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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Brooks P. Goldsmith, Circuit Court Judge

Case No. 2009-CP-27-0331

Phillip Flexon, M.D. Respondent,

v.

PHC-Jasper, Inc., d/b/a Coastal Carolina
Medical Center, Coastal Carolina Medical
Center, Inc., Lifepoint Hospitals, Inc., and
Tenet Healthsystems, Inc., ... Defendants,

Of Whom Lifepoint Hospitals, Inc., is Appellant.

RECORD ON APPEAL
VOLUME I OF II

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) IN THE COURT OF COMMON PLEAS

1) CASE NO. 2009-CP-27-331

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Jasper County, SC

- Figure 1**

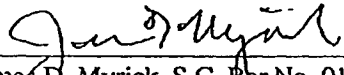
C. Mull
Chief Administrative Judge

Chief Administrative Judge

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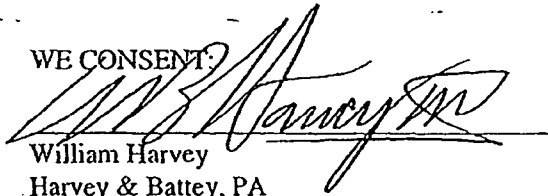
Consent Scheduling Order
Flexon v. PHC-Jasper, Inc. et al.
CASE NO. 2009-CP-27-331

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Consent Scheduling Order
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CASE NO. 2009-CP-27-331

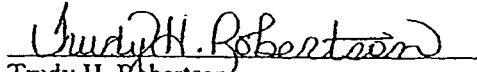
WE CONSENT:

A handwritten signature in black ink, appearing to read 'W. Harvey', is written over a horizontal line.

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Consent Scheduling Order
Flexon v. PHC-Jasper, Inc. et al.
CASE NO. 2009-CP-27-331

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STATE OF SOUTH CAROLINA

COUNTY OF JASPER

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2009-CP-27-331

Phillip Flexon, M.D.,

Plaintiff,

v.

PHC-Jasper, Inc., d/b/a Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc., and Tenet
Healthsystems, Inc.,

Defendants.

ORDER DENYING MOTION TO
COMPEL ARBITRATION

2010 JUL -7 AM 9:11
CLERK OF COURT
JASPER COUNTY

HC
PMB
This case came before me for a hearing on June 9, 2010, on the motion by Defendant Coastal Carolina Medical Center, Inc. (CCMC) to stay this action and for an order compelling arbitration. All parties were represented. For the reasons set forth herein, the Court denies this motion.

This controversy arises out of an employment agreement between the Plaintiff and Coastal Carolina Medical Center. Contained in this agreement are the following provisions:

13.4 This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of South Carolina. Any action or claim arising from, under or pursuant to this Agreement shall be brought in the courts, state or federal, within the State of South Carolina, and the parties expressly waive the right to bring any legal action or claims in any other courts.

13.5 Except as to the provisions contained in Articles VIII and IX, the exclusive jurisdiction of which shall rest with a court of competent jurisdiction in the state where the hospital is located, any controversy or claim arising out

of or related to this Agreement, or any breach thereof, shall be settled by arbitration in the County, in accordance with the rules and procedures of alternative dispute resolution established by the Alternative Dispute Resolution Service of the American Health Lawyers Association ("AHLA"), and judgment upon any award rendered may be entered in any court having jurisdiction thereof. Such arbitration shall be conducted before a single AHLA arbitrator selected jointly by the parties, or in the event the parties are unable to agree, designated by the AHLA.

#2
PMB

Under South Carolina law, an arbitration provision is unenforceable unless the contract states in capitalized, underlined typeface, on the first page of the contract that the agreement is subject to arbitration. S.C. Code Ann. §15-48-10. The parties stipulate that the arbitration provision in the Agreement at issue fails to comply with the South Carolina statute. They further agree that this provision is enforceable only if it falls under the Federal Arbitration Act, 9 U.S.C. §2. When a contract affects interstate commerce, the FAA preempts a state arbitration act's requirements. *Doctor's Assocs. V. Casarotto*, 517 U.S. 681, 683 S.Ct. 1652 (1996). South Carolina recognizes that the FAA preempts the notice requirements of the South Carolina Arbitration Act when interstate commerce is involved. *Thornton v. Trident Medical Center*, 357 S.C.91, 592 S.E.2d 50 (Ct. App. 2004).

In its brief, CCMC argues that *Thornton* mandates that the court grant its motion. To ascertain whether a transaction involves commerce within the FAA, the court must examine the agreement, the complaint, and the surrounding facts. "In all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case." *Thornton, supra*, 592 S.E.2d at 52. I find *Thornton* to be distinguishable from the present case.

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PMB

Thornton involved a "recruiting agreement" in which the plaintiff agreed to relocate his medical practice as a surgeon from Michigan to Charleston, SC. The agreement expressly provided that Thornton was being recruited from out of state to an existing medical practice. The South Carolina Court of Appeals noted that an essential requirement for performance under the agreement was Thornton's relocation from Michigan to South Carolina within a fixed period of time. Thornton was a resident of Michigan when the contract was entered. *Thornton v. Trident Medical Center, supra*, 592 S.E.2d at 53. The Court further noted the contract was denominated as and was intended as a recruiting agreement to induce Thornton's move across state lines. "The express purpose of the recruiting agreement was to provide a monetary incentive to induce Thornton to relocate his professional medical services practice from Michigan to South Carolina." *Id.*

In distinguishing its decision from the United States Supreme Court's decision in *Bernhardt v. Polygraphic Co.*, 350 U.S.198, 76 S.Ct. 273, 100 L.Ed. 199, the Court of Appeals in *Thornton* stated:

Unlike the recruiting agreement in the case *sub judice*, the agreement in *Bernhardt* did not contemplate any actions affecting commerce outside of Vermont. Performance under the contract in *Bernhardt* was-by its terms-confined to a single state. 592 S.E.2d at 53.

It is this analysis that similarly distinguishes *Thornton* from the present case. The agreement in question is clearly and expressly denominated an employment agreement, not a recruiting agreement. Secondly, nowhere in the plaintiff's employment agreement is there any mention of inducement or financial reward depending upon out-of-state activity. At the

hearing, the parties stipulated that, unlike the plaintiff in *Thornton* who was a resident of another state, Plaintiff Phillip Flexon was a resident of Jasper County at the time he entered into this Employment Agreement. As an example, on page 9 of the Employment Agreement, it states that notice to the physician is to be given at his home address at 2712 Levy Road, Hardeeville, South Carolina. The contract in question calls for local medical services to be performed by a Hardeeville resident at a medical facility located in Hardeeville.

Additionally, unlike the Recruiting Agreement in *Thornton*, the Employment Agreement at issue contains, at paragraph 13.4, the following language:

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Any action or claim arising from, under or pursuant to this Agreement shall be brought in the courts, state or federal, within the State of South Carolina, and the parties expressly waive the right to bring any legal action or claims in any other courts. The parties hereby consent to venue in any state or federal court within the State of South Carolina, having jurisdiction over the county for all purposes in connection with any action or proceeding commenced between the parties hereto in connection with or arising from this Agreement. (emphasis added)

This case is more closely aligned with the facts of the recent case of *Arkansas Diagnostic Center, P.A., v. Tahiri*, 370 Ark. 157, 257 S.W.3d 884 (2007). The contract in question in *Tahiri* was an employment agreement to provide medical services similar to the contract at issue herein. Indeed, in specifically distinguishing the case of *Thornton v. Trident Medical Center, supra.*, the Arkansas Supreme Court stated as follows:

The [South Carolina] court observed that an essential requirement for the performance under the agreement was Thornton's relocation from Michigan to South Carolina within a fixed period of time. It then noted that the contract "was

denominated as and was intended as a recruiting agreement to induce Thornton's move across state lines. (592 S.E.2d at 53.) We note that, here, it is only an employment agreement at issue which obligates Dr. Tahiri to perform medical services, and not a recruiting agreement.
257 S.W.3d at 891.

Like Plaintiff Phillip Flexon, the defendant in *Tahiri* was a resident of the community where the medical clinic was located. In ruling that the F.A.A. was not applicable, the Arkansas Supreme Court ruled as follows:

#5
p.6
Most specific to the employment contract at issue is that A.D.C. was a *local* clinic which contracted with Dr. Tahiri to perform medical services to its *local* patients. Based upon these factors, we hold that Dr. Tahiri's employment agreement did not facilitate A.D.C.'s alleged interstate business activities and did not evidence a transaction involving commerce. ... (emphasis in original)

Were this Court to hold otherwise, it would equate to a finding that the F.A.A. is applicable to any contract containing an arbitration clause, as it could be argued that every contract involves some nexus to interstate commerce, i.e. use of interstate telephone lines or of interstate mail. We do not interpret the jurisprudence concerning the F.A.A. to include any and every contract.
257 S.W.3d at 892.

There is no language in the physician employment agreement at issue which mentions, conditions, requires, affects or involves interstate commerce. It is this critical fact which distinguishes this case from *Thornton*. Further, unlike *Thornton*, the parties to this employment agreement specifically agreed to litigate any dispute arising from, under or pursuant to this agreement in the courts of South Carolina. The employment agreement at

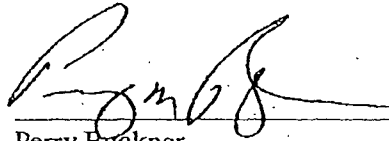
issue is between a Hardeeville resident and a Hardeeville medical center to provide specialized care to patients of Lowcountry South Carolina.

The party seeking to compel arbitration has the burden to prove that the contract at issue involves interstate commerce. *See, Arkansas Diagnostics Center, P.A., v. Tahiri, supra.*

On the record before this Court, Defendant fails to meet this burden.

Defendant's Motion to Stay and to Compel Arbitration is therefore **DENIED**.

AND IT IS SO ORDERED.



Perry Buckner
Presiding Judge, 14th Judicial Circuit

Walterboro, South Carolina

Dated: June 30, 2010

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER) CASE NO. 2009-CP-27-331

Philip Flexon, M.D.,

Plaintiff,

vs.

Amended Consent Scheduling Order

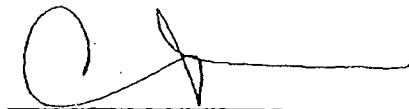
PHC-Jasper, Inc., d/b/a/ Coastal Carolina
Medical Center, Coastal Carolina Medical
Center, Inc., Lifepoint Hospitals, Inc. and
Tenet Healthsystems,

Defendants.

This matter comes before the Court, pursuant to Rules 16(e) and 26(f) of the South Carolina Rules of Civil Procedure. With the consent of all counsel of record, the following Scheduling Order is hereby established in this case:

1. Discovery shall be completed on or before February 15, 2013.
2. Mediation shall be completed by February 28, 2013.
3. This case is subject to being called for trial on or after March 18, 2013.
4. Depositions for use at trial may be taken until the case is called to trial.
5. This order may be modified by order of the Chief Administrative Judge upon Motion of a party.
6. The parties and this Court recognize that one of the Defendants may move to compel arbitration, and that this consent order in no way constitutes a waiver of Defendant's asserted right to compel arbitration. The parties agree that the conduct of written discovery or depositions will not be evidence of a waiver of Defendant's asserted right to arbitration. The Plaintiff also agrees that engaging in discovery pursuant to this order does not constitute prejudice or undue burden.

IT IS SO ORDERED.



Chief Administrative Judge

9-18, 2012
Charleston, South Carolina

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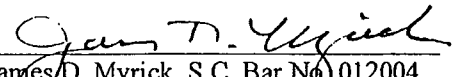
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Amended Consent Scheduling Order

Flexon v. PHC-Jasper, Inc. et al.

CASE NO. 2009-CP-27-331

WE CONSENT:


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Amended Consent Scheduling Order

Flexon v. PHC-Jasper, Inc. et al.

CASE NO. 2009-CP-27-331

WE CONSENT:

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Attorney for the Plaintiff

Amended Consent Scheduling Order

Flexon v. PHC-Jasper, Inc. et al.

CASE NO. 2009-CP-27-331

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Attorneys for LifePoint Hospitals, Inc.

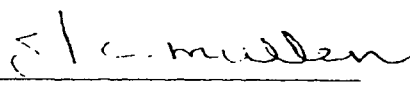
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER	)	CASE NO. 2009-CP-27-331
Philip Flexon, M.D.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Second Amended Consent
	)	Scheduling Order
PHC-Jasper, Inc., d/b/a Coastal Carolina	)	
Medical Center, Coastal Carolina Medical	)	
Center, Inc., Lifepoint Hospitals, Inc. and	)	
Tenet Healthsystems,	)	
	)	
Defendants.	)	

2013 FEB 13 AM 9:41
 HANDEET L. J. JON
 CLERK OF COURT
 JASPER COUNTY, SC

This matter comes before the Court, pursuant to Rules 16(e) and 26(f) of the South Carolina Rules of Civil Procedure. With the consent of all counsel of record, the following Scheduling Order is hereby established in this case:

1. Discovery shall be completed on or before May 29, 2013.
2. Mediation shall be completed by June 14, 2013.
3. This case is subject to being called for trial on or after July 1, 2013.
4. Depositions for use at trial may be taken until the case is called to trial.
5. This order may be modified by order of the Chief Administrative Judge upon Motion of a party.
6. The parties and this Court recognize that one of the Defendants may move to compel arbitration, and that this consent order in no way constitutes a waiver of Defendant's asserted right to compel arbitration. The parties agree that the conduct of written discovery or depositions will not be evidence of a waiver of Defendant's asserted right to arbitration. The Plaintiff also agrees that engaging in discovery pursuant to this order does not constitute prejudice or undue burden.

IT IS SO ORDERED.


 Chief Administrative Judge

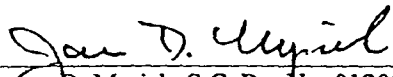
Dated: 2-1-2013
 Charleston, South Carolina

Second Amended Consent Scheduling Order

Flexon v. PHC-Jasper, Inc. et al.

CASE NO. 2009-CP-27-331

WE CONSENT:


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Attorneys for Tenet Healthsystems and Coastal Carolina Medical Center, Inc.

Second Amended Consent Scheduling Order

Flexon v. PHC-Jasper, Inc. et al.

CASE NO. 2009-CP-27-331

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Second Amended Consent Scheduling Order

Flexon v. PHC-Jasper, Inc. et al.

CASE NO. 2009-CP-27-331

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STATE OF SOUTH CAROLINA

COUNTY OF JASPER

Philip Flexon, M.D.,

Plaintiff,

vs.

PHC-Jasper, Inc., d/b/a/ Coastal Carolina
Medical Center, Coastal Carolina Medical
Center, Inc., Lifepoint Hospitals, Inc. and
Tenet Healthsystems,

Defendants.

) IN THE COURT OF COMMON PLEAS

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) CASE NO. 2009-CP-27-331

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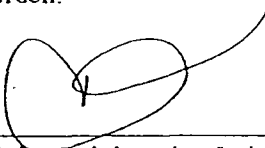
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Third Amended Consent Scheduling Order

This matter comes before the Court, pursuant to Rules 16(e) and 26(f) of the South Carolina Rules of Civil Procedure. With the consent of all counsel of record, the following Scheduling Order is hereby established in this case:

1. Discovery shall be completed on or before September 23, 2013.
2. Mediation shall be completed by October 1, 2013.
3. This case is subject to being called for trial on or after November 1, 2013.
4. Depositions for use at trial may be taken until the case is called to trial.
5. This order may be modified by order of the Chief Administrative Judge upon Motion of a party.
6. The parties and this Court recognize that one of the Defendants may move to compel arbitration, and that this consent order in no way constitutes a waiver of Defendant's asserted right to compel arbitration. The parties agree that the conduct of written discovery or depositions will not be evidence of a waiver of Defendant's asserted right to arbitration. The Plaintiff also agrees that engaging in discovery pursuant to this order does not constitute prejudice or undue burden.

IT IS SO ORDERED.



Chief Administrative Judge

7-2, 2013
Charleston, South Carolina

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Third Amended Consent Scheduling Order

Flexon v. PHC-Jasper, Inc. et al.

CASE NO. 2009-CP-27-331

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Third Amended Consent Scheduling Order

Flexon v. PHC-Jasper, Inc. et al.

CASE NO. 2009-CP-27-331

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Third Amended Consent Scheduling Order

Flexon v. PHC-Jasper, Inc. et al.

CASE NO. 2009-CP-27-331

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STATE OF SOUTH CAROLINA
COUNTY OF JASPER

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2009-CP-27-331

Phillip Flexon, M.D.,

Plaintiff,

v.

PHC-Jasper, Inc., d/b/a Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc., and Tenet
Healthsystems, Inc.,

Defendants.

ORDER

This matter came before me for hearing in Beaufort on September 9, 2013, on Defendant Lifepoint Hospitals, Inc.'s (Lifepoint) Renewed Motion to Compel Arbitration and Defendant PHC-Jasper, Inc., d/b/a/ Coastal Carolina Medical Center's (CCMC) Motion for Relief Pursuant to Rule 60(b). Lifepoint was represented by Trudy Robertson, Esquire and Joseph Belton, Esquire. CCMC was represented by James Myrick, Esquire. Plaintiff was represented by William Harvey, Esquire. For the reasons set forth below, I find that the law of the case doctrine relative to the decision of the South Carolina Court of Appeals applies to these motions, and therefore these motions are denied.

A procedural history of this case is necessary for full consideration of these motions. This case was commenced with the filing of the Summons and Complaint on May 26, 2009. As alleged in the Complaint, this matter arises from an Employment Agreement (the Agreement) between the Plaintiff and Coastal Carolina Medical Center (CCMC) dated December 18, 2006. At the time the Agreement was negotiated and executed, CCMC was

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owned by Lifepoint. The Agreement contains a provision prohibiting assignment without mutual consent. It is alleged by the Plaintiff that, at the time the Agreement was being negotiated, Lifepoint was in active discussions with Defendant Tenet for the sale of the hospital, which Lifepoint failed to disclose to the Plaintiff. That sale occurred in June, 2007, at the very time that Plaintiff began his employment. Plaintiff alleges he would not have considered any employment relationship with Tenet, as Tenet had a very negative reputation to the Plaintiff as a hospital owner. After the sale of the hospital by Lifepoint to Tenet was completed, in July, 2007, CCMC (then owned by Tenet) presented Plaintiff with an Amendment to and Assignment of Physician Employment Agreement (the Assignment) which purported to assign the Employment Agreement to Tenet. Plaintiff refused to sign the Assignment, and in August 2008, delivered a formal notice of termination for cause, pursuant to the Agreement. This action followed.

In response to the Complaint, Defendant Tenet Healthsystems, Inc. filed a Motion to Dismiss alleging that the Complaint failed to state a cause of action. After a hearing on November 30, 2009, the Court denied this Motion to Dismiss.

On October 6, 2009, CCMC served Interrogatories and Requests for Production on the Plaintiff. Similarly Defendant Lifepoint served Interrogatories and Requests for Production upon the Plaintiff on April 16, 2010. Nowhere in any of these discovery requests, or in any correspondence or email communication before the court was there any mention that these discovery requests were in any way limited because of the affirmative defenses alleged by all defendants that this action was subject to mandatory arbitration. Plaintiff responded to the discovery requests of CCMC on April 19, 2010. Defendant Lifepoint



responded to Plaintiff's initial discovery requests on October 30, 2009, and on November 13, 2009, without any reservation or limitation.

On October 21, 2009, CCMC filed a Motion to Compel Arbitration pursuant to the terms of the Agreement. In support of this Motion, CCMC submitted a Memorandum in Support. Nowhere in this memorandum was there any mention of the desire or attempt to take the deposition of the Plaintiff, generally or with reservation of any rights. Prior to the hearing on this Motion to Compel Arbitration, neither counsel made any attempt to take the deposition of the Plaintiff.

A hearing was held on June 9, 2010 before Judge Perry Buckner. The parties submitted the transcript of this earlier hearing in connection with the present motions. It is noteworthy that, in the argument before Judge Buckner, counsel for CCMC made no mention that he needed, or wanted, to take the deposition of the Plaintiff, or that he had made any attempt to take the Plaintiff's deposition prior to the hearing.

At the time of the June 9, 2010 hearing, Defendant Lifepoint had not filed a motion to compel arbitration. However, counsel for Lifepoint acknowledged before Judge Buckner that any such motion would be identical to that of CCMC:

MS. ROBERTSON: Judge, if I may; I'm not presenting argument. This is not our motion today, but we pled this as an affirmative defense as well, that this matter should be submitted to arbitration. I think it goes to arbitration and it should. We support this motion. It goes as to all parties. If I have to separately move, I can do that, but...

THE COURT: I think you ought to do that, because obviously the plaintiff isn't on notice of that. I understand that's your position, but all I can deal with is this motion today. But I understand that. I think you need to file your own motion. And I realize you pled it. But he wasn't prepared to argue, except as against this motion today. It might be an identical argument, but....

MS. ROBERTSON: I think that likely it is. So I will make it.



One week later, on June 16, 2010, and two weeks before the ruling by Judge Buckner on the identical motion by CCMC, Lifepoint filed its Motion to Compel Arbitration.

Significantly, Lifepoint's Motion states as follows:

This Motion will be based on the entire record in the within matter and any additional memorandum which may be filed hereafter. Defendant Lifepoint further, pursuant to Rule 10, South Carolina Rules of Civil Procedure, adopts by reference as if fully set forth herein, the Motion to Stay and for Order Compelling Arbitration and accompanying memorandum in support filed on October 23, 2009, by co-Defendant Coastal Carolina Medical Center, Inc....All of these causes of action, without doubt, arise out of or are related to Plaintiff's employment agreement. As such, this entire action should be subject to arbitration.

As with the motion by CCMC, and the arguments by both counsel at the hearing before Judge Buckner, the motion and supporting memorandum by Lifepoint did not mention the need or attempt to depose the Plaintiff as a condition to a ruling thereon.

By Order dated June 30, 2010, Judge Buckner denied the motion by Defendant CCMC to compel arbitration, stating in part as follows:

There is no language in the physician employment agreement at issue which mentions, conditions, requires, affects or involves interstate commerce. It is this critical fact which distinguishes this case from *Thornton* [*Thornton v. Trident Medical Center*, 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2004)]. Further, unlike *Thornton*, the parties to this employment agreement specifically agreed to litigate any dispute arising from, under or pursuant to this agreement in the courts of South Carolina. The employment agreement at issue is between a Hardeeville resident and a Hardeeville medical center to provide specialized care to patients of Lowcountry South Carolina.

On July 29, 2010, Defendant CCMC filed its Notice of Appeal to the South Carolina Court of Appeals. By reported decision dated March 7, 2012, the Court of Appeals affirmed the lower court's Order, stating in part as follows:



We agree with the trial court that the facts of this case are more akin to those in *Tahiri*. [*Arkansas Diagnostic Center, P.A. v. Tahiri*, 257 S.W.3d 884 (Ark. 2007)]. Under the facts surrounding this agreement, Flexon was a South Carolina resident, and Coastal hired him to provide medical services "at the medical practice office located at 1010 Medical Center Drive, Hardeeville, South Carolina...and such other practice sites in Beaufort and Jasper counties as may be reasonably designated by [PHC] from time to time...." We agree with the trial court's finding that the Agreement and surrounding facts did not implicate interstate commerce. Therefore, the FAA did not apply to the Agreement. See *Thornton*, 357 S.C. at 96, 592 S.E.2d at 52 ("Our courts consistently look to the essential character of the contract when applying the FAA."). *Phillip Flexon, M.D. v. PHC-Jasper, Inc.*, 399 S.C. 83, 89, 731 S.E.2d 1, 4 (Ct. App. 2012). (emphasis supplied)

On March 19, 2012, CCMC filed its Petition for Rehearing and Suggestion of Rehearing En Banc with the Court of Appeals. Significantly, in this Petition for Rehearing, CCMC argued as follows:

In his Complaint, Flexon alleges that, "In order to sign Exhibit 1 [the employment agreement]," he had to "discontinue, close and leave an established practice in Savannah, Georgia, where he had privileges at surgical hospitals." (R. at 9.) The Complaint itself, therefore alleges substantial interstate activity as a consequence of the Agreement. Flexon alleges he lost referrals from Savannah doctors several months after he joined CCMC; if this is true, Flexon was receiving referrals across state lines in support of his practice at CCMC. (R. at 81) ("[A]fter the sale of the hospital to Tenet was announced in June...many Savannah doctors stopped referring patients" to Flexon.) During his employment with CCMC, Flexon alleged he took his more complicated surgical cases across state lines to Memorial Hospital in Savannah, Georgia (R. at 83) ("The availability of equipment became so unreliable that Plaintiff started taking him [sic] complicated cases to Memorial."). Both performing surgery in Georgia and accepting referrals from Georgia physicians in furtherance of Flexon's employment in South Carolina implicate interstate commerce. These facts contradict the Court's understanding that Flexon's employment was purely local in nature.

There is no mention that the Defendants' motions, or the court's consideration, was in any way hampered or impacted by the failure or inability to take the deposition of the Plaintiff.



By Order filed July 23, 2012, the Court of Appeals ruled "the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing."

On August 29, 2012, the Court of Appeals issued its Remittitur of this case to the Jasper Court of Common Pleas.

There is only one employment agreement in this case. It was negotiated and signed by Defendant Lifepoint. Although the Motion to Compel Arbitration was filed, argued and appealed by CCMC, as acknowledged by counsel for Lifepoint the issues and argument are identical for Lifepoint.

Lifepoint now points to statements made in the Plaintiff's deposition which was taken on April 30, 2013. Specifically, Lifepoint cites to the following testimony:

[t]he practice always existed in both states before and after. It really did. I mean, it was--you know-- it--by--by accident there's a river and a state line, but the practice always involved both states [Plaintiff's Depo. p. 269]. [The Plaintiff stated that he had] "plenty of patients coming from Georgia. [Plaintiff's Depo. p. 373] Lifepoint's Reply Memorandum at 4.

It is alleged in the Complaint that Plaintiff had a medical practice in Savannah, Georgia prior to the execution of the employment agreement. It is also alleged that the Plaintiff performed surgeries at Memorial Hospital in Savannah while employed by the Defendants. As acknowledged by CCMC in its appeal, the parties knew that Plaintiff was receiving referrals and other patients from the Savannah area while he was working at the Defendant's hospital. With these facts before it, the South Carolina Court of Appeals ruled that "We agree with the trial court's finding that the Agreement and the surrounding facts did



not implicate interstate commerce. Therefore, the FAA did not apply to the Agreement.”

Phillip Flexon v. PHC-Jasper, Inc., 399 S.C.83, 89, 731 S.E.2d 1, 4 (Ct. App. 2012).

Under the law of the case doctrine, “a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.” *Judy v. Martin*, 381 S.C. 455, 458–59, 674 S.E.2d 151, 153 (2009) (citing *Bakala v. Bakala*, 352 S.C. 612, 632, 576 S.E.2d 156, 166 (2003)). “The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case.” *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957). *Sloan Const. Co., Inc. v. Southco Grassing, Inc.*, 395 S.C. 164, 169-70, 717 S.E.2d 603, 606 (2011).

Lifepoint argues that the “law of the case doctrine” does not apply in this case because the facts established by the quoted portions of the Plaintiff’s deposition are substantially different from those that were before and considered by the circuit court and the Court of Appeals with regard to CCMC’s motion to compel arbitration, citing the case of *Nelson v. Charleston & W.C. Ry. Co.*, 231 S.C. 351, 98 S.E.2d 798 (1957)(“Of course, the doctrine of ‘the law of the case’ has no application where the facts relating to the question decided are substantially different....”). Similarly, in its present Motion for Relief pursuant to rule 60(b), CCMC argues that the quoted portions of the Plaintiff’s deposition create a situation where it would be inequitable to bind CCMC by the rulings on its earlier motion.

Having read the written submissions by the parties, and having heard extensive arguments from counsel, I find that the facts and testimony from the Plaintiff’s deposition argued by the Defendants herein are not substantially different than those before the court in



the prior rulings. Further , if the Defendants believe that the Plaintiff's deposition was necessary for a full review of this issue , they could have sought to present that contention to the lower and appellate courts when this issue was before them. Defendants could have taken a limited deposition of Plaintiff prior to the earlier rulings without invoking any issue of waiver or prejudice. That they did not then cannot now be grounds for reargument of issues about which the parties spent two years litigating in the Court of Appeals.

The Court of Appeals has decided that this "employment agreement and surrounding facts did not implicate interstate commerce. Therefore , the FAA did not apply to the Agreement. Phillip Flexon , M.D. v. PHC-Jasper , Inc. , 399 S.C. 83 , 89 , 731 S.C. 1 , 4 (Ct. App. 2012). The " surrounding facts " are not substantially different now than they were before the earlier courts. The decision of the Court of Appeals on the applicability of the FAA to this Agreement is the law of the case. Therefore CCMC's motion for relief from judgment under SCRCP 60 is denied as is Lifepoint's Motion To Compel Arbitration.

AND IT IS SO ORDERED



Brooks P. Goldsmith
Circuit Judge

Lancaster , S.C.

September 24 2013

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

Philip Flexon ,M.D.

Plaintiff,

vs.

PHC-Jasper, Inc., d/b/a Coastal Carolina
Medical Center, Inc., Lifepoint Hospitals,
Inc., and Tenant Healthsystems,

Defendants.

IN THE COURT OF COMMON PLEAS

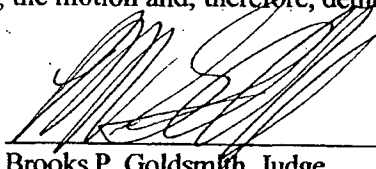
CIVIL CASE NO: 2009 CP 27 0331

ORDER

2013 OCT 28 AM 9:45
CLERK OF COURT
JASPER COUNTY S.C.
2009 CP 27 0331

This matter comes before the Court upon Lifepoint Hospitals, Inc.'s Motion to Reconsider the Court's Order, that denied it's motion for relief from judgment.

After considering the arguments set for in memoranda submitted by each party's counsel, this Court finds there is no basis for granting the motion and, therefore, denies this motion.


Brooks P. Goldsmith, Judge

Edisto Island, South Carolina
October 24, 2013

FILED
10/28/13

R0033

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2009-CP-27- 331

Philip Flexon, M.D.,

Plaintiff,

v.

PHC-Jasper, Inc., d/b/a Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc., and Tenet
Healthsystems, Inc.,

Defendants.

COMPLAINT
(JURY TRIAL DEMANDED)

FILED
2009 MAY 26 AM 10:19
CLERK OF COURT
JASPER COUNTY SC

The Plaintiff above named, complaining of the Defendants herein, would show as follows:

1. Plaintiff is a resident and citizen of Jasper County, South Carolina, and at all times was a Medical Doctor duly licensed in the states of Georgia and South Carolina, and practicing in the specialty of ENT, and the sub-specializations of Otolaryngology and Head and Neck Oncology.
2. Defendant PHC-Jasper, Inc. (hereinafter PHC) is a corporation organized and existing under the laws of the State of South Carolina, with its principal place of business in Jasper County, South Carolina, which at all times relevant herein was doing business as Coastal Carolina Medical Center, located in Jasper County, South Carolina. At all times relevant herein, PHC was the wholly owned subsidiary of defendant Lifepoint Hospitals, Inc.
3. Lifepoint Hospitals, Inc. (hereinafter Lifepoint) is, upon information and belief, a corporation organized and existing under the laws of the State of Tennessee, with its

principal place of business in Brentwood, Tennessee; at all times relevant herein, Lifepoint was the owner and operator of Coastal Carolina Medical Center.

4. Coastal Carolina Medical Center, Inc. (hereinafter Coastal) is a corporation organized and existing under the laws of the state of South Carolina, with its principal place of business in Jasper County, South Carolina. At all times herein, Coastal Carolina Medical Center, Inc. was wholly owned and operated by Tenet Healthsystems, Inc.

5. Tenet Healthsystems, Inc. is, upon information and belief, a corporation organized and existing under the laws of the state of Delaware, and at all times relevant herein was the owner and operator of Coastal Carolina Medical Center, Inc.

6. This court has jurisdiction over the parties and venue is properly situated in Jasper County.

7. Heretofore, on or about December 18, 2006, Plaintiff entered into a Physician Employment Agreement with Lifepoint and/or PHC (hereinafter collectively referred to as Employer), as owner of or doing business as Coastal Carolina Medical Center. A copy of this Agreement is attached hereto as Exhibit 1 and incorporated herein. The term of Exhibit 1 was for a period of five (5) years.

8. In order to sign Exhibit 1, Plaintiff had to discontinue, close and leave an established practice in Savannah, Georgia, where he had privileges at surgical hospitals. Plaintiff was enticed to sign Exhibit 1 by the representations of employees and agents of Lifepoint that he would enjoy a long relationship with Lifepoint and Coastal Carolina Medical Center.

9. As part of the negotiations of Exhibit 1, representatives and agents of Employer represented to Plaintiff that the hospital would purchase the equipment needed by Plaintiff in the operating room, including a CO2 laser machine and a navigational system for sinus surgery. Said representatives further represented that the hospital would recruit and hire an audiologist to be part of Plaintiff's practice.

10. Further, as part of Exhibit 1, Employer agreed to conduct all billing from patients or third party payors for all services rendered by Plaintiff, "regardless of the location where any such services may be rendered by [Plaintiff]."

11. To accentuate Plaintiff's understanding that his employment would solely be with Employer, and his professional relationship would remain solely with Coastal Carolina Medical Center (as owned by Employer), paragraph 13.3 of Exhibit 1 states, in part, "no transfer, assignment or other modification affecting the terms or conditions of the contract will be effected unless extenuating circumstances are shown to exist, as determined by the South Carolina Department of Public Health, and approved by the U.S. Attorney General in accordance with applicable federal rules and regulations."

12. No such extenuating circumstances existed which would allow for the transfer, assignment or other modification of Exhibit 1.

13. Upon information and belief, at the time of the signing of Exhibit 1, and certainly before the Effective Date of Exhibit 1, March 15, 2007, Lifepoint was in active negotiations with Tenet for the purchase by Tenet of the assets of PHC, including the hospital Coastal Carolina Medical Center. Knowing that Plaintiff would have to close and terminate an established practice in Savannah in order to fulfill his obligations under Exhibit 1, there

arose a duty by Employer to disclose to Plaintiff the intent to negotiate and sell PHC and Coastal Carolina Medical Center to Tenet, or to another entity.

14. Employer failed to disclose to Plaintiff the intent to sell PHC and Coastal Carolina Medical Center to Tenet, or to another entity, but instead utilized the contract with the Plaintiff, the highly specialized services provided by the Plaintiff, and the revenue to be produced by such services, as a means to enhance the value of Coastal Carolina Medical Center to Tenet as a prospective purchaser.

15. Upon the commencement of Plaintiff's practice at Coastal Carolina Medical Center on March 15, 2007, and Plaintiff's fulfillment of all conditions and covenants attendant with Exhibit 1, Employer refused to honor its representation to purchase the equipment necessary by Plaintiff to properly practice his specialized field of medicine.

16. Upon the commencement of Plaintiff's practice at Coastal Carolina Medical Center on March 15, 2007, and Plaintiff's fulfillment of all conditions and covenants attendant with Exhibit 1, Employer refused to recruit and hire an audiologist as part of Plaintiff's practice.

17. On or about June 30, 2007, Lifepoint sold PHC and Coastal Carolina Medical Center to Defendant Tenet Healthsystems, Inc. On or about July 3, 2007, Tenet presented to the Plaintiff an Amendment to and Assignment of Physician Employment Agreement, attached hereto as Exhibit 2 and incorporated herein by reference, thereby acknowledging that the Employment Agreement, Exhibit 1, was non-assignable per its terms. Plaintiff refused to sign Exhibit 2 and has not agreed to an assignment of Exhibit 1 to Tenet or any other entity.

18. Rather, per his Employment Agreement with Employer, Plaintiff continued his practice of medicine at Coastal Carolina Medical Center, and at his adjacent office.

19. In breach of their contract, Exhibit 1, commencing on July 1, 2007, Employer ceased all billings for medical services performed by Plaintiff, and ceased submitting charges for Plaintiff's medical services to Medicare, Medicaid and private insurance carriers.

20. In breach of their contract, Exhibit 1, Employer repeatedly failed to provide Plaintiff with reasonable personnel staffing and support, such as billing and marketing. In November, 2007, Employer terminated Plaintiff's practice manager without Plaintiff's knowledge or consent and failed to reinstate him after Plaintiff's repeated protests. On December 31, 2007, Employer terminated Plaintiff's Billing Director without Plaintiff's knowledge or consent. For over six months, and despite Plaintiff's repeated protests and meetings, Employer failed to provide a Practice Manager, a Receptionist or Scheduler, and no billing management, and forced Plaintiff to attempt a specialized medical practice with only one employee.

21. As a result, on August 15, 2008, Plaintiff, through his attorneys, delivered to Employer a formal notice of termination for cause pursuant to Section 6.2.1 of Exhibit 1, a copy of which is attached hereto as Exhibit 3 and incorporated herein. Per the terms of Exhibit 1, Employer had thirty days within which to cure these material breaches. More than 30 days elapsed and no cure was made. At that time, on September 14, 2008, Exhibit 1 was terminated by Plaintiff for cause.

22. As a result of these material breaches by Employer, Plaintiff suffered substantial loss of income, loss of earning potential, loss of patient population, and loss of

professional reputation, and had to incur time, expense and loss of income-producing services to move his practice to Savannah.

23. On or about May 4, 2009, Plaintiff received the letter attached hereto as Exhibit 4 and incorporated herein, claiming that Plaintiff owes Coastal Carolina Medical Center (now owned by Coastal and/or Tenet) an amount exceeding \$725,000, and further claiming that Plaintiff must cease his current practice of medicine in Savannah, Georgia. At the time of Exhibit 4, Coastal Carolina Medical Center was (and continues to be) owned by Defendants Coastal Carolina Medical Center, Inc. and/or Tenet. Plaintiff has no contractual or other relationship with either Coastal Carolina Medical Center, Inc. or Tenet.

FOR A FIRST CAUSE OF ACTION
(BREACH OF CONTRACT AGAINST LIFEPOINT AND PHC)

24. The allegations of paragraphs 1-23 above are incorporated herein as fully and effectually as if set forth verbatim.

25. Employer breached their employment agreement with Plaintiff.

26. As a result of these material breaches, Plaintiff suffered substantial loss of income, loss of earning potential, loss of patient population, and loss of professional reputation, and had to incur time, expense and loss of income-producing services to move his practice to Savannah, all to his detriment and damage in an amount to be determined by the Court and Jury.

FOR A SECOND CAUSE OF ACTION
(FRAUDULENT MISREPRESENTATION)

27. The allegations of paragraphs 1-26 above are incorporated herein as fully and effectually as if set forth verbatim.

28. Employer, by and through their officers and agents made certain representations to Plaintiff in the course of negotiations of Exhibit 1 concerning the long term nature of the pending employment relationship, and the intent of said defendants to purchase and supply to Plaintiff various equipment, supplies and personnel.

29. Further, because of the nature of the pending employment relationship, the upheaval that such relationship would cause to Plaintiffs then-existing practice of medicine, and the affirmative efforts by the Plaintiff to ensure that Exhibit 1 was non-assignable, there arose a duty on behalf of Employer to disclose the fact that Employer was in negotiations with Coastal and/or Tenet for the sale of the hospital, which facts were not within the knowledge of, or capable of being discovered by, Plaintiff.

30. Employer, by and through their agents and/or employees, made material misrepresentations and also intentionally failed to disclose material facts. Employer knew these misrepresentations were false and, by their failure to disclose, acted with reckless disregard for the truth or falsity. Employer intended that its representations and/or failure to disclose would be acted upon by the Plaintiff. Plaintiff relied upon the representations and/or silence of Employer, had the right to rely thereon, and was ignorant of the falsity of the representations and/or silence.

31. As a proximate result, the Plaintiff sustained the injuries and damages set forth in paragraph 26 above, and is entitled to damages, both actual and punitive, in an amount to be determined by the court and jury.

FOR A THIRD CAUSE OF ACTION
(BREACH OF GOOD FAITH AND FAIR DEALING)

32. The allegations of paragraphs 1-31 above are incorporated herein as fully and effectually as if set forth verbatim.

33. Under the circumstances presented, employer breached their duty to the Plaintiff of good faith and fair dealing.

34. As a result thereof the Plaintiff sustained the injuries and damages set forth in paragraph 26 above, and is entitled to damages, both actual and punitive, in an amount to be determined by the court and jury.

FOR A FOURTH CAUSE OF ACTION
(DECLARATORY JUDGMENT)

35. The allegations of paragraphs 1-34 above are incorporated herein as fully and effectually as if set forth verbatim.

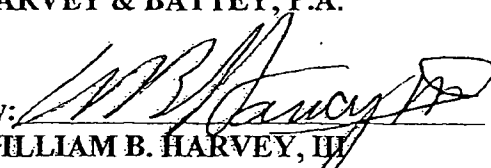
36. By virtue of the letter, Exhibit 4, a justiciable controversy exists between the Plaintiff, and the current owners of Coastal Carolina Medical Center, i.e. defendants Coastal and/or Tenet, on the following issues: (1) whether the employment agreement, Exhibit 1, was terminated for cause on or about September 14, 2008, thereby relieving the Plaintiff from any restrictions thereof; (2) whether the employment agreement, Exhibit 1, is not assignable, and therefore Plaintiff owes no duties to Coastal and/or Tenet; and (3) if

Exhibit 1 is still valid and enforceable, which is denied, whether the Covenant Not to Compete therein prevents the Plaintiff from practicing medicine in his sub-specialty at Memorial Medical Center in Savannah, Georgia.

37. Plaintiff therefore prays for a declaratory judgment that (1) the employment agreement, Exhibit 1, was terminated for cause on or about September 14, 2008, thereby relieving the Plaintiff from any restrictions thereof; (2) the employment agreement, Exhibit 1, is not assignable, and was not assigned, and therefore Plaintiff owes no duties to Coastal and/or Tenet; and (3) if Exhibit 1 is still valid and enforceable, which is denied, the Covenant Not to Compete therein does not prevent the Plaintiff from practicing medicine in his sub-specialty at Memorial Medical Center in Savannah, Georgia, under all the circumstances at issue in this case.

WHEREFORE, Plaintiff prays for judgment against Lifepoint and PHC under the first three causes of action for damages, both actual and punitive, in an amount to be determined by the Court and Jury, and for a declaratory judgment against Coastal and Tenet under the fourth cause of action for the relief set forth in paragraph 37 above, for the costs of this action, and for such other and further relief as this Court may deem just and proper.

HARVEY & BATTEY, P.A.

By: 

WILLIAM B. HARVEY, III

Post Office Box 1107

Beaufort, South Carolina 29901-1107

843-524-3109 telephone

843-524-6973 telefax

Attorneys for Plaintiff

Beaufort, South Carolina

Dated: May 21, 2009

PHYSICIAN EMPLOYMENT AGREEMENT
LPH-460

Ref. No. 12/12/06

THIS PHYSICIAN EMPLOYMENT AGREEMENT (the "Agreement") is made and entered into this 18 day of Dec 2006, by and between Coastal Carolina Medical Center ("Employer"), and Phillip B. Flexon, M.D., ("Physician").

RECITALS

WHEREAS, Employer is engaged in the business of operating and managing medical practices and other health care services in Jasper County, South Carolina (the "County");

WHEREAS, Physician is a licensed physician specializing in otolaryngology; and

WHEREAS, Employer desires to employ Physician, and Physician desires to be employed by Employer, to render professional physician services, in accordance with the terms and conditions specified herein.

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual promises and conditions set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Employer and Physician, intending to become legally bound, agree as follows:

ARTICLE I
ENGAGEMENT

1.1 Employer engages Physician, and Physician accepts such engagement, as a physician primarily at the medical practice office located at 1010 Medical Center Drive, Hardoeville, South Carolina 29927, (the "Practice"), and such other practice sites in Beaufort and Jasper counties as may be reasonably designated by Employer from time to time, and to render professional physician services to patients, in accordance with the terms and conditions of this Agreement.

ARTICLE II
TERM
March 14, 2012

2.1 Term. The Agreement term initially shall be for five (5) year(s) (the "Agreement Term"), commencing on the Effective Date, defined below, and continuing until September 30, 2011, subject to earlier termination of this Agreement pursuant to Article VI [Termination] herein. The Effective Date means the date that Physician begins providing physician services for Employer pursuant to this Agreement, which date shall be October 1, 2006. The Effective Date is contingent upon Physician having obtained provider numbers for Medicare, Medicaid and insurance companies participating with Employer, but no later than ninety (90) days after the complete execution of this Agreement.

March 15, 2007

ARTICLE III
DUTIES AND SERVICES

3.1 Work Schedule. During the Agreement Term, Physician agrees to devote his/her full professional working time and attention, at a minimum of forty (40) hours per work week at the medical practice office, to the practice of medicine for the benefit of Employer under the terms of this Agreement. Employer shall establish Physician's work schedule and on-call schedule, which schedule shall be inclusive of hours providing patient care at the facilities of Employer, any and all Active Medical Staff obligations, and administrative duties. Physician's Emergency Department unassigned patient call schedule responsibility shall be dictated by the Medical Staff's Rules/Regulations of Coastal Carolina Medical Center.

3.2 Non-Physician Personnel. Employer will provide Physician with a reasonable amount of non-physician personnel including, but not limited to, nurses, technicians, secretarial staff, and other medical and non-medical personnel, to assist Physician in the performance of his/her duties. Physician shall report to, consult with, and use the input of Employer regarding the hiring and firing of medical staff who work within the Practice and the overall operations of the Practice. All final decisions regarding hiring and firing of Practice personnel shall rest with Employer.

3.3 Availability and Duties. Physician shall be responsible for such duties as assigned to him or her from time to time by Employer. Physician shall make himself available to provide otolaryngology services to, and treat patients of Employer, whether such patients are outpatients or inpatients. Physician hereby agrees to devote his/her full working time and attention, together with Physician's best endeavors and skill, for the interest, benefit and best advantage of Employer and shall provide services on behalf of Employer in a manner that shall maintain the productivity of the Practice. Physician shall provide all professional medical services in accordance with

the policies and procedures established by Employer, and the appropriate standards of care of the community. Physician shall have the authority to refuse to treat a specific patient or to dismiss any particular patient if the patient has been abusive, disruptive or threatening or has refused to comply with Physician's orders, or for other reasons of a similar nature. In the case of any such dismissal, Physician agrees that appropriate notice by certified letter shall be sent to such patient and emergency care shall be provided by Physician to such patient for an appropriate period after such dismissal. Notwithstanding the foregoing, Physician agrees that he will not refuse to treat a patient and will not discriminate with respect to quality of care of a patient or otherwise on the basis of such patient's race, color, national origin, ancestry, religion, sex, marital status, sexual orientation, age, disability or medical condition, or as otherwise provided by law. Except as otherwise stated herein, Physician specifically understands that Employer shall have the final authority over the acceptance or refusal of any person for whom professional services may be rendered and the amount of fees to be charged to such patients.

3.4 Patient Care. Nothing in the Agreement shall be interpreted to dictate Physician's practice of medicine, delivery of direct patient care or independent judgment in the practice of medicine. Physician shall have complete control over the diagnosis and treatment of patients and neither Employer nor any employee of Employer shall exercise any direct supervision or control over the individual treatment of the patient. Physician agrees that Physician's treatment and diagnosis of patients will be consistent with any rules and regulations promulgated by Employer dealing with the general treatment of patients.

3.5 Performance Standards. In performing services under this Agreement, Physician shall comply with the following Performance Standards:

- 3.5.1 promote cooperation and teamwork among other physicians and other employees and personnel of Employer;
- 3.5.2 develop standardization of otolaryngology practices and procedures;
- 3.5.3 attend all required management meetings;
- 3.5.4 assist Employer as requested in the efficient and effective day to day management of the Practice;
- 3.5.5 respond to patient and referring physician needs and concerns regarding patient diagnosis and treatment as expeditiously as reasonably possible;
- 3.5.6 fully support Employer's overall quality improvement and quality assurance initiatives;
- 3.5.7 adhere to all reasonable Policies and Procedures adopted by Employer;
- 3.5.8 adhere to such other performance standards as established by Employer from time to time.

