowledges and recognizes that the list of suppliers and customers of the Company, its price lists, customer lists, customer price-discount policies and operating procedures, sales methods, customer recruiting and retention policies and all other information or materials defined in the Act, as the same may exist from time to time, are valuable, special and unique assets of the Company's business and are Trade Secrets belonging to the Company.
  - (e) The term "Confidential Information", as such term is used herein, shall mean any information which the Company uses in its business, which is not generally known in the insurance industry and which the Company considers to be confidential or proprietary, whether or not such information rises to the level of a Trade Secret.
  - (f) Employee covenants and agrees that during Employee's employment and at all times thereafter, Employee shall not use any Trade Secrets of the Company, except as an employee of the Company with the consent of the Company. Employee further covenants and agrees that during Employee's employment and at all times thereafter, Employee shall not use or disclose any Trade Secrets of the Company to any firm, company, corporation, association or other entity, for any reason or purpose whatsoever, except as an employee of the Company with the consent of the Company.
  - (g) Employee further covenants and agrees that during Employee's employment and for a period of two (2) years following the termination of Employee's employment relationship with the Company, either by Employee or the Company, for any reason whatsoever, Employee shall not use or disclose any Confidential Information, except as an employee of the Company with the consent of the Company.
13. **Covenant Not to Solicit Customers:** Employee recognizes and acknowledges that the identity and contact information for the Company's customers and knowledge of the specific needs of such customers are essential to the success of the Company's business and that, therefore, the Company's customer list and other customer information is an important, proprietary property of the Company, which has been developed by the Company at great effort and expense. Employee therefore covenants and agrees that in the event Employee's employment relationship with the Company is terminated, either by Employee or the Company, for any reason whatsoever, Employee shall not, for a period of two (2) years following the termination of Employee's employment with the Company, directly or indirectly, alone or in association with or on behalf of any other person or entity, solicit or accept business from or perform any service in competition with the Company for any person or entity who was a customer of the Company at any time during Employee's tenure.
  14. **Covenant Not to Solicit Employees:** Employee recognizes and acknowledges that the Company's Employees are essential to the success of the Company's business and that the Company's Employees have been recruited and trained by the Company at great effort and expense. Employee therefore covenants and agrees that in the event Employee's employment relationship with the Company is terminated, either by Employee or the Company, for any reason whatsoever, Employee shall not, for a period of two (2) years following the termination of Employee's employment with the Company, directly or indirectly, alone or in association with or on behalf of any other person or entity, solicit the employment of or induce to resign and person who was an Employee of the Company at the time the Employee left the Company.

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15. **Covenants are Independent:** The covenants on the part of Employee contained in Paragraphs 12, 13, and 14 hereof shall each be construed as agreements independent of each other and of any other provision in this Agreement and the unenforceability of one shall not effect the remaining covenants.
16. **Injunctive Relief:** Employee recognizes and agrees that a breach by Employee of the covenants contained in Paragraphs 12, 13, and 14 of this Agreement would cause immeasurable and irreparable harm to the Company. In the event of a breach or threatened breach of either of those covenants, the Company shall be entitled to temporary and permanent injunctive relief, restraining Employee from violating or threatening to violate such covenant. The Company and Employee agree that the relief described herein is in addition to such other and further relief as may be available to the Company at equity or by law. Nothing herein shall be construed as prohibiting the Company from pursuing any other remedies available to it for such breach or threatened breach, including the recovery of damages from Employee.
17. **Severability and Substitution of Valid Provisions:** To the extent that any provision or language of this Agreement is deemed unenforceable, by virtue of the scope of the business activity prohibited or the length of time the activity is prohibited, the Company and Employee agree that this Agreement shall be enforced to the fullest extent permissible under the laws and public policies of the State of South Carolina.
18. **Extension of Periods:** Each of the time periods described in Paragraphs 12, 13, and 14 shall be automatically extended by any length of time during which Employee is in breach of the corresponding covenant contained herein. The provisions of this Agreement shall continue in full force and effect throughout the duration of the extended periods.
19. **Reasonable Restraint.** It is agreed by the parties that the foregoing covenants by Employee in this Agreement are necessary for the legitimate business interests of the Company and impose a reasonable restraint on Employee in light of the activities and business of the Company on the date of the execution of this Agreement and the substantial compensation and authority provided Employee hereunder.
20. **Covenant of Good Faith and Fair Dealing.** The parties to this Agreement hereby covenant to deal with each other fairly and in good faith with regard to all items addressed herein above.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, the day and year first above written.

EMPLOYER:

PALMETTO BENEFIT MANAGEMENT, INC.

By: \_\_\_\_\_  
 Name: Brain Stritt  
 Its: President

EMPLOYEE:

By: \_\_\_\_\_

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# PALMETTO BENEFIT MANAGEMENT, INC.

## EMPLOYMENT AGREEMENT

Name:

If under 18 years old, signature of parent or guardian is required:

PARENT OR GUARDIAN:

By: \_\_\_\_\_

Name:

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PALMETTO BENEFIT MANAGEMENT, INC.  
EMPLOYMENT AGREEMENT

EXHIBIT A

Job Duties



PALMETTO BENEFIT MANAGEMENT, INC.  
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EXHIBIT B

Benefits

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