3.6 Location(s) for Services. Physician shall perform his/her duties at the Practice, those hospital facilities at which Physician maintains Medical Staff privileges and such other practice locations of Employer in Beaufort and Jasper counties as may be reasonably designated by Employer from time to time. Employer shall have reasonable discretion to consolidate and relocate practices operated by Employer, including the Practice.

3.7 Professional Fees/Outside Activities. Physician agrees not to engage in any medical professional business activity (whether or not such business activity is pursued for gain, profit or other pecuniary advantage), without the prior written consent of Employer, other than (i) rendering services on behalf of Employer pursuant to this Agreement, (ii) maintaining an ownership interest of less than five percent (5%) of the issued and outstanding stock of a publicly-traded corporation, or (iii) teaching, writing, lecturing, or providing expert witness testimony on otolaryngology topics; provided such activities shall not interfere or conflict with the performance of Physician's duties or provision of services under this Agreement. Physician shall not enter into any other physician employment contract or otherwise engage in the practice of medicine other than for the benefit of Employer. All remuneration and accounts receivable arising from or related to Physician's provision of any medical services pursuant to this Agreement are the property of Employer, and Physician agrees to provide to Employer any such remuneration immediately after it is received by Physician. Physician agrees to take all reasonable actions requested by Employer to assist in the collection of accounts receivable for services provided by Physician. Unless otherwise agreed, all fees or remuneration arising from or related to teaching assignments, lectures, speeches, publications, or expert witness testimony by Physician on or about matters related to the practice of otolaryngology shall also be considered compensation or professional service revenues to which Employer is entitled hereunder.

3.8 Workplace Rules. Physician shall observe and comply with the rules, regulations, policies and procedures established by Employer with respect to the performance of Physician's duties. In the event of any inconsistency between such rules, regulations, policies and procedures and this Agreement, the provisions of this Agreement shall prevail.

3.9 Managed Care. Physician, at all times during the Agreement Term, shall participate in all managed care arrangements made available by or through Employer. Employer shall have the sole and exclusive right and authority to enter into contractual relationships with HMOs, IPAs, PPOs, PHOs, employer groups, provider networks and other managed care organizations and third party payors; however, Employer agrees to consult and obtain input from Physician prior to entering Agreements. Upon request of Employer, Physician shall execute such managed care agreements, applications and other documents as reasonably required. Physician shall not otherwise contract with any managed care organization or third party payor. In connection with such managed care arrangements, Employer shall negotiate such managed care arrangements with the proviso that Physician shall not be individually responsible to the managed care company for any withhold and that no hold harmless provision shall be applicable or enforceable on Physician. Employer

shall use reasonable efforts to ensure that any capitation rates, discounted fees or other risk based arrangements are consistent and competitive with those rates as accepted by other physicians practicing in the same specialty in the County.

3.10 **Other Services.** During the Agreement Term, Physician and Employer may mutually agree to Physician rendering additional services. Such duties may include service on hospital staff committees, peer review organizations, or other committees of Employer, and serving on national and regional committees of Employer's Affiliates (which term as used in this Agreement shall include any person, corporation, partnership, general partner or other entity that directly, or indirectly through one or more intermediaries, controls or is controlled by or is under common control with Employer); provided that such duties shall not interfere with the professional services provided by Physician on behalf of Employer pursuant to this Agreement.

3.11 **Additional Physicians.** Employer and Physician agree as an essential term of this Agreement that it is the intent of the parties to develop a comprehensive medical practice. It is further understood that Employer intends to negotiate and enter into employment relationships with additional qualified physicians. Physician agrees to use his/her best efforts to forge and establish an ongoing relationship and team approach with such additional physicians for the furnishing of physician and related services to patients.

3.12 **Obtaining Staff Privileges.** As a condition precedent to this Agreement, the Physician shall maintain active medical staff privileges at the Hospital. This Agreement shall not be effective until the date that the Physician obtains such privileges. If the Physician has not obtained such privileges on or before October 1, 2006, this Agreement shall automatically terminate. Nothing contained herein is intended to or shall be construed to operate as an agreement or undertaking by the Hospital or the Employer to grant or confer medical staff privileges upon the Physician. For purposes of this Agreement, the date upon which the Physician obtains provisional or active medical staff privileges at the Hospital and commences his or her employment hereunder shall be referred to herein as the "Effective Date."

3.13 **Professional Courtesy.** Physician agrees that no patients of the medical practice will be treated and have their charges written off a Professional Courtesy. In an event a patient has financial reasons impacting their ability to pay, Physician will refer the patient to the Practice Manager to be handled consistent with Employer's procedures.

ARTICLE IV COMPENSATION

4.1 **Compensation.** During the Agreement Term, Employer shall pay Physician compensation as set forth in Exhibit 1 attached hereto (the "Compensation").

4.2 **Leave.** Physician shall be entitled to twenty-five (25) paid days off annually according to the terms of the policy of Employer, which shall include vacation, legal holidays, personal days, and sick days. The maximum amount of time to be used, at any point in time, is ten (10) consecutive days. In addition, Physician will be reimbursed up to \$5,000 per contract year plus no more than five (5) CME days per contract year in connection with Physician attending medical conventions and/or continuing medical education seminars, including travel, lodging and meals. Physician's leave will be earned and accrued on a monthly basis consistent with other Physician employees of Employer. All leave shall be pre-approved by Employer. Leave is to be used during the year it is awarded and cannot be carried over to the following year. Leave may not be cashed in at any time to include termination of employment.

4.3 **Benefits.** Employer shall provide Physician with medical benefits for Physician and Physician's beneficiaries that are comparable to the coverage available, from time to time, to the other employees of Employer. Employer will provide life, disability, and dental benefits for Physician on similar terms as the other employees of Employer. Employer's life insurance company may require Physician to satisfactorily pass a physical examination in order to issue a life insurance policy to Physician. The employee portion of the costs of all such benefits are deemed Physician Benefits as hereafter defined. In addition, Employer may elect to obtain key-man life insurance coverage on Physician, and Physician hereby agrees to submit to any required physical therefor. Physician shall be entitled to participate in Employer's retirement and other benefit plans as offered from time to time at a level commensurate with the retirement benefits offered to other employees of Employer.

4.4 **Income and Employment Taxes.** Physician shall be an employee of Employer for all purposes. Employer shall withhold amounts from Physician's compensation in accordance with the requirements of applicable law for federal income tax, FICA, FUTA, and amounts from Physician's compensation in accordance with the requirements of applicable law for fed other employment or payroll tax purposes. It shall be Physician's responsibility to report and pay all federal taxes arising from Physician's receipt of compensation hereunder.

ARTICLE V INSURANCE

5.1 **Medical Liability Insurance.** As part of Physician Expenses, as defined in Exhibit 1, Employer agrees to directly pay the premium for Physician's professional medical liability insurance during the Agreement Term, with minimum coverage of One Million

Dollars (\$1,000,000.00) per occurrence with a yearly maximum of Three Million Dollars (\$3,000,000.00) in the aggregate (occurrence type policy). Such professional medical liability insurance coverage may be coverage established through an insurance affiliate of Employer. Physician shall maintain on-going coverage or purchase tail insurance covering medical malpractice claims made following the Effective Date that relates to services rendered by Physician to patients prior to the Effective Date and Employer shall have no responsibility therefore.

ARTICLE VI TERMINATION

6.1 Termination by Employer "For Cause". The Agreement Term (including any Renewal Term) may be terminated prior to its expiration, at the election of Employer, under any of the following circumstances:

- 6.1.1 Upon written notice to Physician, if Physician is in a material breach, default or violation of any provision of this Agreement and fails to cure such material breach, default or violation to the reasonable satisfaction of Employer within thirty (30) days after notice in writing by Employer to do so or within said thirty (30) days to commence such cure and thereafter diligently to prosecute such cure to completion; or
- 6.1.2 Immediately upon written notice by Employer to Physician (or Physician's estate) for any of the following reasons:
 - (a) Physician's death or permanent disability. The term "permanent disability" shall be defined as the failure of Physician to perform his/her duties and responsibilities hereunder for a total of one hundred twenty (120) days or more, regardless of whether such days are consecutive, during any twelve consecutive months;
 - (b) Physician's license to practice medicine is suspended, revoked or canceled or a restriction or limitation by any governmental authority having jurisdiction over Physician is placed or imposed upon him so that he cannot perform the professional services for which he was engaged hereunder;
 - (c) Physician is terminated or suspended from Medicare, Medicaid or any successor program;
 - (d) Physician's failure to maintain unrestricted staff membership or privileges on the medical staff of Hospital;
 - (e) Physician is convicted of a felony or a crime of moral turpitude;
 - (f) Physician conducts himself in a manner in which Employer determines to be unethical or fraudulent, is detrimental to patient care, or impairs the reputation or operations of Employer;
 - (g) Upon repeated failure by Physician to meet utilization, performance, efficiency, or quality standards established by Employer;
 - (h) Upon repeated failure by Physician to conform and comply with Employer's professional requirements concerning maintenance of medical records;
 - (i) Upon cancellation of Physician's coverage, or Physician's uninsurability, under the terms and conditions of the professional liability insurance provided; or
 - (j) Upon the use of alcohol or a controlled substance, which materially impairs the ability of Physician to effectively perform Physician's duties and obligations under this Agreement.

6.2 Termination by Physician "For Cause". The Agreement Term (including any renewal Term) may be terminated prior to its expiration, at the election of Physician, under any of the following circumstances:

- 6.2.1 Upon written notice to Employer, if Employer is in material breach, default or violation of any provision of this Agreement and fails to cure such material breach, default or violation within thirty (30) days after notice in writing by Physician to do so or within said thirty (30) days to commence such cure and thereafter diligently to prosecute such cure to completion; or
- 6.2.2 Immediately upon written notice by Physician to Employer for any of the following reasons:

- (i) bankruptcy or receivership of Employer, or
- (ii) revocation or suspension of Employer from the Medicare or Medicaid Programs or any successor program.

6.3 Termination "Without Cause". Employer or Physician may terminate this Agreement hereunder, without cause, at any time upon ninety (90) days prior written notice.

6.4 Obligations After Termination. Upon termination of the Agreement for any reason, Physician's Compensation shall immediately cease and Physician (or Physician's estate) shall be entitled to receive only those amounts earned or accrued on services provided by Physician up to the date of termination. Physician's rights to any on-going or continuing benefits shall be determined in accordance with the terms of the applicable benefit plan of Employer. Termination of the Agreement shall not release or discharge Employer from any obligation, debt or liability incurred prior to the date of termination of the Agreement.

6.5 Other Requirements Upon Termination. Upon termination of this Agreement for any reason: (i) the Physician's participation in any of Employer's fringe benefit plans shall immediately cease (subject to any post-termination benefits, if any, expressly stated in the then-current plans for such benefits); and (ii) the provisions of Articles VIII, IX, and X hereof shall remain in full force and effect, except as otherwise specifically provided herein.

ARTICLE VII REPRESENTATIONS AND WARRANTIES

7.1 Physician represents and warrants at all times during the Agreement Term (including any renewal term) that:

- (a) Physician is duly licensed and registered and in good standing under the laws of the State of South Carolina to engage in the practice of otolaryngology, and that said license and registration have not been suspended, revoked or restricted in any manner.
- (b) Physician is qualified for membership in good standing on the medical staff of a local acute care facility.
- (c) Physician has current controlled substances registrations issued by the State of South Carolina United States Drug Enforcement Administration, which registrations have not been surrendered, suspended, revoked, expired or restricted in any manner.
- (d) Physician has disclosed and will disclose to Employer the following matters, whether occurring at any time during the past five (5) years prior to the date of this Agreement or at any time during the Agreement Term:
 - (i) any actual or threatened malpractice suit, any actual or constructive known claim (whether or not filed in court), settlement, settlement allocation, judgment, verdict or decree against Physician;
 - (ii) any actual or threatened disciplinary, peer review or professional review investigation, proceeding or action instituted against Physician by any licensure board, hospital, medical school, health care facility or entity, professional society or association, third party payor, peer review or professional review committee or body, or governmental agency;
 - (iii) any criminal complaint, indictment or criminal proceeding in which Physician is named as a defendant;
 - (iv) any actual or threatened investigation or proceeding, whether administrative, civil or criminal, relating to an allegation against Physician of filing false health care claims, violating anti-kickback laws, violating fee-splitting laws, or engaging in billing improprieties;
 - (v) any organic or mental illness or condition that impairs or is likely to impair Physician's ability to practice medicine;
 - (vi) any dependency on, or habitual use or abuse of, alcohol or controlled substances, or any participation in an alcohol or controlled substance detoxification, treatment, recovery, rehabilitation, counseling, screening or monitoring program;

- (vii) any actual or threatened allegation, or any investigation or proceeding based on any allegation, against Physician for violating professional ethics or standards, or engaging in illegal, immoral or other misconduct (of any nature or degree), relating to the practice of medicine; and
- (viii) any denial or withdrawal of an application in any state for licensure as a physician, for medical staff privileges at any hospital or other health care entity, for board certification or recertification, for state or federal controlled substances registration, or for malpractice insurance.
- (e) Physician is board certified in otolaryngology by the *American Board of Otolaryngology.*
- (f) Physician shall at all times render services to patients in a competent, professional and ethical manner, in accordance with prevailing standards of medical practice in the relevant community, perform professional and supervisory services in accordance with recognized standards of the medical profession, and act in a manner consistent with the Principles of Medical Ethics of the American Medical Association, and any and all applicable statutes, regulations, rules, orders and directives of any and all applicable governmental and regulatory bodies having competent jurisdiction.
- (g) In connection with the provision of professional services to patients of Employer, Physician shall use the equipment, instruments, pharmaceuticals and supplies furnished by or on behalf of Employer for the purposes for which they are intended and in a manner consistent with sound medical practice.
- (h) Physician shall participate in the Medicare and Medicaid Programs, workers compensation, other federal and state reimbursement programs, and the payment plan of any commercial insurer, health maintenance organization, preferred provider organization, accountable health plan, or other health benefit program.
- (i) Physician shall keep and maintain (or cause to be kept and maintained) appropriate records, consistent with prevailing standards of medical practice in Physician's relevant community, relating to all professional services rendered by him under this Agreement and shall prepare and attend to, in connection with such services, all reports, claims, and correspondence necessary or appropriate in the circumstances, as determined mutually by Employer and Physician, all of which records, reports, claims, and correspondence shall belong to Employer.
- (j) Physician covenants not to use, or permit any other personnel under the supervision of Physician to use, any part of the premises of Employer for any purpose other than the performance of services hereunder.
- (k) Physician has not at any time been excluded from participation in the Medicare and/or Medicaid programs, and Physician shall immediately notify Employer in the event Physician receives any notice whatsoever of a possible exclusion action being brought against Physician.

ARTICLE VIII DISCLOSURE OF INFORMATION

8.1 Custody of Medical Records. Physician understands and agrees that during the Agreement Term and thereafter all medical records, case records, case histories, x-ray files, or personal or regular files concerning patients of Employer or any of Employer's Affiliates, or patients consulted, interviewed or treated and cared for by Physician, shall belong to and remain the property of Employer. Upon termination of this Agreement Physician shall not be entitled to keep original records or preserve records of Employer or any of Employer's Affiliates as to any patient unless the patient shall specifically request a different disposition of his or her records, or copies thereof, and in no event shall Physician be entitled to the records, or copies thereof, of patients not treated by Physician. Employer agrees at all times, both during and after termination of this Agreement, to maintain and preserve such records in a manner consistent and in compliance with all applicable laws and regulations. If Employer provides Physician with original patient records pursuant to the terms hereof, Physician shall retain all of such records and, upon Employer's request, shall make such originals available to Employer. If any medical malpractice or other claim, audit or business need of Physician arises and involves records which are retained by Employer pursuant to the terms hereof, Employer agrees to make such original medical records available to Physician, or Physician's designated counsel or representative for inspection and copying, during regular business hours, in accordance with applicable law.

8.2 Disclosure of Information. Physician recognizes and acknowledges that all records, files, reports, protocols, policies, manuals, databases, processes, procedures, computer systems, materials and other documents pertaining to services rendered by Physician hereunder, or to the operations of Employer, belong to and shall remain the property of Employer and constitute proprietary information and trade secrets of Employer. Physician recognizes and acknowledges that the terms of this Agreement, as well as Employer's proprietary information and trade secrets as they may exist from time to time, are valuable, special, and unique assets of Employer's business. Physician shall not, during or after the Agreement Term, disclose such proprietary information of Employer or trade secrets of

Employer to any other firm, person, corporation, association or other entity for any reason or purpose whatsoever, or use such information for Physician's own benefit, without the prior written consent of Employer, unless otherwise required to disclose such information in accordance with appropriate judicial process.

8.3 **Injunction.** Physician acknowledges that the confidentiality restrictions contained in this Article VIII are a reasonable and necessary protection of the legitimate trade secrets and business interests of Employer. In the event of any violation of these restrictions, Employer shall be entitled to preliminary and permanent injunctive relief, in addition to any other remedy, and shall be entitled to be reimbursed by Physician for any attorneys' fees and costs, at all pre-trial and appellate levels, incurred as a result thereof. Nothing herein contained shall be construed as prohibiting Employer from pursuing any other legal or equitable remedies available to Employer due to a violation of the restrictions set forth in this Article VIII, including monetary damages and relief.

ARTICLE IX COVENANT NOT TO COMPETE

9.1 **Restrictive Covenant.** With the exception of the services and duties that Physician performs for Employer or on Employer's behalf pursuant to the terms of this Agreement, Physician agrees that during the Agreement Term and for a period of two (2) year(s) after the termination of the Agreement Term for any reason whatsoever, Physician shall not:

9.1.1 Within a fifty (50) mile radius of the Practice, as determined at the time of termination, (the "Restricted Territory") engage in any medical practice, or engage in any business or perform any service, directly or indirectly, in competition with the medical services of Employer or any of Employer's Affiliates. Notwithstanding the foregoing, the restrictive covenant shall not prohibit Physician from engaging in the private practice of medicine as an independent Physician including performing ancillary services, but only those provided in Physician's practice on behalf of Employer on or before October 1, 2006. Further, Physician will not, without Hospital's prior written consent (which it may grant, withhold or condition in its sole discretion), directly or indirectly have any financial interest in any hospital, surgery center, imaging center, MRI, outpatient therapy center, medical office, clinic or other facility that competes with Employer, within the Restricted Territory. For purposes of this Agreement, a "financial interest" includes, without limitation, any direct or indirect financial relationship, whether as an employee, independent contractor, principal, agent, joint venture partner, security holder (except for ownership of securities traded on a recognized stock exchange) creditor, landlord, consultant, officer, director or otherwise. Nothing contained in this Section shall restrict Physician from establishing staff privileges at, referring any service to, or treating any patient at any hospital of Physician's choice.

9.1.2 Solicit, recruit or hire any person who is or was an employee of Employer or any of Employer's Affiliates, whether for Physician's benefit or for others with whom Physician may become associated unless Physician engages in the private practice of medicine as an independent physician defined in Section 9.1.1.

9.2 Within the Restricted Territory, Physician further agrees that for a period of time equal to two (2) year(s) after termination of the Agreement Term for any reason whatsoever (including expiration), Physician shall not within the Restricted Territory:

9.2.1 Solicit, serve or accept any business from patients, insurance companies, managed care plans, employers or other customers of the business conducted by Employer, or its affiliates, for services competitive with those of Employer and the Practice or request, induce or advise patients, insurance companies, managed care plans, employers or other customers of the business as conducted by Employer to withdraw, curtail or cancel their business with Employer or assist, induce, help or join any other person or company in doing any of the above activities unless Physician engages in the private practice of medicine as an independent physician defined in Section 9.1.1; or

9.2.2 Solicit the services of any employee, consultant, or provider which render services to, or for the benefit of, Employer or any of Employer's Affiliates for Physician's use or benefit or for any other person's or company's use or benefit, or induce or help to induce any employee, consultant or provider that renders services to, or for the benefit of, Employer or any of Employer's Affiliates to leave his other employment, without Employer's prior written consent unless Physician engages in the private practice of medicine as an independent physician defined in Section 9.1.1.

9.3 **No Running of Covenant During Breach.** With respect to any restrictive covenant which applies after the termination of the Agreement Term, if Physician violates such restrictive covenant and Employer brings legal action for injunctive or other relief, Employer shall not, as a result of the time involved in obtaining the relief, be deprived of the benefit of the full period of such restrictive covenant. Accordingly, after the termination of the Agreement Term for any reason, for any time period that Physician is in violation of the restrictive covenants set forth in this Article IX, such time period shall not be included in calculating any such restrictive covenant time period described in this Article IX.

9.4 **Duration and Geographical Limits.** If it shall be determined that the duration or geographical limit of any restriction contained in this Article IX is unenforceable, it is the intention of the parties that such restrictive covenant set forth herein shall not thereby be terminated or void but shall be deemed amended to the extent required to render it valid and enforceable to the greatest extent permissible by the applicable law and public policy, such amendment shall apply only with respect to the operation of this Article IX.

9.5 **Injunction.** Physician acknowledges that the restrictions contained in this Article IX are a reasonable and necessary protection of the legitimate business interests of Employer. In the event of any violation of these restrictions, Employer shall be entitled to preliminary and permanent injunctive relief, in addition to any other remedy, and shall be entitled to be reimbursed by Physician for any attorneys' fees and costs, at all pre-trial and appellate levels, incurred as a result thereof. Nothing herein contained shall be construed as prohibiting Employer from pursuing any other legal or equitable remedies available to Employer due to a violation of the restrictions set forth in this Article IX.

ARTICLE X FEES

10.1 **Fees for Services.** Except as otherwise may be provided in Section 3.7, all fees, compensation, monies, and other things of value received or realized as a result of the rendering of medical services by Physician, pursuant to this Agreement, shall belong to and be paid and delivered to Employer. Remuneration received by Physician from business activities unrelated to the practice of medicine, which do not interfere or conflict with the terms of this Agreement, or with the applicable provisions of this Agreement, may be retained by Physician, so long as such activity is approved in advance by Employer, and is not performed in the capacity of serving as an employee of Employer.

10.2 **Setting of Fees.** Employer shall have exclusive authority to determine the fees, or a procedure for establishing the fees, to be charged patients, even though such patients may be treated by Physician in the course of Physician's employment by Employer.

10.3 **Power of Attorney.** Physician does hereby appoint Employer as Physician's attorney-in-fact to execute, deliver or endorse checks, applications for payment, insurance claim forms or other instruments required or convenient, as determined by Employer in its sole discretion, to fully collect, secure or realize all sums lawfully due to Employer, for services rendered by Physician under this Agreement during the Agreement Term. The power of attorney is coupled with an interest, is irrevocable and shall survive expiration or termination of this Agreement.

10.4 **Billing and Collection.** Physician agrees that, during the Agreement Term, Physician shall not bill to or collect from any patient or third party payor any amount for services rendered hereunder. Physician hereby irrevocably assigns and grants to Employer the right to bill and collect from patients or third party payors for all services rendered by Physician hereunder, regardless of the location where any such services may be rendered by Physician. Physician agrees to execute any and all documents deemed necessary or desirable by Employer to carry out the provision of this Section. Unless otherwise agreed by Physician, all billing and collection activities shall be conducted as part of the regular business operations of the Practice. Such procedures shall include, but not be limited to, sending bills, filing insurance claims, and making phone calls.

10.5 **Accounting Reports and Review.** Employer shall have available for Physician lists of fees charged for particular services for particular payors and shall update these lists on a regular basis as fees and payors change. Employer also shall provide to Physician, on a monthly basis, production reports which list the billings attributable to services provided by Physician and in the Practice, the collections in connection with the services provided by Physician and the Practice, and accounts receivable in connection with provision of said services, such reports to be provided within thirty (30) days after the applicable month to which such reports relate.

ARTICLE XI LIMITATIONS OF AUTHORITY

11.1 Physician agrees not to enter into any transactions on Employer's behalf without the express written consent of Employer, including, but not limited to, the following actions:

- (i) Pledge the credit of Employer or any of its other employees;
- (ii) Bind Employer under any contract, agreement, note, mortgage or other agreement;
- (iii) Bind, release, or discharge any debt due Employer; or
- (iv) Sell, mortgage, transfer or otherwise dispose of any assets of Employer.

11.2 Physician shall hold Employer harmless from any loss attributable to a violation of this covenant. Notwithstanding anything to the contrary in this Article XI, Physician shall advise and assist Employer in securing and retaining contracts in the name and for the account of Employer with such individuals or entities necessary for the proper and efficient functioning of Employer.

ARTICLE XII
NOTICE

12.1 All notices required or permitted to be given under the terms of this Agreement shall be in writing, and shall be effective upon delivery if delivered to the addressee in person, effective three (3) business days after mailing if mailed by certified mail, postage prepared, return receipt requested, or effective the next business day if delivered by overnight courier with charges prepaid, as follows:

If to Employer: 103 Powell Court, Suite 200
Brentwood, TN 37027
Attn: Vice President, Physician Services

With copies to: 1000 Medical Center Dr. 103 Powell Court, Suite 200
Hardeeville, SC 29927 Brentwood, TN 37027
Attn: CEO Attn: General Counsel

If to Physician: 2712 Levy Rd
Hardeeville, SC 29927

or to such other address as either party shall have designated for notices to be given to him or it in accordance with this Article.

ARTICLE XIII
MISCELLANEOUS

13.1 **Recitals**: The recitals are true and correct and are incorporated herein in their entirety.

13.2 **Severability**. If any provision of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall nevertheless remain in full force and effect. If any provision of this Agreement shall be held invalid or unenforceable under any particular circumstances, it shall nevertheless remain in full force and effect in all other circumstances.

13.3 **Assignment**. In addition the contract shall affirm that no transfer, assignment or other modification affecting the terms or conditions of the contract will be effected unless extenuating circumstances are shown to exist, as determined by the South Carolina Department of Public Health, and approved by the U.S. Attorney General in accordance with applicable federal rules and regulations.

13.4 **Governing Law and Venue**. This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of South Carolina. Any action or claim arising from, under or pursuant to this Agreement shall be brought in the courts, state or federal, within the State of South Carolina, and the parties expressly waive the right to bring any legal action or claims in any other courts. The parties hereto hereby consent to venue in any state or federal court within the State of South Carolina having jurisdiction over the County for all purposes in connection with any action or proceeding commenced between the parties hereto in connection with or arising from this Agreement.

13.5 **Arbitration**. Except as to the provisions contained in Articles VII and IX, the exclusive jurisdiction of which shall rest with a court of competent jurisdiction in the state where the hospital is located any controversy or claim arising out of or related to this Agreement, or any breach thereof, shall be settled by arbitration in the County, in accordance with the rules and procedures of alternative dispute resolution and arbitration established by the Alternative Dispute Resolution Service of the American Health Lawyers Association ("AHLA"), and judgment upon any award rendered may be entered in any court having jurisdiction thereof. Such arbitration shall be conducted before a single AHLA arbitrator selected jointly by the parties, or in the event the parties are unable to agree, designated by the AHLA.

13.6 **Waiver**. Any waiver by any party hereto of a breach of any provision of this Agreement shall not operate or be construed as a waiver of any other provision hereof and shall not be effective at all unless in writing. A waiver of any of the terms and conditions hereof shall not be construed as a general waiver by either party, and such waiving party shall be free to reinstate any such term or condition, with or without notice to the other party.

13.7 **Entire Agreement/Amendment**. This Agreement contains the entire agreement between the parties hereto. No change, addition or amendment shall be made except by written agreement executed by all of the parties hereto.

13.8 Survival. The provisions of this Agreement, including but not limited to Articles VIII and IX, shall survive the termination of Physician's relationship with Employer and the assignment of this Agreement by Employer to any successor or assign.

13.9 Confidentiality. Except as otherwise required by law, Physician hereby agrees to hold in the strictest confidence all of the terms and conditions set forth herein; provided, however, Physician may disclose the terms hereof to his/her attorneys, accountants and other financial and legal advisors as reasonably necessary.

13.10 Expenses. Each party to this Agreement shall pay its own costs and expenses in connection with the transaction contemplated hereby.

13.11 Counterparts. This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

13.12 Binding Effect. This Agreement shall not become effective or legally binding upon either party until signed by both Employer and Physician, and approved by Employer's Division President and Legal Counsel pursuant to a Physician Employment Certificate form which is separate here from.

13.13 Corporate Integrity Agreement. Employee represents and warrants that as of the date of this agreement: (i) it is not excluded, debarred or otherwise ineligible to participate in Medicare, Medicaid or any other federal or state healthcare programs or in any federal or state procurement or non-procurement programs; or (ii) has not been convicted of a criminal offense related to the provision of federal health care items or services, that could lead to debarment or exclusion.

Further, Employee agrees to immediately notify the other party to the contract in the event the foregoing representation and warranty is no longer completely accurate. Employee acknowledges and agrees this is a material term of the agreement and any breach or nonfulfillment of same will entitle the other party to immediately terminate this agreement.

13.14 JCAHO. Physician shall perform all services hereunder in accordance with any and all regulatory and accreditation standards applicable to Hospitals and the relevant service, including without limitation those requirements imposed by the JCAHO, the Medicare/Medicaid conditions of participation and any amendments thereto.

13.15 Non-Discrimination. Facility does not discriminate against any person on the basis of race, color, national origin, disability or age in admission, treatment, program participation, services, activities or employment.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first written above.

WITNESS:

Cynthia G. Holland

PHYSICIAN:

Phillip Flexon, M.D.
Social Security Number: 246-74-7776

EMPLOYER:

By: W. Vall Willis
W. Vall Willis
Vice President, Physician Services

REVIEWED AND APPROVED:

Chief Executive Officer

Division President

APPROVED AS TO FORM:

AK 12/22/04

Legal Counsel

EXHIBIT 1

PHYSICIAN COMPENSATION

I. The following definitions shall apply in the calculation of Physician Compensation:

- A. *Net Practice Revenues* – is defined as all cash collected (minus insurance and patient refunds) for patient services provided after the Effective Date in the Practice location(s) that are generated on behalf of the Practice as a result of professional medical services personally furnished to patients by Physician and other fees or income (as meets the Medicare criteria for "incident to") generated by non-physician employees or other Practice personnel under Physician's direct supervision and control, whether such services are rendered in an inpatient or outpatient setting and whether services are rendered to HMO, PPO, Medicare, Medicaid or other patients, including, without limitation, Capitation Payments, and revenues from testing, clinical trials and other drug research studies. Provided, however, that Net Practice Revenues shall not include cash collected for the non-professional or technical fee component for any ancillary services (e.g., laboratory, radiology, diagnostic testing or outpatient surgery) or inpatient or outpatient hospital services.
- B. *Practice Operating Expenses* – is defined as all direct and indirect expenses incurred subsequent to the date hereof in the day-to-day management and operation of the Practice, including, without limitation:
1. salaries, bonuses, benefits, payroll taxes, and other direct costs of all direct Practice employees (including Physician Compensation) and other Practice personnel;
 2. allocable rent for any medical offices, furniture and equipment used by the Practice, utility expense, management information systems, office and medical supplies;
 3. personal property and intangible taxes assessed against assets used by the Practice;
 4. utility expenses related to the medical offices used solely by the Practice, including cellular phone and pager expenses;
 5. direct office and medical supplies;
 6. premises and general liability insurance for Employer-related to the Practice and;
 7. direct repairs and maintenance of the medical offices used in the Practice;
 8. professional liability insurance of employee;
 9. Physician's medical licensure fees, medical staff memberships, board certification fees and costs of membership in professional associations; and
 10. Costs of continuing medical education of Physician.
 11. Costs of contract services, including allocation for hospital services and practice management.

**AMENDMENT TO AND ASSIGNMENT OF
PHYSICIAN EMPLOYMENT AGREEMENT**

THIS AMENDMENT TO AND ASSIGNMENT OF PHYSICIAN EMPLOYMENT AGREEMENT ("Amendment") is made and entered into as of July 1, 2007 by and between Philip D. Flexon, MD ("Physician"), PBC-Jasper, Inc. d/b/a Coastal Carolina Medical Center ("Employer") and Coastal Carolina Physician Practices, LLC ("CCPP").

RECITALS

WHEREAS, Employer and Physician entered into a physician employment agreement with an effective date of August 1, 2006 (the "Agreement"); and

WHEREAS, on or about June 30, 2007, all of the stock in Employer was sold to Tenet Healthsystems, Inc. and Employer became a wholly owned subsidiary of Tenet Healthsystems, Inc.; and

WHEREAS, the parties desire to amend this Agreement and assign it to CCPP.

NOW, THEREFORE, in consideration of the foregoing and the mutual promises contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Physician, CCMC and CCPP hereby agree as follows:

1. Section 13.3 of the Agreement is deleted in its entirety and replaced with the following:

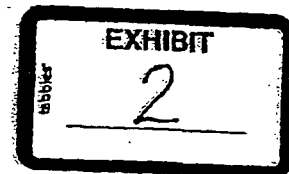
Assignment. The rights and obligations of Employer under this Agreement may be assigned at any time by Employer to an affiliate or to a successor in interest in the event of the sale of all or substantially all of its assets or stock. The rights and obligations of Physician under this Agreement may not be assigned without the prior written consent of Employer.

2. Two new sections, 13.16 and 13.17, shall be added to the Agreement, as follows:

13.16 Compliance Obligations. Physician has received, read, understood, and shall abide by Tenet's Standards of Conduct. The parties to this agreement shall comply with Tenet's Compliance Program and Tenet's policies and procedures related to the Anti-Kickback Statute and the Stark Law. Tenet's Standards of Conduct, summary of Compliance Program, and policies and procedures are available at:

<http://www.tenethospital.com/TenetHealth/OurCompany/EthicsBusinessConduct>.

LEGAL02/30433648v1



R0055

Further, the parties to this Agreement certify that they shall not violate the Anti-Kickback Statute and/or the Stark Law.

13.17 Exclusion Lists Screening. Physician shall screen all of its current and prospective owners, legal entities, officers, directors, employees, contractors, and agents ("Screened Persons") against (a) the United States Department of Health and Human Services/Office of Inspector General List of Excluded Individuals/Entities (available through the Internet at <http://www.oig.hhs.gov>), and (b) the General Services Administration's List of Parties Excluded from Federal Programs (available through the Internet at <http://www.epls.gov>) (collectively, the "Exclusion Lists") to ensure that none of the Screened Persons (y) are currently excluded, debarred, suspended, or otherwise ineligible to participate in Federal healthcare programs or in Federal procurement or nonprocurement programs, or (z) have been convicted of a criminal offense that falls within the ambit of 42 U.S.C. § 1320a-7(a), but have not yet been excluded, debarred, suspended, or otherwise declared ineligible (each, an "Ineligible Person"). If, at any time during the term of this Agreement any Screened Person becomes an Ineligible Person or proposed to be an Ineligible Person, Physician shall immediately notify Hospital of the same. Screened Persons shall not include any employee, contractor or agent who is not providing services under this Agreement.

3. The parties agree that effective July 1, 2007, the Agreement shall be assigned to CCPP, and CCPP shall assume all of the rights and obligations of Employer as of such date.

4. Except as expressly provided in this Amendment, all other terms, conditions and provisions of the Agreement shall continue in full force and effect as provided therein.

IN WITNESS WHEREOF, the parties intending to be bound hereto have caused this Amendment to be executed by persons duly authorized to bind them.

PHYSICIAN

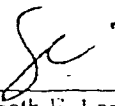
Signature: _____

Phillip B. Flexon, MD

Date: _____

PHC-JASPER, INC. D/B/A COASTAL CAROLINA MEDICAL CENTER

Signature: _____

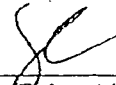

Elizabeth E. Lamkin
President

Date: _____

7/3/07

COASTAL CAROLINA PHYSICIAN PRACTICES, LLC

Signature: _____


Elizabeth E. Lamkin
President

Date: _____

7/3/07



FRIEDMAN,
DEVER &
MERLIN, LLC
ATTORNEYS AT LAW

RECEIVED
AUG 18 2008

5555 GLENRIDGE CONNECTOR, NE
SUITE 925, GLENRIDGE HIGHLANDS
ATLANTA, GEORGIA 30342-4728
TELEPHONE 404 236 8600
TELECOPIER 404 236 8601

direct dial. 404 236 8608
email: lmerlin@fdmlaw.com

August 15, 2008

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
70070220000477118332

Coastal Carolina Medical Center
103 Powell Court
Suite 200
Brentwood, Tennessee 37027
Attention: Vice President, Physician Services

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
70070220000477118349

Coastal Carolina Medical Center
103 Powell Court
Suite 200
Brentwood, Tennessee 37027
Attention: General Counsel

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
70070220000477118356

Coastal Carolina Medical Center
1000 Medical Center Drive
Hardeeville, SC 29927
Attention: CEO

Re: Physician Employment Agreement dated December 18, 2006, by and
between Coastal Carolina Medical Center ("Employer"), and Phillip
B. Flexon, M.D. ("Physician") (the "Contract")

Dear Sir or Madam:

This law firm represents Phillip B. Flexon, M.D. This letter shall serve as formal notice of termination of the referenced Contract by Physician "for cause" pursuant to the terms of Section 6.2.1 of the Contract. Specifically, the Employer is in material breach, default and violation of the Contract in the following particulars:

1. Billing Malfeasance. Since July 1, 2007, the Employer and its representatives have failed and refused to submit charges for Dr. Flexon's services to Medicare, Medicaid and private insurance carriers. This has continued in spite of Dr. Flexon continuing to see patients in the office, cover the Employer's Emergency Room and perform surgeries. This failure in basic office medical management makes it impossible for Dr. Flexon to receive his bonus compensation as set forth in the Contract. This is a clear and material violation of the Contract. The lack of billing has been repeatedly brought to the attention of hospital officials including on more than one occasion its CEO. Yet despite this, nothing has happened and the bills remain unsent.



R0058

August 15, 2008

2. Staffing. The Employer has materially breached the Contract by repeatedly not providing Dr. Flexon reasonable personnel staffing and support, such as billing and marketing as required by Section 3.2 of the Contract. In November 2007, the Employer fired Dan Gemmell, Dr. Flexon's Practice Manager without Dr. Flexon's knowledge or consent and failed to reinstate him after Dr. Flexon's repeated protests. The position has not been filled to date.

On December 31, 2007, Employer terminated Dr. Flexon's Office Billing Director, Phyllis Yingling without Dr. Flexon's knowledge or consent. Later it was learned that Ms. Yingling was specifically instructed by the Employer to stop billing Dr. Flexon's time as of July 1, 2007. The Office Billing Director position has not been filled to date.

In March 2008, Priscilla Green, Dr. Flexon's Scheduler and Receptionist resigned because of working conditions at the Employer. She has not been replaced.

The fact of the matter is for over six months and despite Dr. Flexon's repeated protests and meetings with hospital officials, my client has had no Practice Manager, no Receptionist or Scheduler, and no billing management. He is down to one employee which makes it impossible for him to see and care for his regular patient load that he has established over the last eighteen years (18) before coming to the Employer. My client's practice has been reduced to half its normal patient level.

The Contract allows the Employer thirty (30) days within which to cure these material breaches. However, I am unconvinced that certain of the breaches can in fact be cured due to the amount of time that has passed. However, I would be interested in hearing from you regarding the Employer's position on the content of this letter and its plans, if any, to remedy these defaults. I await your response.

Sincerely,



Lawrence M. Merlin

LMM/jd

cc: Phillip B. Flexon, M.D.

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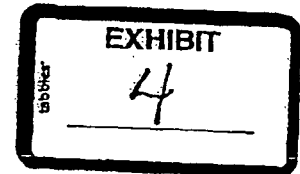
Buist · Moore · Smythe · McGee · P.A.

May 4, 2009

J. MARSHALL ALLEN
ATTORNEY AT LAW
E-Mail: mallen@buistmoore.com
DIRECT DIAL: 843-720-4627
FAX: 843-723-7398

VIA Electronic and U.S. Mail

William B. Harvey III, Esquire
Harvey & Battey, PA
P.O. Drawer 1107
Beaufort, SC 29901-1107



RE: Philip Flexon, M.D./Coastal Carolina Medical Center
BMSM File No.: 5499.0011

Dear Bill:

As I have stated in our telephone conversations, Coastal Carolina Medical Center ("CCMC") would be pursuing amounts determined payable by Dr. Flexon pursuant to the terms of his Employment Agreement with CCMC ("Agreement"). We have gathered the numbers and have now determined the amounts payable by Dr. Flexon. With this information, I would like to earnestly commence discussions with you about these payments.

The term of the Agreement is for a five (5) year period with an Effective date of March 15, 2007. Dr. Flexon improperly terminated the Agreement on September 16, 2008 and ceased as of that date to provide the full-time practice of medicine in Hardeeville (the "Community"). On about this date, Dr. Flexon began working for Memorial University Medical Center ("MUMC") in Savannah.

The three (3) repayment obligations in the Agreement are (i) the "negative EBDITA" repayment required under Exhibit 1, Section IV, (ii) the "Marketing Expense Reimbursement" repayment required under Exhibit 2 and (iii) the "Sign On Bonus" repayment required under Exhibit 3.

As seen on the enclosed Cumulative EBITDA Analysis, Dr. Flexon's EBITDA for the period March 15, 2007 to March 1, 2009 is a negative \$702,941. Pursuant to Exhibit 1, Section IV, my client demands the immediate repayment of this negative amount unless Dr. Flexon requests a deferred payment plan. Please let me know within five (5) days from your receipt of this letter if your client desires a deferred payment plan.

Dr. Flexon was paid a Marketing Expense Reimbursement of \$10,000 pursuant to Exhibit 2 of the Employment Agreement. Dr. Flexon worked full-time in the Community for 18 months

William B. Harvey III, Esquire
Harvey & Battey, PA
May 4, 2009
Page 2

(March 15, 2007 to September 16, 2008). The unamortized amount due and payable is the product of 70% (18/60) and \$10,000, or \$7,000. My client demands the immediate repayment of this amount.

Dr. Flexon was paid a Sign On Bonus of \$25,000 pursuant to Exhibit 3. The unamortized amount due and payable is the product of 70% and \$25,000, or \$17,500. My client demands the immediate repayment of this amount.

Dr. Flexon began working for MUMC immediately subsequent to his wrongful termination of the Employment Agreement in violation of the Restrictive Covenant specified in Section 9.1 of the Agreement. My client demands Dr. Flexon immediately cease violating the restrictive covenant.

In addition to the repayment obligations stated above, my client intends to seek payment for the consequential damages it has suffered as a result of Dr. Flexon's wrongful termination.

You suggested in one or more of our conversations that my client breached the Agreement and should simply abandon the repayment obligations. Please realize, and try to appreciate, that my client will and cannot do this for a variety of reasons, including health care compliance concerns. Unless we expeditiously resolve this matter, it will be resolved in court or in arbitration.

After you have had an opportunity to consider this letter with your client, please give me a telephone call in order for us to discuss this matter.

Sincerely yours,

BUIST MOORE SMYTHE MCGEE P.A.



J. Marshall Allen

JMA/srb
Enclosure

cc: Carol Ferri, Tenet Hospital System

(01485282.)

R0061

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS
JUDICIAL CIRCUIT
CASE NO. 2008-CP-27-331

Philip Flexon, M.D.,)
)
Plaintiff,)

vs.)

ANSWER AND COUNTERCLAIM

PHC-Jasper, Inc., d/b/a/ Coastal Carolina)
Medical Center, Coastal Carolina Medical)
Center, Inc., Lifepoint Hospitals, Inc. and)
Tenet Healthsystems,)
)
Defendants.)

TO: WILLIAM HARVEY, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

The Defendant, Coastal Carolina Medical Center, Inc., (hereinafter "CCMC"),
answering the Complaint of the Plaintiff, alleges and says as follows:

1. Responding to the allegations of Paragraph 1, CCMC lacks information
and belief as to the truth of the residency allegations of Plaintiff and denies same. On
information and belief, CMCC admits the remaining allegations of Paragraph 1.

2. Responding to the allegations of Paragraph 2, "PHC-Jasper, Inc." was the
former name of CCMC. A valid name change was filed with the South Carolina
Secretary of State on or about August 17, 2007. PHC-Jasper, Inc. is not a separate
defendant from Coastal Carolina Medical Center, Inc. Defendant denies all allegations of
Paragraph 2 inconsistent with the above.

3. Responding to the allegations of Paragraph 3, CCMC lacks information
and belief sufficient to form an opinion as to the truth of these allegations and therefore
denies same.

{01546450.}

4. Responding to the allegations of Paragraph 4, CCMC admits that is a South Carolina Corporation with its principal place of business in Jasper County. CCMC admits that Tenet HealthSystem Medical, Inc. is a Delaware corporation owning 100% of the stock in Coastal Carolina Medical Center, Inc. as of June 20, 2007. CCMC denies the remaining allegations of Paragraph 4.

5. Responding to the allegations of Paragraph 5, CCMC admits on information and belief, that Tenet HealthSystem Medical, Inc., improperly named in the Caption, is a Delaware corporation owning 100% of the stock in Coastal Carolina Medical Center, Inc. as of June 20, 2007. CCMC denies the remaining allegations of Paragraph 5.

6. As to Paragraph 6, CCMC admits jurisdiction and venue are proper before this Honorable Court.

7. Responding to the allegations of Paragraph 7, CCMC and Plaintiff entered into a binding employment agreement with a five-year term on December 18, 2006. CCMC further admits that Exhibit One of the Complaint represents a true and correct copy of that agreement. CCMC denies the remaining allegations of Paragraph 7.

8. Responding to Paragraph 8, CCMC admits that entering into an employment contract with CCMC required that Plaintiff leave his prior employment. CCMC denies the remaining allegations of Paragraph 8.

9. CCMC denies the allegations of Paragraph 9.

10. CCMC denies the allegations of Paragraph 10.

11. Responding to the allegations of Paragraphs 11, CCMC craves reference to the employment contract as the best evidence of its contents and denies any allegations

inconsistent with its stated terms. CCMC denies the remaining allegations of Paragraph 11.

12. CCMC admits that no "extenuating circumstances" as described in Paragraph 11 of the Complaint exist.

13. Responding to Paragraph 13, CCMC admits that Lifepoint entered into a stock purchase agreement, with Tenet HealthSystems Medical, Inc. on or about June 30, 2007. CCMC denies all remaining allegations of this Paragraph.

14. CCMC denies the allegations of Paragraph 14, 15 and 16.

15. Responding to Paragraph 17, CCMC admits that Lifepoint entered into a stock purchase agreement with Tenet HealthSystems Medical, Inc. on or about June 30, 2007 and affirmatively states that a stock sale is not an assignment. CCMC denies the remaining allegations of Paragraph 17.

16. Responding to Paragraph 18, CCMC admits that Plaintiff continued employment for CCMC.

17. Responding to Paragraph 19, CCMC admits that CCMC experienced difficulties in billing for Plaintiff's services but denies that these irregularities were in breach of the employment contract.

18. Responding to Paragraph 20, CCMC denies it breached its contract with Plaintiff. CCMC admits that Plaintiff's staff was reduced over the course of 2007 but denies the remaining allegations of Paragraph 20.

19. Responding to Paragraph 21, CCMC admits that the letter attached as Exhibit 3 to the Plaintiff's complaint is a true and correct copy of correspondence received by CCMC. CCMC denies that it materially breached the contract. CCMC

{01546450.}

admits that on September 14, 2008, Plaintiff terminated the employment contract.

CCMC denies all other allegations of Paragraph 21.

20. CCMC denies the allegations of Paragraph 22.

21. Responding to Paragraph 23, CCMC admits that the letter attached as Exhibit 4 to the Plaintiff's Complaint is a true and correct copy of correspondence sent to Plaintiff by CCMC. CCMC denies that Plaintiff has no contractual relationship with CCMC and all other allegations of Paragraph 23.

AS TO THE FIRST CAUSE OF ACTION
(BREACH OF CONTRACT)

22. CCMC incorporates by reference the responses and denials of the foregoing Paragraphs.

23. CCMC denies the allegations of Paragraph 25 and 26.

AS TO THE SECOND CAUSE OF ACTION
(FRAUDULENT MISREPRESENTATION)

24. CCMC incorporates by reference the responses and denials of the foregoing Paragraphs.

25. Responding to the allegations of Paragraph 28, CCMC craves reference to the Employment Contract as the best evidence of its contents, and denies the allegations of Paragraph 28 inconsistent with the terms of the Employment Contract and all remaining allegations of Paragraph 28.

26. CCMC denies the allegations of Paragraph 29, 30 and 31.

AS TO THE THIRD CAUSE OF ACTION
(BREACH OF GOOD FAITH/FAIR DEALING)

27. Responding to Paragraph 32, CCMC incorporates by reference the responses and denials of the foregoing Paragraphs.

{01546450.}

28. CCMC denies the allegations of Paragraph 33 and 34.

AS TO THE FOURTH CAUSE OF ACTION
(DECLARATORY JUDGMENT)

29. CCMC incorporates by reference the responses and denials of the foregoing Paragraphs.

30. Responding to Paragraph 36, CCMC admits a justiciable controversy exists as to whether the employment agreement was terminated for cause, as set out in Complaint Paragraph 36(1), but alleges that this is a question of fact, not law, and is therefore a declaratory judgment action is improper. CCMC denies that a justiciable controversy exists as to whether the contract is assignable, as alleged in Complaint Paragraph 36(2), because the contract was never assigned. CCMC admits that a justiciable controversy exists as to whether the Covenant Not to Compete is enforceable.

31. Responding to Paragraph 37, CCMC states that Paragraphs 37 and the Wherefore Paragraph constitutes prayers for relief, for which no response is required. To the extent these Paragraphs constitute allegations requiring a response from CCMC, they are denied.

AND AS ADDITIONAL DEFENSES

32. Plaintiff fails to state a claim upon which relief may be granted.

33. Plaintiff failed to mitigate his damages, if any.

34. The employment agreement is subject to a valid arbitration clause, and this action should be stayed pending arbitration.

35. CCMC is entitled to a set-off against Plaintiff for any damages owed, which are explicitly denied.

{01546450.}

FOR A FIRST COUNTERCLAIM
(BREACH OF CONTRACT)

36. The allegations of the above Paragraphs are incorporated herein as if set forth here verbatim.

37. Plaintiff entered into a binding employment agreement with PHC-Jasper, Inc.

38. PHC-Jasper, Inc. changed its name to CMCC.

39. The employment contract included a valid and reasonable Covenant Not to Compete.

40. The employment contract included a valid and reasonable repayment obligation if Plaintiff failed to fulfill his five-year employment agreement.

41. The employment contract included a valid and reasonable marketing expense reimbursement clause, which required Plaintiff to reimburse these funds if Plaintiff failed to fulfill his five-year employment agreement.

42. The employment contract included a valid and reasonable signing bonus reimbursement clause, which required Plaintiff to reimburse these funds if Plaintiff failed to fulfill his five-year employment agreement.

43. CCMC is entitled to enforce the employment contract with Plaintiff.

44. Plaintiff has breached the contract in the following ways:

- a. Plaintiff terminated employment after eighteen months of employment.
- b. Plaintiff failed to fulfill his obligations regarding his EBDITA repayment;
- c. Plaintiff failed to repay his marketing expense;

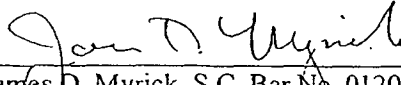
{01546450.}

- d. Plaintiff failed to repay his signing bonus;
- e. Plaintiff failed to honor his Covenant Not to Compete; and
- f. Other breaches of the employment contract.

45. CCMC has been harmed by these breaches of contract in an amount to be determined at trial.

WHEREFORE, CCMC prays that this Honorable Court dismiss all claims against it, stay this action pending arbitration, and prays for judgment against Phillip Flexon for breach of contract in an amount to be determined at trial, plus interest, costs and attorney's fees.

BUIST MOORE SMYTHE MCGEE P.A.


James D. Myrick, S.C. Bar No. 012004
Dana W. Lang, S.C. Bar No. 77546
5 Exchange Street
P.O. Box 999
Charleston, SC 29402
(843) 722-3400

July 15, 2009
Charleston, South Carolina

{01546450.}

R0068

CERTIFICATE OF SERVICE

I do hereby certify that on the 15th day of July 2009, I served a copy of the within Answer and Counterclaim to Counsel of Record in the within entitled matter by sending a copy of the same in an envelope with the correct postage prepaid addressed to:

William Harvey
Harvey & Battey, PA
1001 Craven Street
P.O. Drawer 1107
Beaufort, SC 29901-1107

Karla Koster

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER)

Philip Flexon, M.D.,)
)
Plaintiff,)
)
vs.)
)
PHC-Jasper, Inc., d/b/a Coastal)
Carolina Medical Center, Coastal)
Carolina Medical Center, Inc.,)
Lifepoint Hospitals, Inc., and Tenet)
Healthsystems, Inc.,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS

C.A. NO.: 2009-CP-27-331

ANSWER

FILED
2009 AUG -3 AM 10:01
CLERK OF COURT
JASPER COUNTY SC

The Defendant, Lifepoint Hospitals, Inc. (hereinafter, "Lifepoint"), answering the Complaint of the Plaintiff herein, states as follows:¹

1. Lifepoint denies each and every allegation of the Complaint not hereinafter specifically admitted.

FOR A FIRST DEFENSE

2. In response to the allegations of Paragraph 1, Lifepoint lacks knowledge or information sufficient to form a belief as to the residency of Plaintiff and therefore denies the same. In further response to the allegations of Paragraph 1, Lifepoint admits, upon information and belief, that Plaintiff is a Medical Doctor licensed in the states of Georgia and South Carolina, and practicing in the specialty of ENT. Lifepoint lacks knowledge and information sufficient to form a belief as to the remaining allegations of Paragraph 1 and therefore denies the same.

3. Lifepoint denies the allegations of Paragraph 2 and asserts that Province Healthcare Company, a Delaware Corporation, prior to June 30, 2007, owned 100% of the issued

¹ PHC-Jasper, Inc. d/b/a Coastal Carolina Medical Center is not an appropriately named Defendant in this action as it is not a separate Defendant from Defendant Coastal Carolina Medical Center, Inc.

and outstanding capital stock of PHC-Jasper, Inc., a South Carolina corporation, which owned and operated the acute care general facility commonly known as Coastal Carolina Medical Center located at 1000 Medical Center Drive, Hardeeville, South Carolina. The sole stockholder of Province Healthcare Company and parent corporation of PHC-Jasper, Inc. was LifePoint Hospitals, Inc. On or about June 30, 2007, a Stock Purchase Agreement was entered into by and between Province Healthcare Company and Tenet HealthSystem Medical, Inc., whereby Province Healthcare Company sold all issued and outstanding capital stock of PHC-Jasper, Inc. to Tenet HealthSystem Medical, Inc. On or about August 17, 2007, PHC-Jasper, Inc. changed its name to Coastal Carolina Medical Center, Inc., which, upon information and belief, is wholly owned and operated by Tenet HealthSystem Medical, Inc. PHC-Jasper, Inc. is not an appropriate defendant in this action as it is not, upon information and belief, a separate defendant from Coastal Carolina Medical Center, Inc.

4. In response to the allegations of Paragraph 3, Lifepoint admits only that Lifepoint Hospitals, Inc. is a corporation organized and existing under the laws of the State of Tennessee with its principal place of business in Brentwood, Tennessee. Lifepoint denies the remaining allegations of Paragraph 3.

5. Lifepoint admits, upon information and belief, the allegations of Paragraphs 4 and 5.

6. The allegations of Paragraph 6 constitute conclusions of law which LifePoint is required neither to admit nor deny. To the extent a response is required, Lifepoint denies the allegations of Paragraph 6.

7. In response to the allegations of Paragraph 7, Lifepoint admits only that Plaintiff and Coastal Carolina Medical Center entered into that certain Physician Employment Agreement

(the "Employment Agreement"), dated December 16, 2006, and craves reference to that Employment Agreement for the term provisions of the Employment Agreement. Lifepoint denies the remaining allegations of Paragraph 7.

8. Lifepoint lacks knowledge and information sufficient to form a belief as to the allegations of the first sentence of Paragraph 8 and therefore denies the same. Lifepoint denies the remaining allegations of Paragraph 8.

9. Lifepoint lacks knowledge and information sufficient to form a belief as to the allegations of Paragraph 9 and therefore denies the same. Lifepoint further craves reference to the Employment Agreement and denies any and all allegations inconsistent therewith as relates to any equipment purchases or staff recruitment and hiring.

10. In response to the allegations of Paragraph 10, Lifepoint craves reference to the Employment Agreement and denies any and all allegations inconsistent therewith as relates to the billing provisions.

11. In response to the allegations of Paragraph 11 attempting to quote the Employment Agreement, Lifepoint craves reference to the Employment Agreement and admits that the quoted language appears in Section 13.3 of the Employment Agreement. Lifepoint lacks knowledge and information sufficient to form a belief as to the remaining allegations of Paragraph 11 and therefore denies the same.

12. Lifepoint lacks knowledge and information sufficient to form a belief as to the allegations of Paragraph 12 and therefore denies the same, and further asserts that the allegations are vague and unclear.

13. Lifepoint denies the allegations of Paragraphs 13, 14, 15, and 16.

14. In response to the allegations of the first sentence of Paragraph 17, Lifepoint admits only that on or about June 30, 2007, a Stock Purchase Agreement was entered into by and between Province Healthcare Company and Tenet HealthSystem Medical, Inc., whereby Province Healthcare Company sold all issued and outstanding capital stock of PHC-Jasper, Inc. to Tenet HealthSystem Medical, Inc. Province Healthcare Company owned 100% of the issued and outstanding capital stock of PHC-Jasper, Inc., which owned and operated the acute care general facility commonly known as Coastal Carolina Medical Center located at 1000 Medical Center Drive, Hardeeville, South Carolina. Lifepoint lacks knowledge and information sufficient to form a belief as to the allegations of the second sentence of Paragraph 17 and therefore denies the same. Lifepoint denies, upon information and belief, the allegations of the third sentence of Paragraph 17.

15. In response to the allegations of Paragraph 18, Lifepoint admits only, upon information and belief, that Plaintiff, subsequent to the June 30, 2007 Stock Purchase Agreement described above, continued his practice of medicine at Coastal Carolina Medical Center, and at his adjacent office. Lifepoint denies the remaining allegations of Paragraph 18.

16. Lifepoint denies the allegations of Paragraphs 19 and 20.

17. In response to the allegations of Paragraph 21, Lifepoint admits only that it received the referenced letter, but denies that it was the "Employer" as alleged by Plaintiff in Paragraph 21 or that it breached the Employment Agreement. Lifepoint lacks knowledge and information sufficient to form a belief as to the remaining allegations of Paragraph 21 and therefore denies the same.

18. Lifepoint denies the allegations of Paragraph 22.

19. Lifepoint lacks knowledge and information sufficient to form a belief as to the allegations of the first sentence of Paragraph 23 and therefore denies the same. Lifepoint admits the allegations of the second sentence of Paragraph 23. Lifepoint denies, upon information and belief, the allegations of the final sentence of Paragraph 23.

AS TO THE FIRST CAUSE OF ACTION

20. Answering Paragraph 24, Lifepoint repeats and incorporates herein by reference so much of the foregoing portions of the within Answer as may be pertinent hereto.

21. Lifepoint denies the allegations of Paragraphs 25 and 26.

AS TO THE SECOND CAUSE OF ACTION

22. Answering Paragraph 27, Lifepoint repeats and incorporates herein by reference so much of the foregoing portions of the within Answer as may be pertinent hereto.

23. Lifepoint denies the allegations of Paragraphs 28, 29, 30, and 31.

AS TO THE THIRD CAUSE OF ACTION

24. Answering Paragraph 32, Lifepoint repeats and incorporates herein by reference so much of the foregoing portions of the within Answer as may be pertinent hereto.

25. Lifepoint denies the allegations of Paragraphs 33 and 34.

AS TO THE FOURTH CAUSE OF ACTION

26. Answering Paragraph 35, Lifepoint repeats and incorporates herein by reference so much of the foregoing portions of the within Answer as may be pertinent hereto.

27. The allegations of Paragraph 36 constitute conclusions of law to which Lifepoint is required neither to admit nor deny. Further, the allegations do not identify Lifepoint as a Defendant to this cause of action and, therefore, do not require a response from Lifepoint.

28. In response to the allegations of Paragraph 37, Lifepoint admits only that Plaintiff prays for such relief, but denies that Plaintiff is entitled to the relief as prayed.

FOR A SECOND DEFENSE

29. Further answering the Complaint, and as and for a further defense thereto, Lifepoint alleges that the Complaint fails to state facts sufficient to constitute causes of action against it.

FOR A THIRD DEFENSE

30. Further answering the Complaint, and as and for a further defense thereto, Lifepoint alleges that Plaintiff's action is barred by the doctrines of waiver and/or estoppel.

FOR A FOURTH DEFENSE

31. Further answering the Complaint, and as and for a further defense thereto, Lifepoint alleges that Plaintiff's action is barred in this forum and should be dismissed or stayed based on the mandatory arbitration provision in the Employment Agreement.

FOR A FIFTH DEFENSE

32. Further answering the Complaint, and as and for a further defense thereto, Lifepoint alleges, upon information and belief, that Plaintiff's action against it must be dismissed due to impossibility or impracticability of performance, illegality, and/or invalidity.

FOR A SIXTH DEFENSE

33. Further answering the Complaint, and as and for a further defense thereto, Lifepoint alleges, upon information and belief, that Plaintiff's action must be dismissed as to it due to his course of dealing and conduct in continuing his employment after the Stock Purchase Agreement.

FOR A SEVENTH DEFENSE

34. Further answering the Complaint, and as and for a further defense thereto, Lifepoint alleges that Plaintiff's Employment Agreement states the entire agreement between the parties and cannot be contradicted by any oral representations not otherwise stated in the Employment Agreement.

FOR AN EIGHTH DEFENSE

35. Further answering the Complaint, and as and for a further defense thereto, Lifepoint alleges that Plaintiff failed to mitigate his damages, if any, as required by law.

FOR A NINTH DEFENSE

36. Further answering the Complaint, and as and for a further defense thereto, Lifepoint alleges that Plaintiff's claims are barred by the applicable statute of limitations and/or laches.

FOR A TENTH DEFENSE

37. Further answering the Complaint, and as and for a further defense thereto, Lifepoint alleges that the Plaintiff's action is barred in part or whole based on the doctrine of unclean hands.

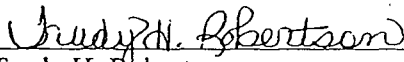
FOR AN ELEVENTH DEFENSE

38. Further answering the Complaint, and as and for a further defense thereto, Lifepoint alleges that PHC-Jasper, Inc., d/b/a Coastal Carolina Medical Center, is not a proper party defendant to this action and should be dismissed.

FOR A TWELFTH DEFENSE

39. Further answering the Complaint, and as and for a further defense thereto, Lifepoint alleges, upon information and belief, that the entire Complaint should be dismissed as to it pursuant to S.C. Code Ann. § 33-6-220 and applicable South Carolina case law.

WHEREFORE, having fully answered the Complaint, Lifepoint prays that the same be dismissed as to it with attorneys' fees and costs, and for such other and further relief as the Court may deem appropriate.


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ATTORNEYS FOR DEFENDANT
LIFEPOINT HOSPITALS, INC.

July 31, 2009

Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS

C.A. NO.: 2009-CP-27-331

Philip Flexon, M.D.,)
)
Plaintiff,)

vs.)

PHC-Jasper, Inc., d/b/a Coastal)
Carolina Medical Center, Coastal)
Carolina Medical Center, Inc.,)
Lifepoint Hospitals, Inc., and Tenet)
Healthsystems, Inc.,)
)
Defendants.)

CERTIFICATE OF SERVICE

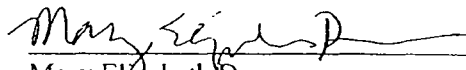
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CLERK OF COURT
JASPER COUNTY SC

The undersigned hereby certifies that a copy of *Defendant, Lifepoint Hospitals, Inc.'s*

Answer was served upon the following by U.S. Mail:

James D. Myrick
Dana W. Lang
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5 Exchange Street
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William B. Harvey, III
Harvey & Battey P.A.
P.O. Drawer 1107
Beaufort, SC 29901-1107


Mary Elizabeth Duncan

CHARLESTON, SC

July 31, 2009

STATE OF SOUTH CAROLINA)
COUNTY OF JASPER)
IN THE COURT OF COMMON PLEAS
JUDICIAL CIRCUIT
CASE NO. 2009-CP-27-331

Philip Flexon, M.D.,)
Plaintiff,)

vs.)

PHC-Jasper, Inc., d/b/a/ Coastal Carolina)
Medical Center, Coastal Carolina Medical)
Center, Inc., Lifepoint Hospitals, Inc. and)
Tenet Healthsystems,)
Defendants.)

MOTION TO STAY AND FOR ORDER
COMPELLING ARBITRATION

PLEASE TAKE NOTICE that Defendant Coastal Carolina Medical Center, Inc. will move before this Honorable Court at such place and time as the Court may appoint, for an order compelling arbitration and for a stay of this action pending arbitration. The grounds for this motion are that the employment contract, subject of this litigation, contains a valid and enforceable arbitration provision, as explained in the attached memorandum of law.

BUIST MOORE SMYTHE MCGEE P.A.

James D. Myrick
James D. Myrick, S.C. Bar No. 012004
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FILED
2009 OCT 23 AM 10:09
MARGARET BOSTICK
CLERK OF COURT
JASPER COUNTY SC

October 21, 2009
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS
JUDICIAL CIRCUIT
CASE NO. 2009-CP-27-331

Philip Flexon, M.D.,)
)
Plaintiff,)

vs.)

PHC-Jasper, Inc., d/b/a/ Coastal Carolina)
Medical Center, Coastal Carolina Medical)
Center, Inc., Lifepoint Hospitals, Inc. and)
Tenet Healthsystems,)

Defendants.)

**MEMORANDUM IN SUPPORT OF
MOTION TO STAY AND FOR ORDER
COMPELLING ARBITRATION**

2009 OCT 23 AM 10:09
MARGARET BOSCH
CLERK OF COURT
JASPER COUNTY

FILED

Coastal Carolina Medical Center, Inc. ("CCMC") files this Memorandum

Support of its motion to stay these proceedings and for an order compelling arbitration,
for the following reasons.

BACKGROUND

On or about December 18, 2006 Plaintiff Phillip Flexon, MD ("Flexon") entered
an employment contract with PHC-Jasper, Inc., whose name was later changed to CCMC
("Hospital"). The employment contract contained an arbitration clause stating:

13.5 Arbitration. Except as to the provisions contained in Articles
VIII and IX, the exclusive jurisdiction of which shall rest with a court of
competent jurisdiction in the state where the hospital is located[,] any
controversy or claim arising out of or related to this Agreement, or any
breach thereof, shall be settled by arbitration in the County, in accordance
with the rules and procedures of alternative dispute resolution established
by the Alternative Dispute Resolution Service of the American Health
Lawyers Association ("AHLA"), and judgment upon any award rendered
may be entered in any court having jurisdiction thereof. Such arbitration
shall be conducted before a single AHLA arbitrator selected jointly by the
parties, or in the event the parties are unable to agree, designated by the
AHLA.

{01610600.}

On or about September 14, 2008, Flexon terminated his employment with the Hospital. The parties disagree about certain terms in the contract, and Flexon filed this lawsuit on May 21, 2009.

ARGUMENT

The employment agreement's arbitration clause above is enforceable under the Federal Arbitration Act. Under South Carolina law, an arbitration provision is unenforceable unless the contract states in capitalized, underlined typeface, on the first page of the contract that the agreement is subject to arbitration. S.C. CODE ANN. § 15-48-10. When a contract affects interstate commerce, the Federal Arbitration Act ("FAA") preempts a state arbitration act's requirements. Doctor's Assocs. v. Casarotto, 517 U.S. 681, 683 116 S.Ct. 1652, 1654 (1996). Under the FAA, an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." Federal Arbitration Act, 9 U.S.C. § 2 (emphasis added). A state act which places notice requirements only on arbitration contracts, not all contracts, will be superseded by the FAA if the contract affects interstate commerce. Casarotto, 517 US at 681, 116 S. Ct. at 1654.

South Carolina recognizes that the FAA preempts the notice requirements of the S.C. Arbitration Act when interstate commerce is involved. In Thornton v. Trident Medical Center, a hospital and a doctor signed an employment contract that contained an arbitration provision but lacked the notice requirements of South Carolina Code Section 15 48-10. 357 S.C. 91, 94 592 S.E.2d 50, 51 (Ct. App. 2004). The Court of Appeals plainly held that if "the agreement involves interstate commerce, the FAA applies and trumps the state arbitration laws." Id. at 94-95, 592 S.E. 2d at 51.

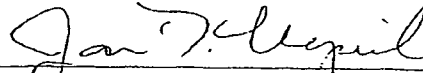
Whether a contract involves interstate commerce is a question of the agreement itself, the complaint, and the facts surrounding the contract. Id. at 95-96, 592 S.E.2d at 52. In Thornton, the contract concerned the recruitment and employment of a physician. The physician had to move his professional practice across state lines in order to perform the contract. Id. at 97, 592 S.E.2d at 53. The Court found that the physician's movement across state lines in order to perform the contract implicated interstate commerce; thus, the Federal Arbitration Act preempted the state arbitration act's notice requirements and compelled enforcement of the contract's arbitration provision. Id. at 100, 592 S.E.2d at 54.

Here, as in Thornton, the "express purpose of the . . . agreement was to provide a monetary incentive . . . to induce [the physician] to relocate his professional medical services practice from [another state] to South Carolina." Id. at 98, 592 S.E.2d at 53. Flexon alleges in his Complaint that the "In order to sign [the employment contract], Plaintiff had to discontinue, close and leave and established practice in Savannah, Georgia, where he had privileges at surgical hospitals." Complaint, ¶ 8. Flexon alleges damages for "expense and loss of income-producing services to move his practices to [sic] Savannah." Complaint ¶ 26. Thus, performance of the Employment Agreement necessitated Flexon's practice move across state lines, implicating interstate commerce and triggering the Federal Arbitration Act.

CONCLUSION

For the reasons set for above, CCMC respectfully requests that this proceeding be stayed, and for an order mandating arbitration in accordance with the parties' agreement.

BUIST MOORE SMYTHE MCGEE P.A.



James D. Myrick, , S.C. Bar No. 012004

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5 Exchange Street (29401)

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Charleston, SC 29402

(843) 722-3400

October 21, 2009
Charleston, South Carolina

{01610600.}4

R0083

CERTIFICATE OF SERVICE

I do hereby certify that on the 22nd day of October, 2009, I served a copy of the Defendants' Motion to Stay and Memorandum in Support Counsel of Record in the within entitled matter by sending a copy of the same in an envelope with the correct postage prepaid, addressed to:

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Harvey & Battey, PA
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Beaufort, SC 29901-1107

Trudy H. Robertson, Esquire
Moore & Van Allen, PLLC
P. O. Box 22828
Charleston, SC 29413

Karla B. Koster

FILED
2009 OCT 23 AM 10:09
MARGARET BOSTICK
CLERK OF COURT
JASPER COUNTY SC

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2009-CP-27-331

Philip Flexon, M.D.,
Plaintiff,

v.

PHC-Jasper, Inc., d/b/a Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc., and Tenet
Healthsystems, Inc.,

Defendants.

MEMORANDUM IN OPPOSITION TO
DEFENDANT CCMC'S MOTION
COMPELLING ARBITRATION

Defendant Coastal Carolina Medical Center, Inc., (CCMC), has filed a motion to compel arbitration under the Employment Agreement at issue herein. Plaintiff opposes that Motion and files this Memorandum.

The arbitration provision in the Employment Agreement in this case is admittedly unenforceable under South Carolina law, as it does not contain any language in capitalized, underlined typeface on the first page of the contract that the agreement is subject to arbitration, as required by *S.C. Code Ann.* §15-48-10. Therefore, the only way CCMC can compel arbitration under this agreement is if it can meet its burden of showing the contract "affects interstate commerce."

In its supporting Memorandum, CCMC relies on the South Carolina Court of Appeals case of *Thornton v. Trident Medical Center*, 357 S.C. 91, 592 SE2d 50 (Ct.App. 2004) for the proposition that this contract affects interstate commerce. This memorandum will show

that this reliance is misplaced, as this case is distinguishable in numerous respects from *Thornton*.

In *Thornton*, Defendant Trident expressly "began an effort to recruit physicians from other parts of the country to join South Carolina Cardiovascular Associates."

To entice physicians to move to Charleston, Trident offered substantial financial incentives that would not only cover the expenses of relocation, but would provide bonuses and a guaranteed stream of income for period of time after their arrival.

592 S.E.2d at 51.

In its supporting memorandum herein, Defendant CCMC erroneously states that in *Thornton* the hospital and the doctor "signed an employment agreement." Rather, the agreement entered into by the parties in *Thornton* was a "Recruiting Agreement" in which Thornton expressly agreed in the contract to relocate his medical practice as a cardiovascular surgeon from Grand Rapids, Michigan, to Charleston. *Id.* In addition, the Recruiting Agreement provided for the payment of moving expenses and expressly stated that Thornton was being recruited into the existing practice. *Id.*

In ruling that the Recruiting Agreement involved interstate commerce, the S.C. Court of Appeals noted as follows:

An essential requirement for performance under the agreement was Thornton's relocation from Michigan to South Carolina within a fixed period of time. Thornton was a resident of Michigan at the time the contract was entered.

592 S.E.2d at 53.

Additionally, the Court of Appeals noted as follows:

The contract was denominated as and intended as a recruiting agreement to induce Thornton's move across state lines. The express purpose of the recruiting agreement was to provide a monetary

incentive consisting of multiple related promises, to induce Thornton to relocate his professional medical services practice from Michigan to South Carolina. *Id.*

In *Thornton*, the Court distinguished the United States Supreme Court case of *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956), in which the Court's finding that the Federal Arbitration Act did not apply "was based upon the absence of any proof demonstrating that plaintiff, while performing duties under the employment contract, was working in commerce, was producing goods for commerce, or was engaging in activity that affected commerce." *Id.*, 350 U.S. at 201.

A review of the employment contract in question illustrates the facts which distinguish this case from *Thornton*. First, the agreement in question is clearly and expressly denominated an employment agreement, not a recruiting agreement. Secondly, nowhere in the plaintiff's employment agreement is there any mention of inducement or financial reward depending upon out-of-state activity. Unlike the plaintiff in *Thornton* who was a resident of another state, Plaintiff Phillip Flexon was a resident of Jasper County at the time he entered into this Employment Agreement. As an example, on page 9 of the Employment Agreement, it states that notice to the physician is to be given at his home address at 2712 Levy Road, Hardeeville, South Carolina.

The contract in question calls for local medical services to be performed by a Hardeeville resident at a medical facility located in Hardeeville.

Additionally, unlike the Recruiting Agreement in *Thornton*, the Employment Agreement at issue contains, at paragraph 13.4, the following language:

This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of South Carolina. Any action or claim arising from, under or pursuant to this Agreement shall be brought in the courts, state or federal, within the State of South Carolina, and the parties expressly waive the right to bring any legal action or claims in any other courts. The parties hereby consent to venue in any state or federal court within the State of South Carolina, having jurisdiction over the county for all purposes in connection with any action or proceeding commenced between the parties hereto in connection with or arising from this Agreement. (emphasis added)

This case is more closely aligned with the facts of the recent case of *Arkansas Diagnostic Center, P.A., v. Tahiri*, 370 Ark. 157, 257 S.W.3d 884 (2007). The contract in question in *Tahiri* was an employment agreement to provide medical services similar to the contract at issue herein. Indeed, in specifically distinguishing the case of *Thornton v. Trident Medical Center, supra.*, the Arkansas Supreme Court stated as follows:

The [South Carolina] court observed that an essential requirement for the performance under the agreement was Thornton's relocation from Michigan to South Carolina within a fixed period of time. It then noted that the contract "was denominated as and was intended as a recruiting agreement to induce Thornton's move across state lines. (592 S.E.2d at 53.) We note that, here, it is only an employment agreement at issue which obligates Dr. Tahiri to perform medical services, and not a recruiting agreement.
257 S.W.3d at 891.

Like Plaintiff Phillip Flexon, the defendant in *Tahiri* was a resident of the community where the medical clinic was located. In ruling that the F.A.A. was not applicable, the Arkansas Supreme Court ruled as follows:

Most specific to the employment contract at issue is that A.D.C. was a *local* clinic which contracted with Dr. Tahiri to perform medical services to its *local* patients. Based upon these factors, we hold that Dr. Tahiri's employment agreement did not facilitate A.D.C.'s alleged interstate business activities and did not evidence a transaction involving commerce. ...(emphasis in original)

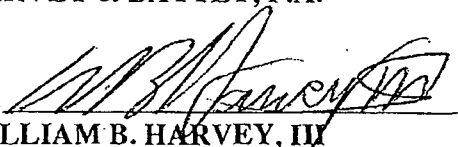
Were this Court to hold otherwise, it would equate to a finding that the F.A.A. is applicable to any contract containing an arbitration clause, as it could be argued that every contract involves some nexus to interstate commerce, *i.e.* use of interstate telephone lines or of interstate mail. We do not interpret the jurisprudence concerning the F.A.A. to include any and every contract.

257 S.W.3d at 892.

In summary, there is not one word in the physician employment agreement at issue which mentions, conditions, requires, affects or involves interstate commerce. It is this critical fact which distinguishes this case from *Thornton*. Further, unlike *Thornton*, the parties to this employment agreement specifically agreed to litigate any dispute arising from, under or pursuant to this agreement in the courts of South Carolina. The employment agreement at issue is between a Hardeeville resident and a Hardeeville medical center to provide specialized care to patients of lowcountry South Carolina.

It is clear that the party seeking to compel arbitration has the burden to prove that the contract at issue involves commerce. *See, Arkansas Diagnostics Center, P.A., v. Tahiri, supra*. On the record before this Court, Defendant CCMC cannot meet this burden. Its Motion to Compel Arbitration must therefore be denied.

Respectfully submitted,
HARVEY & BATTEY, P.A.

By: 

WILLIAM B. HARVEY, III

Post Office Box 1107

Beaufort, South Carolina 29901-1107

843-524-3109 telephone

843-524-6973 telefax

Attorneys for Plaintiff

Beaufort, South Carolina

Dated: November 25, 2009

STATE OF SOUTH CAROLINA)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS
CASE NO. 2009-CP-27-331

Philip Flexon, M.D.,

Plaintiff,

vs.

PHC-Jasper, Inc., d/b/a/ Coastal Carolina
Medical Center, Coastal Carolina Medical
Center, Inc., Lifepoint Hospitals, Inc. and
Tenet Healthsystems,

Defendants.

**DEFENDANT LIFEPOINT HOSPITALS,
INC.'S NOTICE OF MOTION AND
MOTION TO COMPEL ARBITRATION
AND STAY ACTION**

YOU WILL PLEASE TAKE NOTICE that Defendant, Lifepoint Hospitals, Inc. ("Lifepoint"), by and through its undersigned counsel, will move before the Presiding Judge of the Jasper County Court of Common Pleas, Jasper County Courthouse, Ridgeland, South Carolina, on the tenth day after the date hereof, or as soon thereafter as counsel may be heard, for an Order compelling arbitration and for a stay of this action pending arbitration. The grounds for this motion are that the employment contract at issue, which is the subject of this litigation, contains a valid and enforceable arbitration provision which requires that all causes of action in this case be determined through arbitration.

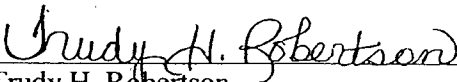
This Motion will be based on the entire record in the within matter and any additional memorandum which may be filed hereafter. Defendant Lifepoint further, pursuant to Rule 10, South Carolina Rules of Civil Procedure, adopts by reference as if fully set forth herein, the Motion to Stay and For Order Compelling Arbitration and accompanying memorandum in support filed on October 23, 2009, by co-Defendant Coastal Carolina Medical Center, Inc.

Lifepoint further states in support of its Motion. All causes of action alleged by Plaintiff in this action are subject to the arbitration provision contained in the applicable employment agreement. Unless the parties provide otherwise, the question of the arbitrability of a claim is an issue for judicial determination. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596-97, 553 S.E.2d 110, 118-19 (2001). The policy of South Carolina is to favor arbitration of disputes. Id. Arbitration is a matter of contract, and a party must submit to arbitration any dispute that he or she has agreed to submit. Id. Because arbitration rests on the agreement of the parties, the range of issues that can be arbitrated is determined by the terms of the agreement. Id. To decide whether an arbitration agreement encompasses a dispute, the Court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the label assigned to the claim. Id. Doubts, if any, concerning the scope of arbitrable issues should be resolved in favor of arbitration. Id. Additionally, unless the Court can say with positive assurance the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered. Id.

Here, the employment agreement's arbitration provision at Section 13.5 specifically states, in pertinent part, that "[a]ny controversy or claim arising out of or related to this Agreement, or any breach thereof, shall be settled by arbitration in the County, in accordance with the rules and procedures of alternative dispute resolution established by the Alternative Dispute Resolution Service of the American Health Lawyers Association ("AHLA"), and judgment upon any award rendered may be entered in any court having jurisdiction thereof" All of Plaintiff's claims in the instant action relate to his physician employment agreement, which is attached to the Complaint as Exhibit 1. Plaintiff's causes of action alleged against Lifepoint are as follows: the first cause of action alleged is for breach of the employment

agreement; the second cause of action alleged is for fraudulent misrepresentations that Plaintiff alleges were made in the course of negotiations of his employment agreement; and the third cause of action alleged is for breach of the duty of good faith and fair dealing implied in the employment agreement. All of these causes of action, without doubt, arise out of or are related to Plaintiff's employment agreement. As such, this entire action should be subject to arbitration.

PLEASE BE PRESENT TO DEFEND IF YOU ARE SO MINDED.


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Attorneys for Defendant Lifepoint Hospitals, Inc.

June 16, 2010

Charleston, SC

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS
)

COUNTY OF JASPER

) C.A. NO.: 2009-CP-27-331
)

Philip Flexon, M.D.,

)
)
) Plaintiff,
)
)

vs.

)
)
) PHC-Jasper, Inc., d/b/a Coastal
) Carolina Medical Center, Coastal
) Carolina Medical Center, Inc.,
) Lifepoint Hospitals, Inc., and Tenet
) Healthsystems, Inc.,
)

) Defendants.
)
)

CERTIFICATE OF SERVICE

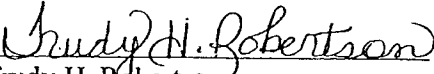
The undersigned hereby certifies that a copy of *Defendant Lifepoint Hospitals, Inc.'s Notice of Motion to Compel Arbitration and Stay Action* was served upon the following by U.S.

Mail:

James D. Myrick
Dana W. Lang
Buist Moore Smythe McGee P.A.
5 Exchange Street
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William B. Harvey, III
Harvey & Battey P.A.
P.O. Drawer 1107
Beaufort, SC 29901-1107

2010 JUN 17 AM 9:01
MARGARET BOYD
CLERK OF COURT
JASPER COUNTY SC


Trudy H. Robertson

CHARLESTON, SC

June 16, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Perry Buckner, Circuit Court Judge

Case No. 2009-CP-27-331

Phillip Flexon, M.D.

Respondent,

v.

PHC-Jasper, Inc., d/b/a/ Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc. and
Tenet Healthsystems,

Defendants,

Of whom, Coastal Carolina Medical
Center, Inc., is

Appellant.

FINAL BRIEF OF APPELLANT

James D. Myrick, SC Bar No. 12004
John C. Hawk IV, SC Bar No. 74786
Dana W. Lang, SC Bar No. 77546

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Attorneys for Appellant Coastal Carolina
Medical Center, Inc.

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STATEMENT OF ISSUES ON APPEAL

1. IS AN ORDER DENYING A MOTION TO STAY PENDING ARBITRATION IMMEDIATELY APPEALABLE?
2. DOES THE FEDERAL ARBITRATION ACT GOVERN THE FLEXON EMPLOYMENT AGREEMENT?
3. DID THE CIRCUIT COURT ERR IN RELYING ON THE FACT THAT THE AGREEMENT BETWEEN CCMC AND FLEXON WAS AN EMPLOYMENT AGREEMENT?

STATEMENT OF THE CASE

The underlying dispute in this matter arises out of an agreement of employment entered on December 18, 2006 between Dr. Phillip Flexon and Coastal Carolina Medical Center. (R. at 58.) The Flexon/CCMC Agreement contains an arbitration provision, but lacks the notice requirements of the South Carolina Arbitration Act. (R. at 67.)

On May 21, 2009, Phillip Flexon MD filed a complaint against CCMC in Jasper County. (R. at 8.) The Complaint alleges various breaches of contract against CCMC and requests a declaratory judgment as to certain aspects of the Agreement. *Id.* CCMC answered, alleging in part that the Federal Arbitration Act governed this controversy, and moving the court to stay the litigation pending arbitration.

The lower court heard oral arguments on the arbitration issue on June 9, 2010 (R. at 35), and issued its Order Denying Motion to Stay Pending Arbitration on June 30, 2010. (R. at 2.) The present matter is an appeal from the June 30, 2010 Order.

STATEMENT OF FACTS

Prior to joining Coastal Carolina Medical Center ("CCMC"), Phillip Flexon was an otolaryngologist with a practice in Savannah, Georgia. (Compl. ¶¶ 1,7,8.) (R. at 8,9.) At some point in 2006, CCMC (located in Jasper County, South Carolina) approached him to leave his Savannah practice to join CCMC. (See Compl. ¶ 8.) (R. at 9.)

Flexon and CCMC executed an employment agreement ("Agreement") on December 18, 2006. (Agreement p. 1.) (R. at 59.) As an essential requirement for the performance of the Agreement, Flexon left his Georgia practice and began working for CCMC on or about March 15, 2007. See Compl.; Agreement, Art. II. (R. at 59.) The Agreement was for a five-year term, and mandated a method of calculating whether any moneys must be paid back to CCMC should Flexon fail to complete his contractual term. (Agreement, Art. II & Exhs. I, II, III.) (R. at 59; R. at 72 §V; R. at 74 §2; R. at 75 §2.) It also memorialized the duties of each party. Finally, the Agreement contained an arbitration provision. Agreement Art. XIII, §13.5. It reads:

13.5 Arbitration. Except as to the provisions contained in Articles VIII and IX, the exclusive jurisdiction of which shall rest with a court of competent jurisdiction in the state where the hospital is located[,] any controversy or claim arising out of or related to this Agreement, or any breach thereof, shall be settled by arbitration in the County, in accordance with the rules and procedures of alternative dispute resolution established by the Alternative Dispute Resolution Service of the American Health Lawyers Association "AHLA"), and judgment upon any award rendered may be entered in any court having jurisdiction thereof. Such arbitration shall be conducted before a single AHLA arbitrator selected jointly by the parties, or in the event the parties are unable to agree, designated by the AHLA.

(R. at 67.)

Flexon terminated his employment with CCMC on or about September 16, 2008, after approximately eighteen months, to return to his Georgia practice—a clear failure to complete the agreed-upon contractual term of five years. Flexon alleges several breaches of the contract by CCMC, maintaining that such breaches relieve him of his contractual obligations. CCMC has counterclaimed for breach of contract and repayment in accordance with the contract terms.

ARGUMENT

South Carolina law requires that a contract containing an arbitration provision have “notice that a contract is subject to arbitration . . . typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract.” S.C. Code. Ann. § 15-48-10. The parties stipulate that the contract at issue does not meet the South Carolina Arbitration Act’s notice requirements. (R. at 3.) However, if the contract evidences a transaction affecting interstate commerce, the Federal Arbitration Act (“FAA”) preempts South Carolina’s notice requirement and compels arbitration of this dispute. 9 U.S.C. § 2; Doctor’s Associates, Inc. v. Casarotto, 517 U.S. 681, 687, 116 S.Ct. 1652, 1656 (1996).

This matter should be stayed pending arbitration pursuant to the Agreement between the parties. As an initial matter, the trial court’s decision to deny arbitration is immediately appealable. Further, the transaction evidenced by the Agreement implicates interstate commerce sufficiently to trigger the FAA. Finally, the trial court erred in failing to properly consider the Complaint, Agreement and the surrounding facts properly in determining whether the FAA applied to the Agreement between the parties.

I. THE TRIAL COURT'S REFUSAL TO COMPEL ARBITRATION IS IMMEDIATELY APPEALABLE.

A trial court's order denying a motion to stay pending arbitration is immediately appealable. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 587, 553 S.E.2d 110, 113 (2001) (hearing appeal of a trial court's denial of a motion for arbitration). The FAA specifically provides for such an appeal. 9 U.S.C. §16(a)(1)(C) (1999) ("[A]n appeal may be taken from . . . an order . . . denying an application under section 206 of this title to compel arbitration."). Further, South Carolina's Arbitration Act plainly allows for appeals to be taken from "an order denying an application to compel arbitration made under §15-48-20." S. C. Code Ann. § 15-48-200(a)(1).

II. THE FEDERAL ARBITRATION ACT APPLIES TO THE FLEXON EMPLOYMENT AGREEMENT.

The question of applicability of the FAA is an issue for judicial determination. See Zabinski, 346 S.C. 580, 553 S.E.2d 110. This Court will review a lower court's determination of arbitrability of a contract de novo. Stokes v. Met Life Ins. Co., 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002). However, the lower court's factual findings will be reversed only if there is no evidence reasonably supporting the findings of the lower court. Thornton v. Trident Med. Ctr., 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2004).

Section Two of the FAA provides that a "written provision in any maritime transaction or a *contract evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be

valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (1988)(emphasis added). The United States Supreme Court interprets the statutory term “involving commerce” as the functional equivalent of “affecting commerce,” signaling “an intent to exercise Congress’ commerce power to the full.” Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 277, 115 S.Ct. 834 (1995). For the FAA to apply, the transaction itself must involve interstate commerce “in fact.” Id. at 277-81; Towles v. United Healthcare Corp., 338 S.C. 29, 36, 524 S.E.2d 839, 843 (Ct. App. 1999).

Both South Carolina’s and the United States’ jurisprudence require an expansive view of interstate commerce. Zabinski, 346 S.C. at 596, 553 S.E.2d at 118. The “basic purpose of the FAA is to overcome state courts’ refusal to enforce arbitration agreements.” Id. at 590-91, 553 S.E.2d at 114. Thus, if interstate commerce is actually involved in the performance of the contract, then the FAA applies.

Whether a contract involves interstate commerce “in fact” is determined by examination of the agreement, the complaint, and the facts surrounding the contract. Thornton, 357 S.C. at 95-96, 592 S.E.2d at 52. In Thornton, the contract at issue concerned the recruitment and employment of a physician. The physician had to move his professional practice across state lines in order to perform the contract. Id. at 97, 592 S.E.2d at 53. This Court found that the physician’s movement, among other actions, across state lines in order to perform the agreement implicated interstate commerce; thus, the FAA preempted the state Arbitration Act’s notice requirements and compelled enforcement of the contract’s arbitration provision. Id. at 100, 592 S.E.2d at 54.

Here, the Agreement evidenced a transaction affecting interstate commerce. The Complaint, the contract itself, and the surrounding facts determine whether interstate commerce is implicated. Thornton, 357 S.C. at 95-96, 592 S.E.2d at 52. Specifically, the allegations of the Plaintiff's Complaint, the notice provision in the Agreement, and the Plaintiff's characterization of the facts surrounding his employment demonstrate an interstate transaction to a degree sufficient to trigger the FAA.

In his Complaint, Flexon alleges that, "In order to sign Exhibit 1 [the employment agreement]," he had to "discontinue, close and leave an established practice in Savannah, Georgia where he had privileges at surgical hospitals." Compl. ¶ 8. (R. at 9.) Flexon alleges CMCC knew "that Plaintiff would have to close and terminate an established practice in Savannah in order to fulfill his obligations" in South Carolina under the Agreement. Compl. ¶ 13. (R. at 10.) Flexon includes in his allegations of damages the "time, expense and loss of income producing services to move his practice to Savannah." Compl. ¶ 26. (R. at 12.) Flexon alleges duties arose because of "the nature of the pending employment relationship, [and] the upheaval that such a relationship would cause to Plaintiff's then-existing practice of medicine." Compl. ¶ 29. (R. at 15.) The "then-existing" practice is Flexon's Georgia practice.

Plaintiff's discovery responses, alleging the "facts surrounding" the contract, further illustrate that interstate commerce was implicated by this transaction. Flexon alleges Savannah-area doctors stopped referring patients to Flexon after he experienced difficulties in his employment with CCMC; the necessary implication is that Flexon, at some point during his employment with CCMC, was receiving referrals across state lines. Ans. to CCMC Interrog. 7 (R. at 81) ("[A]fter the sale of the hospital to Tenet was

announced in June . . . many Savannah doctors stopped referring patients to Plaintiff because of Tenet's horrible reputation."). Further, in discovery responses, Plaintiff explained that he took his more complicated surgical cases across state lines to Memorial Hospital in Savannah during the course of his employment with CCMC. Ans. to CCMC Interrog. 9(c.) (R. at 82-83) ("The availability of equipment became so unreliable that Plaintiff started taking him [sic] complicated cases to Memorial.").

In short, Flexon himself alleges that moving his practice in interstate commerce was a prerequisite of performing the Agreement, and alleges several interstate activities as a consequence of his employment at CCMC. The allegations of Flexon's Complaint demonstrate that the transaction evidenced by the Agreement between Flexon and CCMC involved interstate commerce to a degree sufficient to trigger the FAA. Flexon's discovery responses provide additional evidence of interstate activities in which Flexon personally engaged in furtherance of his employment with CCMC.

The Plaintiff argues that the present case is distinguishable from Thornton because the Agreement itself does not articulate evidence of interstate commerce. This argument ignores the indisputable fact that one contract provision directs Flexon to send all written notices to the employer to an address in Brentwood, Tennessee. Employment Agreement, Art. XII. (R. at 67.)

More fundamentally, the determination of applicability of the FAA does not end with examination of the Agreement. In fact, the South Carolina Court of Appeals has upheld an arbitration agreement without any reference whatsoever to the employment or recruiting contract. In Towles v. United Healthcare Corporation, an arbitration agreement was embedded in an employee handbook and referenced in an

acknowledgement form. 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). The Court determined that the FAA was implicated after inquiring into Towles' activities during the course of his employment. Id. at 36, 524 S.E.2d at 843. This Court noted Towles' responsibilities included interstate activities, such as reviewing insurance claims from out-of-state healthcare providers. Id. The Towles decision plainly illustrates that South Carolina jurisprudence requires a court to extend its inquiry beyond the contract language alone.

The lower court relied heavily on an Arkansas case, Arkansas Diagnostic Center, PA v. Tahiri, in which the Arkansas Supreme Court held the FAA did not apply to a particular employment agreement between a doctor and a hospital. 370 Ark. 157, 257 S.W.3d 884 (2007). (See R. at 5-7.) Tahiri is distinguishable in many aspects from the present case.

First, the hospital/employer in Tahiri argued unsuccessfully that if "employer's business activities involve interstate commerce, no matter how slight, Congress has plenary authority to direct the application of the FAA." Id. at 161, 257 S.W.3d at 888. Notably, Tahiri's employer relied on its *own* activities, such as interstate purchasing of supplies, the hospital's treatment of three out-of state patients, and the hospital's receipt of payments from out-of-state insurers to demonstrate interstate activity. Id. at 160-61, 257 S.W.3d at 888.

Here, CCMC does not rely on its own activities to implicate an interstate commerce transaction triggering the FAA. Instead, CCMC points to the Plaintiff's interstate activities during his employment and the Plaintiff's characterization that

moving his practice across state lines was necessary in order to fulfill his contractual obligations. See Compl. ¶¶ 8, 13. (R. at 9, 10-11.)

Second, Dr. Tahiri, unlike Flexon, both lived and worked in the same state prior to his employment that was the subject of his lawsuit. In contrast, according to the Complaint, Flexon maintained a comprehensive medical practice in Georgia which he moved across state lines in order to join his new employer. (R. at 9, ¶8. See also R. at 49, l. 24 – R. at 50, l. 4.) That Flexon moved his practice from Georgia to South Carolina in order to perform his contract with Coastal substantially distinguishes this matter from the facts in Tahiri.

III. THE TRIAL COURT'S RELIANCE ON THE FACT THAT THE FLEXON/CCMC CONTRACT IS AN EMPLOYMENT AGREEMENT, NOT A RECRUITING AGREEMENT, IS MISPLACED.

The trial court distinguished the present case from Thornton in part because “the agreement in question is clearly and expressly denominated an employment agreement, not a recruiting agreement.” (June 30, 2010 Order, p. 3.) (R. at 4.)

The type of contract containing an arbitration clause is irrelevant. South Carolina’s rules governing the applicability of the FAA are entirely independent of the type of agreement in which the clause is embedded. See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360 (2001) (installment contract); Episcopal Housing Corp. v. Fed. Ins. Co., 269 S.C. 631, 239 S.E.2d 647 (1977) (construction contract). That the Flexon/CCMC Agreement was for employment, instead of recruitment, is entirely irrelevant to the determination of applicability of the FAA.

The trial court purported to rely upon the reasoning from a 1956 Supreme Court case to support its opinion. (Order, p. 3.) (R. at 4.) (“It is [the Bernhardt] analysis that

similarly distinguishes Thornton from the present case.”) (referencing Bernhardt v. Polygraphic Co., 350 U.S. 198, 76 S.Ct. 273 (1956)). Specifically, the trial court quoted Thornton, stating that “unlike the recruiting agreement in the case *sub judice*, the agreement in Bernhardt did not contemplate any actions affecting commerce outside of Vermont. Performance under the contract in Bernhardt was-by its terms-confined to a single state.” (Order, p. 3.) (R. at 4.) (quoting Thornton, 592 S.E.2d at 53). This reliance is misplaced, and the trial courts selective quotation from Thornton distorts the United States Supreme Court’s holding in Bernhardt.

First, South Carolina and the United State Supreme Court have recognized that the 1956 Bernhardt decision was written when arbitration law was in its infancy, and that this body of law has “evolved and matured” considerably since then. Thornton, 357 S.C. at 98, 592 S.E.2d at 53. The U.S. Supreme Court has described the FAA’s evolutionary “reach expansively as coinciding with [the expansion] of the Commerce Clause.” Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 266, 115 S.Ct. 834 (1995).

Moreover, even the Bernhardt decision recognizes that the agreement alone does not dictate whether interstate commerce is implicated. In Bernhardt, arbitration was denied because there was no evidence that petitioner, “while performing his duties under the employment contract[,] was working ‘in’ commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions.” Bernhardt, 350 U.S. at 201, 76 S.Ct. at 275. “The mere absence in the contract of mention of interstate activities does not control whether interstate commerce is affected; rather, the question, according to a long line of state and federal

jurisprudence, is whether performance of the contract actually affected interstate commerce.

Later decisions clarify that if interstate commerce is actually affected by the transaction, the contemplation of the parties—and therefore their contractual language—is not relevant. See, e.g., Allied-Bruce, 513 U.S. at 278, 115 S.Ct. 834 (holding that the FAA is triggered when interstate commerce is involved in fact, even if interstate commerce was not within the contemplation of the parties at the time of contracting). After noting that the goal of the FAA is to assure that an arbitration provision is given “equal footing” with other contract provisions, the Court recognized the absurdity of merely looking to the contract to discern whether interstate commerce is implicated:

Moreover, that interpretation too often would turn the validity of an arbitration clause on what, from the perspective of the [FAA’s] basic purpose, seems happenstance, namely whether the parties happened to think to insert a reference to interstate commerce in the document or happened to mention it in an initial conversation. After all, parties to a sales contract with an arbitration clause might naturally think about the goods sold, or about arbitration, but why should they naturally think about an interstate commerce connection?

Allied-Bruce, 513 U.S. at 278, 115 S.Ct. 834.

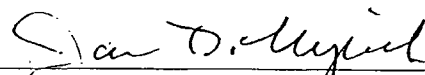
As argued *supra* Section 2, the lower court’s inquiry should not have ended with a review of the Agreement itself. The lower court should have considered the Complaint, the Agreement and the facts surrounding the transaction to determine whether interstate commerce was actually implicated. Because this Court reviews this matter de novo, it should now order the parties to arbitrate according to the terms of the Agreement.

CONCLUSION

For the foregoing reasons, Appellant Coastal Carolina Medical Center respectfully requests that this Court reverse the order of the trial court below; enter a stay

of that litigation pending arbitration; and order the parties to arbitrate their dispute in accordance with the contract's terms.

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Dated: February 24, 2011

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Perry Buckner, Circuit Court Judge

Case No. 2009-CP-27-331

Phillip Flexon, M.D.

Respondent,

v.

PHC-Jasper, Inc., d/b/a/ Coastal
Carolina Medical Center, Coastal
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Lifepoint Hospitals, Inc. and
Tenet Healthsystems,

Defendants,

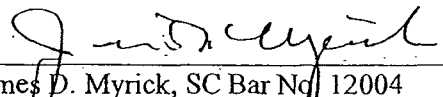
Of whom, Coastal Carolina Medical
Center, Inc., is

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b),
SCACR, February 18, 2011.

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FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE *CITIZENS* “TEST” IS NOT A TEST FOR APPLICATION OF THE FAA TO A PARTICULAR TRANSACTION AND IS INAPPLICABLE HERE.

Respondent argues that the “United States Supreme Court fashioned a three-prong test of the reach of the Commerce Clause and the FAA upon local activity such as that at issue here.” (Resp’t’s Br. 7.) No such test was announced in *Citizens*. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 123 S.Ct. 2037 (2003). Rather, the *Citizens* decision was an explanation of the long line of jurisprudence expanding the extraordinarily broad reach of the Federal Arbitration Act (hereinafter, “FAA”) (9 USC §2 *et seq.*). In *Citizens*, the Court determined that a debt-restructuring transaction, even if transacted entirely within the boundaries of a single state, is subject to the FAA because of the broad general impact of commercial lending on the nation’s economy. *Id.* at 57, 123 S.Ct. at 2040. The Court held that even if the particular transaction at issue had no nexus with interstate commerce, the FAA would still apply if “in the aggregate the economic activity in question would ‘represent a general practice . . . subject to federal control.’ [citations omitted.] Only the general practice need bear on interstate commerce in a substantial way.” *Id.*

Whether healthcare employment agreements for medical professionals who accept federal funds broadly impacts the national economy sufficient to trigger Commerce Clause is perhaps debatable. What is unmistakably clear is that the particular transaction between Flexon and CCMC (hereinafter, “Agreement”) did, in fact, affect interstate commerce—Flexon moved his practice across state lines, was referred business by out-of-state physicians, and performed surgeries in Georgia during his “local” employment.

Citizens merely explained an alternate route for broad application of the FAA when an intrastate transaction is of a type that broadly impacts commerce. Citizens is inapplicable to this case.

II. CONTRARY TO RESPONDENT'S ASSERTIONS, THE EMPLOYMENT AGREEMENT REQUIRES CESSATION OF FLEXON'S GEORGIA PRACTICE.

Flexon argues that "nothing in the Agreement . . . conditions the employment of the Respondent upon the cessation of his practice in Savannah." (Resp't's Br. 8.) To the contrary, the Employment Agreement is replete with requirements that Flexon cease his Georgia practice in order to perform the Agreement.

For example, Section 3.1 requires Flexon to "devote his full professional working time and attention" to CCMC. (R. at 59.) Section 3.3 likewise insists that Flexon's "full working time and attention" be devoted to his new employer. (R. at 59.) In Section 3.7, Flexon agrees "not to engage in any other medical professional business activity without prior written consent" of CCMC. (R. at 60.) Finally, Section 9.1 is a covenant not to compete during the term of his employment. (R. at 65.) Fundamentally, each of these terms "conditions the employment of the Respondent upon the cessation of his practice in Savannah." (Resp't's Br. 8.) Therefore, the Agreement affects interstate commerce and is subject to the FAA.

III. THE CASES CITED BY RESPONDENT ALL RELY EXCLUSIVELY UPON ACTIONS OF THE PARTY SEEKING TO ENFORCE ARBITRATION.

Respondent cites several cases from states other than South Carolina to support his argument that the transaction does not show sufficient indicia of interstate commerce to require application of the FAA. In all of those cases, the party seeking enforcement of the FAA relied on its own activities, instead of activities of both parties necessary and incident to the agreement.

For example, in one case, the extreme position of the party seeking enforcement of the FAA was that if "employer's business activities involve interstate commerce, no matter how slight, Congress has plenary authority to direct the application of the FAA." Arkansas Diagnostic Center, PA v. Tahiri, 370 Ark. 157, 161 257 S.W.3d 884, 888 (2007). The party, a hospital, relied on its *own* activities, such as interstate purchasing of supplies, the hospital's treatment of three out-of state patients, and the hospital's receipt of payments from out-of-state insurers to demonstrate interstate activity. *Id.* at 160-61, 257 S.W.3d at 888. The doctor in Tahiri did not move his practice across state lines (as Flexon did), did not get referrals from out-of-state physicians for his business (as Flexon did), and did not perform complex medical procedures at an out-of-state hospital as part of his employment (as Flexon did).

In Timms, a South Carolina case cited by the Respondent, a nursing home resident brought a personal injury action against a nursing home when her hair caught fire under a hair dryer. Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (1993). The nursing home argued unsuccessfully that the home's acceptance of Medicaid payments, marketing efforts across state lines, and other acts of the nursing home implicated

interstate commerce sufficient to require application of the FAA. The Court disagreed, stating, “[a]lthough these factors could evidence the Center’s involvement in interstate commerce, we find that their relationship to the agreement between the Center and the respondent is insufficient to form the basis of the contract between the parties.” *Id.* at 473; 427 S.E.2d at 644.

By contrast, CCMC points to the actions taken by Flexon in the course of his performance of the Agreement, not acts of CCMC unrelated to the Flexon Agreement. These include Flexon’s allegations in his Complaint of closing his established practice in Savannah, Georgia to perform the Agreement (Compl. ¶ 8, 13) (R. at 9, 10-11); losing time and income for his move (Compl. ¶ 26) (R. at 14); and disrupting his Georgia medical practice (Compl. ¶ 29) (R. at 15). Flexon further notes Savannah-area doctors stopped referring patients to Flexon during his CCMC tenure. The necessary implication is that Flexon, at some point, was receiving referrals across state lines during his employment with CCMC. (Ans. to CCMC Interrog. 7) (R. at 81.) Finally Flexon performed complicated surgical cases across state lines in Savannah during the course of his employment with CCMC. (Ans. to CCMC Interrog. 9(c.)) (R. at 82-83.)

In short, Flexon himself alleges that moving his practice across state lines was a prerequisite of performing the Agreement, and alleges several interstate activities as either prerequisites or consequences of his employment at CCMC. These actions are essential parts of his performance on the Agreement, not isolated acts of CCMC alone. Therefore, the present case is distinguished substantially from the cases cited by Respondent.

IV: THE CONTRACT PROVISIONS REGARDING ARBITRATION AND LITIGATION MAY BE RECONCILED, GIVING MEANING TO BOTH PROVISIONS.

Lastly, Flexon points to the "Governing Law and Venue" section of the Agreement, arguing that this somehow negates the otherwise enforceable arbitration provision. Section 13.4 (R. at 67) of the agreement states:

Governing Law and Venue This Agreement shall be governed by, and construed and enforced in acceptance with the laws of the State of South Carolina. Any action or claim arising from under or pursuant to this Agreement shall be brought in the courts, state or federal, within the State of South Carolina, and the parties expressly waive the right to bring any legal action or claims in any other courts. The parties hereto hereby consent to venue in any state or federal court within the State of South Carolina having jurisdiction over the County for all purposes in connection with any action or proceeding commenced between the parties hereto in connection with or arising from this Agreement.

Section 13.5 (R. at 67) of the same Agreement states:

Arbitration. Except as to the provisions contained in Articles VIII and IX, the exclusive jurisdiction of which shall rest with a court of competent jurisdiction in the state where the hospital is located, any controversy or claim arising out of or related to this Agreement, or any breach thereof, shall be settled by arbitration in the County, in accordance with the rules and procedures of alternative dispute resolution and arbitration established by the Alternative Dispute Resolution Service of the American Health Lawyers Association ("AHLA"), and judgment upon any award rendered may be entered in any court having jurisdiction thereof. Such arbitration shall be conducted before a single AHLA arbitrator selected jointly by the parties, or in the event the parties are unable to agree, designated by the AHLA.

The inclusion of these two provisions, at first glance, suggests an ambiguity. This is not the case, however, since the provisions can be reconciled. The Court will endeavor to give "effect to all of [a contract's] provisions, if the court reasonably may do so."

Burch v. S.C. Cotton Growers' Co-op. Ass'n, 181 S.C. 295, 187 S.E. 422 (1936). Thus, a Court will first reconcile the two sections to give effect to both, if reasonable. Id.

Here, the Arbitration provision carves out two Articles of the Agreement which are not to be handled by arbitration, but rather in a South Carolina court (“Except as to the provisions contained in Articles VIII and IX, the exclusive jurisdiction of which shall rest with a court of competent jurisdiction . . .”). Thus, Section 13.4 concerns only those portions of the Agreement carved out of the Arbitration provision. In this manner, full effect is given to all terms of the contract, as required by Burch. Id.

Such a carve-out is logical in the larger scheme of the Agreement as a whole. The two carved-out Articles deal with (a) custody of medical records after employment ends and non-disclosure of proprietary information of employer and (b) a covenant not to compete with Employer within a certain geographic range (R. at 65—66). The parties contemplated and bargained for speedy injunctive relief for the Employer should Respondent violate either of these narrow Articles. (Article 8.3; Article 9.5 (R. at 65-66) (both stating “[i]n the event of any violation of these restrictions, Employer shall be entitled to preliminary and permanent injunctive relief . . .”). Because Flexon’s violation of either of these Articles could lead to immediate and irreparable damage to CCMC, the parties sensibly carved these items out of the Arbitration scheme, and granted exclusive jurisdiction of those items to the courts of South Carolina so that CCMC could have immediate relief.

Further, Section 13.4 can be read as merely a venue and governing law provision not conflicting with the arbitration provision, as the heading implies—it reads, “Governing Law and Venue.” (R. at 65.) “The parties’ intent to have ‘the validity and

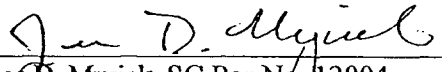
construction of the contract determined by the arbitrators according to the substantive law identified in the agreement' is entirely consistent with an agreement to arbitrate." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 595, 553 S.E.2d 110, 117 (2001) (internal citation omitted). Selecting South Carolina substantive law and naming the appropriate venue for any injunctive relief are entirely consistent with the FAA. See Osteen v. T.E. Cuttino Constr. Co., 315 S.C. 422, 434 S.E.2d 281 (1993).

CONCLUSION

Respondent's arguments seemingly ignore that the interstate actions cited by CCMC as implicating interstate commerce are Respondent's own actions, as pled in his Complaint and as answered in his discovery responses. Respondent relies on cases across several jurisdictions that find no indicia of interstate commerce for particular transactions. In each cited case, however, the purported interstate acts were solely acts of the party seeking application of the FAA and did not involve performance of the particular contract at issue. In contrast, as described above, performance of the Employment Agreement involved in this case itself implicated interstate commerce.

For the foregoing reasons, Appellant Coastal Carolina Medical Center respectfully requests that this Court reverse the order of the trial court below, enter a stay of that litigation pending arbitration, and order the parties to arbitrate their dispute in accordance with the contract's terms.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Perry Buckner, Circuit Court Judge

Case No. 2009-CP-27-331

Phillip Flexon, M.D.

Respondent,

v.

PHC-Jasper, Inc., d/b/a/ Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc. and
Tenet Healthsystems,

Defendants,

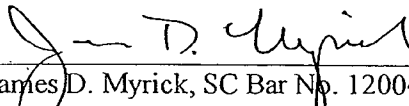
Of whom, Coastal Carolina Medical
Center, Inc., is

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b),
SCACR, February 18, 2011.

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February 24, 2011

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
APPEAL FROM JASPER COUNTY

Perry Buckner, Circuit Court Judge

Case No. 2009-CP27-331

PHILLIP FLEXON, M.D., ...Respondent

v.

PHC-JASPER, INC., d/b/a
Coastal Carolina Medical Center,
Coastal Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc., and
Tenet Healthsystems, ...Defendants

Of whom
Coastal Carolina Medical Center, Inc., is, ...Appellant

RESPONDENT'S FINAL BRIEF

Dated: February 21, 2011

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STATEMENT OF ISSUE ON APPEAL

1. THE LOWER COURT PROPERLY FOUND THE EMPLOYMENT AGREEMENT IN QUESTION TO BE ONE BETWEEN A LOCAL RESIDENT AND A LOCAL MEDICAL FACILITY FOR SERVICES TO LOCAL CITIZENS, WHICH DOES NOT AFFECT COMMERCE AND THEREFORE DOES NOT TRIGGER APPLICATION OF THE FEDERAL ARBITRATION ACT.

STATEMENT OF THE CASE

Respondent adopts the Statement of the Case set forth in the Brief of Appellant.

STATEMENT OF FACTS

This action, filed in the Jasper County Court of Common Pleas, arises out of an employment agreement between Respondent and Coastal Carolina Medical Center¹ (hereinafter the Agreement). The Agreement, dated December 18, 2006, is entitled Physician Employment Agreement and contains the following language:

WHEREAS, Employer is engaged in the business of operating and managing medical practices and other health care services in Jasper County, South Carolina;

...

Employer engages Physician, and physician accepts such engagement, as a physician primarily at the medical practice office located at 1010 Medical Center Drive, Hardeeville, South Carolina 29927, and such other practice sites in Beaufort and Jasper counties as may be reasonably designated by Employer from time to time. (R. p. 59)

The Agreement further contains the following provisions:

13.4 This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of South Carolina. Any action or claim arising from, under or pursuant to this Agreement shall be brought in the courts, state or federal, within the State of South Carolina, and the parties expressly waive the right to bring any legal action or claims in any other courts.

13.5 Except as to the provisions contained in Articles VIII and IX, the exclusive jurisdiction of which shall rest with a court of competent

¹The Physician Employment Agreement in question is between Respondent and Coastal Carolina Medical Center. Defendant PHC-Jasper, Inc., d/b/a Coastal Carolina Medical Center, is a South Carolina corporation with its principal place of business in Jasper County, SC. Defendant Coastal Carolina Medical Center, Inc. is likewise a South Carolina corporation with its principal place of business in Jasper County, SC. While the Motion to Compel Arbitration under appeal is by Coastal Carolina Medical Center, Inc. (R. p. 2), the analysis of the arbitration issue is the same for both of the Coastal Carolina Medical Center Defendants.

jurisdiction in the state where the hospital is located, any controversy or claim arising out of or related to this Agreement, or any breach thereof, shall be settled by arbitration in the County, in accordance with the rules and procedures of alternative dispute resolution established by the Alternative Dispute Resolution Service of the American Health Lawyers Association ("AHLA"), and judgment upon any award rendered may be entered in any court having jurisdiction thereof. Such arbitration shall be conducted before a single AHLA arbitrator selected jointly by the parties, or in the event the parties are unable to agree, designated by the AHLA. (R. p. 67)²

Finally, the Agreement acknowledges that Respondent has an address of 2712 Levy Road, Hardeeville, SC 29927. (R. p. 67)

Upon Respondent's commencement of employment, the Defendants began a series of acts and omissions that were in violation of the Agreement and the representations made to induce Respondent's signing of the Agreement. These culminated when, on August 15, 2008, Respondent delivered to the Defendants a formal notice of termination for cause, pursuant to the terms of the Agreement. The Defendants failed to cure the material breaches of the Agreement set forth in the notice, and the Agreement terminated for cause on September 14, 2008. Thereafter, on May 4, 2009, Respondent received a letter from the Defendants CCMC/Tenet claiming Respondent owed Defendant CCMC an amount exceeding \$725,000, and further claiming that Respondent must cease his current practice of medicine. This action followed.

²It is admitted by the Appellant that this arbitration provision is not conspicuous, and is therefore not in accord with the requirements of the South Carolina Arbitration Act, *S.C. Code Ann* §15-48-10.

The Complaint alleges several causes of action against the various Defendants; Breach of Contract, Fraud in the Inducement, and Breach of Good Faith and Fair Dealing. Additionally, as to Appellant and/or Defendant Tenet, it seeks a declaratory judgment of the duties owed by Respondent. (R. pp. 8-34)

Appellant filed a Motion to Compel arbitration of all issues in this litigation. A hearing was held on June 9, 2010, at which time the parties stipulated that the Agreement at issue does not meet the notice requirements of the South Carolina Arbitration Act, S.C. Code Ann. §15-48-10, and the only way arbitration survives is if the Federal Arbitration Act (FAA), 9 U.S.C. §2, applies. (R. p. 48) Respondent submits the Agreement involved does not affect interstate commerce, but rather is simply an employment agreement for local medical services to be performed by a Hardeeville resident at a medical facility located in Hardeeville. As such, the FAA does not apply and the arbitration clause in the Agreement is unenforceable.

ARGUMENT

The question of applicability of the FAA is an issue for judicial determination. *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 553 S.E.2d 110 (2001). While the appellate court will review a lower court's determination of arbitrability of a contract *de novo*, "in all cases, determination of whether a transaction involves interstate commerce depends on the facts of each case." *Thornton v. Trident Medical Center*, 357 S.C.91, 592 S.E.2d 51, 52 (Ct. App. 2004). Further, the lower court's factual findings will be

reversed only if there is no evidence reasonably supporting the findings of the lower court. *Id.*, 592 S.E.2d at 51.

At the hearing, the parties stipulated that Respondent was a resident of Jasper County at the time he entered into the Agreement. (R. p. 50) The lower court ruled that the Agreement contains no language which mentions, conditions, requires, affects or involves interstate commerce. Rather, it is simply an employment agreement “for local medical services to be performed by a Hardeeville resident at a medical facility located in Hardeeville.” (R. pp. 6-7)

In the seminal case of *Bernhardt v. Polygraphic Company of America*, 350 U.S.198, 76 S.Ct. 273, 100 L.Ed. 199 (1956), which also involved an employment agreement, the Plaintiff/Petitioner was a resident of New York when the contract was made, the Respondent was a New York corporation, and the contract was executed in New York. Petitioner later became a resident of Vermont, where he was to perform his duties under the contract. Even though the facts clearly involved two states (New York and Vermont), the Supreme Court held that the contract did not involve “a transaction involving commerce” within the meaning of Section 2 of the FAA. 350 U.S. at 201, 76 S.Ct. at 275. “There is no showing that petitioner while performing his duties under the employment contract was working “in” commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decision.” *Id.*

Similarly, in the case of *Arkansas Diagnostic Center, P.A. v. Tahiri*, 370

Ark. 157, 257 S.W.3d 884 (2007), the contract in question was an employment agreement to provide medical services, as in the Agreement in question. Like Respondent, the defendant in Tahiri was a resident of the community where the medical clinic was located. In ruling that the FAA was not applicable, the Arkansas Supreme Court ruled as follows:

Most specific to the employment contract at issue is that A.D.C. was a *local* clinic which contracted with Dr. Tahiri to perform medical services to its *local* patients. Based upon these factors, we hold that Dr. Tahiri's employment agreement did not facilitate A.D.C.'s alleged interstate business activities and did not evidence a transaction involving commerce. ...(emphasis in original)

Were this Court to hold otherwise, it would equate to a finding that the F.A.A. is applicable to any contract containing an arbitration clause, as it could be argued that every contract involves some nexus to interstate commerce, *i.e.* use of interstate telephone lines or of interstate mail. We do not interpret the jurisprudence concerning the F.A.A. to include any and every contract.
257 S.W.3d at 892.

In the recent case of *Bruner v. Timberland Manor Limited Partnership*, 2006 OK 90, 155 P.3d 16 (2006), involving a medical negligence case against a nursing home, the defendant relied on a dispute resolution provision in its admission contract which provided that all disputes arising out of the care rendered by the nursing home would be resolved by binding arbitration. After a lengthy and thorough analysis of the various Supreme Court and other federal decisions dealing with the FAA, the Oklahoma Supreme Court affirmed the lower court's denial of the motion to compel arbitration, stating as follows:

Finally, plaintiff argues that the FAA does not preempt the NHCA because 1) the nursing home admission contract does not evidence a transaction involving commerce, and 2) the nursing home failed to prove that nursing home care substantially affects interstate commerce. Plaintiff argues that the evidence showing the nursing home has some transactions that affect interstate commerce is insufficient, considering that the patient was an Oklahoma resident, the nursing home is an Oklahoma limited partnership with its principal place of business in Oklahoma, and the nursing home is licensed by Oklahoma. We agree.

The nursing home admission contract in this case involves a profoundly local transaction-in-state nursing home care provided to an Oklahoma individual by an Oklahoma entity licensed under Oklahoma law.

155 P.3d at 31.

In *Citizens Bank v. Alafabco, Inc.*, 539 U.S.52, 123 S.Ct. 2037, 156 L.Ed.46 (2003), the United States Supreme Court fashioned a three-prong test of the reach of the Commerce Clause and the FAA upon local activity such as that at issue here. The FAA reaches arbitration agreements in contracts evidencing a transaction that is 1) economic activity, 2) which in aggregate is a general practice subject to control under the Commerce Clause, and 3) which in aggregate has a substantial impact on interstate commerce. *Bruner, supra*, 155 P.3d at 31. This case, as in *Bruner*, fails this test on the second prong and on the third prong.

In this record, there is no showing that Congress intended to place local employment agreements in the interstate commerce category. Further, the fact that, incidental to a local employment agreement, Respondent closed his medical practice in Georgia is insufficient to impress interstate commerce regulation upon

an employment agreement between a Jasper County hospital and a Jasper County resident for services to Lowcountry South Carolina patients. *See, Bruner*, 155 P.3d at 31.

Appellant attempts to focus on the allegations that the Respondent's primary practice was located in Savannah prior to the commencement of his employment under the Agreement. This argument overlooks the nature of that allegation. The second cause of action in the Complaint is for fraud in the inducement. In paragraph 8, Respondent alleges that "Plaintiff was enticed to sign Exhibit 1 by the representations of employees and agents of Lifepoint that he would enjoy a long relationship with Lifepoint and Coastal Carolina Medical Center." (R. p. 9) Defendant Lifepoint is not a party to this appeal – Appellant is Defendant Coastal Carolina Medical Center, Inc. Further, there is nothing in the Agreement that conditions the employment of the Respondent upon the cessation of his practice in Savannah; the Agreement does not contain any language the mentions this medical practice. Respondent's allegation of his practice in Savannah is in connection with the cause of action for fraud in the inducement. Appellant's attempt to focus on this to create an issue affecting commerce in connection with the Agreement is misplaced.

The case of *Libby Corporation v. Skelly and Loy, Inc.* 910 F. Supp.195 (M.D. Pa. 1995) involved a lawsuit over construction of a shopping center between the contractor (Libby) and the project engineer (Skelly and Loy, Inc.). The

contract between the parties included a provision requiring arbitration of all disputes. The District Court ruled that the FAA did not apply, stating as follows:

We must therefore determine whether the FAA applies here. We conclude that it does not. Although Libby is an Ohio corporation and Skelly is a Pennsylvania corporation, there is nothing to indicate that this contract involved commerce between two states. Rather, all correspondence arising out of the contract was within Pennsylvania, between Libby's Wexford, Pennsylvania office and Skelly's Monroeville and Harrisburg, Pennsylvania offices. Further the services were performed in Pennsylvania by Skelly employees. Accordingly, we find that the FAA does not govern the outcome of this matter, and we look to the substantive law of Pennsylvania. 910 F. Supp. at 198.

In *Timms v. Greene*, 310 S.C.469, 427 S.E.2d 642 (1993), plaintiff brought a negligence action against Mary Greene and Greenwood Health Care Center. The contract between the plaintiff and the Center required the submission of dispute to binding arbitration. Despite various factors, including the out-of-state location of the Center's parent corporation, the S.C. Supreme Court affirmed the lower court's denial of the defendants' motion to compel arbitration, stating as follows:

In this record is an affidavit of the administrator of the Center, which avers that the Center engages in interstate commerce in that the Center 1) is a division of National HealthCorp, L.P., a Delaware Limited Partnership; 2) markets its services to person residing outside this State; 3) hires employees from outside the State; 4) purchases a majority of its good, equipment and supplies out the state for use at the Center; and 5) contemplates payment in part by Medicare or Medicaid. Although these factors could evidence the Center's involvement in interstate commerce, we find that their relationship to the agreement between the Center and the respondent is insufficient to form the basis of the contract between the parties. 427 S.E.2d at 644.

In its Order, the Lower Court acknowledged that "To ascertain whether a transaction involves commerce within the FAA, the court must examine the agreement, the complaint, and the surrounding facts. 'In all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case.'" (R. p. 3) In analyzing these elements, the Lower Court found the Agreement in question "is between a Hardeeville resident and a Hardeeville medical center to provide specialized care to patients of Lowcountry South Carolina." (R. p. 7) It is this finding which distinguishes this case from *Thornton v. Trident Medical Center*, 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2004), so heavily relied upon by Appellant. Thornton involved a "recruiting agreement" in which the plaintiff expressly agreed to relocate his medical practice as a surgeon from Michigan to Charleston, S.C. The agreement expressly provided that Thornton was being recruited from out of state to an existing medical practice. The S.C. Court of Appeals noted that an essential requirement of performance under the agreement was Thornton's relocation from Michigan to South Carolina within a fixed period of time. Thornton was a resident of Michigan when the contract was entered. 592 S.E.2d at 53. "The express purpose of the recruiting agreement was to provide a monetary incentive to induce Thornton to relocate his professional medical services practice from Michigan to South Carolina." *Id.*

To the contrary, the Agreement at issue is an employment agreement, which contains no mention of any inducement or financial reward depending upon out-of-

state activity. There is no language, nor any requirement, in the Agreement which mentions, conditions, requires, affects or involves interstate commerce. (R. p. 5) It is this finding which more likens this case to *Arkansas Diagnostic Center, P.A. v. Tahiri*, 370 Ark. 157, 257 S.W. 3d 884 (2007), cited by the Lower Court. This factor also closely aligns this case with the various decisions cited above in which the courts found the FAA inapplicable.

The Lower Court also noted that, unlike the Recruiting Agreement in *Thornton*, the Agreement at issue contains, in paragraph 13.4, the following language:

Any action or claim arising from, under or pursuant to this Agreement shall be brought in the courts, state or federal, within the State of South Carolina, and the parties expressly waive the right to bring any legal action or claims in any other courts. The parties hereby consent to venue in any state or federal court within the State of South Carolina, having jurisdiction over the county for all purposes in connection with any action or proceeding commenced between the parties hereto in connection with or arising from this Agreement. (emphasis added)

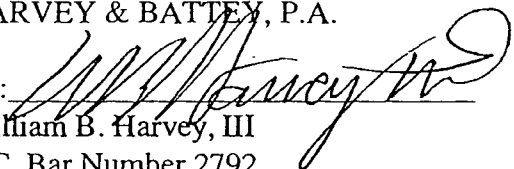
The Lower Court found this to be significant, stating “unlike *Thornton*, the parties to this employment agreement specifically agreed to litigate any dispute arising from, under or pursuant to this agreement in the courts of South Carolina.” (R. p. 6) Further, the express language of the Agreement “waives” the rights of the parties to bring any action or claim in any court other than the courts of South Carolina.

CONCLUSION

The Agreement at issue is an employment agreement between a local resident physician and a local medical facility for services to be performed to local citizens. The Lower Court properly found that the facts of this case did not affect commerce so as to trigger application of the FAA. South Carolina law applies to this Agreement, which admittedly fails to meet the requirements of the South Carolina Arbitration Act. The Lower Court's Order denying the Motion to Compel Arbitration should therefore be affirmed.

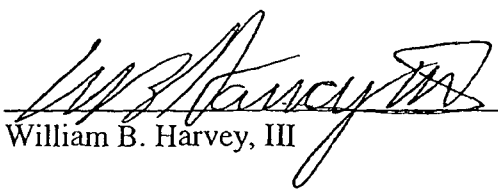
Dated: February 21, 2011

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CERTIFICATE OF COMPLIANCE

I certify that the Respondent's **Final Brief** complies with Rule 211(b) of the South Carolina Appellate Court Rules.


William B. Harvey, III

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM JASPER COUNTY

Perry Buckner, Circuit Court Judge

Case No. 2009-CP27-331

PHILLIP FLEXON,
M.D., ...

Respondent

v.

PHC-JASPER, INC., d/b/a
Coastal Carolina Medical Center,
Coastal Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc., and
Tenet Healthsystems, ...

Defendants

Of whom

Coastal Carolina Medical Center, Inc., is, ... Appellant

CERTIFICATE OF SERVICE

I certify that I have served the Respondent's Final Brief on all parties, by depositing a copy of same in the United States Mail, postage prepaid, on February 18, 2011, addressed to their respective counsel of record, as follows:

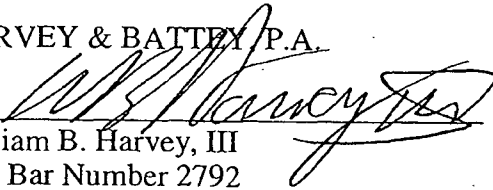
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STATE OF SOUTH CAROLINA
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Coastal Carolina Medical Center,
Coastal Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc., and
Tenet Healthsystems, ... Defendants

Of whom
Coastal Carolina Medical Center, Inc., is, ... Appellant

Respondent's Return to
Appellant's Petition for Rehearing

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Attorney for Respondent
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In its Petition for Rehearing, Appellant argues that “the Court limited its inquiry to the intent of the parties to engage in interstate activities” and “failed to consider the interstate connections that occurred as a direct result of Flexon signing the Agreement with CCMC.” A reading of the Court’s opinion clearly reveals otherwise (“Flexon alleged he had to close an established practice in Savannah, Georgia, in order to accept employment with PHC.” Op. at p.2).

The arguments made by Appellant in this Petition are simply those already made in its Brief and Reply Brief on Appeal. Appellant has added, for the first time in this Petition, reference to the sign-on bonus addendum in the Employment Agreement. “The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” *Kennedy v. S. Carolina Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). As the Supreme Court stated in *Kennedy*, “Appellants had the opportunity to present their arguments and evidence when this case was originally heard by the trial court. Therefore, this Court should not consider appellants’ previously unrepresented evidence when deciding whether to grant the petition for rehearing.” *Id.* In response to this Petition, Respondent would incorporate by reference the arguments and case citations in its Final Brief.

The key to both the Lower Court’s and this Court’s analysis is the parties’ stipulation at the lower court hearing that Respondent was a resident of Jasper County at the time he entered into the Agreement. (R. p. 50) There is no language, or any requirement in the

language of the Employment Agreement which mentions, conditions, requires, affects or involves interstate commerce. (R. p. 5) The fact that, incidental to a local employment agreement, Respondent closed his medical practice in Georgia is insufficient to impress interstate commerce regulation upon an employment agreement between a Jasper County hospital and a Jasper County resident for services to Lowcountry South Carolina patients. See, *Bruner v. Timberland Manor Limited Partnership*, 2006 OK 90, 155 P.3d 16, 31 (2006).

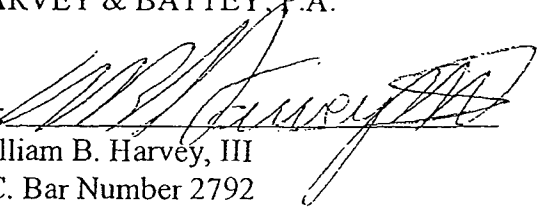
In its Opinion, this Court ruled as follows:

Under the facts surrounding this agreement, Flexon was a South Carolina resident, and Coastal hired him to provide medical services “at the medical practice office located at 1010 Medical Center Drive, Hardeeville, South Carolina...and such other practice sites in Beaufort and Jasper counties as may be reasonably designated by [PHC] from time to time.” Op. at p.7

The standard of review is “the trial court’s factual findings will not be reversed on appeal if there is any evidence reasonably supporting the findings.” *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491; 689 S.E.2d 602, 603 (2010). In this case there is clearly evidence reasonably supporting the lower court’s findings. This Court did not overlook the facts or misapprehend the law. There is certainly no reason compelling *en banc* reconsideration of this decision. Appellant’s Petition for Rehearing should be denied.

///

Respectfully submitted,
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
APPEAL FROM JASPER COUNTY

Perry Buckner, Circuit Court Judge

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PHILLIP FLEXON,
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Of whom
Coastal Carolina Medical Center, Inc., is, ... Appellant

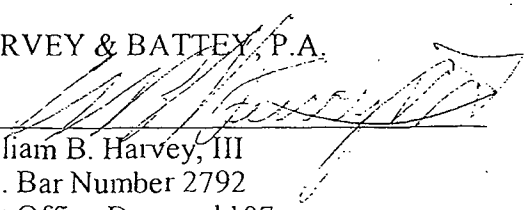
CERTIFICATE OF SERVICE

I certify that I have served the Respondent's Return to Appellant's Petition for Rehearing on all parties, by depositing a copy of same in the United States Mail, postage prepaid, on March 29, 2012, addressed to their respective counsel of record, as follows:

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Attorney for Respondent Flexon

Dated: March 29, 2012
Beaufort, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

Philip Flexon, M.D.,

Plaintiff,

vs.

PHC-Jasper, Inc., d/b/a/ Coastal Carolina Medical
Center, Coastal Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc. and
Tenet Healthsystems,

Defendants.

) IN THE COURT OF COMMON PLEAS

)

) CIVIL CASE NO.: 2009-CP-27-0331

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**DEFENDANT LIFEPOINT HOSPITALS,
INC.'S NOTICE OF MOTION AND
RENEWED MOTION TO COMPEL
ARBITRATION AND STAY ACTION**

YOU WILL PLEASE TAKE NOTICE that Defendant, Lifepoint Hospitals, Inc. ("Lifepoint"), by and through its undersigned counsel, will move before the Presiding Judge of the Jasper County Court of Common Pleas, Jasper County Courthouse, Ridgeland, South Carolina, on the tenth day after the date hereof, or as soon thereafter as counsel may be heard, for an Order compelling arbitration and for a stay of this action pending arbitration.¹ The grounds for this motion are that the employment contract at issue, which is the subject of this litigation, contains a valid and enforceable arbitration provision which requires that all causes of action in this case be determined through arbitration.²

¹ It is important to mention for background purposes that Lifepoint previously filed a motion to compel arbitration on June 17, 2010, which was later withdrawn without prejudice. Moreover, on February 13, 2013, the Plaintiff and the Defendants entered into a Second Amended Consent Scheduling Order ("Consent Order") which specifically addressed the ability of Lifepoint to re-file its motion to compel arbitration without prejudice. The Consent Order states: "The parties and this Court recognize that one of the Defendants may move to compel arbitration, and that this consent order in no way constitutes a waiver of Defendant's asserted right to compel arbitration. The parties agree that the conduct of written discovery or depositions will not be evidence of a waiver of Defendant's asserted right to arbitration. The Plaintiff also agrees that engaging in discovery pursuant to this order does not constitute prejudice or undue burden."

² Lifepoint has recently obtained deposition testimony from the Plaintiff which clearly demonstrates that the subject employment agreement containing the arbitration provision involved and affected interstate commerce. Previously,

All causes of action alleged by Plaintiff in this action are subject to the arbitration provision contained in the applicable employment agreement. Unless the parties provide otherwise, the question of the arbitrability of a claim is an issue for judicial determination. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596-97, 553 S.E.2d 110, 118-19 (2001). The policy of South Carolina is to favor arbitration of disputes. Id. Arbitration is a matter of contract, and a party must submit to arbitration any dispute that he or she has agreed to submit. Id. Because arbitration rests on the agreement of the parties, the range of issues that can be arbitrated is determined by the terms of the agreement. Id. To decide whether an arbitration agreement encompasses a dispute, the Court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the label assigned to the claim. Id. Doubts, if any, concerning the scope of arbitrable issues should be resolved in favor of arbitration. Id. Additionally, unless the Court can say with positive assurance the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered. Id.

Here, the employment agreement's arbitration provision at Section 13.5 specifically states, in pertinent part, that "[a]ny controversy or claim arising out of or related to this Agreement, or any breach thereof, shall be settled by arbitration in the County, in accordance with the rules and procedures of alternative dispute resolution established by the Alternative Dispute Resolution Service of the American Health Lawyers Association ("AHLA"), and

Defendant, Coastal Carolina Medical Center, Inc. ("CCMC"), filed its own motion to compel arbitration which was denied by this Court, and later affirmed on appeal, because the evidentiary record before the Court at that time of the hearing lacked sufficient facts to demonstrate that the transaction affected interstate commerce. Lifepoint did not join in CCMC's motion to compel arbitration and was expressly instructed by this Court to file its own motion if Lifepoint wanted to pursue enforcing the arbitration provision against the Plaintiff. Lifepoint is now re-filing its motion to compel arbitration because there are sufficient facts that clearly establish that the Plaintiff's employment agreement with Lifepoint facilitated interstate business activities.

judgment upon any award rendered may be entered in any court having jurisdiction thereof”

All of Plaintiff's claims in the instant action relate to his physician employment agreement, which is attached to the Complaint as Exhibit 1. Plaintiff's causes of action alleged against Lifepoint are as follows: the first cause of action alleged is for breach of the employment agreement; the second cause of action alleged is for fraudulent misrepresentations that Plaintiff alleges were made in the course of negotiations of his employment agreement; and the third cause of action alleged is for breach of the duty of good faith and fair dealing implied in the employment agreement. All of these causes of action, without doubt, arise out of or are related.

Additionally, unless the parties have contracted otherwise, the FAA applies to any arbitration agreement regarding a transaction that involves interstate commerce, despite the parties' contemplation of an interstate transaction. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538-39, 542 S.E.2d 360, 363-64 (2001). “The United States Supreme Court has held that the phrase ‘involving commerce’ is the same as ‘affecting commerce,’ which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent.” Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct.App.2002) (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995)). “To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts.” Zabinski, 346 S.C. at 594, 553 S.E.2d at 117.

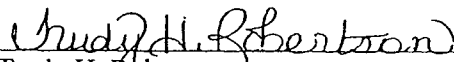
Here, the terms of the Agreement and the surrounding facts clearly evidence that the employment transaction involved and affected interstate commerce. The medical services provided by the Plaintiff under the terms of the Agreement were not simply contained to a local

clinic, with privileges at a local hospital, and treating local patients. The required performance of the Agreement, by its terms, was not limited to the State of South Carolina. In fact, the Agreement contemplated and the Plaintiff's practice actually involved providing medical services in both South Carolina and Georgia. Under Article 1, Section 1.1, the Agreement states that the "Employer engages Physician and Physician accepts such engagement . . . to render professional physician services to *patients*." (emphasis added). As evidenced in the recent deposition testimony of the Plaintiff, it is clear that the Plaintiff would be providing medical services to *patients* in both Georgia and South Carolina. The Plaintiff testified that "[t]he practice always existed in both states before and after. It really did. I mean, it was -- you know, it -- by -- by accident there's a river and a state line, but the practice always involved both states." See Exhibit A (Plaintiff's Depo. p. 269 ll. 20-24). The Plaintiff stated that he had "plenty of patients coming from Georgia." Id. (Plaintiff's Depo. p. 373 ll 1-2).

In addition, under Article 3, Section 3.6, the Agreement states that the "Physician shall perform his/her duties at . . . those hospitals facilities at which Physician maintains Medical Staff privileges." As evidenced by the deposition testimony, the Plaintiff was expected to maintain medical staff privileges at Savannah Memorial Hospital ("Memorial"), and did in fact perform medical services for patients at Memorial, as part of the Agreement. The Plaintiff testified that one of [Lifepoint's] issues was, you know, [Plaintiff] -- I was to continue on the staff at Memorial . . . So that was -- [Lifepoint] wanted that, [Lifepoint] wanted me on the staff at Memorial." Id. (Plaintiff's Depo. p. 115 ll. 3-7). The Plaintiff also stated that he was working at Memorial "Maybe three [days a week] -- . . . because I was with Memorial and having -- and, again, having to do rounds both places." Id. (Plaintiff's Depo. p. 181 ll. 17-21).

This motion will be supported by the pleadings and exhibits attached thereto, the applicable laws, statutes and rules of civil procedure, any affidavit and/or memorandums that may be filed, as well as any additional supporting materials as Defendant Lifepoint may be permitted to submit in accordance with the Rules of Civil Procedure.

PLEASE BE PRESENT TO DEFEND IF YOU ARE SO MINDED.


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Attorneys for Defendant Lifepoint Hospitals, Inc.

May 30, 2013

Charleston, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF JASPER	)	C.A. NO.: 2009-CP-27-331
	)	
Philip Flexon, M.D.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
PHC-Jasper, Inc., d/b/a Coastal	)	<u>CERTIFICATE OF SERVICE</u>
Carolina Medical Center, Coastal	)	
Carolina Medical Center, Inc.,	)	
Lifepoint Hospitals, Inc., and Tenet	)	
Healthsystems, Inc.,	)	
	)	
Defendants.	)	
	)	

The undersigned hereby certifies that a copy of *Defendant, Lifepoint Hospitals, Inc.'s Notice of Motion and Renewed Motion to Compel Arbitration and Stay Action* was served upon the following by U.S. Mail:

James D. Myrick
Dana W. Lang
Buist Moore Smythe McGee P.A.
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Charleston, SC 29402

William B. Harvey, III
Harvey & Battey P.A.
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Heather Morin
Heather Morin

CHARLESTON, SC

May 30, 2013

EXHIBIT A

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF JASPER

3 PHILLIP FLEXON, MD,

4 Plaintiff,

5 vs.

CASE NO. 2009-CP-27-331

6 PHC-JASPER, INC. D/B/A COASTAL
7 CAROLINA MEDICAL CENTER,
8 COASTAL CAROLINA MEDICAL CENTER,
INC., LIFEPOINT HOSPITALS, INC.,
and TENET HEALTHSYSTEMS,

9 Defendants.

COPY

10
11 DEPOSITION OF: PHILLIP FLEXON, MD

12 DATE: April 30, 2013

13 TIME: 10:04 AM

14 LOCATION: Law Offices of Harvey & Battey, PA
15 1001 Craven Street
16 Beaufort, SC

17 TAKEN BY: Counsel for the Defendants

18 REPORTED BY: KELLY A. BALL, Court Reporter

19 A. WILLIAM ROBERTS, JR., & ASSOCIATES

20 Fast, Accurate & Friendly

21 Charleston, SC Hilton Head, SC Myrtle Beach, SC
22 (843) 722-8414 (843) 785-3263 (843) 839-3376

23 Columbia, SC Greenville, SC Charlotte, NC
24 (803) 731-5224 (864) 234-7030 (704) 573-3919
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A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
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1 APPEARANCES OF COUNSEL:

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8 (843) 524-3109
9 Bharvey@harveyandbattey.com10 ATTORNEYS FOR THE DEFENDANT
11 PHC-JASPER, INC. D/B/A COASTAL CAROLINA
12 MEDICAL CENTER, COASTAL CAROLINA
13 MEDICAL CENTER, INC., and
14 TENET HEALTHSYSTEMS:15 WOMBLE, CARLYLE, SANDRIDGE & RICE, PA
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19 (843) 720-4643
20 Jmyrick@wcsr.com21 ATTORNEYS FOR THE DEFENDANT
22 LIFEPOINT HOSPITALS, INC.:23 MOORE & VAN ALLEN, PLLC
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(843) 579-7040
Josephbelton@mvalaw.com

21 (INDEX AT REAR OF TRANSCRIPT)

1 me, the kind of things we could do at -- at Coastal
2 and at Memorial. I mean, bear in mind, Eric
3 Deaton, one of his issues was, you know, he -- I
4 was to continue on the staff at Memorial.

5 Q. Uh-huh.

6 A. So that was -- he wanted that, he
7 wanted me on the staff at Memorial.

8 Q. And you feel like that -- that CCMC let
9 you down on letting the world know where you were,
10 all of your information?

11 A. Right.

12 Q. All right. Right.

13 A. And in some of the cases, you know,
14 some of the -- the things that I did that -- that
15 had possibly the biggest potential patient-building
16 capabilities, navigational equipment for my sinus
17 surgery, lasers, they didn't -- they didn't get the
18 equipment.

19 Q. Uh-huh. Did you ever need that
20 equipment to do a procedure and it was not provided
21 to you by a rental or borrowing it from somewhere?

22 A. Yes, and -- and -- and in this -- this
23 fashion. Initially it was going to be, well, we're
24 going to buy it, you're going to get to pick it
25 out. And so right off the bat some vendors brought

1 A. I don't. I don't.

2 Q. And what would you do if you did not
3 have scheduled surgeries for two days?

4 A. Oh, if I didn't have -- for two days?

5 Q. Yeah. You said you would usually have
6 two days surgery and three days in the office.

7 A. Yeah, but I would have like -- like say
8 Tuesdays and Thursdays is surgery and Monday,
9 Wednesday, but I'd probably try to, you know, put
10 patients on or -- or -- or something like that.
11 So, you know, try to, you know, do something.

12 Q. And how many days a week would you be
13 absent from your office?

14 A. I don't know. You know, the surgery
15 days I would be, you know, but -- would be absent
16 and...

17 Q. So two days a week?

18 A. Maybe three --

19 Q. Maybe three.

20 A. -- because I was with Memorial and
21 having -- and, again, having to do rounds both
22 places.

23 Q. Okay. Did you report these absences --
24 or absences to your employer --

25 A. What?

1 A. That's right.

2 Q. Okay.

3 A. Yeah, I mean, I think it's easy to look
4 at the pro forma that I submitted. It's not my
5 numbers, those are not my numbers, those are
6 Memorial's numbers. Don't even include my activity
7 at Chandler which existed at the time. And that's
8 the practice I was engaged in. That's what -- I
9 mean, I didn't go anywhere. I had the practice.
10 It was -- you know, I switched hospitals. There
11 was nothing -- it was right there.

12 Q. Uh-huh.

13 A. And they -- you know, they -- they -- I
14 feel they destroyed it.

15 Q. Uh-huh. Were there any other problems
16 not caused by Tenet that would result from trying
17 to transport a practice from Georgia to South
18 Carolina?

19 A. You know, I -- you know, the practice
20 wasn't transported. The practice always existed in
21 both states before and after. It really did. I
22 mean, it was -- you know, it -- by -- by accident
23 there's a river and a state line, but the practice
24 always involved both states. So there was nothing
25 that moving from the -- the -- the practice from

1 did change a little bit. But Georgia -- plenty of
2 patients coming from Georgia.

3 Q. All right. You mentioned earlier about
4 kind of just going out on your own, not being
5 connected to a hospital. Why did you not do that?
6 Again, when -- this would be at the time of leaving
7 Memorial for the first time to go to Coastal,
8 instead of going to Coastal, you just --

9 A. Right. Well, I had -- I had -- that
10 was an option. An option was to go in with my old
11 group and start up new as a private practice with
12 that group. An option was to -- I actually think I
13 had a couple options with some people in town.
14 I -- I would have had to, you know, borrow money
15 and -- and I was -- would have felt that it would
16 have been better to have -- you know, be a little
17 younger to borrow the substantial amount of money.

18 I felt that to go on your own,
19 Georgia -- might have just been verbally the fact
20 the CON and the surgery center might have been, you
21 know, the best way to go and I didn't want to do an
22 investment like that.

23 South Carolina, again, that's where I
24 lived and I thought that the new hospital was a
25 great way to start and bring what practice I had

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

Philip Flexon, M.D.,

Plaintiff,

vs.

PHC-Jasper, Inc., d/b/a/ Coastal Carolina
Medical Center, Coastal Carolina Medical
Center, Inc., Lifepoint Hospitals, Inc. and
Tenet Healthsystems,

Defendants.

) IN THE COURT OF COMMON PLEAS

) CASE NO. 2009-CP-27-331

)

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**DEFENDANT PHC- JASPER, INC., d/b/a
COASTAL CAROLINA MEDICAL
CENTER, COASTAL CAROLINA
MEDICAL CENTER, INC.'S MOTION
FOR RELIEF PURSUANT TO RULE**

60(b)

Defendant PHC-Jasper, Inc., d/b/a Coastal Carolina Medical Center, Coastal Carolina Medical Center, Inc. (hereinafter "CCMC"), pursuant to Rules 60(b) of the South Carolina Rules of Civil Procedure, hereby moves this Court for an Order relieving CCMC from this Court's Order denying arbitration because newly discovered evidence renders the Order unjust.

This motion will be supported by a memorandum of law to be filed prior to the motion.

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

Dana Lang

James D. Myrick, , S.C. Bar No. 012004

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August 7, 2013
Charleston, South Carolina

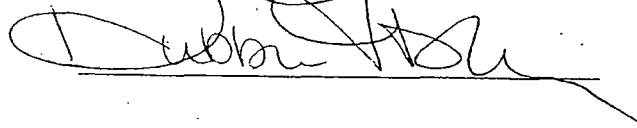
CERTIFICATE OF SERVICE

I do hereby certify that on the 7th day of August, 2013, I served a copy of the within Defendant PHC-Jasper, Inc., d/b/a Coastal Carolina Medical Center, Coastal Carolina Medical Center, Inc.'s Motion for Relief Pursuant to Rule 60(b) to Counsel of Record in the within entitled matter by sending a copy of same in an envelope with the correct postage prepaid addressed to:

William B. Harvey, III, Esq.
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Attorneys for Defendant Lifepoint Hospitals, Inc.

WOMBLE CARLYLE SANDRIDGE & RICE LLP



STATE OF SOUTH CAROLINA
COUNTY OF JASPER

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2009-CP-27-331

Phillip Flexon, M.D.,

Plaintiff,

v.

PHC-Jasper, Inc., d/b/a Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc., and Tenet
Healthsystems, Inc.,

Defendants.

**MEMORANDUM IN OPPOSITION TO
DEFENDANT LIFEPOINT'S
RENEWED MOTION TO COMPEL
ARBITRATION AND TO
DEFENDANT CCMC'S MOTION FOR
RELIEF PURSUANT TO RULE 60(b)**

This matter is before the Court upon Defendant Lifepoint's Renewed Motion to Compel Arbitration and Defendant CCMC's Motion for Relief Pursuant to Rule 60(b). Plaintiff would show below that the issues involved in these motions have been decided with finality by the South Carolina Court of Appeals, which is the law of the case. As such, these motions must be denied and Plaintiff should have the opportunity to try his case in Jasper County as filed.

A procedural history of this case is necessary for full consideration of these motions. This case was commenced with the filing of the Summons and Complaint on May 26, 2009 (Exhibit A). As alleged in the Complaint, this matter arises from an Employment Agreement (the Agreement) between the Plaintiff and Coastal Carolina Medical Center (CCMC) dated December 18, 2006. At the time the Agreement was negotiated and executed, CCMC was owned by Defendant Lifepoint Hospitals, Inc. (Lifepoint). The Agreement contains a

provision prohibiting assignment without mutual consent. It is alleged that, at the time the Agreement was being negotiated, Lifepoint was in active discussions with Defendant Tenet for the sale of the hospital. That sale occurred in June, 2007, at the very time that Plaintiff began his employment. Plaintiff would not have entered into any employment relationship with Tenet, as Tenet had a very negative reputation to the Plaintiff as a hospital owner. In July, 2007, Tenet presented Plaintiff with an Amendment to and Assignment of Physician Employment Agreement (the Assignment) which purported to assign the Agreement to Tenet. Plaintiff refused to sign the Assignment, and in August 2008, delivered a formal notice of termination for cause, pursuant to the Agreement. This action followed.

In response to the Complaint, Defendant Tenet Healthsystems, Inc. filed a Motion to Dismiss alleging that the Complaint failed to state a cause of action. After a hearing on November 30, 2009, the Court denied this Motion to Dismiss.

On October 6, 2009, Defendant Tenet¹ served Interrogatories and Requests for Production on the Plaintiff (Exhibit B). Similarly Defendant Lifepoint served Interrogatories and Requests for Production upon the Plaintiff on April 16, 2010 (Exhibit C). Nowhere in any of these discovery requests, or in any correspondence or email communication, was there any mention that these discovery requests were in any way limited because of the affirmative defenses alleged (by both counsel) that this action was subject to mandatory arbitration. Plaintiff responded to the discovery requests of CCMC on April 19, 2010. Defendant

¹There has been one collective response by Defendants PHC-Jasper, Inc., Coastal Carolina Medical Center, Inc., and Tenet Healthsystems. They are collectively referred to herein as "Tenet". Tenet has also responded for CCMC.

Lifepoint responded to Plaintiff's initial discovery requests on October 30, 2009, and on November 13, 2009, again without any reservation or limitation.

On October 21, 2009, Tenet (designated as CCMC) filed a Motion to Compel Arbitration pursuant to the terms of the Agreement. In support of this Motion, Tenet submitted a Memorandum in Support (Motion and Memorandum, Exhibit D). Nowhere in this Memorandum is there any mention of the desire or attempt to take the deposition of the Plaintiff, generally or with reservation of any rights. Prior to the hearing on this Motion to Compel Arbitration, neither counsel made any attempt whatsoever to take the deposition of the Plaintiff.

In response to the Motion to Compel Arbitration, Plaintiff submitted a Memorandum in Opposition (Exhibit E). A hearing was held on June 9, 2010 before the Honorable Judge Perry Buckner. Attached as Exhibit F is the transcript of this hearing. It is noteworthy that, in the entire argument before the Court, counsel for CCMC made no mention that he needed, or wanted, to take the deposition of the Plaintiff, or that he had any thought of, or had made any attempt to take the Plaintiff's deposition prior to the hearing.

At the time of the June 9, 2010 hearing, Defendant Lifepoint had not filed a Motion to Compel Arbitration. However, counsel for Lifepoint acknowledged before the Court that any such Motion would be identical to that of CCMC:

MS. ROBERTSON: Judge, if I may; I'm not presenting argument. This is not our motion today, but we pled this as an affirmative defense as well, that this matter should be submitted to arbitration. I think it goes to arbitration and it should. We support this motion. It goes as to all parties. If I have to separately move, I can do that, but

THE COURT: I think you ought to do that, because obviously the plaintiff isn't on notice of that. I understand that's your position, but all I can deal with is this motion today.

But I understand that. I think you need to file your own motion. And I realize you pled it. But he wasn't prepared to argue, except as against this motion today. It might be an identical argument, but....

MS. ROBERTSON: I think that likely it is. So I will make it.
(Exhibit F, page 18; emphasis supplied).

One week later, on June 16, 2010, and two weeks before the ruling of the Court on the identical motion by CCMC, Lifepoint filed its Motion to Compel Arbitration (Exhibit G). Significantly, Lifepoint's Motion states as follows:

This Motion will be based on the entire record in the within matter and any additional memorandum which may be filed hereafter. Defendant Lifepoint further, pursuant to Rule 10, South Carolina Rules of Civil Procedure, adopts by reference as if fully set forth herein, the Motion to Stay and for Order Compelling Arbitration and accompanying memorandum in support filed on October 23, 2009, by co-Defendant Coastal Carolina Medical Center, Inc....All of these causes of action, without doubt, arise out of or are related to Plaintiff's employment agreement. As such, this entire action should be subject to arbitration. (Exhibit G).

As with the Motion by CCMC, and the arguments by both counsel at the hearing, the Motion and Supporting Memorandum by Lifepoint did not mention at all the need to depose the Plaintiff as a condition to a ruling thereon.

By Order dated June 30, 2010, Judge Buckner denied the Motion by Defendant CCMC to compel arbitration (Exhibit H), stating in part as follows:

There is no language in the physician employment agreement at issue which mentions, conditions, requires, affects or involves interstate commerce. It is this critical fact which distinguishes this case from *Thornton* [*Thornton v. Trident Medical Center*, 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2004)]. Further, unlike *Thornton*, the parties to this employment agreement specifically agreed to litigate any dispute arising from, under or pursuant to this agreement in the courts of South Carolina. The employment agreement at issue is between a Hardeeville resident and a Hardeeville medical center to provide specialized care to patients of Lowcountry South Carolina. (Order pp 5-6)

On July 29, 2010, Defendant CCMC filed its Notice of Appeal to the South Carolina Court of Appeals. By reported decision dated March 7, 2012, (Exhibit I) the Court of Appeals affirmed the lower court's Order, stating in part as follows:

We agree with the trial court that the facts of this case are more akin to those in *Tahiri*. [*Arkansas Diagnostic Center, P.A. v. Tahiri*, 257 S.W.3d 884 (Ark. 2007)]. Under the facts surrounding this agreement, Flexon was a South Carolina resident, and Coastal hired him to provide medical services "at the medical practice office located at 1010 Medical Center Drive, Hardeeville, South Carolina...and such other practice sites in Beaufort and Jasper counties as may be reasonably designated by [PHC] from time to time...." **We agree with the trial court's finding that the Agreement and surrounding facts did not implicate interstate commerce. Therefore, the FAA did not apply to the Agreement.** See *Thornton*, 357 S.C. at 96, 592 S.E.2d at 52 ("Our courts consistently look to the essential character of the contract when applying the FAA."). *Phillip Flexon, M.D. v. PHC-Jasper, Inc.*, 399 S.C. 83, 89, 731 S.E.2d 1, 4 (Ct. App. 2012). (emphasis supplied)

On March 19, 2012, CCMC filed its Petition for Rehearing and Suggestion of Rehearing En Banc with the Court of Appeals. (Exhibit J). Again, nowhere in this filing is there any mention that the Defendants' Motion, or the court's consideration, was in any way hampered or impacted by the failure or inability to take the deposition of the Plaintiff.

By Order filed July 23, 2012, (Exhibit K), the Court of Appeals ruled "the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing."

On August 29, 2012, the Court of Appeals issued its Remittitur of this case back to the Jasper Court of Common Pleas. (Exhibit L).

There is only one Employment Agreement in this case, which is attached to the Complaint. It was negotiated and signed by Defendant Lifepoint. Although the Motion to

Compel Arbitration was filed and appealed by CCMC, as acknowledged by counsel for Lifepoint, the issues and argument are identical for Lifepoint. Lifepoint now points to statements made in the Plaintiff's deposition which was taken on April 30, 2013. The fact that the parties have now taken the deposition of the Plaintiff, and did not do this before fully prosecuting their motion, is not "newly discovered facts" warranting the reopening of rulings already decided by the Court of Appeals.

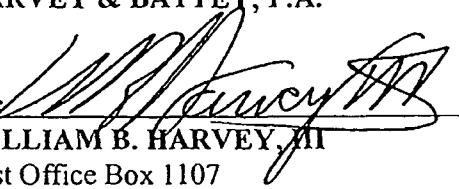
Under the law of the case doctrine, "a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *Judy v. Martin*, 381 S.C. 455, 458-59, 674 S.E.2d 151, 153 (2009) (citing *170 *Bakala v. Bakala*, 352 S.C. 612, 632, 576 S.E.2d 156, 166 (2003)). "The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case." *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957). *Sloan Const. Co., Inc. v. Southco Grassing, Inc.*, 395 S.C. 164, 169-70, 717 S.E.2d 603, 606 (2011).

The Court of Appeals has decided that this Employment "Agreement and surrounding facts did not implicate interstate commerce. Therefore, the FAA did not apply to the Agreement." *Phillip Flexon, M.D. v. PHC-Jasper, Inc.*, 399 S.C. 83, 89, 731 S.E.2d 1, 4 (Ct. App. 2012). If Defendants believe that the Plaintiff's deposition was necessary for a full review of this issue, they should have sought to present that contention to the lower and appellate courts when this issue was before them. That they did not then cannot now be grounds for reargument of issues about which the parties spent two years

litigating in the Court of Appeals. The decision of the Court of Appeals on the applicability of the FAA to this Agreement is the law of the case. The motions by the Defendants to reopen and reargue this issue must be rejected and denied.

Respectfully submitted,

HARVEY & BATTEY, P.A.

By: 

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Attorneys for Plaintiff

Beaufort, South Carolina

Dated: September 3, 2013

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2009-CP-27- 331

Philip Flexon, M.D.,
Plaintiff,

v.

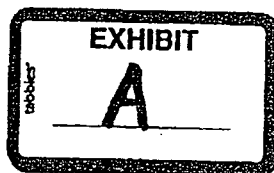
PHC-Jasper, Inc., d/b/a Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc., and Tenet
Healthsystems, Inc.,

Defendants.

SUMMONS
(JURY TRIAL DEMANDED)

TO: THE DEFENDANT(S) ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer on Plaintiff or his attorney, William B. Harvey, III, Esquire, at 1001 Craven Street, Beaufort, South Carolina, 29902, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.



HARVEY & BATTEY, P.A.

By: A handwritten signature in black ink, appearing to read "W.B. Harvey III".
WILLIAM B. HARVEY, III

Post Office Box 1107
Beaufort, South Carolina 29901-1107
843-524-3109 telephone
843-524-6973 telefax
Attorneys for Plaintiff

Beaufort, South Carolina

Dated: May 21, 2009

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2009-CP-27- 331

Philip Flexon, M.D.,
Plaintiff,

v.

PHC-Jasper, Inc., d/b/a Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc., and Tenet
Healthsystems, Inc.,

Defendants.

COMPLAINT
(JURY TRIAL DEMANDED)

FILED
2009 MAY 26 AM 10:19
JASPER COUNTY, SC
CLERK OF COURT
MALPASET 105-028

The Plaintiff above named, complaining of the Defendants herein, would show as follows:

1. Plaintiff is a resident and citizen of Jasper County, South Carolina, and at all times was a Medical Doctor duly licensed in the states of Georgia and South Carolina, and practicing in the specialty of ENT, and the sub-specializations of Otolaryngology and Head and Neck Oncology.

2. Defendant PHC-Jasper, Inc. (hereinafter PHC) is a corporation organized and existing under the laws of the State of South Carolina, with its principal place of business in Jasper County, South Carolina, which at all times relevant herein was doing business as Coastal Carolina Medical Center, located in Jasper County, South Carolina. At all times relevant herein, PHC was the wholly owned subsidiary of defendant Lifepoint Hospitals, Inc.

3. Lifepoint Hospitals, Inc. (hereinafter Lifepoint) is, upon information and belief, a corporation organized and existing under the laws of the State of Tennessee, with its

principal place of business in Brentwood, Tennessee; at all times relevant herein, Lifepoint was the owner and operator of Coastal Carolina Medical Center.

4. Coastal Carolina Medical Center, Inc. (hereinafter Coastal) is a corporation organized and existing under the laws of the state of South Carolina, with its principal place of business in Jasper County, South Carolina. At all times herein, Coastal Carolina Medical Center, Inc. was wholly owned and operated by Tenet Healthsystems, Inc.

5. Tenet Healthsystems, Inc. is, upon information and belief, a corporation organized and existing under the laws of the state of Delaware, and at all times relevant herein was the owner and operator of Coastal Carolina Medical Center, Inc.

6. This court has jurisdiction over the parties and venue is properly situated in Jasper County.

7. Heretofore, on or about December 18, 2006, Plaintiff entered into a Physician Employment Agreement with Lifepoint and/or PHC (hereinafter collectively referred to as Employer), as owner of or doing business as Coastal Carolina Medical Center. A copy of this Agreement is attached hereto as Exhibit 1 and incorporated herein. The term of Exhibit 1 was for a period of five (5) years.

8. In order to sign Exhibit 1, Plaintiff had to discontinue, close and leave an established practice in Savannah, Georgia, where he had privileges at surgical hospitals. Plaintiff was enticed to sign Exhibit 1 by the representations of employees and agents of Lifepoint that he would enjoy a long relationship with Lifepoint and Coastal Carolina Medical Center.

9. As part of the negotiations of Exhibit 1, representatives and agents of Employer represented to Plaintiff that the hospital would purchase the equipment needed by Plaintiff in the operating room, including a CO2 laser machine and a navigational system for sinus surgery. Said representatives further represented that the hospital would recruit and hire an audiologist to be part of Plaintiff's practice.

10. Further, as part of Exhibit 1, Employer agreed to conduct all billing from patients or third party payors for all services rendered by Plaintiff, "regardless of the location where any such services may be rendered by [Plaintiff]."

11. To accentuate Plaintiff's understanding that his employment would solely be with Employer, and his professional relationship would remain solely with Coastal Carolina Medical Center (as owned by Employer), paragraph 13.3 of Exhibit 1 states, in part, "no transfer, assignment or other modification affecting the terms or conditions of the contract will be effected unless extenuating circumstances are shown to exist, as determined by the South Carolina Department of Public Health, and approved by the U.S. Attorney General in accordance with applicable federal rules and regulations."

12. No such extenuating circumstances existed which would allow for the transfer, assignment or other modification of Exhibit 1.

13. Upon information and belief, at the time of the signing of Exhibit 1, and certainly before the Effective Date of Exhibit 1, March 15, 2007, Lifepoint was in active negotiations with Tenet for the purchase by Tenet of the assets of PHC, including the hospital Coastal Carolina Medical Center. Knowing that Plaintiff would have to close and terminate an established practice in Savannah in order to fulfill his obligations under Exhibit 1, there

arose a duty by Employer to disclose to Plaintiff the intent to negotiate and sell PHC and Coastal Carolina Medical Center to Tenet, or to another entity.

14. Employer failed to disclose to Plaintiff the intent to sell PHC and Coastal Carolina Medical Center to Tenet, or to another entity, but instead utilized the contract with the Plaintiff, the highly specialized services provided by the Plaintiff, and the revenue to be produced by such services, as a means to enhance the value of Coastal Carolina Medical Center to Tenet as a prospective purchaser.

15. Upon the commencement of Plaintiff's practice at Coastal Carolina Medical Center on March 15, 2007, and Plaintiff's fulfillment of all conditions and covenants attendant with Exhibit 1, Employer refused to honor its representation to purchase the equipment necessary by Plaintiff to properly practice his specialized field of medicine.

16. Upon the commencement of Plaintiff's practice at Coastal Carolina Medical Center on March 15, 2007, and Plaintiff's fulfillment of all conditions and covenants attendant with Exhibit 1, Employer refused to recruit and hire an audiologist as part of Plaintiff's practice.

17. On or about June 30, 2007, Lifepoint sold PHC and Coastal Carolina Medical Center to Defendant Tenet Healthsystems, Inc. On or about July 3, 2007, Tenet presented to the Plaintiff an Amendment to and Assignment of Physician Employment Agreement, attached hereto as Exhibit 2 and incorporated herein by reference, thereby acknowledging that the Employment Agreement, Exhibit 1, was non-assignable per its terms. Plaintiff refused to sign Exhibit 2 and has not agreed to an assignment of Exhibit 1 to Tenet or any other entity.

18. Rather, per his Employment Agreement with Employer, Plaintiff continued his practice of medicine at Coastal Carolina Medical Center, and at his adjacent office.

19. In breach of their contract, Exhibit 1, commencing on July 1, 2007, Employer ceased all billings for medical services performed by Plaintiff, and ceased submitting charges for Plaintiff's medical services to Medicare, Medicaid and private insurance carriers.

20. In breach of their contract, Exhibit 1, Employer repeatedly failed to provide Plaintiff with reasonable personnel staffing and support, such as billing and marketing. In November, 2007, Employer terminated Plaintiff's practice manager without Plaintiff's knowledge or consent and failed to reinstate him after Plaintiff's repeated protests. On December 31, 2007, Employer terminated Plaintiff's Billing Director without Plaintiff's knowledge or consent. For over six months, and despite Plaintiff's repeated protests and meetings, Employer failed to provide a Practice Manager, a Receptionist or Scheduler, and no billing management, and forced Plaintiff to attempt a specialized medical practice with only one employee.

21. As a result, on August 15, 2008, Plaintiff, through his attorneys, delivered to Employer a formal notice of termination for cause pursuant to Section 6.2.1 of Exhibit 1, a copy of which is attached hereto as Exhibit 3 and incorporated herein. Per the terms of Exhibit 1, Employer had thirty days within which to cure these material breaches. More than 30 days elapsed and no cure was made. At that time, on September 14, 2008, Exhibit 1 was terminated by Plaintiff for cause.

22. As a result of these material breaches by Employer, Plaintiff suffered substantial loss of income, loss of earning potential, loss of patient population, and loss of

professional reputation, and had to incur time, expense and loss of income-producing services to move his practice to Savannah.

23. On or about May 4, 2009, Plaintiff received the letter attached hereto as Exhibit 4 and incorporated herein, claiming that Plaintiff owes Coastal Carolina Medical Center (now owned by Coastal and/or Tenet) an amount exceeding \$725,000, and further claiming that Plaintiff must cease his current practice of medicine in Savannah, Georgia. At the time of Exhibit 4, Coastal Carolina Medical Center was (and continues to be) owned by Defendants Coastal Carolina Medical Center, Inc. and/or Tenet. Plaintiff has no contractual or other relationship with either Coastal Carolina Medical Center, Inc. or Tenet.

FOR A FIRST CAUSE OF ACTION
(BREACH OF CONTRACT AGAINST LIFEPOINT AND PHC)

24. The allegations of paragraphs 1-23 above are incorporated herein as fully and effectually as if set for verbatim.

25. Employer breached their employment agreement with Plaintiff.

26. As a result of these material breaches, Plaintiff suffered substantial loss of income, loss of earning potential, loss of patient population, and loss of professional reputation, and had to incur time, expense and loss of income-producing services to move his practice to Savannah, all to his detriment and damage in an amount to be determined by the Court and Jury.

professional reputation, and had to incur time, expense and loss of income-producing services to move his practice to Savannah.

23. On or about May 4, 2009, Plaintiff received the letter attached hereto as Exhibit 4 and incorporated herein, claiming that Plaintiff owes Coastal Carolina Medical Center (now owned by Coastal and/or Tenet) an amount exceeding \$725,000, and further claiming that Plaintiff must cease his current practice of medicine in Savannah, Georgia. At the time of Exhibit 4, Coastal Carolina Medical Center was (and continues to be) owned by Defendants Coastal Carolina Medical Center, Inc. and/or Tenet. Plaintiff has no contractual or other relationship with either Coastal Carolina Medical Center, Inc. or Tenet.

FOR A FIRST CAUSE OF ACTION
(BREACH OF CONTRACT AGAINST LIFEPOINT AND PHC)

24. The allegations of paragraphs 1-23 above are incorporated herein as fully and effectually as if set forth verbatim.

25. Employer breached their employment agreement with Plaintiff.

26. As a result of these material breaches, Plaintiff suffered substantial loss of income, loss of earning potential, loss of patient population, and loss of professional reputation, and had to incur time, expense and loss of income-producing services to move his practice to Savannah, all to his detriment and damage in an amount to be determined by the Court and Jury.

FOR A SECOND CAUSE OF ACTION
(FRAUDULENT MISREPRESENTATION)

27. The allegations of paragraphs 1-26 above are incorporated herein as fully and effectually as if set forth verbatim.

28. Employer, by and through their officers and agents made certain representations to Plaintiff in the course of negotiations of Exhibit 1 concerning the long term nature of the pending employment relationship, and the intent of said defendants to purchase and supply to Plaintiff various equipment, supplies and personnel.

29. Further, because of the nature of the pending employment relationship, the upheaval that such relationship would cause to Plaintiffs then-existing practice of medicine, and the affirmative efforts by the Plaintiff to ensure that Exhibit 1 was non-assignable, there arose a duty on behalf of Employer to disclose the fact that Employer was in negotiations with Coastal and/or Tenet for the sale of the hospital, which facts were not within the knowledge of, or capable of being discovered by, Plaintiff.

30. Employer, by and through their agents and/or employees, made material misrepresentations and also intentionally failed to disclose material facts. Employer knew these misrepresentations were false and, by their failure to disclose, acted with reckless disregard for the truth or falsity. Employer intended that its representations and/or failure to disclose would be acted upon by the Plaintiff. Plaintiff relied upon the representations and/or silence of Employer, had the right to rely thereon, and was ignorant of the falsity of the representations and/or silence.

31. As a proximate result, the Plaintiff sustained the injuries and damages set forth in paragraph 26 above, and is entitled to damages, both actual and punitive, in an amount to be determined by the court and jury.

FOR A THIRD CAUSE OF ACTION
(BREACH OF GOOD FAITH AND FAIR DEALING)

32. The allegations of paragraphs 1-31 above are incorporated herein as fully and effectually as if set forth verbatim.

33. Under the circumstances presented, employer breached their duty to the Plaintiff of good faith and fair dealing.

34. As a result thereof the Plaintiff sustained the injuries and damages set forth in paragraph 26 above, and is entitled to damages, both actual and punitive, in an amount to be determined by the court and jury.

FOR A FOURTH CAUSE OF ACTION
(DECLARATORY JUDGMENT)

35. The allegations of paragraphs 1-34 above are incorporated herein as fully and effectually as if set forth verbatim.

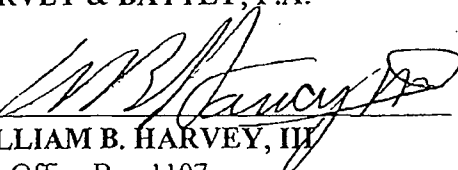
36. By virtue of the letter, Exhibit 4, a justiciable controversy exists between the Plaintiff, and the current owners of Coastal Carolina Medical Center, i.e. defendants Coastal and/or Tenet, on the following issues: (1) whether the employment agreement, Exhibit 1, was terminated for cause on or about September 14, 2008, thereby relieving the Plaintiff from any restrictions thereof; (2) whether the employment agreement, Exhibit 1, is not assignable, and therefore Plaintiff owes no duties to Coastal and/or Tenet; and (3) if

Exhibit 1 is still valid and enforceable, which is denied, whether the Covenant Not to Compete therein prevents the Plaintiff from practicing medicine in his sub-specialty at Memorial Medical Center in Savannah, Georgia.

37. Plaintiff therefore prays for a declaratory judgment that (1) the employment agreement, Exhibit 1, was terminated for cause on or about September 14, 2008, thereby relieving the Plaintiff from any restrictions thereof; (2) the employment agreement, Exhibit 1, is not assignable, and was not assigned, and therefore Plaintiff owes no duties to Coastal and/or Tenet; and (3) if Exhibit 1 is still valid and enforceable, which is denied, the Covenant Not to Compete therein does not prevent the Plaintiff from practicing medicine in his sub-specialty at Memorial Medical Center in Savannah, Georgia, under all the circumstances at issue in this case.

WHEREFORE, Plaintiff prays for judgment against Lifepoint and PHC under the first three causes of action for damages, both actual and punitive, in an amount to be determined by the Court and Jury, and for a declaratory judgment against Coastal and Tenet under the fourth cause of action for the relief set forth in paragraph 37 above, for the costs of this action, and for such other and further relief as this Court may deem just and proper.

HARVEY & BATTEY, P.A.

By: 

WILLIAM B. HARVEY, III

Post Office Box 1107

Beaufort, South Carolina 29901-1107

843-524-3109 telephone

843-524-6973 telefax

Attorneys for Plaintiff

Beaufort, South Carolina

Dated: May 21, 2009

PHYSICIAN EMPLOYMENT AGREEMENT
LPH-460

THIS PHYSICIAN EMPLOYMENT AGREEMENT (the "Agreement") is made and entered into this 18 day of Dec 2006, by and between Coastal Carolina Medical Center ("Employer"), and Phillip B. Flexon, M.D., ("Physician").

RECITALS

WHEREAS, Employer is engaged in the business of operating and managing medical practices and other health care services in Jasper County, South Carolina (the "County");

WHEREAS, Physician is a licensed physician specializing in otolaryngology; and

WHEREAS, Employer desires to employ Physician, and Physician desires to be employed by Employer, to render professional physician services, in accordance with the terms and conditions specified herein.

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual promises and conditions set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Employer and Physician, intending to become legally bound, agree as follows:

ARTICLE I
ENGAGEMENT

1.1 Employer engages Physician, and Physician accepts such engagement, as a physician primarily at the medical practice office located at 1010 Medical Center Drive, Hardooville, South Carolina 29927, (the "Practice"), and such other practice sites in Beaufort and Jasper counties as may be reasonably designated by Employer from time to time, and to render professional physician services to patients, in accordance with the terms and conditions of this Agreement.

ARTICLE II
TERM

2.1 Term. The Agreement term initially shall be for five (5) year(s) (the "Agreement Term"), commencing on the Effective Date, defined below, and continuing until ~~September 30, 2011~~, subject to earlier termination of this Agreement pursuant to Article VI [Termination] herein. The Effective Date means the date that Physician begins providing physician services for Employer pursuant to this Agreement, which date shall be ~~October 1, 2006~~. The Effective Date is contingent upon Physician having obtained provider numbers for Medicare, Medicaid and insurance companies participating with Employer, but no later than ninety (90) days after the complete execution of this Agreement.

March 15, 2007 ~~18~~

ARTICLE III
DUTIES AND SERVICES

3.1 Work Schedule. During the Agreement Term, Physician agrees to devote his/her full professional working time and attention, at a minimum of forty (40) hours per work week at the medical practice office, to the practice of medicine for the benefit of Employer under the terms of this Agreement. Employer shall establish Physician's work schedule and on-call schedule, which schedule shall be inclusive of hours providing patient care at the facilities of Employer, any and all Active Medical Staff obligations, and administrative duties. Physician's Emergency Department unassigned patient call schedule responsibility shall be dictated by the Medical Staff's Rules/Regulations of Coastal Carolina Medical Center.

3.2 Non-Physician Personnel. Employer will provide Physician with a reasonable amount of non-physician personnel including, but not limited to, nurses, technicians, secretarial staff, and other medical and non-medical personnel, to assist Physician in the performance of his/her duties. Physician shall report to, consult with, and use the input of Employer regarding the hiring and firing of medical staff who work within the Practice and the overall operations of the Practice. All final decisions regarding hiring and firing of Practice personnel shall rest with Employer.

3.3 Availability and Duties. Physician shall be responsible for such duties as assigned to him or her from time to time by Employer. Physician shall make himself available to provide otolaryngology services to, and treat patients of Employer, whether such patients are outpatients or inpatients. Physician hereby agrees to devote his/her full working time and attention, together with Physician's best endeavors and skill, for the interest, benefit and best advantage of Employer and shall provide services on behalf of Employer in a manner that shall maintain the productivity of the Practice. Physician shall provide all professional medical services in accordance with

the policies and procedures established by Employer, and the appropriate standards of care of the community. Physician shall have the authority to refuse to treat a specific patient or to dismiss any particular patient if the patient has been abusive, disruptive or threatening or has refused to comply with Physician's orders, or for other reasons of a similar nature. In the case of any such dismissal, Physician agrees that appropriate notice by certified letter shall be sent to such patient and emergency care shall be provided by Physician to such patient for an appropriate period after such dismissal. Notwithstanding the foregoing, Physician agrees that he will not refuse to treat a patient and will not discriminate with respect to quality of care of a patient or otherwise on the basis of such patient's race, color, national origin, ancestry, religion, sex, marital status, sexual orientation, age, disability or medical condition, or as otherwise provided by law. Except as otherwise stated herein, Physician specifically understands that Employer shall have the final authority over the acceptance or refusal of any person for whom professional services may be rendered and the amount of fees to be charged to such patients.

3.4 **Patient Care.** Nothing in the Agreement shall be interpreted to dictate Physician's practice of medicine, delivery of direct patient care or independent judgment in the practice of medicine. Physician shall have complete control over the diagnosis and treatment of patients and neither Employer nor any employee of Employer shall exercise any direct supervision or control over the individual treatment of the patient. Physician agrees that Physician's treatment and diagnosis of patients will be consistent with any rules and regulations promulgated by Employer dealing with the general treatment of patients.

3.5 **Performance Standards.** In performing services under this Agreement, Physician shall comply with the following Performance Standards:

- 3.5.1 promote cooperation and teamwork among other physicians and other employees and personnel of Employer;
- 3.5.2 develop standardization of otolaryngology practices and procedures;
- 3.5.3 attend all required management meetings;
- 3.5.4 assist Employer as requested in the efficient and effective day to day management of the Practice;
- 3.5.5 respond to patient and referring physician needs and concerns regarding patient diagnosis and treatment as expeditiously as reasonably possible;
- 3.5.6 fully support Employer's overall quality improvement and quality assurance initiatives;
- 3.5.7 adhere to all reasonable Policies and Procedures adopted by Employer;
- 3.5.8 adhere to such other performance standards as established by Employer from time to time.

3.6 **Location(s) for Services.** Physician shall perform his/her duties at the Practice, those hospital facilities at which Physician maintains Medical Staff privileges and such other practice locations of Employer in Deaford and Jasper counties as may be reasonably designated by Employer from time to time. Employer shall have reasonable discretion to consolidate and relocate practices operated by Employer, including the Practice.

3.7 **Professional Fees/Outside Activities.** Physician agrees not to engage in any medical professional business activity (whether or not such business activity is pursued for gain, profit or other pecuniary advantage), without the prior written consent of Employer, other than (i) rendering services on behalf of Employer pursuant to this Agreement, (ii) maintaining an ownership interest of less than five percent (5%) of the issued and outstanding stock of a publicly-traded corporation, or (iii) teaching, writing, lecturing, or providing expert witness testimony on otolaryngology topics; provided such activities shall not interfere or conflict with the performance of Physician's duties or provision of services under this Agreement. Physician shall not enter into any other physician employment contract or otherwise engage in the practice of medicine other than for the benefit of Employer. All remuneration and accounts receivable arising from or related to Physician's provision of any medical services pursuant to this Agreement are the property of Employer, and Physician agrees to provide to Employer any such remuneration immediately after it is received by Physician. Physician agrees to take all reasonable actions requested by Employer to assist in the collection of accounts receivable for services provided by Physician. Unless otherwise agreed, all fees or remuneration arising from or related to teaching assignments, lectures, speeches, publications, or expert witness testimony by Physician on or about matters related to the practice of otolaryngology shall also be considered compensation or professional service revenues to which Employer is entitled hereunder.

3.8 **Workplace Rules.** Physician shall observe and comply with the rules, regulations, policies and procedures established by Employer with respect to the performance of Physician's duties. In the event of any inconsistency between such rules, regulations, policies and procedures and this Agreement, the provisions of this Agreement shall prevail.

3.9 **Managed Care.** Physician, at all times during the Agreement Term, shall participate in all managed care arrangements made available by or through Employer. Employer shall have the sole and exclusive right and authority to enter into contractual relationships with HMOs, IPAs, PPOs, PHOs, employer groups, provider networks and other managed care organizations and third party payors however, Employer agrees to consult and obtain input from Physician prior to entering Agreements. Upon request of Employer, Physician shall execute such managed care agreements, applications and other documents as reasonably required. Physician shall not otherwise contract with any managed care organization or third party payor. In connection with such managed care arrangements, Employer shall negotiate such managed care arrangements with the proviso that Physician shall not be individually responsible to the managed care company for any withhold and that no hold harmless provision shall be applicable or enforceable on Physician. Employer

shall use reasonable efforts to ensure that any capitation rates, discounted fees or other risk based arrangements are consistent and competitive with those rates as accepted by other physicians practicing in the same specialty in the County.

3.10 Other Services. During the Agreement Term, Physician and Employer may mutually agree to Physician rendering additional services. Such duties may include service on hospital staff committees, peer review organizations, or other committees of Employer, and serving on national and regional committees of Employer's Affiliates (which term as used in this Agreement shall include any person, corporation, partnership, general partner or other entity that directly, or indirectly through one or more intermediaries, controls or is controlled by or is under common control with Employer); provided that such duties shall not interfere with the professional services provided by Physician on behalf of Employer pursuant to this Agreement.

3.11 Additional Physicians. Employer and Physician agree as an essential term of this Agreement that it is the intent of the parties to develop a comprehensive medical practice. It is further understood that Employer intends to negotiate and enter into employment relationships with additional qualified physicians. Physician agrees to use his/her best efforts to forge and establish an ongoing relationship and team approach with such additional physicians for the furnishing of physician and related services to patients.

3.12 Obtaining Staff Privileges. As a condition precedent to this Agreement, the Physician shall maintain active medical staff privileges at the Hospital. This Agreement shall not be effective until the date that the Physician obtains such privileges. If the Physician has not obtained such privileges on or before October 1, 2006, this Agreement shall automatically terminate. Nothing contained herein is intended to or shall be construed to operate as an agreement or undertaking by the Hospital or the Employer to grant or confer medical staff privileges upon the Physician. For purposes of this Agreement, the date upon which the Physician obtains provisional or active medical staff privileges at the Hospital and commences his or her employment hereunder shall be referred to herein as the "Effective Date."

3.13 Professional Courtesy. Physician agrees that no patients of the medical practice will be treated and have their charges written off a Professional Courtesy. In an event a patient has financial reasons impacting their ability to pay, Physician will refer the patient to the Practice Manager to be handled consistent with Employer's procedures.

ARTICLE IV COMPENSATION

4.1 Compensation. During the Agreement Term, Employer shall pay Physician compensation as set forth in Exhibit 1 attached hereto (the "Compensation").

4.2 Leave. Physician shall be entitled to twenty-five (25) paid days off annually according to the terms of the policy of Employer, which shall include vacation, legal holidays, personal days, and sick days. The maximum amount of time to be used, at any point in time, is ten (10) consecutive days. In addition, Physician will be reimbursed up to \$5,000 per contract year plus no more than five (5) CME days per contract year in connection with Physician attending medical conventions and/or continuing medical education seminars, including travel, lodging and meals. Physician's leave will be earned and accrued on a monthly basis consistent with other Physician employees of Employer. All leave shall be pre-approved by Employer. Leave is to be used during the year it is awarded and cannot be carried over to the following year. Leave may not be cashed in at any time to include termination of employment.

4.3 Benefits. Employer shall provide Physician with medical benefits for Physician and Physician's beneficiaries that are comparable to the coverage available, from time to time, to the other employees of Employer. Employer will provide life, disability, and dental benefits for Physician on similar terms as the other employees of Employer. Employer's life insurance company may require Physician to satisfactorily pass a physical examination in order to issue a life insurance policy to Physician. The employee portion of the costs of all such benefits are deemed Physician Benefits as hereafter defined. In addition, Employer may elect to obtain key-man life insurance coverage on Physician, and Physician hereby agrees to submit to any required physical therefor. Physician shall be entitled to participate in Employer's retirement and other benefit plans as offered from time to time at a level commensurate with the retirement benefits offered to other employees of Employer.

4.4 Income and Employment Taxes. Physician shall be an employee of Employer for all purposes. Employer shall withhold amounts from Physician's compensation in accordance with the requirements of applicable law for federal income tax, FICA, FUTA, and amounts from Physician's compensation in accordance with the requirements of applicable law for federal other employment or payroll tax purposes. It shall be Physician's responsibility to report and pay all federal taxes arising from Physician's receipt of compensation hereunder.

ARTICLE V INSURANCE

5.1 Medical Liability Insurance. As part of Physician Expenses, as defined in Exhibit 1, Employer agrees to directly pay the premium for Physician's professional medical liability insurance during the Agreement Term, with minimum coverage of One Million

Dollars (\$1,000,000.00) per occurrence with a yearly maximum of Three Million Dollars (\$3,000,000.00) in the aggregate (occurrence type policy). Such professional medical liability insurance coverage may be coverage established through an insurance affiliate of Employer. Physician shall maintain on-going coverage or purchase full insurance covering medical malpractice claims made following the Effective Date that relates to services rendered by Physician to patients prior to the Effective Date and Employer shall have no responsibility therefore.

ARTICLE VI TERMINATION

6.1 Termination by Employer "For Cause". The Agreement Term (including any Renewal Term) may be terminated prior to its expiration, at the election of Employer, under any of the following circumstances:

6.1.1 Upon written notice to Physician, if Physician is in a material breach, default or violation of any provision of this Agreement and fails to cure such material breach, default or violation to the reasonable satisfaction of Employer within thirty (30) days after notice in writing by Employer to do so or within said thirty (30) days to commence such cure and thereafter diligently to prosecute such cure to completion; or

6.1.2 Immediately upon written notice by Employer to Physician (or Physician's estate) for any of the following reasons:

- (a) Physician's death or permanent disability. The term "permanent disability" shall be defined as the failure of Physician to perform his/her duties and responsibilities hereunder for a total of one hundred twenty (120) days or more, regardless of whether such days are consecutive, during any twelve consecutive months;
- (b) Physician's license to practice medicine is suspended, revoked or canceled or a restriction or limitation by any governmental authority having jurisdiction over Physician is placed or imposed upon him so that he cannot perform the professional services for which he was engaged hereunder;
- (c) Physician is terminated or suspended from Medicare, Medicaid or any successor program;
- (d) Physician's failure to maintain unrestricted staff membership or privileges on the medical staff of Hospital;
- (e) Physician is convicted of a felony or a crime of moral turpitude;
- (f) Physician conducts himself in a manner in which Employer determines to be unethical or fraudulent, is detrimental to patient care, or impairs the reputation or operations of Employer;
- (g) Upon repeated failure by Physician to meet utilization, performance, efficiency, or quality standards established by Employer;
- (h) Upon repeated failure by Physician to conform and comply with Employer's professional requirements concerning maintenance of medical records;
- (i) Upon cancellation of Physician's coverage, or Physician's uninsurability, under the terms and conditions of the professional liability insurance provided; or
- (j) Upon the use of alcohol or a controlled substance, which materially impairs the ability of Physician to effectively perform Physician's duties and obligations under this Agreement.

6.2 Termination by Physician "For Cause". The Agreement Term (including any renewal Term) may be terminated prior to its expiration, at the election of Physician, under any of the following circumstances:

6.2.1 Upon written notice to Employer, if Employer is in material breach, default or violation of any provision of this Agreement and fails to cure such material breach, default or violation within thirty (30) days after notice in writing by Physician to do so or within said thirty (30) days to commence such cure and thereafter diligently to prosecute such cure to completion; or

6.2.2 Immediately upon written notice by Physician to Employer for any of the following reasons:

- (I) bankruptcy or receivership of Employer; or
- (II) revocation or suspension of Employer from the Medicare or Medicaid Programs or any successor program.

6.3 Termination "Without Cause". Employer or Physician may terminate this Agreement hereunder, without cause, at any time upon ninety (90) days prior written notice.

6.4 Obligations After Termination. Upon termination of the Agreement for any reason, Physician's Compensation shall immediately cease and Physician (or Physician's estate) shall be entitled to receive only those amounts earned or accrued on services provided by Physician up to the date of termination. Physician's rights to any on-going or continuing benefits shall be determined in accordance with the terms of the applicable benefit plan of Employer. Termination of the Agreement shall not release or discharge Employer from any obligation, debt or liability incurred prior to the date of termination of the Agreement.

6.5 Other Requirements Upon Termination. Upon termination of this Agreement for any reason: (i) the Physician's participation in any of Employer's fringe benefit plans shall immediately cease (subject to any post-termination benefits, if any, expressly stated in the then-current plans for such benefits); and (ii) the provisions of Articles VIII, IX, and X hereof shall remain in full force and effect, except as otherwise specifically provided herein.

ARTICLE VII REPRESENTATIONS AND WARRANTIES

7.1 Physician represents and warrants at all times during the Agreement Term (including any renewal term) that:

- (a) Physician is duly licensed and registered and in good standing under the laws of the State of South Carolina to engage in the practice of otolaryngology, and that said license and registration have not been suspended, revoked or restricted in any manner.
- (b) Physician is qualified for membership in good standing on the medical staff of a local acute care facility.
- (c) Physician has current controlled substances registrations issued by the State of South Carolina United States Drug Enforcement Administration, which registrations have not been surrendered, suspended, revoked, expired or restricted in any manner.
- (d) Physician has disclosed and will disclose to Employer the following matters, whether occurring at any time during the past five (5) years prior to the date of this Agreement or at any time during the Agreement Term:
 - (i) any actual or threatened malpractice suit, any actual or constructive known claim (whether or not filed in court), settlement, settlement allocation, judgment, verdict or decree against Physician;
 - (ii) any actual or threatened disciplinary, peer review or professional review investigation, proceeding or action instituted against Physician by any licensure board, hospital, medical school, health care facility or entity, professional society or association, third party payor, peer review or professional review committee or body, or governmental agency;
 - (iii) any criminal complaint, indictment or criminal proceeding in which Physician is named as a defendant;
 - (iv) any actual or threatened investigation or proceeding, whether administrative, civil or criminal, relating to an allegation against Physician of filing false health care claims, violating anti-kickback laws, violating fee-splitting laws, or engaging in billing improprieties;
 - (v) any organic or mental illness or condition that impairs or is likely to impair Physician's ability to practice medicine;
 - (vi) any dependency on, or habitual use or abuse of, alcohol or controlled substances, or any participation in an alcohol or controlled substance detoxification, treatment, recovery, rehabilitation, counseling, screening monitoring program;

- (vii) any actual or threatened allegation, or any investigation or proceeding based on any allegation, against Physician for violating professional ethics or standards, or engaging in illegal, immoral or other misconduct (of any nature or degree), relating to the practice of medicine; and
 - (viii) any denial or withdrawal of an application in any state for licensure as a physician, for medical staff privileges at any hospital or other health care entity, for board certification or recertification, for state or federal controlled substances registration, or for malpractice insurance.
- (e) Physician is board certified in otolaryngology by the *American Board of Otolaryngology*.
 - (f) Physician shall at all times render services to patients in a competent, professional and ethical manner, in accordance with prevailing standards of medical practice in the relevant community, perform professional and supervisory services in accordance with recognized standards of the medical profession, and act in a manner consistent with the Principles of Medical Ethics of the American Medical Association, and any and all applicable statutes, regulations, rules, orders and directives of any and all applicable governmental and regulatory bodies having competent jurisdiction.
 - (g) In connection with the provision of professional services to patients of Employer, Physician shall use the equipment, instruments, pharmaceuticals and supplies furnished by or on behalf of Employer for the purposes for which they are intended and in a manner consistent with sound medical practice.
 - (h) Physician shall participate in the Medicare and Medicaid Programs, workers compensation, other federal and state reimbursement programs, and the payment plan of any commercial insurer, health maintenance organization, preferred provider organization, accountable health plan, or other health benefit program.
 - (i) Physician shall keep and maintain (or cause to be kept and maintained) appropriate records, consistent with prevailing standards of medical practice in Physician's relevant community, relating to all professional services rendered by him under this Agreement and shall prepare and attend to, in connection with such services, all reports, claims, and correspondence necessary or appropriate in the circumstances, as determined mutually by Employer and Physician, all of which records, reports, claims, and correspondence shall belong to Employer.
 - (j) Physician covenants not to use, or permit any other personnel under the supervision of Physician to use, any part of the premises of Employer for any purpose other than the performance of services hereunder.
 - (k) Physician has not at any time been excluded from participation in the Medicare and/or Medicaid programs, and Physician shall immediately notify Employer in the event Physician receives any notice whatsoever of a possible exclusion action being brought against Physician.

ARTICLE VIII DISCLOSURE OF INFORMATION

5.1 Custody of Medical Records. Physician understands and agrees that during the Agreement Term and thereafter all medical records, case records, case histories, x-ray files, or personal or regular files concerning patients of Employer or any of Employer's Affiliates, or patients consulted, interviewed or treated and cared for by Physician, shall belong to and remain the property of Employer. Upon termination of this Agreement Physician shall not be entitled to keep original records or preserve records of Employer or any of Employer's Affiliates as to any patient unless the patient shall specifically request a different disposition of his or her records, or copies thereof, and in no event shall Physician be entitled to the records, or copies thereof, of patients not treated by Physician. Employer agrees at all times, both during and after termination of this Agreement, to maintain and preserve such records in a manner consistent and in compliance with all applicable laws and regulations. If Employer provides Physician with original patient records pursuant to the terms hereof, Physician shall retain all of such records and, upon Employer's request, shall make such originals available to Employer. If any medical malpractice or other claim, audit or business need of Physician arises and involves records which are retained by Employer pursuant to the terms hereof, Employer agrees to make such original medical records available to Physician, or Physician's designated counsel or representative for inspection and copying, during regular business hours, in accordance with applicable law.

5.2 Disclosure of Information. Physician recognizes and acknowledges that all records, files, reports, protocols, policies, manuals, databases, processes, procedures, computer systems, materials and other documents pertaining to services rendered by Physician hereunder, or to the operations of Employer, belong to and shall remain the property of Employer and constitute proprietary information and trade secrets of Employer. Physician recognizes and acknowledges that the terms of this Agreement, as well as Employer's proprietary information and trade secrets as they may exist from time to time, are valuable, special, and unique assets of Employer's business. Physician shall not, during or after the Agreement Term, disclose such proprietary information of Employer or trade secrets of

Employer to any other firm, person, corporation, association or other entity for any reason or purpose whatsoever, or use such information for Physician's own benefit, without the prior written consent of Employer, unless otherwise required to disclose such information in accordance with appropriate judicial process.

8.3 Injunction. Physician acknowledges that the confidentiality restrictions contained in this Article VIII are a reasonable and necessary protection of the legitimate trade secrets and business interests of Employer. In the event of any violation of these restrictions, Employer shall be entitled to preliminary and permanent injunctive relief, in addition to any other remedy, and shall be entitled to be reimbursed by Physician for any attorneys' fees and costs, at all pre-trial and appellate levels, incurred as a result thereof. Nothing herein contained shall be construed as prohibiting Employer from pursuing any other legal or equitable remedies available to Employer due to a violation of the restrictions set forth in this Article VIII, including monetary damages and relief.

ARTICLE IX COVENANT NOT TO COMPETE

9.1 Restrictive Covenant. With the exception of the services and duties that Physician performs for Employer or on Employer's behalf pursuant to the terms of this Agreement, Physician agrees that during the Agreement Term and for a period of two (2) year(s) after the termination of the Agreement Term for any reason whatsoever, Physician shall not:

9.1.1 Within a fifty (50) mile radius of the Practice, as determined at the time of termination, (the "Restricted Territory") engage in any medical practice, or engage in any business or perform any service, directly or indirectly, in competition with the medical services of Employer or any of Employer's Affiliates. Notwithstanding the foregoing, the restrictive covenant shall not prohibit Physician from engaging in the private practice of medicine as an independent Physician including performing ancillary services, but only those provided in Physician's practice on behalf of Employer on or before ~~October 1, 2006~~ ^{March 15, 2007}. Further, Physician will not, without Hospital's prior written consent (which it may grant, withhold or condition in its sole discretion), directly or indirectly have any financial interest in any hospital, surgery center, imaging center, MRI, outpatient therapy center, medical office, clinic or other facility that competes with Employer, within the Restricted Territory. For purposes of this Agreement, a "financial interest" includes, without limitation, any direct or indirect financial relationship, whether as an employee, independent contractor, principal, agent, joint venture partner, security holder (except for ownership of securities traded on a recognized stock exchange) creditor, landlord, consultant, officer, director or otherwise. Nothing contained in this Section shall restrict Physician from establishing staff privileges at, referring any service to, or treating any patient at any hospital of Physician's choice.

9.1.2 Solicit, recruit or hire any person who is or was an employee of Employer or any of Employer's Affiliates, whether for Physician's benefit or for others with whom Physician may become associated unless Physician engages in the private practice of medicine as an independent physician defined in Section 9.1.1.

9.2 Within the Restricted Territory, Physician further agrees that for a period of time equal to two (2) year(s) after termination of the Agreement Term for any reason whatsoever (including expiration), Physician shall not within the Restricted Territory:

9.2.1 Solicit, serve or accept any business from patients, insurance companies, managed care plans, employers or other customers of the business conducted by Employer, or its affiliates, for services competitive with those of Employer and the Practice or request, induce or advise patients, insurance companies, managed care plans, employers or other customers of the business as conducted by Employer to withdraw, curtail or cancel their business with Employer or assist, induce, help or join any other person or company in doing any of the above activities unless Physician engages in the private practice of medicine as an independent physician defined in Section 9.1.1; or

9.2.2 Solicit the services of any employee, consultant, or provider which renders services to, or for the benefit of, Employer or any of Employer's Affiliates for Physician's use or benefit or for any other person's or company's use or benefit, or induce or help to induce any employee, consultant or provider that renders services to, or for the benefit of, Employer or any of Employer's Affiliates to leave for other employment, without Employer's prior written consent unless Physician engages in the private practice of medicine as an independent physician defined in Section 9.1.1.

9.3 No Running of Covenant During Breach. With respect to any restrictive covenant which applies after the termination of the Agreement Term, if Physician violates such restrictive covenant and Employer brings legal action for injunctive or other relief, Employer shall not, as a result of the time involved in obtaining the relief, be deprived of the benefit of the full period of such restrictive covenant. Accordingly, after the termination of the Agreement Term for any reason, for any time period that Physician is in violation of the restrictive covenants set forth in this Article IX, such time period shall not be included in calculating any such restrictive covenant time period described in this Article IX.

9.4 **Duration and Geographical Limits.** If it shall be determined that the duration or geographical limit of any restriction contained in this Article IX is unenforceable, it is the intention of the parties that such restrictive covenant set forth herein shall not thereby be terminated or void but shall be deemed amended to the extent required to render it valid and enforceable to the greatest extent permissible by the applicable law and public policy, such amendment shall apply only with respect to the operation of this Article IX.

9.5 **Injunction.** Physician acknowledges that the restrictions contained in this Article IX are a reasonable and necessary protection of the legitimate business interests of Employer. In the event of any violation of these restrictions, Employer shall be entitled to preliminary and permanent injunctive relief, in addition to any other remedy, and shall be entitled to be reimbursed by Physician for any attorneys' fees and costs, at all pre-trial and appellate levels, incurred as a result thereof. Nothing herein contained shall be construed as prohibiting Employer from pursuing any other legal or equitable remedies available to Employer due to a violation of the restrictions set forth in this Article IX.

ARTICLE X **FEES**

10.1 **Fees for Services.** Except as otherwise may be provided in Section 3.7, all fees, compensation, monies, and other things of value received or realized as a result of the rendering of medical services by Physician, pursuant to this Agreement, shall belong to and be paid and delivered to Employer. Remuneration received by Physician from business activities unrelated to the practice of medicine, which do not interfere or conflict with the terms of this Agreement, or with the applicable provisions of this Agreement, may be retained by Physician, so long as such activity is approved in advance by Employer, and is not performed in the capacity of serving as an employee of Employer.

10.2 **Setting of Fees.** Employer shall have exclusive authority to determine the fees, or a procedure for establishing the fees, to be charged patients, even though such patients may be treated by Physician in the course of Physician's employment by Employer.

10.3 **Power of Attorney.** Physician does hereby appoint Employer as Physician's attorney-in-fact to execute, deliver or endorse checks, applications for payment, insurance claim forms or other instruments required or convenient, as determined by Employer in its sole discretion, to fully collect, secure or realize all sums lawfully due to Employer, for services rendered by Physician under this Agreement during the Agreement Term. The power of attorney is coupled with an interest, is irrevocable and shall survive expiration or termination of this Agreement.

10.4 **Billing and Collection.** Physician agrees that, during the Agreement Term, Physician shall not bill to or collect from any patient or third party payor any amount for services rendered hereunder. Physician hereby irrevocably assigns and grants to Employer the right to bill and collect from patients or third party payors for all services rendered by Physician hereunder, regardless of the location where any such services may be rendered by Physician. Physician agrees to execute any and all documents deemed necessary or desirable by Employer to carry out the provision of this Section. Unless otherwise agreed by Physician, all billing and collection activities shall be conducted as part of the regular business operations of the Practice. Such procedures shall include, but not be limited to, sending bills, filing insurance claims, and making phone calls.

10.5 **Accounting Reports and Review.** Employer shall have available for Physician lists of fees charged for particular services for particular payors and shall update these lists on a regular basis as fees and payors change. Employer also shall provide to Physician, on a monthly basis, production reports which list the billings attributable to services provided by Physician and in the Practice, the collections in connection with the services provided by Physician and the Practice, and accounts receivable in connection with provision of said services, such reports to be provided within thirty (30) days after the applicable month to which such reports relate.

ARTICLE XI **LIMITATIONS OF AUTHORITY**

11.1 Physician agrees not to enter into any transactions on Employer's behalf without the express written consent of Employer, including, but not limited to, the following actions:

- (i) Pledge the credit of Employer or any of its other employees;
- (ii) Bind Employer under any contract, agreement, note, mortgage or other agreement;
- (iii) Bind, release, or discharge any debt due Employer; or
- (iv) Sell, mortgage, transfer or otherwise dispose of any assets of Employer.

11.2 Physician shall hold Employer harmless from any loss attributable to a violation of this covenant. Notwithstanding anything to the contrary in this Article XI, Physician shall advise and assist Employer in securing and retaining contracts in the name and for the account of Employer with such individuals or entities necessary for the proper and efficient functioning of Employer.

ARTICLE XII
NOTICE

12.1 All notices required or permitted to be given under the terms of this Agreement shall be in writing, and shall be effective upon delivery if delivered to the addressee in person, effective three (3) business days after mailing if mailed by certified mail, postage prepared, return receipt requested, or effective the next business day if delivered by overnight courier with charges prepaid, as follows:

If to Employer: 103 Powell Court, Suite 200
Brentwood, TN 37027
Attn: Vice President, Physician Services

With copies to:	1000 Medical Center Dr. Hardenville, SC 29927 Attn: CEO	103 Powell Court, Suite 200 Brentwood, TN 37027 Attn: General Counsel

If to Physician: 2712 Lovy Rd
Hardenville, SC 29927

or to such other address as either party shall have designated for notices to be given to him or it in accordance with this Article.

ARTICLE XIII
MISCELLANEOUS

13.1 **Recitals.** The recitals are true and correct and are incorporated herein in their entirety.

13.2 **Severability.** If any provision of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall nevertheless remain in full force and effect. If any provision of this Agreement shall be held invalid or unenforceable under any particular circumstances, it shall nevertheless remain in full force and effect in all other circumstances.

13.3 **Assignment.** In addition the contract shall affirm that no transfer, assignment or other modification affecting the terms or conditions of the contract will be effected unless extenuating circumstances are shown to exist, as determined by the South Carolina Department of Public Health, and approved by the U.S. Attorney General in accordance with applicable federal rules and regulations.

13.4 **Governing Law and Venue.** This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of South Carolina. Any action or claim arising from, under or pursuant to this Agreement shall be brought in the courts, state or federal, within the State of South Carolina, and the parties expressly waive the right to bring any legal action or claims in any other courts. The parties hereto hereby consent to venue in any state or federal court within the State of South Carolina having jurisdiction over the County for all purposes in connection with any action or proceeding commenced between the parties hereto in connection with or arising from this Agreement.

13.5 **Arbitration.** Except as to the provisions contained in Articles VIII and IX, the exclusive jurisdiction of which shall rest with a court of competent jurisdiction in the state where the hospital is located any controversy or claim arising out of or related to this Agreement, or any breach thereof, shall be settled by arbitration in the County, in accordance with the rules and procedures of alternative dispute resolution and arbitration established by the Alternative Dispute Resolution Service of the American Health Lawyers Association ("AHLA"), and judgment upon any award rendered may be entered in any court having jurisdiction thereof. Such arbitration shall be conducted before a single AHLA arbitrator selected jointly by the parties, or in the event the parties are unable to agree, designated by the AHLA.

13.6 **Waiver.** Any waiver by any party hereto of a breach of any provision of this Agreement shall not operate or be construed as a waiver of any other provision hereof and shall not be effective at all unless in writing. A waiver of any of the terms and conditions hereof shall not be construed as a general waiver by either party, and such waiving party shall be free to reinstate any such term or condition, with or without notice to the other party.

13.7 **Entire Agreement/Amendment.** This Agreement contains the entire agreement between the parties hereto. No change, addition or amendment shall be made except by written agreement executed by all of the parties hereto.

13.8 **Survival.** The provisions of this Agreement, including but not limited to Articles VIII and IX, shall survive the termination of Physician's relationship with Employer and the assignment of this Agreement by Employer to any successor or assign.

13.9 **Confidentiality.** Except as otherwise required by law, Physician hereby agrees to hold in the strictest confidence all of the terms and conditions set forth herein; provided, however, Physician may disclose the terms hereof to his/her attorneys, accountants and other financial and legal advisors as reasonably necessary.

13.10 **Expenses.** Each party to this Agreement shall pay its own costs and expenses in connection with the transaction contemplated hereby.

13.11 **Counterparts.** This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

13.12 **Binding Effect.** This Agreement shall not become effective or legally binding upon either party until signed by both Employer and Physician, and approved by Employer's Division President and Legal Counsel pursuant to a Physician Employment Certificate form which is separate here from.

13.13 **Corporate Integrity Agreement.** Employee represents and warrants that as of the date of this agreement: (i) it is not excluded, debarred or otherwise ineligible to participate in Medicare, Medicaid or any other federal or state healthcare programs or in any federal or state procurement or non-procurement programs; or (ii) has not been convicted of a criminal offense related to the provision of federal health care items or services, that could lead to debarment or exclusion.

Further, Employee agrees to immediately notify the other party to the contract in the event the foregoing representation and warranty is no longer completely accurate. Employee acknowledges and agrees this is a material term of the agreement and any breach or nonfulfillment of same will entitle the other party to immediately terminate this agreement.

13.14 **JCAHO.** Physician shall perform all services hereunder in accordance with any and all regulatory and accreditation standards applicable to Hospitals and the relevant service, including without limitation those requirements imposed by the JCAHO, the Medicare/Medicaid conditions of participation and any amendments thereto.

13.15 **Non-Discrimination.** Facility does not discriminate against any person on the basis of race, color, national origin, disability or age in admission, treatment, program participation, services, activities or employment.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first written above.

WITNESS:

Cynthia J. Holland

PHYSICIAN:

P. Flexon M.D.
Phillip Flexon, M.D.

Social Security Number: 246-74-7776

EMPLOYER:

By: W. Vall Willis
W. Vall Willis
Vice President, Physician Services

REVIEWED AND APPROVED:

[Signature]
Chief Executive Officer

Division President

APPROVED AS TO FORM:

12/22/04
Legal Counsel

8/28/2006

EXHIBIT 1

PHYSICIAN COMPENSATION

I. *The following definitions shall apply in the calculation of Physician Compensation:*

- A. *Net Practice Revenues* - is defined as all cash collected (minus insurance and patient refunds) for patient services provided after the Effective Date in the Practice location(s) that are generated on behalf of the Practice as a result of professional medical services personally furnished to patients by Physician and other fees or income (as meets the Medicare criteria for "incident to") generated by non-physician employees or other Practice personnel under Physician's direct supervision and control, whether such services are rendered in an inpatient or outpatient setting and whether services are rendered to HMO, PPO, Medicare, Medicaid or other patients, including, without limitation, Capitation Payments, and revenues from testing, clinical trials and other drug research studies. Provided, however, that Net Practice Revenues shall not include cash collected for the non-professional or technical fee component for any ancillary services (e.g., laboratory, radiology, diagnostic testing or outpatient surgery) or inpatient or outpatient hospital services.
- B. *Practice Operating Expenses* - is defined as all direct and indirect expenses incurred subsequent to the date hereof in the day-to-day management and operation of the Practice, including, without limitation:
1. salaries, bonuses, benefits, payroll taxes, and other direct costs of all direct Practice employees (including Physician Compensation) and other Practice personnel;
 2. allocable rent for any medical offices, furniture and equipment used by the Practice, utility expense, management information systems, office and medical supplies;
 3. personal property and intangible taxes assessed against assets used by the Practice;
 4. utility expenses related to the medical offices used solely by the Practice, including cellular phone and pager expenses;
 5. direct office and medical supplies;
 6. premiums and general liability insurance for Employer related to the Practice and;
 7. direct repairs and maintenance of the medical offices used in the Practice;
 8. professional liability insurance of employee;
 9. Physician's medical licensure fees, medical staff memberships, board certification fees and costs of membership in professional associations; and
 10. Costs of continuing medical education of Physician.
 11. Costs of contract services, including allocation for hospital services and practice management.

R0189

**AMENDMENT TO AND ASSIGNMENT OF
PHYSICIAN EMPLOYMENT AGREEMENT**

THIS AMENDMENT TO AND ASSIGNMENT OF PHYSICIAN EMPLOYMENT AGREEMENT ("Amendment") is made and entered into as of July 1, 2007 by and between Philip D. Flexon, MD ("Physician"), PHC-Jasper, Inc. d/b/a Coastal Carolina Medical Center ("Employer") and Coastal Carolina Physician Practices, LLC ("CCPP").

RECITALS

WHEREAS, Employer and Physician entered into a physician employment agreement with an effective date of August 1, 2006 (the "Agreement"); and

WHEREAS, on or about June 30, 2007, all of the stock in Employer was sold to Tenet Healthsystems, Inc. and Employer became a wholly owned subsidiary of Tenet Healthsystems, Inc.; and

WHEREAS, the parties desire to amend this Agreement and assign it to CCPP.

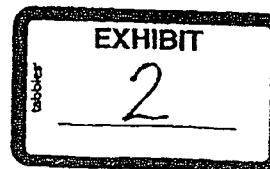
NOW, THEREFORE, in consideration of the foregoing and the mutual promises contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Physician, CCMC and CCPP hereby agree as follows:

1. Section 13.3 of the Agreement is deleted in its entirety and replaced with the following:

Assignment. The rights and obligations of Employer under this Agreement may be assigned at any time by Employer to an affiliate or to a successor in interest in the event of the sale of all or substantially all of its assets or stock. The rights and obligations of Physician under this Agreement may not be assigned without the prior written consent of Employer.

2. Two new sections, 13.16 and 13.17, shall be added to the Agreement, as follows:

13.16 Compliance Obligations. Physician has received, read, understood, and shall abide by Tenet's Standards of Conduct. The parties to this agreement shall comply with Tenet's Compliance Program and Tenet's policies and procedures related to the Anti-Kickback Statute and the Stark Law. Tenet's Standards of Conduct, summary of Compliance Program, and policies and procedures are available at: <http://www.tenethealth.com/TenetHealth/OurCompany/EthicsBusinessConduct>.



Further, the parties to this Agreement certify that they shall not violate the Anti-Kickback Statute and/or the Stark Law.

13.17 Exclusion List Screening. Physician shall screen all of its current and prospective owners, legal entities, officers, directors, employees, contractors, and agents ("Screened Persons") against (a) the United States Department of Health and Human Services/OIG (Office of Inspector General) List of Excluded Individuals/Entities (available through the Internet at <http://www.oig.hhs.gov>), and (b) the General Services Administration's List of Parties Excluded from Federal Programs (available through the Internet at <http://www.epls.gov>) (collectively, the "Exclusion Lists") to ensure that none of the Screened Persons (y) are currently excluded, debarred, suspended, or otherwise ineligible to participate in Federal healthcare programs or in Federal procurement or nonprocurement programs, or (z) have been convicted of a criminal offense that falls within the ambit of 42 U.S.C. § 1320a-7(a), but have not yet been excluded, debarred, suspended, or otherwise declared ineligible (each, an "Ineligible Person"). If, at any time during the term of this Agreement any Screened Person becomes an Ineligible Person or proposed to be an Ineligible Person, Physician shall immediately notify Hospital of the same. Screened Persons shall not include any employee, contractor or agent who is not providing services under this Agreement.

3. The parties agree that effective July 1, 2007, the Agreement shall be assigned to CPHP, and CPHP shall assume all of the rights and obligations of Employer as of such date.

4. Except as expressly provided in this Amendment, all other terms, conditions and provisions of the Agreement shall continue in full force and effect as provided therein.

IN WITNESS WHEREOF, the parties intending to be bound hereto have caused this Amendment to be executed by persons duly authorized to bind them.

PHYSICIAN

Signature: _____
Phillip B. Flexon, MD

Date: _____

PHC-JASPER, INC. D/B/A COASTAL CAROLINA MEDICAL CENTER

Signature:

Elizabeth E. Lamkin
President

Date:

7/3/07

COASTAL CAROLINA PHYSICIAN PRACTICES, LLC

Signature:

Elizabeth E. Lamkin
President

Date:

7/3/07



RECEIVED
AUG 18 2008

5555 GLENRIDGE CONNECTOR NE
SUITE 925, GLENRIDGE HIGHLANDS
ATLANTA, GEORGIA 30342-4728
TELEPHONE 404 236 8600
TELECOPIER 404 236 8601

direct dial. 404 236 8608
email: lmerlin@fdmllaw.com

August 15, 2008

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

70070220000477118332
Coastal Carolina Medical Center
103 Powell Court
Suite 200
Brentwood, Tennessee 37027
Attention: Vice President, Physician Services

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

70070220000477118349
Coastal Carolina Medical Center
103 Powell Court
Suite 200
Brentwood, Tennessee 37027
Attention: General Counsel

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

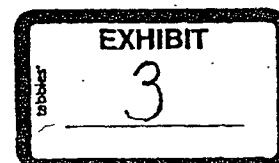
70070220000477118356
Coastal Carolina Medical Center
1000 Medical Center Drive
Hardeeville, SC 29927
Attention: CEO

Re: Physician Employment Agreement dated December 18, 2006, by and between Coastal Carolina Medical Center ("Employer"), and Phillip B. Flexon, M.D. ("Physician") (the "Contract")

Dear Sir or Madam:

This law firm represents Phillip B. Flexon, M.D. This letter shall serve as formal notice of termination of the referenced Contract by Physician "for cause" pursuant to the terms of Section 6.2.1 of the Contract. Specifically, the Employer is in material breach, default and violation of the Contract in the following particulars:

1. Billing Malfeasance. Since July 1, 2007, the Employer and its representatives have failed and refused to submit charges for Dr. Flexon's services to Medicare, Medicaid and private insurance carriers. This has continued in spite of Dr. Flexon continuing to see patients in the office, cover the Employer's Emergency Room and perform surgeries. This failure in basic office medical management makes it impossible for Dr. Flexon to receive his bonus compensation as set forth in the Contract. This is a clear and material violation of the Contract. The lack of billing has been repeatedly brought to the attention of hospital officials including on more than one occasion its CEO. Yet despite this, nothing has happened and the bills remain unsent.



R0193

2. Staffing. The Employer has materially breached the Contract by repeatedly not providing Dr. Flexon reasonable personnel staffing and support, such as billing and marketing as required by Section 3.2 of the Contract. In November 2007, the Employer fired Dan Gemmell, Dr. Flexon's Practice Manager without Dr. Flexon's knowledge or consent and failed to reinstate him after Dr. Flexon's repeated protests. The position has not been filled to date.

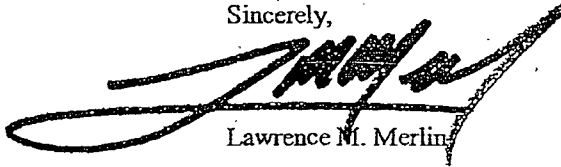
On December 31, 2007, Employer terminated Dr. Flexon's Office Billing Director, Phyllis Yingling without Dr. Flexon's knowledge or consent. Later it was learned that Ms. Yingling was specifically instructed by the Employer to stop billing Dr. Flexon's time as of July 1, 2007. The Office Billing Director position has not been filled to date.

In March 2008, Priscilla Green, Dr. Flexon's Scheduler and Receptionist resigned because of working conditions at the Employer. She has not been replaced.

The fact of the matter is for over six months and despite Dr. Flexon's repeated protests and meetings with hospital officials, my client has had no Practice Manager, no Receptionist or Scheduler, and no billing management. He is down to one employee which makes it impossible for him to see and care for his regular patient load that he has established over the last eighteen years (18) before coming to the Employer. My client's practice has been reduced to half its normal patient level.

The Contract allows the Employer thirty (30) days within which to cure these material breaches. However, I am unconvinced that certain of the breaches can in fact be cured due to the amount of time that has passed. However, I would be interested in hearing from you regarding the Employer's position on the content of this letter and its plans, if any, to remedy these defaults. I await your response.

Sincerely,



Lawrence M. Merlin

LMM/jd

cc: Phillip B. Flexon, M.D.

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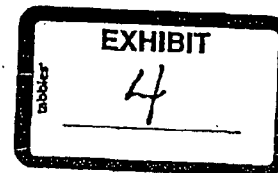
Buist • Moore • Smythe • McGee • P.A.

May 4, 2009

J. MARSHALL ALLEN
ATTORNEY AT LAW
E-Mail: mallen@buistmoore.com
DIRECT DIAL: 843-720-4627
FAX: 843-723-7398

VIA Electronic and U.S. Mail

William B. Harvey III, Esquire
Harvey & Battey, PA
P.O. Drawer 1107
Beaufort, SC 29901-1107



RE: Philip Flexon, M.D./Coastal Carolina Medical Center
BMSM File No.: 5499.0011

Dear Bill:

As I have stated in our telephone conversations, Coastal Carolina Medical Center ("CCMC") would be pursuing amounts determined payable by Dr. Flexon pursuant to the terms of his Employment Agreement with CCMC ("Agreement"). We have gathered the numbers and have now determined the amounts payable by Dr. Flexon. With this information, I would like to earnestly commence discussions with you about these payments.

The term of the Agreement is for a five (5) year period with an Effective date of March 15, 2007. Dr. Flexon improperly terminated the Agreement on September 16, 2008 and ceased as of that date to provide the full-time practice of medicine in Hardeeville (the "Community"). On about this date, Dr. Flexon began working for Memorial University Medical Center ("MUMC") in Savannah.

The three (3) repayment obligations in the Agreement are (i) the "negative EBDITA" repayment required under Exhibit 1, Section IV, (ii) the "Marketing Expense Reimbursement" repayment required under Exhibit 2 and (iii) the "Sign On Bonus" repayment required under Exhibit 3.

As seen on the enclosed Cumulative EBITDA Analysis, Dr. Flexon's EBITDA for the period March 15, 2007 to March 1, 2009 is a negative \$702,941. Pursuant to Exhibit 1, Section IV, my client demands the immediate repayment of this negative amount unless Dr. Flexon requests a deferred payment plan. Please let me know within five (5) days from you receipt of this letter if your client desires a deferred payment plan.

Dr. Flexon was paid a Marketing Expense Reimbursement of \$10,000 pursuant to Exhibit 2 of the Employment Agreement. Dr. Flexon worked full-time in the Community for 18 months

William B. Harvey III, Esquire
Harvey & Battey, PA
May 4, 2009
Page 2

(March 15, 2007 to September 16, 2008). The unamortized amount due and payable is the product of 70% (18/60) and \$10,000, or \$7,000. My client demands the immediate repayment of this amount.

Dr. Flexon was paid a Sign On Bonus of \$25,000 pursuant to Exhibit 3. The unamortized amount due and payable is the product of 70% and \$25,000, or \$17,500. My client demands the immediate repayment of this amount.

Dr. Flexon began working for MUMC immediately subsequent to his wrongful termination of the Employment Agreement in violation of the Restrictive Covenant specified in Section 9.1 of the Agreement. My client demands Dr. Flexon immediately cease violating the restrictive covenant.

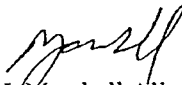
In addition to the repayment obligations stated above, my client intends to seek payment for the consequential damages it has suffered as a result of Dr. Flexon's wrongful termination.

You suggested in one or more of our conversations that my client breached the Agreement and should simply abandon the repayment obligations. Please realize, and try to appreciate, that my client will and cannot do this for a variety of reasons, including health care compliance concerns. Unless we expeditiously resolve this matter, it will be resolved in court or in arbitration.

After you have had an opportunity to consider this letter with your client, please give me a telephone call in order for us to discuss this matter.

Sincerely yours.

BUIST MOORE SMYTHE MCGEE P.A.


J. Marshall Allen

JMA/srb
Enclosure
cc: Carol Ferri, Tenet Hospital System

{01485282.}

R0196

STATE OF SOUTH CAROLINA)

COUNTY OF JASPER)

PHILIP FLEXON, M.D.)

Plaintiff(s))

vs.)

PHC-Jasper, Inc., d/b/a Coastal Carolina Medical)
Center, Coastal Carolina Medical Center, Inc.,))
Lifepoint Hospitals, Inc., and Tenet Healthsystems,)
Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2009 CP - 27- 331

(Please Print)

Submitted By: William B. Harvey, III

Address: Harvey & Battey, P.A.

1001 Craven Street, Beaufort, SC 29902

SC Bar #: 2792

Telephone #: 843-524-3109

Fax #: 843-524-6973

Other:

E-mail: bharvey@harveyandbattey.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts	Torts - Professional Malpractice	Torts - Personal Injury	Real Property
☐ Constructions (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Libel (300)	☐ Claim & Delivery (400)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (410)
☐ Employment (120)	☐ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	☐ Notice/ File Med Mal (230)	☐ Premises Liability (330)	☐ Mechanic's Lien (430)
☒ Breach of Contract (140)	☐ Other (299)	☐ Products Liability (340)	☐ Partition (440)
☐ Other (199)		☐ Personal Injury (350)	☐ Possession (450)
		☐ Wrongful Death (360)	☐ Building Code Violation (460)
		☐ Other (399)	☐ Other (499)
-
Inmate Petitions	Judgments/Settlements	Administrative Law/Relief	Appeals
☐ PCR (500)	☐ Death Settlement (700)	☐ Reinstate Driver's License (800)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Foreign Judgment (710)	☐ Judicial Review (810)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Magistrate's Judgment (720)	☐ Relief (820)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Minor Settlement (730)	☐ Permanent Injunction (830)	☐ Municipal (930)
	☐ Transcript Judgment (740)	☐ Forfeiture-Petition (840)	☐ Probate Court (940)
	☐ Lis Pendens (750)	☐ Forfeiture-Consent Order (850)	☐ SCDOT (950)
	☐ Other (799)	☐ Other (899)	☐ Worker's Comp (960)
-
Special/Complex /Other			
☐ Environmental (600)	☐ Pharmaceuticals (630)		
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)		
☐ Medical (620)	☐ Out-of State Depositions (650)		
☐ Other (699)	☐ Sexual Predator (510)		
-
			☐ Administrative Law Judge (980)
			☐ Public Service Commission (990)
			☐ Employment Security Comm (991)
			☐ Other (999)

Submitting Party Signature: 

Date: 5/21/09

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

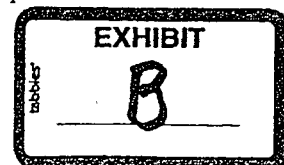
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	JUDICIAL CIRCUIT
COUNTY OF JASPER	)	CASE NO. 2009-CP-27-331
Philip Flexon, M.D.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	COASTAL CAROLINA MEDICAL
	)	CENTER, INC'S INTERROGATORIES
PHC-Jasper, Inc., d/b/a/ Coastal Carolina	)	TO THE PLAINTIFF
Medical Center, Coastal Carolina Medical	)	
Center, Inc., Lifepoint Hospitals, Inc. and	)	
Tenet Healthsystems,	)	
	)	
Defendants.	)	
	)	

TO: WILLIAM HARVEY, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

The Defendant Coastal Carolina Medical Center, Inc. ("CCMC"), by and through its undersigned attorney, hereby require the Plaintiff, within thirty (30) days after service hereof, to answer under oath the Interrogatories hereinafter set forth, in accordance with Rule 33(b) of the South Carolina Rules of Civil Procedure. In these Interrogatories the term "party" is used to designate the Plaintiff.

GENERAL INSTRUCTIONS AND DEFINITIONS

- (a) These Interrogatories are continuing in character, so as to require you to file supplementary answers if you obtain further or different information.
- (b) Where the name or identity of a person is required, state the person's full name, address, and telephone number(s).
- (c) Where the identity of an organization is requested, state the name under which it customarily does business, its address, and if known, the identity of the person in such organization who is believed to have the greatest knowledge with respect to the matters referred to in these Interrogatories.



(d) Where you are asked to identify a Document, state (i) the name of the person who prepared it or over whose signature it was issued; (ii) the name of each person to whom it was addressed or distributed; (iii) the nature and substance of the writing with sufficient particularity to enable it to be identified; (iv) its date and, if it bears no date, the date when it was prepared; (v) the physical location of it and the name and address of its custodian; and (vi) whether it will be voluntarily made available for inspection and copying. If so, please attach copies to your answers to these Interrogatories.

(e) "Person(s)" shall mean any natural persons, proprietorships, partnerships, firms, corporations, joint ventures, independent establishments, government agencies or corporations, any divisions or subsidiaries thereof, and any other group or combination acting as an entity.

(f) "Document" or "Documents" shall mean any tangible thing upon which any expression, communication, representative or data has been recorded by any means including, but not limited to, handwriting, typewriting, printing, photostating, photographing, on a computer, magnetic impulse, or mechanical or electronic recording and any non-identical copies (whether different from the original because of notes made on such copies, because of indications that said copies were sent to different individuals than were the originals, or because of any other reason), including but not limited to working papers, preliminary, intermediate or final drafts, correspondence, email, memoranda, charts, notes, records of any sort of meetings, invoices, financial statements, financial calculations, diaries, reports of telephone or other oral conversations, desk calendars, appointment books, audio or video tape recordings, microfilm, microfiche,

computer tape, computer disk, computer printout, computer card, and all other writings and recordings of every kind that are in your actual or constructive possession, custody or control.

(g) "Communication" means any transmission, conveyance, or exchange of information whether by written, oral, electronic or other means.

(h) Whenever appropriate in these Interrogatories, the singular form shall be interpreted as plural and vice versa, the male gender shall be interpreted as the male, female, or neutral gender, and "and" or "or" shall be construed either disjunctively or conjunctively to bring within the scope of these Interrogatories any information that might otherwise be construed to be outside their scope. "Any" or "each" should be understood to include and encompass "all."

(i) Unless otherwise indicated, these Interrogatories refer to the time, place, and circumstances of the allegations contained in the pleadings.

(j) Where these Interrogatories call for knowledge or information of a party, the request includes the knowledge of a party's agents, representatives and, unless privileged, their attorneys.

(k) The terms "you," "your," "Plaintiff" and "Flexon" shall refer to the Plaintiff, Phillip Flexon, MD.

(l) The request to "describe" and to "explain" includes an identification of all relevant circumstances including but not limited to identification of persons and dates.

(m) If you refuse to provide any of the requested information on the grounds that it is embodied in communications or documents protected by the attorney-client privilege or work product immunity, identify specifically each communication or

document embodying the allegedly protected information and provide sufficient information about the content of the communication or document to permit objective verification of the claim of privilege or immunity, including but not limited to the identity of the persons involved.

(n) If an Interrogatory is objected to in part, a complete answer to all portions of that Interrogatory not objected to should be provided.

INTERROGATORIES

1. Give the names and addresses of persons known to you or your counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from such witnesses and indicate who has possession of such statements.

2. For each person known to the party or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

3. Set forth a list of photographs, plats, sketches, or other prepared documents in your possession that relate to the claim or defense in the case.

4. Set forth an itemized statement of all damages claimed to have been sustained by the Plaintiff in connection with the incident alleged in your Complaint.

5. List the names and addresses of any expert witnesses whom you propose to use as a witness at the trial of the case.

6. For the past ten (10) years, state the names and addresses of each of the employers of the Plaintiff, including current employer, or, if self-employed, the business

address or addresses along with the dates of commencement and termination for each such source of employment.

7. Identify any and all actions you undertook to promote your practice at Coastal Carolina Medical Center. Please include dates and a list of documentary evidence supporting your assertions.

8. When did you begin negotiations to return to Savannah? Who initiated these conversations? Please list documents evidencing these negotiations.

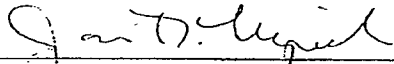
9. Did CCMC ever refuse to rent a CO₂ laser for your surgical use during your time at Coastal Carolina Medical Center? If yes, please state:

- a. The manner and date you requested the laser;
- b. The date and reason given for refusal; and
- c. The name of the party who refused your request.

10. Please list what documents you contend make up your employment agreement with Coastal Carolina Medical Center.

11. What do you contend your EBIDTA was at the time of your termination?
- a. Who prepared that calculation?
- b. On what data is it based?

BUIST MOORE SMYTHE MCGEE P.A.


James D. Myrick, , S.C. Bar No. 012004
Dana W. Lang, S.C. Bar No. 77546
5 Exchange Street (29401)
P.O. Box 999
Charleston, SC 29402
(843) 722-3400

October 6, 2009
Charleston, South Carolina

CERTIFICATE OF SERVICE

I do hereby certify that on the 6th day of October 2009, I served a copy of the within Interrogatories in the within entitled matter by sending a copy of the same in an envelope with the correct postage prepaid addressed to:

William Harvey, Esquire
Harvey & Battey, PA
1001 Craven Street
P.O. Drawer 1107
Beaufort, SC 29901-1107

Michelle Miller

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	JUDICIAL CIRCUIT
COUNTY OF JASPER	)	CASE NO. 2009-CP-27-331
Philip Flexon, M.D.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	COASTAL CAROLINA MEDICAL
	)	CENTER, INC'S REQUESTS FOR
PHC-Jasper, Inc., d/b/a/ Coastal Carolina	)	PRODUCTION TO THE PLAINTIFF
Medical Center, Coastal Carolina Medical	)	
Center, Inc., Lifepoint Hospitals, Inc. and	)	
Tenet Healthsystems,	)	
	)	
Defendants.	)	
	)	

Defendant Coastal Carolina Medical Center, Inc. (hereinafter "CCMC") requests, pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, that Phillip Flexon, MD, ("Flexon" or "Plaintiff") respond within thirty (30) days after the service hereof and produce and permit CCMC to inspect, copy, or photograph each of the following documents or things that may be in the possession, custody, or control of Flexon or his attorneys and which constitute or contain evidence relating to the claim or defense of the within cause. make available, within thirty (30) days of the date of this request, for inspection and copying by Firestone's counsel, the following documents and things:

DEFINITIONS AND INSTRUCTIONS

1. The word "person" means any natural person, firm or corporation, partnership, joint venture or any other form of business entity.
2. The pronoun "you" refers to the party or parties to whom these Interrogatories are addressed and to its or their subsidiaries, officers, employees, representatives, agents and, unless privileged, its or their attorneys.

3. The term "documents" means all writings and amendments of any kind including the originals and all non-identical copies whether different from the original by reason of any notation made on such copies or otherwise, including, without limitation, correspondence, memoranda, notes, diaries, statistics, letters, application for jobs, medical records, telegrams, reports, studies, checks, statements, receipts, returns, summaries, pamphlets, books, offers, notations of any sort of conversations, telephone calls, meetings, or other communications, and all drafts, alterations, modifications, changes and amendments of any of the foregoing; graphic or aural records, or representatives of any kind, including, without limitation, photographs, charts, microfilm, videotape, recordings, and motion pictures; and electronically stored information of any kind, including, but not limited to, information kept or stored in any fashion whatsoever on computer hard drives, diskettes, tapes, or other storage devices, and any other tangible or intangible things which constitute or contain matters relevant to the subject matter herein, including but not limited to computer hard drives, diskettes, tapes, or other storage devices, telephone messages, calendars, backups of any of the aforementioned items (including but not limited to tape backups, backup diskettes, compressed backups, or the like), drafts of any of the aforementioned documents, revisions of drafts of any documents, and original preliminary notes concerning drafts of any documents as defined herein. The term "document(s)" means both the originals and non-identical copies thereof.

4. If any document requested is not being produced on the basis of privilege or for any other reason, please provide a list of such documents giving the nature of the

document, the date of origination, the author of the document, the person to whom the document was addressed, and the reason for not producing the document for inspection.

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. Any written statements made by any witnesses or persons, including the parties to this action, pertaining to the subject matter of this action.
2. Any books, records, reports, photographs, videotapes, drawings, charts, maps, diagrams, models, or other documentary materials or tangible objects that relate to the allegations of the complaint or which you intend to offer into evidence as exhibits at the time of trial.
3. Any written reports submitted by expert witnesses whom you expect to testify at trial.
4. Any documents supplied to or received from expert witnesses whom you expect to testify at trial.
5. All documents identified in response to CCMC's Interrogatories to Flexon, served concurrently herewith.
6. All contracts, agreements, memoranda, and other documents that are a part of any contract, or any draft or proposed contract, between you and CCMC.
7. All correspondence, letters, notes of conversations, memoranda, minutes of meetings, and other documents evidencing, referring, or relating to any communication, whether written or oral, between you and anyone relating to your employment at CCMC, or your termination with CCMC.
8. All correspondence, letters, notes of conversations, memoranda, minutes of meetings, and other documents evidencing, referring, or relating to any communication, whether written or oral, between you and anyone relating to alleged extra-contractual

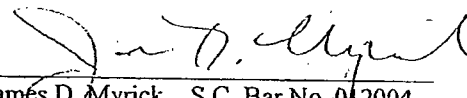
promises made to you in the course of negotiations, or later, by representatives of LifePoint or CCMC.

9. All calculations, spreadsheets, or other documents evidencing an EBITDA calculation by you, or your consultant, expert, accountant, or agent.

10. All documents evidencing damages sustained by you.

11. Your entire file relating to your employment with or departure from Coastal Carolina Medical Center.

BUIST MOORE SMYTHE MCGEE P.A.



James D. Myrick, , S.C. Bar No. 012004
Dana W. Lang, S.C. Bar No. 77546
5 Exchange Street (29401)
P.O. Box 999
Charleston, SC 29402
(843) 722-3400

October 6, 2009
Charleston, South Carolina

CERTIFICATE OF SERVICE

I do hereby certify that on the 6th day of October 2009, I served a copy of the within Requests for Production to the Plaintiff in the within entitled matter by sending a copy of the same in an envelope with the correct postage prepaid addressed to:

William Harvey, Esquire
Harvey & Battey, PA
1001 Craven Street
P.O. Drawer 1107
Beaufort, SC 29901-1107

Michelle Miller

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER) C.A. NO.: 2009-CP-27-331
Philip Flexon, M.D.,)
Plaintiff,)
vs.) DEFENDANT LIFEPOINT HOSPITALS,
) INC.'S INTERROGATORIES TO
) PLAINTIFF
PHC-Jasper, Inc., d/b/a Coastal)
Carolina Medical Center, Coastal)
Carolina Medical Center, Inc.,)
Lifepoint Hospitals, Inc., and Tenet)
Healthsystems, Inc.,)
Defendants.)

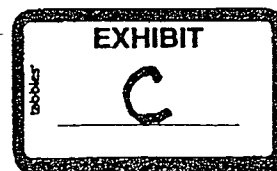
TO: WILLIAM B. HARVEY, III, ESQUIRE, HARVEY & BATTEY, P.A., ATTORNEYS
FOR PLAINTIFF:

Defendant, Lifepoint Hospitals, Inc., ("Defendant"), by and through its undersigned attorney, hereby requires Plaintiff, Philip Flexon, M.D., within thirty (30) days after service hereof, to answer under oath the Interrogatories hereinafter set forth, in accordance with Rule 33(b) of the South Carolina Rules of Civil Procedure.

INTERROGATORIES

1. Give the names and addresses of persons known to you or your counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from such witnesses and indicate who has possession of such statements.

2. For each person known to you or your counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important



facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

3. Set forth a list of photographs, plats, sketches or other prepared documents in your possession that relate to the claim or defense in the case.

4. Set forth an itemized statement of all damages claimed to have been sustained by the Plaintiff in connection with the allegations in your Complaint.

5. List the names and addresses of any expert witnesses whom you propose to use as a witness at the trial of the case.

6. For the past ten (10) years, state the names and addresses of each of the employers of the Plaintiff, including current employer, or, if self-employed, the business address or addresses along with the dates of commencement and termination for each source of employment.

7. Identify and list all documents you contend make up your employment agreement with Coastal Carolina Medical Center or any other Defendant.

8. Identify by name and address all persons to whom Plaintiff refers in Paragraph 8 of his Complaint as being employees and agents of Lifepoint, the allegation being that: "Plaintiff was enticed to sign Exhibit 1 by the representations of *employees and agents of Lifepoint* that he would enjoy a long relationship with Lifepoint and Coastal Carolina Medical Center."

9. Identify by name and address all persons to whom Plaintiff refers in Paragraph 9 of his Complaint as being representatives and agents of Employer, the allegation being that: "As part of the negotiations of Exhibit 1, *representatives and agents of Employer* represented to Plaintiff that the hospital would purchase the equipment needed by Plaintiff in the operating room, including a CO2 laser machine and a navigational system for sinus surgery. Said

representatives further represented that the hospital would recruit and hire an audiologist to be part of Plaintiff's practice." Likewise, identify by name and address all persons to whom Plaintiff refers in Paragraph 28 of the Complaint as being *officers and agents* of Employer.

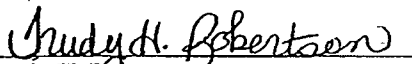
10. Identify and set forth in detail all facts and circumstances which you contend support the allegations in Paragraph 13 of the Complaint that "upon information and belief, at the time of the signing of Exhibit 1, and certainly before the Effective Date of Exhibit 1, March 15, 2007, Lifepoint was in active negotiations with Tenet for the purchase by Tenet of the assets of PHC, including the hospital Coastal Carolina Medical Center. Knowing that Plaintiff would have to close and terminate an established practice in Savannah in order to fulfill his obligations under Exhibit 1, there arose a duty by Employer to disclose to Plaintiff the intent to negotiate and sell PHC and Coastal Carolina Medical Center to Tenet, or to another entity."

11. Identify and set forth in detail all facts and circumstances which you contend support the allegations of Paragraph 14 of the Complaint that "Employer failed to disclose to Plaintiff the intent to sell PHC and Coastal Carolina Medical Center to Tenet, or to another entity, but instead utilized the contract with the Plaintiff, the highly specialized services provided by the Plaintiff, and the revenue to be produced by such services, as a means to enhance the value of Coastal Carolina Medical Center to Tenet as a prospective purchaser."

12. Did Coastal Carolina Medical Center ever refuse to rent a laser for surgical use during the Plaintiff's time at Coastal Carolina Medical Center? If so, state the manner and date the laser was requested, the date and reason given for the refusal and the name of the person or party who refused the request.

13. Did Coastal Carolina Medical Center ever refuse to recruit and hire an audiologist during the Plaintiff's time at Coastal Carolina Medical Center? If so, state the manner and date

the audiologist was requested, the date and reason given for the refusal and the name of the person or party who refused the request.


Trudy H. Robertson
Charles M. Jordan, Jr.
Moore & Van Allen, PLLC
40 Calhoun Street, Suite 300
P.O. Box 22828
Charleston, SC 29413-2828
Telephone: (843) 579-7000
Facsimile: (843) 579-7099

ATTORNEYS FOR DEFENDANT
LIFEPOINT HOSPITALS, INC.

April 16, 2010

Charleston, South Carolina

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF JASPER)

C.A. NO.: 2009-CP-27-331

Philip Flexon, M.D.,)

Plaintiff,)

vs.)

PHC-Jasper, Inc., d/b/a Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc., and Tenet
Healthsystems, Inc.,)

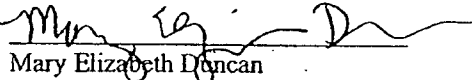
Defendants.)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of *Defendant Lifepoint Hospitals, Inc.'s Interrogatories to Plaintiff* was served upon the following by U.S. Mail:

James D. Myrick
Dana W. Lang
Buist Moore Smythe McGee P.A.
5 Exchange Street
P.O. Box 999
Charleston, SC 29402

William B. Harvey, III
Harvey & Battéy P.A.
P.O. Drawer 1107
Beaufort, SC 29901-1107


Mary Elizabeth Duncan

CHARLESTON, SC

April 16, 2010

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF JASPER	)	C.A. NO.: 2009-CP-27-331
	)	
Philip Flexon, M.D.,	)	
	)	
Plaintiff,	)	
	)	DEFENDANT LIFEPOINT HOSPITALS,
vs.	)	INC.'S REQUEST TO PRODUCE TO
	)	PLAINTIFF
	)	
PHC-Jasper, Inc., d/b/a Coastal	)	
Carolina Medical Center, Coastal	)	
Carolina Medical Center, Inc.,	)	
Lifepoint Hospitals, Inc., and Tenet	)	
Healthsystems, Inc.,	)	
	)	
Defendants.	)	

The Defendant, Lifepoint Hospitals, Inc., hereby requests, pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, that the Plaintiff, Philip Flexon, M.D., respond within thirty (30) days after the service hereof to the following request, to wit, that the Plaintiff produce and permit Defendant to inspect, copy or photograph each of the following documents or things, which may be in the possession, custody or control of Plaintiff or Plaintiff's legal counsel which constitute or contain evidence relating to the claim or defense of the within cause.

1. Any and all surveys, sketches, writings, letters, electronic mails, photographs, moving pictures, maps, plats, drawings, diagrams, measurements, or other documentary materials or tangible objects relating to the case and/or of the persons or entities involved made either before, after or at the time of the transactions referenced in the Complaint and Answer.
2. Any and all written statements, made by any witnesses or persons, including the parties to this action, pertaining to the subject matter of this action.
3. Any and all expert reports, all documents relied upon by experts in formulating their opinions and all documents transmitted to and from experts by Plaintiff and/or his counsel.

4. Any and all books, records, reports, photographs, moving pictures, videotapes, drawings, charts, maps, diagrams, models, letters, electronic mails or other documentary materials or tangible objects which Plaintiff intends to rely upon to support the allegations of his Complaint and/or which Plaintiff intends to offer into evidence as exhibits at the time of trial.

5. Any and all correspondence, materials, reports, records, recordings, statements, memoranda, notes, working papers, emails or other electronic communications, telephone messages and other documents or written communications (whether authored or received) between Plaintiff and Defendants (including either's agents).

6. All documents identified in, or upon which Plaintiff referred or bases, Plaintiff's Answers to Interrogatories served by Defendant.

7. All contracts, agreements, memoranda and other writings that Plaintiff contends is a part of any contract, or any draft or proposed contract, between Plaintiff and Coastal Carolina Medical Center.

8. Any and all correspondence, electronic mails, letters, notes of conversations, phone messages, memoranda, minutes of meetings, or other documents evidencing, referring or relating to any communication, whether written or oral, between you and anyone regarding your employment at Coastal Carolina Medical Center or your termination from Coastal Carolina Medical Center.

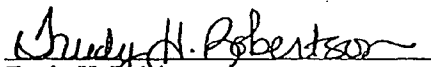
9. Any and all correspondence, electronic mails, letters, notes of conversations, phone messages, memoranda, minutes of meetings, or other documents evidencing, referring or relating to any communication, whether written or oral, between you and anyone relating to alleged extra-contractual promises or representations made to you in the course of negotiations,

or later, by representatives of Defendant Lifepoint Hospitals, Inc. or Coastal Carolina Medical Center.

10. All documents evidencing damages sustained by you.

11. Your entire file relating to your employment with or departure from Coastal Carolina Medical Center.

It is requested that the aforesaid production be made by the delivery of the above-mentioned documents and things to the offices of Moore & Van Allen, PLLC, Attorneys for Defendant, at 40 Calhoun Street, Suite 300, Charleston, South Carolina, or at a place and in a manner to be designated in the response thereto, within thirty (30) days after the service hereof, for inspection, copying or photographing.



Trudy H. Robertson
Charles M. Jordan, Jr.
Moore & Van Allen, PLLC
40 Calhoun Street, Suite 300
P.O. Box 22828
Charleston, SC 29413-2828
Telephone: (843) 579-7000
Facsimile: (843) 579-7099

ATTORNEYS FOR DEFENDANT
LIFEPOINT HOSPITALS, INC.

April 16, 2010

Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

Philip Flexon, M.D.,

Plaintiff,

vs.

PHC-Jasper, Inc., d/b/a Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc., and Tenet
Healthsystems, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

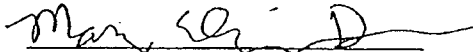
C.A. NO.: 2009-CP-27-331

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of *Defendant Lifepoint Hospitals, Inc.'s Request to Produce to Plaintiff* was served upon the following by U.S. Mail:

James D. Myrick
Dana W. Lang
Buist Moore Smythe McGee P.A.
5 Exchange Street
P.O. Box 999
Charleston, SC 29402

William B. Harvey, III
Harvey & Battey P.A.
P.O. Drawer 1107
Beaufort, SC 29901-1107


Mary Elizabeth Durcan

CHARLESTON, SC

April 16, 2010

10-6

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER) IN THE COURT OF COMMON PLEAS
) JUDICIAL CIRCUIT
) CASE NO. 2009-CP-27-331

Philip Flexon, M.D.,)
)
Plaintiff,)

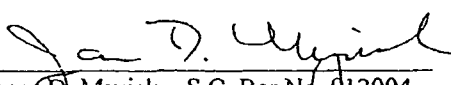
vs.)

PHC-Jasper, Inc., d/b/a/ Coastal Carolina)
Medical Center, Coastal Carolina Medical)
Center, Inc., Lifepoint Hospitals, Inc. and)
Tenet Healthsystems,)
)
Defendants.)

MOTION TO STAY AND FOR ORDER
COMPELLING ARBITRATION

PLEASE TAKE NOTICE that Defendant Coastal Carolina Medical Center, Inc. will move before this Honorable Court at such place and time as the Court may appoint, for an order compelling arbitration and for a stay of this action pending arbitration. The grounds for this motion are that the employment contract, subject of this litigation, contains a valid and enforceable arbitration provision, as explained in the attached memorandum of law.

BUIST MOORE SMYTHE MCGEE P.A.


James D. Myrick, , S.C. Bar No. 012004
Dana W. Lang, S.C. Bar No. 77546
5 Exchange Street (29401)
P.O. Box 999
Charleston, SC 29402
(843) 722-3400

October 21, 2009
Charleston, South Carolina



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	JUDICIAL CIRCUIT
COUNTY OF JASPER	)	CASE NO. 2009-CP-27-331
Philip Flexon, M.D.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	MEMORANDUM IN SUPPORT OF
	)	MOTION TO STAY AND FOR ORDER
PHC-Jasper, Inc., d/b/a/ Coastal Carolina	)	COMPELLING ARBITRATION
Medical Center, Coastal Carolina Medical	)	
Center, Inc., Lifepoint Hospitals, Inc. and	)	
Tenet Healthsystems,	)	
	)	
Defendants.	)	
	)	

Coastal Carolina Medical Center, Inc. ("CCMC") files this Memorandum in Support of its motion to stay these proceedings and for an order compelling arbitration, for the following reasons.

BACKGROUND

On or about December 18, 2006 Plaintiff Phillip Flexon, MD ("Flexon") entered an employment contract with PHC-Jasper, Inc., whose name was later changed to CCMC ("Hospital"). The employment contract contained an arbitration clause stating:

13.5 Arbitration. Except as to the provisions contained in Articles VIII and IX, the exclusive jurisdiction of which shall rest with a court of competent jurisdiction in the state where the hospital is located[,] any controversy or claim arising out of or related to this Agreement, or any breach thereof, shall be settled by arbitration in the County, in accordance with the rules and procedures of alternative dispute resolution established by the Alternative Dispute Resolution Service of the American Health Lawyers Association "AHLA"), and judgment upon any award rendered may be entered in any court having jurisdiction thereof. Such arbitration shall be conducted before a single AHLA arbitrator selected jointly by the parties, or in the event the parties are unable to agree, designated by the AHLA.

On or about September 14, 2008, Flexon terminated his employment with the Hospital. The parties disagree about certain terms in the contract, and Flexon filed this lawsuit on May 21, 2009.

ARGUMENT

The employment agreement's arbitration clause above is enforceable under the Federal Arbitration Act. Under South Carolina law, an arbitration provision is unenforceable unless the contract states in capitalized, underlined typeface, on the first page of the contract that the agreement is subject to arbitration. S.C. CODE ANN. § 15-48-10. When a contract affects interstate commerce, the Federal Arbitration Act ("FAA") preempts a state arbitration act's requirements. Doctor's Assocs. v. Casarotto, 517 U.S. 681, 683 116 S.Ct. 1652, 1654 (1996). Under the FAA, an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." Federal Arbitration Act, 9 U.S.C. § 2 (emphasis added). A state act which places notice requirements only on arbitration contracts, not all contracts, will be superseded by the FAA if the contract affects interstate commerce. Casarotto, 517 US at 681, 116 S. Ct. at 1654.

South Carolina recognizes that the FAA preempts the notice requirements of the S.C. Arbitration Act when interstate commerce is involved. In Thornton v. Trident Medical Center, a hospital and a doctor signed an employment contract that contained an arbitration provision but lacked the notice requirements of South Carolina Code Section 15 48-10. 357 S.C. 91, 94 592 S.E.2d 50, 51 (Ct. App. 2004). The Court of Appeals plainly held that if "the agreement involves interstate commerce, the FAA applies and trumps the state arbitration laws." Id. at 94-95, 592 S.E. 2d at 51.

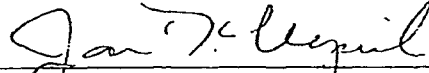
Whether a contract involves interstate commerce is a question of the agreement itself, the complaint, and the facts surrounding the contract. *Id.* at 95-96, 592 S.E.2d at 52. In Thornton, the contract concerned the recruitment and employment of a physician. The physician had to move his professional practice across state lines in order to perform the contract. *Id.* at 97, 592 S.E.2d at 53. The Court found that the physician's movement across state lines in order to perform the contract implicated interstate commerce; thus, the Federal Arbitration Act preempted the state arbitration act's notice requirements and compelled enforcement of the contract's arbitration provision. *Id.* at 100, 592 S.E.2d at 54.

Here, as in Thornton, the "express purpose of the . . . agreement was to provide a monetary incentive . . . to induce [the physician] to relocate his professional medical services practice from [another state] to South Carolina." *Id.* at 98, 592 S.E.2d at 53. Flexon alleges in his Complaint that the "In order to sign [the employment contract], Plaintiff had to discontinue, close and leave and established practice in Savannah, Georgia, where he had privileges at surgical hospitals." Complaint, ¶ 8. Flexon alleges damages for "expense and loss of income-producing services to move his practices to [sic] Savannah." Complaint ¶ 26. Thus, performance of the Employment Agreement necessitated Flexon's practice move across state lines, implicating interstate commerce and triggering the Federal Arbitration Act.

CONCLUSION

For the reasons set for above, CCMC respectfully requests that this proceeding be stayed, and for an order mandating arbitration in accordance with the parties' agreement.

BUIST MOORE SMYTHE MCGEE P.A.



James D. Myrick, , S.C. Bar No. 012004

Dana W. Lang, S.C. Bar No. 77346

5 Exchange Street (29401)

P.O. Box 999

Charleston, SC 29402

(843) 722-3400

October 21, 2009
Charleston, South Carolina

(01610600)4

R0224

CERTIFICATE OF SERVICE

I do hereby certify that on the 22nd day of October, 2009, I served a copy of the Defendants' Motion to Stay and Memorandum in Support Counsel of Record in the within entitled matter by sending a copy of the same in an envelope with the correct postage prepaid, addressed to:

William Harvey, Esquire
Harvey & Battey, PA
P.O. Drawer 1107
Beaufort, SC 29901-1107

Trudy H. Robertson, Esquire
Moore & Van Allen, PLLC
P. O. Box 22828
Charleston, SC 29413

Karla B. Koster

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

Philip Flexon, M.D.,

☐ Plaintiff

v.

PHC Jasper, Inc. d/b/a Coastal Carolina Medical
Center, Coastal Carolina Medical Center, Inc.,
Lifepoint Hospital, Inc., and Tenet Healthsystems,

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

09-CP-27-331

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:

William B. Harvey, III

Address:

P. O. Drawer 1107, Beaufort, SC 29901

phone: 843-524-3109 fax: 843-524-6973

e-mail: bharvey@harveyandbattey.com

Defendant's Attorney:

James D. Myrick, Bar No. 12004

Address:

P.O. Box 999, Charleston, SC 29402

phone: 843-722-3400 fax: 843-723-7398

e-mail: jmyrick@buistmoore.com

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Stay Pending Arbitration

Estimated Time Needed: 15 minutes

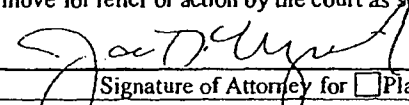
Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Order:

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff / ☒ Defendant

October 22, 2009

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status

☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act

☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication

☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

11-2
IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2009-CP-27-331

Philip Flexon, M.D.,

Plaintiff,

v.

PHC-Jasper, Inc., d/b/a Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc., and Tenet
Healthsystems, Inc.,

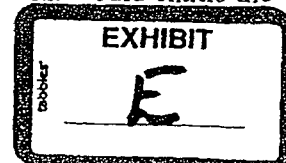
Defendants.

MEMORANDUM IN OPPOSITION TO
DEFENDANT TENET'S MOTION TO
DISMISS

2009 NOV -2 PM 3:39
JERRY AND DEBRA REARD
BEAUFORT COUNTY, S.C.
CLERK OF COURT

Defendant Tenet has filed a Motion to Dismiss the Complaint for failure to state a claim pursuant to South Carolina Rules of Civil Procedure 12(b)(6). Plaintiff hereby submits his Memorandum in Opposition to this motion.

Under Rule 12(b)(6), SCRCP, a defendant may make a motion to dismiss based upon the plaintiff's failure to state a claim constituting a cause of action. *Bergstrom v. Palmetto Health Alliance*, 352 S.C.221, 573 S.E.2d 805 (Ct.App. 2002). The trial judge may dismiss the claim if the defendant demonstrates the plaintiff has failed "to state facts sufficient to constitute a cause of action" in the pleadings filed with the court. *Williams v. Condon*, 347 S.C.227, 553 S.E.2d 496 (Ct.App. 2001). When considering the motion to dismiss for failure to state a claim, the trial court must base its ruling solely upon the allegations made on the face of the complaint. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). If the facts and inferences drawn from the facts alleged in the complaint would entitle the



plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987); *McCormick v. England*, 328 S.C. 627, 494 S.E.2d 431 (Ct.App. 1997). The facts and inferences alleged on the complaint are viewed in the light most favorable to the plaintiff. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987).

The complaint in this case alleges that Defendant Tenet was the owner and operator of Coastal Carolina Medical Center (CCMC). The complaint alleges that defendant Lifepoint sold CCMC to Defendant Tenet. Further, the complaint alleges as follows:

On or about July 3, 2007, Tenet present to the Plaintiff an Amendment to and Assignment of Physician Employment Agreement, attached hereto as Exhibit 2 and incorporated herein by reference, thereby acknowledging that the Employment Agreement, Exhibit 1 was non-assignable per its terms.

Paragraph 23 of the Complaint states as follows:

On or about May 4, 2009, Plaintiff received the letter attached hereto as Exhibit 4 and incorporated herein, claiming that Plaintiff owes Coastal Carolina Medical Center (now owned by Coastal and/or Tenet) an amount exceeding \$725,000, and further claiming that Plaintiff must cease his current practice of medicine in Savannah, Georgia. At the time of Exhibit 4, Coastal Carolina Medical Center was (and continues to be) owned by Defendants Coastal Carolina Medical Center, Inc. and/or Tenet. Plaintiff has no contractual or other relationship with either Coastal Carolina Medical Center, Inc. or Tenet.

The Complaint does not seek a money judgment against Defendant Tenet. Therefore, Defendant's statement that Tenet is not liable to the Plaintiff misses the mark.

Rather, in the Fourth Cause of Action, the Complaint seeks a declaratory judgment concerning the issues set forth in Paragraph 37.

As to whether there is any justiciable issue of the Plaintiff's obligations, if any, to Tenet, Exhibit 2 to the Complaint is an Amendment and Assignment of Physician Employment Agreement, which was submitted to Plaintiff by CCMC, which had then been sold to Tenet. Concerning the Plaintiff's alleged obligations to Tenet, this document states, in pertinent part, as follows:

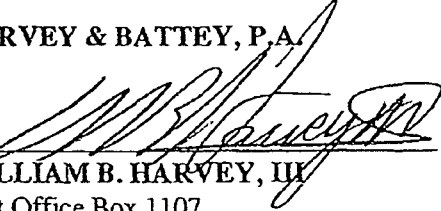
Physician has received, read, understood, and shall abide by Tenet's Standards of Conduct. The parties to this agreement shall comply with Tenet's Compliance Program and Tenet's policies and procedures related to the Anti-Kickback Statute and the Stark Law. Tenet's Standards of Conduct, summary of Compliance Program and policies and procedures are available at: <http://www.tenethealth.com/TenetHealth/OurCompany/EthicsBusinessConduct>. (emphasis added)

Construing these allegations, and all inferences from these allegations, in a light most favorable to the Plaintiff, there has clearly been plead a justiciable issue against Defendant Tenet; i.e. whether the Plaintiff has any contractual or other obligation to Tenet—certainly to the extent that the Plaintiff should be allowed to pursue discovery of this issue. Applying the standard concerning a motion to dismiss stated above, the granting of Defendant's motion on the ground of failure to state a claim would be improper.

Judgment on the pleadings pursuant to a Rule 12(b)(6) motion to dismiss "is considered to be a drastic procedure by our courts." *Overcash v. SCE&G Company*, 364 S.C. 569, 572, 614 S.E.2d 619, 620, (2005); *Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991). Therefore, pleadings in a case should be construed liberally and the Court must presume all well pled facts to be true do that substantial justice is done between the parties. *Overcash, supra*, 406 S.E.2d at 620. Applying this standard to the pleadings at issue, Defendant's Motion to Dismiss must be denied.

Respectfully submitted,

HARVEY & BATTEY, P.A.

By: 

WILLIAM B. HARVEY, III

Post Office Box 1107

Beaufort, South Carolina 29901-1107

843-524-3109 telephone

843-524-6973 telefax

Attorneys for Plaintiff

Beaufort, South Carolina

Dated: October 30, 2009

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER) FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-27-331

PHILLIP FLEXON, M.D.)

PLAINTIFF)

v.)

TRANSCRIPT OF RECORD

TENET HEALTHSYSTEMS, ET AL.)

DEFENDANTS.)

JUNE 9th, 2010
RIDGELAND, SOUTH CAROLINA

B E F O R E

THE HONORABLE PERRY M. BUCKNER, JUDGE.

A P P E A R A N C E S:

MS. DANA LANG, ESQUIRE

BUIST, MOORE, SMYTHE, McGEE, P.A.

Attorney for Defendant, Coastal Carolina Medical Center

MR. WILLIAM B. HARVEY, III, ESQUIRE

Attorney for Plaintiff, Dr. Phillip Flexon

MS. TRUDY H. ROBERTSON, ESQUIRE

Attorney for the defendant, Life Point Hospitals, Inc.

Rebecca H. Hill
522 Dowling Avenue
Walterboro, SC 29488
Official Court Reporter



INDEX

MOTION TO COMPEL ARBITRATION	3
CERTIFICATE OF COURT REPORTER	23

EXHIBITS

NONE.

1 THE COURT: All right. I've had a chance now to review
2 this motion. This is 2009 at 331, Phillip Flexon v. Coastal
3 Carolina Medical Center, Inc. I'd ask that the parties
4 identify themselves and who they represent, beginning with
5 counsel for the plaintiff.

6 MR. HARVEY: Your Honor, Bill Harvey from Beaufort. I
7 represent Dr. Flexon.

8 THE COURT: Counsel for the defendant.

9 MS. LANG: Your Honor, Dana Lang, with Buist Moore in
10 Charleston. I'm representing Coastal Carolina Medical
11 Center, today.

12 MS. ROBERTSON: Your Honor, Trudy Robertson with Moore
13 and Van Allen in Charleston. We represent Life Point
14 Hospitals, Inc.

15 THE COURT: I see there's also Tenet, who was a party
16 at one time. Is Tenet represented by anyone?

17 MS. LANG: We're also counsel of record for Tenet.

18 THE COURT: So I have counsel for all the defendants
19 present?

20 MS. LANG: That's correct, Your Honor.

21 THE COURT: All right. Mr. Harvey, I understand that
22 you are the moving party; is that right?

23 MR. HARVEY: I am not, Your Honor.

24 THE COURT: Oh, I'm sorry. I assumed that you were.
25 Ms. Lang, you're the moving party?

1 MS. LANG: That's correct.

2 THE COURT: Happy to hear from you. You asked for
3 thirty minutes. Your fifteen begin now.

4 MS. LANG: Thank you, Your Honor. May it please the
5 Court.

6 THE COURT: Thank you for your patience.

7 MS. LANG: Just to give you a little bit of context,
8 this is essentially an employment contract dispute. Dr.
9 Flexon, the plaintiff, was a practicing Savannah ENT. He
10 was ---

11 THE COURT: ENT?

12 MS. LANG: Yes, sir. Ear, nose and throat. He signed
13 an employment contract to come to Hardeeville, South
14 Carolina, to work at Coastal Carolina Medical Center. The
15 employment agreement did have an arbitration provision in it
16 and the scope of that arbitration provision, with a couple
17 of very particular exceptions, was -- and I'm quoting from
18 it, "Any controversy or claims arising out of, or related to
19 this agreement, or any breach thereof, shall be settled by
20 arbitration."

21 Dr. Flexon resigned before his term was up and he
22 subsequently filed suit against us, and against Life Point,
23 for breach of contract, negligent misrepresentation, breach
24 of good faith, and he's also asked the Court for declaratory
25 judgment, under the contract.

1 We have also filed counter claims for breach of
2 contract against Dr. Flexon; but we're before the Court
3 today seeking to enforce the parties' arbitration agreement
4 and to stay these judicial proceedings until the arbitration
5 is complete.

6 The question before the Court is whether the Federal
7 Arbitration Act, in this instance, supplants South Carolina
8 Law, such as the notice provisions for arbitration, which
9 are a part of the South Carolina Arbitration Act, are pre-
10 empted.

11 The United States Supreme Court has said that "a
12 statute that conditions enforceability of arbitration
13 agreements ---

14 **THE COURT:** --- if it affects interstate commerce, the
15 Federal Act pre-empts. I'm aware of the case, Ms. Lang.
16 Now, tell me why it's circumstantial. You want to tell me
17 this is not a recruiting contract, as opposed to an
18 employment contract?

19 **MS. LANG:** Well, I think that it's important to note
20 that when we are determining whether arbitration, or rather,
21 a contract involves interstate commerce, we don't look
22 simply at the contract, we look at the contract, we look at
23 the Complaint, and the surrounding fact of the case; and
24 that is from Thornton, which a case I cited to you, and you
25 probably have a copy of, and also Towles v. United

1 Healthcare, which is another Court of Appeals case, that's
2 524 S.E. 2d, 839.

3 So when you're reviewing whether or not interstate
4 commerce is involved, we're going to look at all of those
5 things. For example, in the Towles case, that was a South
6 Carolina case. It was a doctor that joined United
7 Healthcare. The governing arbitration provision wasn't even
8 in a contract; it was actually in an employee handbook. The
9 doctor signed an acknowledgement of this employee handbook
10 that lacked the requisite notice provision of South
11 Carolina.

12 The Court ultimately determined that the agreement did,
13 in fact, involve interstate commerce, and in so determining,
14 the Court did not rely at all on the language that was
15 actually in the handbook, or in our case, in the contract;
16 instead, they looked at Dr. Towles's activity that were
17 requisite in performing his job. And those were things like
18 attending out of state conferences or participating in sales
19 presentations, reviewing claims from out of state insurance
20 providers, and that sort of thing.

21 I bring that up to you for illustration purposes to
22 kind of bring forth a point. South Carolina does not rely
23 solely on the language of a contract in order to determine
24 whether interstate commerce is involved. So let's look at

1 this particular case and what facts we have that support
2 interstate commerce.

3 Again, agreement, complaint, and facts. In the
4 complaint, Dr. Flexon alleges in Paragraph Eight, and I'll
5 quote, "In order to sign Exhibit One,' which is the
6 employment agreement, he had to "discontinue, close, and
7 leave an established practice in Savannah, Georgia, where he
8 had privileges at surgical hospitals."

9 THE COURT: And came to Hardeeville?

10 MS. LANG: And came to Hardeeville.

11 THE COURT: All right.

12 MS. LANG: In Paragraph Thirteen of the Complaint,
13 Flexon alleges that Life Point "knew that plaintiff would
14 have to close and terminate an established practice in
15 Savannah in order to fulfill his obligations under the
16 employment contract." In his recitation of damages, which
17 begins in Paragraph Twenty-six of the Complaint, but
18 continues on, he repeatedly cites the time he spent for loss
19 of income-producing services to move his practice from
20 Savannah to Hardeeville.

21 Let's see, in his misrepresentation claim, which I
22 believe is against Life Point, he alleges that duties arose
23 to Life Point because of the "Nature of the pending
24 employment relationship and the appeale that such a
25 relationship would cause the plaintiff's then existing

1 practice of medicine," which we know from prior allegations
2 was in Savannah.

3 Further, when we look at the contract itself, the
4 notice that is to the employer in the employment contract,
5 which is actually in Brentwood, Tennessee, not in South
6 Carolina, and then we can also look at surrounding facts.

7 Obviously, there's an awful lot of facts in dispute,
8 but I would like to turn your attention to some of Dr.
9 Flexon's interrogatory answers through the limited discovery
10 that we have exchanged.

11 For example, in an answer to an interrogatory that we
12 filed, he said that many Savannah doctors stopped referring
13 patients to Dr. Flexon after a stop purchase agreement
14 occurred between our clients. I think the implication here
15 is that he was getting business across state lines, and was
16 relying on that business in order to have a successful
17 practice.

18 On Interrogatory Four, which was a particularized
19 statement of damages, he mentions that he lost six weeks of
20 his salary while he had to move his practice from Savannah
21 to Coastal, and then move it back again once he quit.

22 Interrogatory Nine, which was about availability of
23 equipment in the E.R., which is one of the complaints Dr.
24 Flexon had against my client. He said that availability of
25 equipment became so unreliable, the plaintiff, Dr. Flexon,

1 began taking his complicated cases to Memorial. I'm fairly
2 certain Memorial means Savannah Memorial Hospital. So,
3 while he was working for our client, he was sending his
4 complicated cases and performing those surgeries that were
5 being billed by our hospital, performing that surgery in
6 Savannah.

7 I think that we've shown that interstate commerce has
8 been effective. There's a strong ---

9 THE COURT: Ms. Lang, that's a new one for me. You can
10 perform surgery in Savannah and bill it from a hospital in
11 Hardeeville; is that what you're contending to me?

12 MS. LANG: That's the way I understand that it
13 happened, Your Honor.

14 THE COURT: I don't think I've ever seen that before.

15 MS. LANG: There's a strong presumption favoring
16 arbitration in both our state and our Federal Jurisprudent.
17 The intent of -- the intent of all of our efforts,
18 especially under the FAA, is to exercise the commerce clause
19 to its fullest. We don't have to show a substantial effect
20 on commerce, merely that it's within the flow of commerce,
21 in order for the FAA to apply.

22 THE COURT: All right. Is there anything else you want
23 to tell me?

24 MS. LANG: That's all right now, although I might have
25 some reply later.

1 THE COURT: Thank you very much. Mr. Harvey, happy to
2 hear from you.

3 MR. HARVEY: Your Honor, thank you. First of all, I
4 would point out that we have alleged as to defendant Life
5 Point, a fraud in the inducement claim which deals with the
6 fact that they induced Dr. Flexon to enter into this
7 agreement. Now, this is Life Point. This is not Ms. Lang's
8 client. A fraud in the inducement that they induced him to
9 come into -- to leave his practice in Savannah and come to
10 Beaufort in order to ---

11 THE COURT: Not Beaufort.

12 MR. HARVEY: I mean, Hardeeville.

13 THE COURT: Jasper County.

14 MR. HARVEY: In order to enter into this employment
15 relationship. So, the allegations that she's pointed to are
16 in relation to that.

17 Now, what we have here is Dr. Flexon, at all points in
18 time, was a resident of Hardeeville, Jasper County. He
19 lives in the Leevy area, over near the Pink Pig, on the way
20 to Savannah; right in the Leevy area. He's a Jasper County
21 resident. He's always been a Jasper County resident. His
22 contract was entered into in Jasper County. It has, the
23 contract itself, has no mention at all of any ---

24 THE COURT: Tell me why, Mr. Harvey, whether the
25 Federal Arbitration Act applies or the South Carolina

1 Arbitration Provisions apply; it's of such significance you
2 believe. I mean, it's Ms. Lang's motion to stay and to
3 compel arbitration as against her client, I assume. Tell me
4 -- you oppose it, obviously. Tell me why and why the
5 significance of the Federal versus the State Act.

6 MR. HARVEY: It does not fall under the State act
7 because of the notice provision.

8 THE COURT: So it fails under the State Act because of
9 notice.

10 MR. HARVEY: Fails totally under the State Act. So,
11 the only way that this survives, this arbitration provision
12 enforceable,

13 THE COURT: Is under the Federal Act.

14 MR. HARVEY: Is under the Federal Act.

15 THE COURT: And it would have to be interstate commerce
16 in order for the Federal Act to apply completely.

17 MR. HARVEY: Now, I took the Thornton case, which they
18 relied on in their Brief.

19 THE COURT: I'm familiar with the Thornton case.

20 MR. HARVEY: And I Shepardized it. And I found the
21 Arkansas case, which is cited in our brief, which is
22 absolutely dead on.

23 THE COURT: Ms. Lang, do you have a copy?

24 MS. LANG: I don't ---

1 **THE COURT:** If you don't, I'll give you the site so you
2 can write it down.

3 **MR. HARVEY:** It's in our Brief, Your Honor.

4 **THE COURT:** It's 257, Southwest 3rd, 884. It's a 2007
5 Supreme Court of Arkansas case. Arkansas Diagnostics Center
6 v. Tahiri, let me spell that for you, T-A-H-I-R-I, who's the
7 M.D. Dr. Abdullah Tahiri. Yes, sir?

8 **MR. HARVEY:** In the Arkansas Diagnostics Case, the tort
9 analyzed and distinguished the Thornton case, because the
10 very facts and circumstances that we have here. We have a
11 local doctor, a local hospital, it was an employment
12 agreement that had no mention at all of any interstate
13 activities.

14 **THE COURT:** As opposed to an inducement.

15 **MR. HARVEY:** As opposed to an inducement contract,
16 which was the case in the Thornton case, and in the other
17 case, they were inducement activities as well. Now, in this
18 case, in dealing with the employment agreement, it is a
19 local contract. It does not involve -- I mean it involved
20 employment of a Jasper County doctor to a Jasper County
21 hospital to render services to Jasper County residents. I
22 mean, in point of fact, that's what we're talking about.

23 In the Arkansas case, the Arkansas Supreme Court case
24 is dead on point. I would point out that in the Arkansas
25 Supreme Court case, the Arkansas Diagnostic case, it pointed

1 out that the United States Supreme Court, in the Bernhardt
2 v. Polygraphic case, said that the Federal Arbitration Act
3 in that case did not apply because it was based upon the
4 absence of any proof demonstrating that the plaintiff, while
5 performing duties under the employment contract, was working
6 in commerce with producing goods for commerce, or was
7 engaging in activities that affected commerce. That was an
8 employment agreement as well. This is an employment
9 agreement, and if you look at the contract itself, it fails
10 admittedly under the South Carolina Act, and the only way
11 that it survives is under the Federal Act. And we contend
12 that under the analysis of the Arkansas Diagnostic Case,
13 that the motion should be denied.

14 THE COURT: Thank you, sir. Ms. Lang, briefly in
15 reply?

16 MS. LANG: Well, first off, I don't think that there's
17 any reason that this Court needs to look to an Arkansas case
18 right now when we've got an awful lot of South Carolina law
19 that's directly on point. The Arkansas Court, though ---

20 THE COURT: Ms. Lang, it's interesting to me, if you
21 have a case for another jurisdiction that doesn't apply,
22 then I shouldn't look at it; if it hurts you, I shouldn't
23 look at it. If it helps you, I should look at it, regardless
24 of South Carolina law, but I understand.

25 MS. LANG: That's probably fair enough.

1 **THE COURT:** I understand that completely. I've been
2 there before.

3 **MS. LANG:** There are some distinguishing facts though.

4 **THE COURT:** I'm not bound by Arkansas law, but it could
5 be persuasive. Mr. Harvey knows that and you know that, Ms.
6 Lang. I don't ignore it.

7 **MS. LANG:** No, absolutely not, Your Honor. And I won't
8 ignore it either. In the Tahiri case, though, the doctor
9 that was within the employment agreement did not move his
10 practice across state lines. The Arkansas Diagnostics was
11 trying to predicate its interstate commerce solely on acts
12 of the hospital. I think that they ---

13 **THE COURT:** Do you agree with Mr. Harvey that the only
14 way arbitration survives here is if the Federal Arbitration
15 Act applies because of the notice provision in the South
16 Carolina Act?

17 **MS. LANG:** Yes, Your Honor.

18 **THE COURT:** All right. So the issue truly becomes then
19 -- both of you agree that the issue for the Court is whether
20 or not the Federal Arbitration Act applies, and that is
21 predicated on whether or not interstate commerce is
22 affected.

23 Mr. Harvey argues this is purely a Jasper County
24 resident entered into an agreement with a Jasper County
25 hospital for services at the Jasper County hospital. It is

1 true, however, that you tell me, although, I assume you've
2 taken -- have you had any discovery in this case?

3 MS. LANG: We've had some limited written discovery,
4 Your Honor.

5 THE COURT: It amazes me how when we get to motions
6 like this, because I have to treat it, if I go outside the
7 pleadings, it's a motion to stay and compel arbitration, but
8 you argue to me, and I have no way of knowing that he was a
9 staff privileged doctor in Savannah, and then came to
10 Hardeeville, and therefore, crossed state lines; although
11 his residency, according to Mr. Harvey, who is his lawyer,
12 never left South Carolina and Jasper County. Do you agree
13 with that as a fact?

14 MS. LANG: Well, Your Honor, in Dr. Flexon's Complaint,
15 the facts that I presented before the Court today are the
16 facts that Mr. Harvey has pled ---

17 THE COURT: Well, I understand that. That are pled in
18 the Complaint, which he says are part of a fraud and the
19 inducement against your co-defendant over here, Life Point
20 Hospitals. But, I'm asking you factually, regardless of
21 what's alleged in the Complaint. Factually, do you agree
22 for purposes of my hearing this motion, and I'll ask Mr.
23 Harvey, because he didn't mention this in his argument. You
24 agree that he was always a resident of South Carolina, but

1 he practiced in Georgia and came to South Carolina as a
2 result of this agreement; is that what you're ---

3 MR. HARVEY: That's correct, Your Honor. I concede
4 that.

5 MS. LANG: I'm not sure of what his residency was.

6 THE COURT: I'm asking her, too. I know you will. I'm
7 asking her. That's what your understanding of the facts
8 are?

9 MS. LANG: That's my understanding right now, and I
10 believe Mr. Harvey did say that he was always a Jasper
11 County resident. But residency itself is not ---

12 THE COURT: Oh, I agree that that's not necessarily
13 binding. I understand that. I don't want you to believe
14 that. I'm just asking so that I'll understand where we are.

15 MS. LANG: That's the way that I understand it.
16 Anyway, in the Tahiri case by the Arkansas Court, Dr. Tahiri
17 did not have to move his practice across state lines and I
18 think that's a really important point and a really important
19 distinction. It said, the diagnostic center predicated that
20 interstate argument on things that the hospital had done.
21 They had seen a couple of, I think, three out of state
22 claims in total. They bought like janitorial and medical
23 supplies across state lines and this sort of thing. The
24 Arkansas Court said you know, that's enough even for some
25 other courts. It's not going to be enough for us, but it is

1 enough, even those minor things that the diagnostic center
2 showed were enough to evidence interstate commerce. It was
3 not enough for this Court, but I would like to turn your
4 attention to footnote five.

5 THE COURT: All right. Hold on a second and let me get
6 there, please. You got a page?

7 MS. LANG: No, I don't, because of the way that it's
8 printed out, it does not.

9 MR. HARVEY: On the copy I gave to you, Judge, it would
10 be page 8, or at the top, page 9 of 11, I think.

11 THE COURT: I'm with you at footnote 5, Ms. Lang.

12 MS. LANG: All right. Essentially, the opinion is
13 stating that the circuit court got to the right result for
14 the wrong reason. It says, "The Circuit Court, in making
15 its decision, relied more on contemplation of the parties,
16 rather than whether the transaction itself involved
17 commerce." That's where we are. It's not about what the
18 contract says or doesn't say, though that's certainly
19 something that you will consider.

20 MS. ROBERTSON: Judge, if I may; I'm not presenting
21 argument. This is not our motion today, but we pled this as
22 an affirmative defense as well, that this matter should be
23 submitted to arbitration. I think it goes to arbitration
24 and it should. We support this motion. It goes as to all
25 parties. If I have to separately move, I can do that,

1 but ---

2 **THE COURT:** I think you ought to do that, because
3 obviously the plaintiff isn't on notice of that. I
4 understand that's your position, but all I can deal with is
5 this motion today. But I understand that. I think you need
6 to file your own motion. And I realize you pled it.

7 **MS. ROBERTSON:** Yes, sir.

8 **THE COURT:** But he wasn't prepared to argue, except as
9 against this motion today. It might be an identical
10 argument, but ---

11 **MS. ROBERTSON:** I think that likely it is. So I will
12 make it.

13 **THE COURT:** Ms. Lang, I want to thank you. It's
14 interesting. I run into this it seems like everywhere that
15 I'm in a border county like Jasper; you run into this every
16 now and then.

17 I'm going to ask you both to submit proposed Orders to
18 me. Please let's stay right on point on this. The issue is
19 whether or not the Federal Arbitration Act applies. No need
20 to go into anything else. I understand you want to argue
21 about -- Bill wants to distinguish the Thornton case, and he
22 wants me to --- and I'm taking the Arkansas case with me.
23 Obviously, I have Thornton. I'm very familiar with it. So
24 seven days from today. Submit them to me at P.O. Drawer
25 470. That's drawer 470, Walterboro, 29488. Copy opposing

1 counsel on your transmittal to the Court. Please include a
2 self-addressed, stamped envelope, with sufficient postage
3 affixed thereto for the return of your proposed Order. You
4 have seven days to submit it to me. You can e-mail it to me
5 to comply with the seven day requirement for your
6 convenience; however, you'll still need to mail to me the
7 envelope with sufficient postage affixed thereto, so that I
8 can return your proposed Order.

9 Any question about the proposed Order procedure from
10 counsel for the plaintiff?

11 MR. HARVEY: No, sir.

12 THE COURT: Any questions about the proposed Order
13 procedure from counsel for the moving party?

14 MS. LANG: No questions. I would like to hand up a
15 copy of the Towles case that I mentioned earlier.

16 THE COURT: This is my copy, right?

17 MS. LANG: Yes, Your Honor.

18 THE COURT: Let the record reflect I'm being handed
19 524, S.E. 2d, 839. I now have the Arkansas case, that I
20 previously put on the record, and that case, and I have
21 copies of both your Memorandums, and I'm looking forward to
22 receiving your proposed Orders. I want to thank you both
23 for your patience.

24 MR. HARVEY: Your Honor, the motion is to stay and
25 compel arbitration. I am concerned that if the Court were

1 to grant this, that we might - it might impact further
2 discovery in the case.

3 THE COURT: Well, in that case, while I have the motion
4 under advisement, because I have a little reading to do.
5 I'm assuming that you both agree there will be no discovery
6 in this case until I can rule.

7 MR. HARVEY: Well, I mean ---

8 THE COURT: That way, it isn't going to impact
9 anything, and nobody waives anything. I mean, I don't want
10 anything being delayed; you agree to that, Ms. Lang?

11 MS. LANG: I do.

12 THE COURT: You agree to that, counsel?

13 MS. ROBERTSON: I do, Your Honor.

14 THE COURT: You agree to that, bill?

15 MR. HARVEY: I do.

16 THE COURT: Until I can rule.

17 MR. HARVEY: But my concern is after you rule; if you
18 were to stay and compel arbitration. I had earlier filed
19 interrogatories and requests for production as to both
20 defendants, and actually filed a motion to compel
21 interrogatories.

22 THE COURT: Well, obviously, because I don't know how
23 I'm going to rule yet, I can't anticipate that. It's like
24 what if we have a hurricane this year, and I understand
25 that, Bill. I don't blame you for being concerned. I'm

1 assuming that you do not believe there is any discovery
2 available to you if the Federal Arbitration Act applies?

3 MR. HARVEY: I'm concerned about it. If we could have
4 an understanding with counsel that irrespective of your
5 ruling that discovery moves forward afterwards, then I'm
6 fine.

7 THE COURT: Are you willing to answer his discovery
8 regardless of my ruling; it's not directed to me. He's
9 asking this to you, but Bill, you're taking up time

10 MR. HARVEY: I apologize.

11 THE COURT: That's okay, Bill. You need to talk to
12 them because I can't make a ruling on that, other than if
13 they want to put it on the record.

14 He's asking if you're willing, of course, y'all would
15 also have the ability to serve him with discovery and he
16 would have to answer it as well, because what's good for the
17 goose is good for the gander. He didn't mention that, but
18 that would obviously be implied as well. Are you all
19 willing to make a decision on that?

20 MS. ROBERTSON: Your Honor, motions to compel were
21 filed previously by these two parties. They were withdrawn
22 and we entered into a consent protective order to get Bill,
23 Mr. Harvey, some documents. We did that with the stop
24 purchase agreement. It had confidentiality provisions in
25 it. He wants some additional documents now, having received

1 the stop purchase agreement that he did ask for in discovery
2 that we also asserted as subject to confidentiality.

3 THE COURT: But you got a protective Order?

4 MS. ROBERTSON: We have a protective Order, as to the
5 stop purchase agreement and others, but we do have some
6 issues.

7 THE COURT: I understand. The answer is subject to a
8 protective order, are you willing to at least complete
9 discovery both sides? He has to answer y'alls, regardless
10 of whether you go into arbitration or you remain in Court.

11 MS. ROBERTSON: He owes us discovery as well.

12 THE COURT: The answer is "yes" or "no". Not whether
13 he owes it to you.

14 MS. ROBERTSON: We have some issues with the school of
15 correspondence that he's requesting.

16 THE COURT: Is the answer "no", ma'am?

17 MS. ROBERTSON: The answer may be no. I told ---

18 THE COURT: Great God, lawyers can't give a straight
19 answer.

20 MS. ROBERTSON: It is a "no", right now, but ---

21 THE COURT: It's "yes" or "no". Is it "yes" or "no"?

22 MS. ROBERTSON: No.

23 THE COURT: All right. Bill, that's the answer to your
24 question, you'll have to wait on me to rule.

25 MR. HARVEY: Thank you.

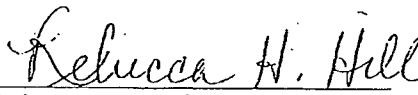
STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)

CERTIFICATE

I, REBECCA H. HILL, Official Court Reporter for the Judicial Department of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had in the hearing of the captioned case, in the Court of Common Pleas for Jasper County, South Carolina, on the 9th day of June 2010.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

August 18, 2010


Rebecca H. Hill,
Official Court Reporter

STATE OF SOUTH CAROLINA)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS
CASE NO. 2009-CP-27-331

2010 JAN 17 01:59:01
CLERK OF COURT
JASPER COUNTY SC

Philip Flexon, M.D.,)
Plaintiff,)

vs.)

PHC-Jasper, Inc., d/b/a/ Coastal Carolina
Medical Center, Coastal Carolina Medical
Center, Inc., Lifepoint Hospitals, Inc. and
Tenet Healthsystems,)

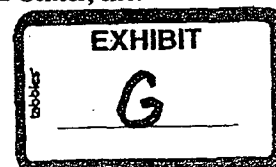
Defendants.)

DEFENDANT LIFEPOINT HOSPITALS,
INC.'S NOTICE OF MOTION AND
MOTION TO COMPEL ARBITRATION
AND STAY ACTION

YOU WILL PLEASE TAKE NOTICE that Defendant, Lifepoint Hospitals, Inc. ("Lifepoint"), by and through its undersigned counsel, will move before the Presiding Judge of the Jasper County Court of Common Pleas, Jasper County Courthouse, Ridgeland, South Carolina, on the tenth day after the date hereof, or as soon thereafter as counsel may be heard, for an Order compelling arbitration and for a stay of this action pending arbitration. The grounds for this motion are that the employment contract at issue, which is the subject of this litigation, contains a valid and enforceable arbitration provision which requires that all causes of action in this case be determined through arbitration.

This Motion will be based on the entire record in the within matter and any additional memorandum which may be filed hereafter. Defendant Lifepoint further, pursuant to Rule 10, South Carolina Rules of Civil Procedure, adopts by reference as if fully set forth herein, the Motion to Stay and For Order Compelling Arbitration and accompanying memorandum in support filed on October 23, 2009, by co-Defendant Coastal Carolina Medical Center, Inc.

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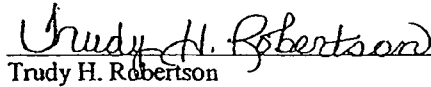


Lifepoint further states in support of its Motion. All causes of action alleged by Plaintiff in this action are subject to the arbitration provision contained in the applicable employment agreement. Unless the parties provide otherwise, the question of the arbitrability of a claim is an issue for judicial determination. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596-97, 553 S.E.2d 110, 118-19 (2001). The policy of South Carolina is to favor arbitration of disputes. Id. Arbitration is a matter of contract, and a party must submit to arbitration any dispute that he or she has agreed to submit. Id. Because arbitration rests on the agreement of the parties, the range of issues that can be arbitrated is determined by the terms of the agreement. Id. To decide whether an arbitration agreement encompasses a dispute, the Court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the label assigned to the claim. Id. Doubts, if any, concerning the scope of arbitrable issues should be resolved in favor of arbitration. Id. Additionally, unless the Court can say with positive assurance the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered. Id.

Here, the employment agreement's arbitration provision at Section 13.5 specifically states, in pertinent part, that "[a]ny controversy or claim arising out of or related to this Agreement, or any breach thereof, shall be settled by arbitration in the County, in accordance with the rules and procedures of alternative dispute resolution established by the Alternative Dispute Resolution Service of the American Health Lawyers Association ("AHLA"), and judgment upon any award rendered may be entered in any court having jurisdiction thereof" All of Plaintiff's claims in the instant action relate to his physician employment agreement, which is attached to the Complaint as Exhibit 1. Plaintiff's causes of action alleged against Lifepoint are as follows: the first cause of action alleged is for breach of the employment

agreement; the second cause of action alleged is for fraudulent misrepresentations that Plaintiff alleges were made in the course of negotiations of his employment agreement; and the third cause of action alleged is for breach of the duty of good faith and fair dealing implied in the employment agreement. All of these causes of action, without doubt, arise out of or are related to Plaintiff's employment agreement. As such, this entire action should be subject to arbitration.

PLEASE BE PRESENT TO DEFEND IF YOU ARE SO MINDED.



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Telephone (843) 579-7000
Facsimile (843) 579-7099

Attorneys for Defendant Lifepoint Hospitals, Inc.

June 16, 2010

Charleston, SC

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF JASPER)

C.A. NO.: 2009-CP-27-331

Philip Flexon, M.D.,)

Plaintiff,)

vs.)

PHC-Jasper, Inc., d/b/a Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc., and Tenet
Healthsystems, Inc.,)

Defendants.)

CERTIFICATE OF SERVICE

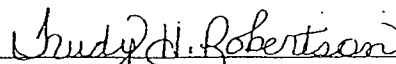
The undersigned hereby certifies that a copy of *Defendant Lifepoint Hospitals, Inc.'s Notice of Motion to Compel Arbitration and Stay Action* was served upon the following by U.S.

Mail:

James D. Myrick
Dana W. Lang
Buist Moore Smythe McGee P.A.
5 Exchange Street
P.O. Box 999
Charleston, SC 29402

William B. Harvey, III
Harvey & Battey P.A.
P.O. Drawer 1107
Beaufort, SC 29901-1107

2010 JUN 17 AM 9:01
CLERK OF COURT
JASPER COUNTY SC


Trudy H. Robertson

CHARLESTON, SC

June 16, 2010

CHARLESTON414288v1

R0257

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2009-CP-27-331

Phillip Flexon, M.D.,

Plaintiff,

v.

PHC-Jasper, Inc., d/b/a Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc., and Tenet
Healthsystems, Inc.,

Defendants.

ORDER DENYING MOTION TO
COMPEL ARBITRATION

2010 JUL - 7 AM 9:
MARGARET BOOTH
CLERK OF COURT
JASPER COUNTY

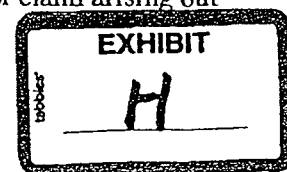
HC
PMB
This case came before me for a hearing on June 9, 2010, on the motion by Defendant Coastal Carolina Medical Center, Inc. (CCMC) to stay this action and for an order compelling arbitration. All parties were represented. For the reasons set forth herein, the Court denies this motion.

This controversy arises out of an employment agreement between the Plaintiff and Coastal Carolina Medical Center. Contained in this agreement are the following provisions:

13.4 This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of South Carolina. Any action or claim arising from, under or pursuant to this Agreement shall be brought in the courts, state or federal, within the State of South Carolina, and the parties expressly waive the right to bring any legal action or claims in any other courts.

13.5 Except as to the provisions contained in Articles VIII and IX, the exclusive jurisdiction of which shall rest with a court of competent jurisdiction in the state where the hospital is located, any controversy or claim arising out

Proposed Order.wpd



of or related to this Agreement, or any breach thereof, shall be settled by arbitration in the County, in accordance with the rules and procedures of alternative dispute resolution established by the Alternative Dispute Resolution Service of the American Health Lawyers Association ("AHLA"), and judgment upon any award rendered may be entered in any court having jurisdiction thereof. Such arbitration shall be conducted before a single AHLA arbitrator selected jointly by the parties, or in the event the parties are unable to agree, designated by the AHLA.

#2
AmB

Under South Carolina law, an arbitration provision is unenforceable unless the contract states in capitalized, underlined typeface, on the first page of the contract that the agreement is subject to arbitration. S.C. Code Ann. §15-48-10. The parties stipulate that the arbitration provision in the Agreement at issue fails to comply with the South Carolina statute. They further agree that this provision is enforceable only if it falls under the Federal Arbitration Act, 9 U.S.C. §2. When a contract affects interstate commerce, the FAA preempts a state arbitration act's requirements. *Doctor's Assocs. V. Casarotto*, 517 U.S. 681, 683 S.Ct. 1652 (1996). South Carolina recognizes that the FAA preempts the notice requirements of the South Carolina Arbitration Act when interstate commerce is involved. *Thornton v. Trident Medical Center*, 357 S.C.91, 592 S.E.2d 50 (Ct. App. 2004).

In its brief, CCMC argues that *Thornton* mandates that the court grant its motion. To ascertain whether a transaction involves commerce within the FAA, the court must examine the agreement, the complaint, and the surrounding facts. "In all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case." *Thornton, supra*, 592 S.E.2d at 52. I find *Thornton* to be distinguishable from the present case.

#3
PMB

Thornton involved a "recruiting agreement" in which the plaintiff agreed to relocate his medical practice as a surgeon from Michigan to Charleston, SC. The agreement expressly provided that Thornton was being recruited from out of state to an existing medical practice. The South Carolina Court of Appeals noted that an essential requirement for performance under the agreement was Thornton's relocation from Michigan to South Carolina within a fixed period of time. Thornton was a resident of Michigan when the contract was entered. *Thornton v. Trident Medical Center, supra*, 592 S.E.2d at 53. The Court further noted the contract was denominated as and was intended as a recruiting agreement to induce Thornton's move across state lines. "The express purpose of the recruiting agreement was to provide a monetary incentive to induce Thornton to relocate his professional medical services practice from Michigan to South Carolina." *Id.*

In distinguishing its decision from the United States Supreme Court's decision in *Bernhardt v. Polygraphic Co.*, 350 U.S.198, 76 S.Ct. 273, 100 L.Ed. 199, the Court of Appeals in *Thornton* stated:

Unlike the recruiting agreement in the case *sub judice*, the agreement in *Bernhardt* did not contemplate any actions affecting commerce outside of Vermont. Performance under the contract in *Bernhardt* was-by its terms-confined to a single state. 592 S.E.2d at 53.

It is this analysis that similarly distinguishes *Thornton* from the present case. The agreement in question is clearly and expressly denominated an employment agreement, not a recruiting agreement. Secondly, nowhere in the plaintiff's employment agreement is there any mention of inducement or financial reward depending upon out-of-state activity. At the

hearing, the parties stipulated that, unlike the plaintiff in *Thornton* who was a resident of another state, Plaintiff Phillip Flexon was a resident of Jasper County at the time he entered into this Employment Agreement. As an example, on page 9 of the Employment Agreement, it states that notice to the physician is to be given at his home address at 2712 Levy Road, Hardeeville, South Carolina. The contract in question calls for local medical services to be performed by a Hardeeville resident at a medical facility located in Hardeeville.

Additionally, unlike the Recruiting Agreement in *Thornton*, the Employment Agreement at issue contains, at paragraph 13.4, the following language:

#4
PAB

Any action or claim arising from, under or pursuant to this Agreement shall be brought in the courts, state or federal, within the State of South Carolina, and the parties expressly waive the right to bring any legal action or claims in any other courts. The parties hereby consent to venue in any state or federal court within the State of South Carolina, having jurisdiction over the county for all purposes in connection with any action or proceeding commenced between the parties hereto in connection with or arising from this Agreement. (emphasis added)

This case is more closely aligned with the facts of the recent case of *Arkansas Diagnostic Center, P.A., v. Tahiri*, 370 Ark. 157, 257 S.W.3d 884 (2007). The contract in question in *Tahiri* was an employment agreement to provide medical services similar to the contract at issue herein. Indeed, in specifically distinguishing the case of *Thornton v. Trident Medical Center, supra.*, the Arkansas Supreme Court stated as follows:

The [South Carolina] court observed that an essential requirement for the performance under the agreement was Thornton's relocation from Michigan to South Carolina within a fixed period of time. It then noted that the contract "was

denominated as and was intended as a recruiting agreement to induce Thornton's move across state lines. (592 S.E.2d at 53.) We note that, here, it is only an employment agreement at issue which obligates Dr. Tahiri to perform medical services, and not a recruiting agreement.
257 S.W.3d at 891.

Like Plaintiff Phillip Flexon, the defendant in *Tahiri* was a resident of the community where the medical clinic was located. In ruling that the F.A.A. was not applicable, the Arkansas Supreme Court ruled as follows:

#5
Pnb
Most specific to the employment contract at issue is that A.D.C. was a *local* clinic which contracted with Dr. Tahiri to perform medical services to its *local* patients. Based upon these factors, we hold that Dr. Tahiri's employment agreement did not facilitate A.D.C.'s alleged interstate business activities and did not evidence a transaction involving commerce. ...(emphasis in original)

Were this Court to hold otherwise, it would equate to a finding that the F.A.A. is applicable to any contract containing an arbitration clause, as it could be argued that every contract involves some nexus to interstate commerce, i.e. use of interstate telephone lines or of interstate mail. We do not interpret the jurisprudence concerning the F.A.A. to include any and every contract.
257 S.W.3d at 892.

There is no language in the physician employment agreement at issue which mentions, conditions, requires, affects or involves interstate commerce. It is this critical fact which distinguishes this case from *Thornton*. Further, unlike *Thornton*, the parties to this employment agreement specifically agreed to litigate any dispute arising from, under or pursuant to this agreement in the courts of South Carolina. The employment agreement at

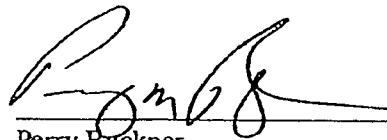
issue is between a Hardeeville resident and a Hardeeville medical center to provide specialized care to patients of Lowcountry South Carolina.

The party seeking to compel arbitration has the burden to prove that the contract at issue involves interstate commerce. *See, Arkansas Diagnostics Center, P.A., v. Tahiri, supra.*

On the record before this Court, Defendant fails to meet this burden.

Defendant's Motion to Stay and to Compel Arbitration is therefore **DENIED**.

AND IT IS SO ORDERED.



Perry Buckner
Presiding Judge, 14th Judicial Circuit

Walterboro, South Carolina

Dated: June 30, 2010

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Phillip Flexon, M.D., Respondent,

v.

PHC-Jasper, Inc., d/b/a Coastal Carolina
Medical Center, Coastal Carolina Medical
Center, Inc., Lifepoint Hospitals, Inc., and
Tenet Healthsystems, Defendants,

Of whom, Coastal Carolina Medical Center,
Inc. is, Appellant.

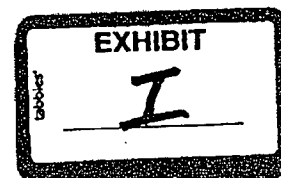
Appeal From Jasper County
Perry M. Buckner, Circuit Court Judge

Opinion No. 4950
Submitted January 3, 2012 – Filed March 7, 2012

AFFIRMED

James D. Myrick, John C. Hawk, & Dana W.
Lang, all of Charleston, for Appellant.

William Harvey of Beaufort, for Respondent.



SHORT, J.: Coastal Carolina Medical Center, Inc. (Coastal) appeals the trial court's order denying its motion to compel arbitration in this breach of employment contract action filed by Phillip Flexon, M.D., against Coastal, PHC-Jasper, Inc., d/b/a Coastal Carolina Medical Center (PHC), Lifepoint Hospitals, Inc. (Lifepoint), and Tenet Healthsystems, Inc. (Tenet). We affirm.

FACTS

Flexon is a resident of Hardeeville, South Carolina, and is licensed to practice medicine as an ear, nose, and throat specialist in South Carolina and Georgia. Coastal is a South Carolina corporation with its principal place of business in Jasper County, and it is wholly owned by Tenet, a Delaware corporation. PHC is a South Carolina corporation doing business as Coastal Carolina Medical Center in Jasper County, and it is the wholly-owned subsidiary of Lifepoint, a Tennessee corporation.

On December 18, 2006, Flexon entered into the Physician Employment Agreement (the Agreement) with PHC. The Agreement provided that Flexon would practice for five years "at the medical practice office located at 1010 Medical Center Drive, Hardeeville, South

Carolina . . . and such other practice sites in Beaufort and Jasper counties as may be reasonably designated by [PHC] from time to time" Flexon alleged he had to close an established practice in Savannah, Georgia, in order to accept employment with PHC. The Agreement further provided:

13.4 Governing Law and Venue: This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of South Carolina. Any action or claim arising from, under or pursuant to this Agreement shall be brought in the courts, state or federal, within the State of South Carolina, and the parties expressly waive the right to bring any legal action or claims in any other courts. The parties hereto hereby (sic) consent to venue in any state or federal court within the State of South Carolina having jurisdiction over the County for all purposes in connection with any action or proceeding commenced between the parties hereto in connection with or arising from this Agreement.

13.5 Arbitration: Except as to the provisions contained in Articles VIII and IX [Disclosure of Information and Covenant Not to Compete], the exclusive jurisdiction of which shall rest with a court of competent jurisdiction in the state where the hospital is located any controversy or claim arising out of or related to this Agreement, or any breach thereof, shall be settled by arbitration in the County, in accordance with the rules and procedures of alternative dispute resolution and arbitration . . . , and judgment upon any award rendered may be entered in any court having jurisdiction thereof.

Flexon alleges that at the time of negotiating the Agreement, PHC was in negotiations to sell its assets, including the hospital, Coastal Carolina Medical Center, to Tenet. Upon Flexon's commencement of practice at Coastal Carolina Medical Center in March of 2007, PHC allegedly refused to honor commitments it made to Flexon regarding equipment purchases and the recruitment of an audiologist. In June 2007, Lifepoint sold PHC and Coastal Carolina Medical Center to Tenet.

In July 2007, Tenet presented Flexon with an Amendment to and Assignment of Physician Employment Agreement (the Amendment), which purported to assign the Agreement to Tenet. Flexon refused to sign the Amendment. In August 2008, he allegedly delivered a formal notice of termination for cause, pursuant to the Agreement. Flexon received a letter in May 2009 claiming he owed Tenet more than \$725,000, and he must cease his practice of medicine in Savannah, Georgia. Flexon filed this action. Coastal filed a motion to compel arbitration. The trial court held a hearing on the motion. The parties stipulated that the arbitration provision in the Agreement failed to comply with the South Carolina Arbitration Act. Coastal argued the Federal Arbitration Act (FAA) governed, alleging the Agreement involved interstate commerce.

The trial court found the Agreement "calls for local medical services to be performed by a Hardeeville resident at a medical facility located in Hardeeville." Distinguishing Thornton v. Trident Medical Center, L.L.C., 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003), and citing Arkansas Diagnostic Center, P.A. v. Tahiri, 257 S.W.3d 884 (Ark. 2007), the trial court denied the motion to compel arbitration, finding the Agreement did not involve interstate commerce, and the FAA did not apply. This appeal followed.

STANDARD OF REVIEW

The question of whether a claim is subject to arbitration is subject to de novo review. Partain v. Upstate Auto. Grp., 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). However, the trial court's factual findings will not be reversed on appeal if there is any evidence reasonably supporting the findings. Id.

LAW/ANALYSIS

I. FAA

Coastal argues the trial court erred in finding the FAA did not apply to the Agreement. We disagree.

Here, the parties stipulated that the South Carolina Arbitration Act does not apply. Therefore, we must determine whether the FAA preempts the state requirements. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001) (stating the inquiry does not conclude with the application of the state act, and the court must determine if the federal act preempts state requirements).

The FAA provides in pertinent part: "A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2010) (emphasis added). Unless the parties have contracted otherwise, the FAA applies to any arbitration agreement regarding a transaction that involves interstate commerce, despite the parties' contemplation of an interstate transaction. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538-39, 542 S.E.2d 360, 363-64 (2001).

"The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent." Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)). "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." Zabinski, 346 S.C. at 594, 553 S.E.2d at 117.

The trial court rejected Coastal's argument that the Agreement here, and its surrounding circumstances, involved interstate commerce under Thornton v. Trident Medical Center, L.L.C., 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003). In Thornton, Trident was experiencing a shortage of cardiovascular physicians and began to recruit physicians, including Thornton, from other parts of the country to Charleston, South Carolina. Id. at 93, 592 S.E.2d at 50-51.

The Agreement required Thornton to move his practice from Michigan to Charleston, provided financial incentives, and further provided for arbitration in the event of a dispute. Id. at 93, 592 S.E.2d at 51. The parties had a dispute, and Thornton filed a declaratory judgment action seeking a determination that the arbitration provision was unenforceable. Id. at 94, 592 S.E.2d at 51. This court disagreed, finding that because the Agreement affected interstate commerce, the FAA applied. Id. at 95-96, 592 S.E.2d at 52-53. The court relied heavily on the fact that Thornton relocated from Michigan, and the contract provided for him to be compensated for the expenses incurred in moving his personal effects to South Carolina. Id. at 97, 592 S.E.2d at 53.

The trial court distinguished Thornton and relied on the analysis in Arkansas Diagnostic Center, P.A. v. Tahiri, 257 S.W.3d 884, 892 (Ark. 2007), in which the Arkansas Supreme Court found there was no interstate commerce involved, and the FAA did not apply to the employment contract at issue. The contract in Tahiri contained an arbitration provision, and the Arkansas Diagnostic Center (ADC) attempted to enforce the provision when Dr. Tahiri filed a complaint against ADC for numerous causes of action, including breach of the contract. Id. at 886-87. ADC argued interstate commerce was involved because there was "evidence to show that it treated out-of-state patients, received payments from out-of-state insurance carriers, purchased goods from out-of-state vendors, and paid for Dr. Tahiri to travel to seminars outside of Arkansas." Id. at 888. The Arkansas Supreme Court found these factors alone insufficient to compel arbitration under the FAA. Id. at 891-92. The court stated:

[ADC] failed to demonstrate anything other than that it was a local clinic, with local physicians who had privileges at local hospitals, and treated local patients.

[I]t also failed to prove that Dr. Tahiri's employment facilitated its alleged interstate business activities. . . . Most specific to the employment contract at issue is that ADC was a *local clinic*, which contracted with Dr. Tahiri to provide medical services to its *local patients*. Based on these factors, we hold that Dr. Tahiri's employment agreement . . . did not evidence a transaction involving commerce. . . .

Were this court to hold otherwise, it would equate to a finding that the FAA is applicable to any contract containing an arbitration clause, as it could be argued that every contract involves some nexus to interstate commerce. . . . Instead, the question is simply whether the *contract evidences a transaction* involving commerce.

Id. at 892 (emphasis in original).

We agree with the trial court that the facts of this case are more akin to those in Tahiri. Under the facts surrounding this agreement, Flexon was a South Carolina resident, and Coastal hired him to provide medical services "at the medical practice office located at 1010 Medical Center Drive, Hardeeville, South Carolina . . . and such other practice sites in Beaufort and Jasper counties as may be reasonably designated by [PHC] from time to time . . ." We agree with the trial court's finding that the Agreement and surrounding facts did not implicate interstate commerce. Therefore, the FAA did not apply to the Agreement. See Thornton, 357 S.C. at 96, 592 S.E.2d at 52 ("Our courts consistently look to the essential character of the contract when applying the FAA.").

II. Employment v. Recruiting Agreements

Coastal also argues the trial court erred in distinguishing this case from Thornton v. Trident Medical Center, L.L.C., 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003), based on the difference between a recruiting contract and an employment contract. We agree, but find no resulting prejudice.

In Thornton, this court cited Selma Medical Center, Inc. v. Fontenot, 824 So.2d 668 (Ala. 2001), and relied in part on the fact that the contract was a recruiting contract in determining it implicated interstate commerce. Thornton, 357 S.C. at 98-100, 592 S.E.2d at 53-54. [1] The Arkansas Supreme Court also relied on the difference between an employment contract and a recruiting contract in distinguishing Thornton and finding interstate commerce not implicated. Arkansas Diagnostic Center, P.A. v. Tahiri, 257 S.W.3d 884, 891 (Ark. 2007). The Court stated: "[w]e note that, here, it is only an employment agreement at issue, which obligates Dr. Tahiri to provide medical services, and not a recruitment agreement." Id. at 891 n.3.

Here, the trial court also noted that Thornton involved a recruiting agreement, and the Agreement here "is clearly and expressly denominated an employment agreement, not a recruiting agreement." To the extent the trial court relied on this distinction, we find the trial court erred. The United States Supreme Court has expressly noted that "[e]mployment contracts, except for those covering workers engaged in transportation, are covered by the FAA." E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 289 (2002). The relevant inquiry is whether "the agreement, the complaint, and the surrounding facts" affect interstate commerce. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001).

Despite this error, we find the trial court employed the appropriate analysis by reviewing the Agreement and the surrounding circumstances. Therefore, we find no prejudice resulting from the trial court's error in distinguishing between an employment agreement and a recruiting agreement. See State v. Patterson, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006) ("An error not shown to be prejudicial does not constitute grounds for reversal.").

CONCLUSION

For the foregoing reasons, the order on appeal is

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.

[1] In Selma, the recruiting contracts involved two physicians moving their practices from South Carolina to Alabama. Selma, 824 So.2d at 669. The Alabama Supreme Court found the contracts "were themselves an integral part of the Physicians' movement in the flow of commerce, subjecting their personal-service contracts to the jurisdiction of the FAA." Id. at 675.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Perry Buckner, Circuit Court Judge

Case No. 2009-CP-27-331
Petition from Opinion No. 4950 (filed March 7, 2012)

Phillip Flexon, M.D. Respondent,

v.

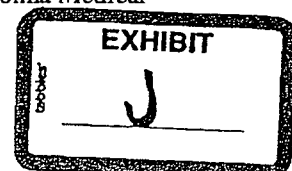
PHC-Jasper, Inc., d/b/a/ Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc. and
Tenet Healthsystems, Defendants,

Of whom, Coastal Carolina Medical
Center, Inc., is Appellant.

APPELLANT'S PETITION FOR REHEARING,
SUGGESTION OF REHEARING *EN BANC*,
AND MEMORANDUM IN SUPPORT

James D. Myrick, SC Bar No. 12004
John C. Hawk IV, SC Bar No. 74786
Dana W. Lang, SC Bar No. 77546

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Attorneys for Appellant Coastal Carolina Medical
Center, Inc.



Pursuant to SCACR 221(a) and SCACR 219(a), Appellant Coastal Carolina Medical Center, Inc. ("CCMC") respectfully petitions this Court for rehearing of its decision in Flexon v. PHC-Jasper, Inc., Op. No. 4950 (S.C. Ct.App. filed March 7, 2012) (Shearouse Adv. Sh. No. 9 at 83) and suggests that the rehearing should be *en banc*. Rehearing is appropriate because this Court misapprehended the law governing applicability of the Federal Arbitration Act, and overlooked critical facts, when it focused on pre-contractual acts evidencing intent of the parties. The appropriate inquiry is whether interstate commerce was implicated in fact during course of performance of the contract.

Rehearing *en banc* is suggested to maintain the uniformity of this Court's decisions on applicability of the Federal Arbitration Act. SCACR 219(a). "Both state and federal policy favor arbitration of disputes." Aiken v. World Fin. Corp., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596-97, 553 S.E.2d 110, 118-19 (2001) ("Because of the FAA's expansive view of interstate commerce, we find the FAA covers the . . . agreement in the present case."); Soil Remediation Co. v. Nu-Way Envtl., 323 S.C. 454, 460, 476 S.E.2d 149, 152 (1996) ("[t]he court *must* examine the agreement, the complaint, and the facts to ascertain whether the transaction is one involving commerce within the meaning of the Act") (emphasis added.) The Court's decision in this matter narrowed the applicability of the Federal Arbitration Act in South Carolina by limiting the trial court's inquiry to the intent of the parties; an *en banc* hearing will ensure uniformity in the Court's jurisprudence on applicability of the Federal Arbitration Act.

PARTICULAR POINTS OVERLOOKED OR MISAPPREHENDED

1. The Court analyzed only the Agreement itself to determine whether interstate commerce was implicated. The proper inquiry is whether *performance* of the transaction evidenced by the agreement actually affected interstate commerce, irrespective of the intent of the parties when the agreement was made. This inquiry requires examination of the complaint and surrounding facts.
2. The Court overlooked several terms in the Agreement that evidence a transaction affecting interstate commerce.

DISCUSSION

Flexon and CCMC entered into an employment agreement (the "Agreement") that contained an agreement to arbitrate. The Agreement, however, did not contain the first-page, typed, underlined, all-caps notice of arbitration required by South Carolina's Arbitration Act. S.C. CODE ANN. § 15-48-10. If an agreement contains a clear arbitration provision, but lacks the notice required by the South Carolina Arbitration Act, the Federal Arbitration Act ("FAA") will require the parties to arbitrate as agreed when the transaction evidenced by the contract affects interstate commerce. Towles v. United Healthcare Corp., 338 S.C. 29, 36, 524 S.E.2d 839, 843 (Ct. App. 1999). The Flexon agreement contained a clear arbitration agreement, but lacked the requisite state notice. Thus the issue on appeal was whether interstate commerce was implicated by the transaction, triggering the FAA, which would permit the parties to arbitrate their disputes in accordance with the Agreement's terms. Here, the Court of Appeals misapprehended the law governing applicability of the FAA, and overlooked facts surrounding the transaction that evidence interstate commerce. For those reasons, this Court should rehear this appeal.

I. THE COURT MISAPPREHENDED THE LAW GOVERNING
APPLICABILITY OF THE FEDERAL ARBITRATION ACT

The Court, in its decision, improperly focused on whether the Agreement contemplated interstate commerce, instead of whether the transaction memorialized by the Agreement involved interstate commerce. The Federal Arbitration Act applies when “written provision in any maritime transaction or a *contract evidencing a transaction involving commerce*” contains an arbitration clause. 9 U.S.C. § 2 (1988) (emphasis added). The transaction, not the contract, must evidence interstate commerce. The proper inquiry, therefore, is whether the employment of Flexon—which was the transaction evidenced by the contract—involved interstate commerce *in fact*.

If interstate commerce is actually affected by a transaction, the contemplation of the parties—and therefore their express contractual language—is only marginally relevant. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 277, 115 S.Ct. 834 (1995) (holding that the FAA is triggered when interstate commerce is involved in fact, even if interstate commerce was not within the contemplation of the parties at the time of contracting). The “FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 363 (S.C. 2001). The intent of Flexon and CCMC to engage in interstate commerce is not outcome-determinative when the Agreement, by its terms, reflects an explicit agreement to arbitrate and the conduct governed by the Agreement affects interstate commerce. Id.

In determining whether the FAA applied, the Court erred in examining only the language and circumstances surrounding the making of Agreement, therefore limiting its

inquiry to the intent of the parties to engage in interstate activities. The Court found, “[u]nder the facts surrounding this Agreement, Flexon was a South Carolina resident and Coastal hired him to provide medical services” in South Carolina. (Shearouse Adv. Sh. No. 9 at 89.) The Court then agreed with the trial court’s finding that the “Agreement and the surrounding facts did not implicate interstate commerce.” (Shearouse Adv. Sh. No. 9 at 89.) (citing to Thornton, *infra*, for the proposition that the Court should look to the essential character of the contract when applying the FAA). In its discussion, the Court cited with approval the language from Arkansas Diagnostic Center, P.A. v. Tahiri, an Arkansas case, that stated, “the question is whether the *contract* evidences a *transaction* involving commerce.” (Shearouse Adv. Sh. No. 9 at 88) (citing 257 S.W.3d, 893(Ark. 2007).

By limiting its analysis to the residency of the plaintiff and to one isolated phrase from the Agreement, the Court failed to consider the interstate connections that occurred as a direct result of Flexon signed the Agreement with CCMC. Munoz, 343 S.C. 531, 542 S.E.2d at 363. These circumstances are described in both Flexon’s Complaint and in his own discovery responses. “The court *must* examine the agreement, the complaint, and the facts to ascertain whether the transaction is one involving commerce within the meaning of the Act.” Soil Remediation Co., 323 S.C. at 460, 476 S.E.2d at 152 (emphasis added).

In his Complaint, Flexon alleges that, “In order to sign Exhibit I [the employment agreement],” he had to “discontinue, close and leave an established practice in Savannah, Georgia where he had privileges at surgical hospitals.” (R. at 9.) The Complaint itself, therefore, alleges substantial interstate activity as a consequence of the Agreement.

Flexon alleges he lost referrals from Savannah doctors several months after he joined CCMC; if this is true, Flexon was receiving referrals across state lines in support of his practice at CCMC. (R. at 81) (“[A]fter the sale of the hospital to Tenet was announced in June . . . many Savannah doctors stopped referring patients” to Flexon.) During his employment with CCMC, Flexon alleged he took his more complicated surgical cases across state lines to Memorial Hospital in Savannah, Georgia. (R. at 83) (“The availability of equipment became so unreliable that Plaintiff started taking him [sic] complicated cases to Memorial.”). Both performing surgery in Georgia and accepting referrals from Georgia physicians in furtherance of Flexon’s employment in South Carolina implicate interstate commerce. These facts contradict the Court’s understanding that Flexon’s employment was purely local in nature. (Shearouse Adv. Sh. No. 9 at 89.) Because the Court misapprehended the law regarding applicability of the FAA, rehearing is warranted.

II. THE COURT OVERLOOKED KEY FACTS WHEN IT FAILED TO CONSIDER THOSE PORTIONS OF THE AGREEMENT THAT REFERENCED INTERSTATE COMMERCE

Further, the Court overlooked key facts when it found that the Agreement itself did not evidence interstate commerce. The Court distinguished the present case from the situation in Thornton v. Trident Medical Center, relying on the fact that there, Thornton relocated from another state and was contractually entitled to moving expenses in his agreement. (Shearouse Adv. Sh. No. 9 at 87 (quoting 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003).) Here, the Court ignored facts in Flexon’s situation that render it extraordinarily similar to Thornton. Flexon practiced medicine in Georgia prior to entering the Agreement with CCMC. (R. at 9 (Comp. ¶8).) His Agreement with CCMC

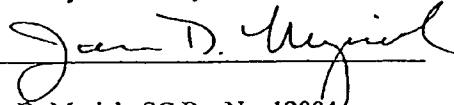
included a "Sign On Bonus" that stated, "In order to induce Physician to relocate his place of employment to Hardeeville, South Carolina, Hospital shall pay Physician the sum of \$25,000." (R. at 75 (Agreement Ex. 3).) Like the Thornton agreement, the Flexon Agreement contained an express term for substantial payment to induce the physician to move his practice from one state to another. (R. at 75.) Thus, the distinction drawn by the Court in its decision in the present matter does not exist.

Further, other portions of the Agreement itself evidence interstate commerce, when the fact that Flexon was practicing in Georgia prior to joining CCMC is considered. For example, Sections 3.1 and 3.3 require Flexon to "devote his full professional working time and attention" to CCMC. (R. at 59, 60.) Section 9.1 is a covenant not to compete during the term of his employment. (R. at 24.) Fundamentally, each of these terms conditions the employment of the Respondent upon the cessation of his practice in Savannah. The stated purpose of the Sign On Bonus was to induce Flexon to close his existing Georgia practice (R. at 75.) Therefore, the Court improperly found that the Agreement did not have a nexus with interstate commerce, and rehearing is proper to correct this error.

CONCLUSION

Appellant Coastal Carolina Medical Center, Inc. respectfully requests that this Court rehear this matter, and suggests that the rehearing should be *en banc*.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "James D. Myrick", is written over a horizontal line.

James D. Myrick, SC Bar No. 12004

John C. Hawk IV, SC Bar No. 74786

Dana W. Lang, SC Bar No. 77546

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*Attorneys for Appellant Coastal Carolina
Medical Center, Inc.*

5

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Phillip Flexon, M.D.,

Respondent,

v.

PHC-Jasper, Inc., d/b/a
Coastal Carolina Medical
Center, Coastal Carolina
Medical Center, Inc.,
Lifepoint Hospitals, Inc.,
and Tenet Healthsystems,

Defendants,

Of whom, Coastal Carolina
Medical Center, Inc. is,

Appellant.

Appeal From Jasper County
Perry M. Buckner, Circuit Court Judge

Opinion No. 4950
Submitted January 3, 2012 – Filed March 7, 2012

AFFIRMED

James D. Myrick, John C. Hawk, & Dana W. Lang,
all of Charleston, for Appellant.

William Harvey of Beaufort, for Respondent.

SHORT, J.: Coastal Carolina Medical Center, Inc. (Coastal) appeals the trial court's order denying its motion to compel arbitration in this breach of employment contract action filed by Phillip Flexon, M.D., against Coastal, PHC-Jasper, Inc., d/b/a Coastal Carolina Medical Center (PHC), Lifepoint Hospitals, Inc. (Lifepoint), and Tenet Healthsystems, Inc. (Tenet). We affirm.

FACTS

Flexon is a resident of Hardeeville, South Carolina, and is licensed to practice medicine as an ear, nose, and throat specialist in South Carolina and Georgia. Coastal is a South Carolina corporation with its principal place of business in Jasper County, and it is wholly owned by Tenet, a Delaware corporation. PHC is a South Carolina corporation doing business as Coastal Carolina Medical Center in Jasper County, and it is the wholly-owned subsidiary of Lifepoint, a Tennessee corporation.

On December 18, 2006, Flexon entered into the Physician Employment Agreement (the Agreement) with PHC. The Agreement provided that Flexon would practice for five years "at the medical practice office located at 1010 Medical Center Drive, Hardeeville, South Carolina . . . and such other practice sites in Beaufort and Jasper counties as may be reasonably designated by [PHC] from time to time" Flexon alleged he had to close an established practice in Savannah, Georgia, in order to accept employment with PHC. The Agreement further provided:

13.4 Governing Law and Venue: This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of South Carolina. Any action or claim arising from, under or pursuant to this Agreement shall be brought in the courts, state or federal, within the State of South Carolina, and the parties expressly waive the right to bring any legal action or claims in any other courts. The parties hereto hereby (sic) consent to venue in any state or federal court within the State of South Carolina having jurisdiction over the County for all

purposes in connection with any action or proceeding commenced between the parties hereto in connection with or arising from this Agreement.

13.5 Arbitration: Except as to the provisions contained in Articles VIII and IX [Disclosure of Information and Covenant Not to Compete], the exclusive jurisdiction of which shall rest with a court of competent jurisdiction in the state where the hospital is located any controversy or claim arising out of or related to this Agreement, or any breach thereof, shall be settled by arbitration in the County, in accordance with the rules and procedures of alternative dispute resolution and arbitration . . . , and judgment upon any award rendered may be entered in any court having jurisdiction thereof.

Flexon alleges that at the time of negotiating the Agreement, PHC was in negotiations to sell its assets, including the hospital, Coastal Carolina Medical Center, to Tenet. Upon Flexon's commencement of practice at Coastal Carolina Medical Center in March of 2007, PHC allegedly refused to honor commitments it made to Flexon regarding equipment purchases and the recruitment of an audiologist. In June 2007, Lifepoint sold PHC and Coastal Carolina Medical Center to Tenet.

In July 2007, Tenet presented Flexon with an Amendment to and Assignment of Physician Employment Agreement (the Amendment), which purported to assign the Agreement to Tenet. Flexon refused to sign the Amendment. In August 2008, he allegedly delivered a formal notice of termination for cause, pursuant to the Agreement. Flexon received a letter in May 2009 claiming he owed Tenet more than \$725,000, and he must cease his practice of medicine in Savannah, Georgia. Flexon filed this action. Coastal filed a motion to compel arbitration. The trial court held a hearing on the motion. The parties stipulated that the arbitration provision in the Agreement failed to comply with the South Carolina Arbitration Act. Coastal argued the Federal Arbitration Act (FAA) governed, alleging the Agreement involved interstate commerce.

The trial court found the Agreement "calls for local medical services to be performed by a Hardeeville resident at a medical facility located in Hardeeville." Distinguishing Thornton v. Trident Medical Center, L.L.C., 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003), and citing Arkansas Diagnostic Center, P.A. v. Tahiri, 257 S.W.3d 884 (Ark. 2007), the trial court denied the motion to compel arbitration, finding the Agreement did not involve interstate commerce, and the FAA did not apply. This appeal followed.

STANDARD OF REVIEW

The question of whether a claim is subject to arbitration is subject to de novo review. Partain v. Upstate Auto. Grp., 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). However, the trial court's factual findings will not be reversed on appeal if there is any evidence reasonably supporting the findings. Id.

LAW/ANALYSIS

I. FAA

Coastal argues the trial court erred in finding the FAA did not apply to the Agreement. We disagree.

Here, the parties stipulated that the South Carolina Arbitration Act does not apply. Therefore, we must determine whether the FAA preempts the state requirements. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001) (stating the inquiry does not conclude with the application of the state act, and the court must determine if the federal act preempts state requirements).

The FAA provides in pertinent part: "A written provision in any . . . contract evidencing a transaction **involving commerce** to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2010) (emphasis added). Unless the parties have contracted otherwise, the FAA applies to any

arbitration agreement regarding a transaction that involves interstate commerce, despite the parties' contemplation of an interstate transaction. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538-39, 542 S.E.2d 360, 363-64 (2001).

"The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent." Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)). "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." Zabinski, 346 S.C. at 594, 553 S.E.2d at 117.

The trial court rejected Coastal's argument that the Agreement here, and its surrounding circumstances, involved interstate commerce under Thornton v. Trident Medical Center, L.L.C., 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003). In Thornton, Trident was experiencing a shortage of cardiovascular physicians and began to recruit physicians, including Thornton, from other parts of the country to Charleston, South Carolina. Id. at 93, 592 S.E.2d at 50-51. The Agreement required Thornton to move his practice from Michigan to Charleston, provided financial incentives, and further provided for arbitration in the event of a dispute. Id. at 93, 592 S.E.2d at 51. The parties had a dispute, and Thornton filed a declaratory judgment action seeking a determination that the arbitration provision was unenforceable. Id. at 94, 592 S.E.2d at 51. This court disagreed, finding that because the Agreement affected interstate commerce, the FAA applied. Id. at 95-96, 592 S.E.2d at 52-53. The court relied heavily on the fact that Thornton relocated from Michigan, and the contract provided for him to be compensated for the expenses incurred in moving his personal effects to South Carolina. Id. at 97, 592 S.E.2d at 53.

The trial court distinguished Thornton and relied on the analysis in Arkansas Diagnostic Center, P.A. v. Tahiri, 257 S.W.3d 884, 892 (Ark. 2007), in which the Arkansas Supreme Court found there was no interstate commerce involved, and the FAA did not apply to the employment contract

at issue. The contract in Tahiri contained an arbitration provision, and the Arkansas Diagnostic Center (ADC) attempted to enforce the provision when Dr. Tahiri filed a complaint against ADC for numerous causes of action, including breach of the contract. Id. at 886-87. ADC argued interstate commerce was involved because there was "evidence to show that it treated out-of-state patients, received payments from out-of-state insurance carriers, purchased goods from out-of-state vendors, and paid for Dr. Tahiri to travel to seminars outside of Arkansas." Id. at 888. The Arkansas Supreme Court found these factors alone insufficient to compel arbitration under the FAA. Id. at 891-92. The court stated:

[ADC] failed to demonstrate anything other than that it was a local clinic, with local physicians who had privileges at local hospitals, and treated local patients. . . .

[I]t also failed to prove that Dr. Tahiri's employment facilitated its alleged interstate business activities. . . . Most specific to the employment contract at issue is that ADC was a *local* clinic, which contracted with Dr. Tahiri to provide medical services to its *local* patients. Based on these factors, we hold that Dr. Tahiri's employment agreement . . . did not evidence a transaction involving commerce. .

Were this court to hold otherwise, it would equate to a finding that the FAA is applicable to any contract containing an arbitration clause, as it could be argued that every contract involves some nexus to interstate commerce Instead, the question is simply whether the *contract* evidences a *transaction* involving commerce.

Id. at 892 (emphasis in original).

We agree with the trial court that the facts of this case are more akin to those in Tahiri. Under the facts surrounding this agreement, Flexon was a South Carolina resident, and Coastal hired him to provide medical services "at the medical practice office located at 1010 Medical Center Drive, Hardeeville, South Carolina . . . and such other practice sites in Beaufort and Jasper counties as may be reasonably designated by [PHC] from time to time" We agree with the trial court's finding that the Agreement and surrounding facts did not implicate interstate commerce. Therefore, the FAA did not apply to the Agreement. See Thornton, 357 S.C. at 96, 592 S.E.2d at 52 ("Our courts consistently look to the essential character of the contract when applying the FAA.").

II. Employment v. Recruiting Agreements

Coastal also argues the trial court erred in distinguishing this case from Thornton v. Trident Medical Center, L.L.C., 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003), based on the difference between a recruiting contract and an employment contract. We agree, but find no resulting prejudice.

In Thornton, this court cited Selma Medical Center, Inc. v. Fontenot, 824 So.2d 668 (Ala. 2001), and relied in part on the fact that the contract was a recruiting contract in determining it implicated interstate commerce. Thornton, 357 S.C. at 98-100, 592 S.E.2d at 53-54.¹ The Arkansas Supreme Court also relied on the difference between an employment contract and a recruiting contract in distinguishing Thornton and finding interstate commerce not implicated. Arkansas Diagnostic Center, P.A. v. Tahiri, 257 S.W.3d 884, 891 (Ark. 2007). The Court stated: "[w]e note that, here, it is only an employment agreement at issue, which obligates Dr. Tahiri to provide medical services, and not a recruitment agreement." Id. at 891 n.3.

¹ In Selma, the recruiting contracts involved two physicians moving their practices from South Carolina to Alabama. Selma, 824 So.2d at 669. The Alabama Supreme Court found the contracts "were themselves an integral part of the Physicians' movement in the flow of commerce, subjecting their personal-service contracts to the jurisdiction of the FAA." Id. at 675.

MAR - 8 2012

Here, the trial court also noted that Thornton involved a recruiting agreement, and the Agreement here "is clearly and expressly denominated an employment agreement, not a recruiting agreement." To the extent the trial court relied on this distinction, we find the trial court erred. The United States Supreme Court has expressly noted that "[e]mployment contracts, except for those covering workers engaged in transportation, are covered by the FAA." E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 289 (2002). The relevant inquiry is whether "the agreement, the complaint, and the surrounding facts" affect interstate commerce. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001).

Despite this error, we find the trial court employed the appropriate analysis by reviewing the Agreement and the surrounding circumstances. Therefore, we find no prejudice resulting from the trial court's error in distinguishing between an employment agreement and a recruiting agreement. See State v. Patterson, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006) ("An error not shown to be prejudicial does not constitute grounds for reversal.").

CONCLUSION

For the foregoing reasons, the order on appeal is

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Perry Buckner, Circuit Court Judge

Case No. 2009-CP-27-331

Phillip Flexon, M.D.

Respondent,

v.

PHC-Jasper, Inc., d/b/a/ Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc. and
Tenet Healthsystems,

Defendants,

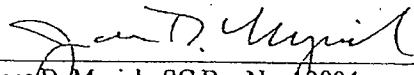
Of whom, Coastal Carolina Medical
Center, Inc., is

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this **Petition for Rehearing** complies with Rules
221(a) and 240, SCACR.

WOMBLE CARLYLE SANDRIDGE &
RICE, LLP


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John C. Hawk IV, SC Bar No. 74786
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*Attorneys for Appellant Coastal Carolina
Medical Center, Inc.*

March 19, 2012

{02065122.}

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Perry Buckner, Circuit Court Judge

Case No. 2009-CP-27-331

Phillip Flexon, M.D.

Respondent,

v.

PHC-Jasper, Inc., d/b/a/ Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc. and
Tenet Healthsystems,

Defendants,

Of whom, Coastal Carolina Medical
Center, Inc., is

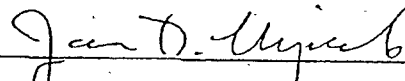
Appellant.

CERTIFICATE OF SERVICE

I certify that on the 9th day of March, 2012, I served a copy of the **Petition for Rehearing** on Respondent, by delivering a copy of same to counsel of record in the above entitled matter via U.S. Mail addressed to the following:

William Harvey, Esquire
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1001 Craven Street
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Beaufort, SC 29901-1107
Attorney for the Plaintiff

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Attorney for Defendant Lifepoint Hospitals, Inc.



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Attorneys for Appellant Coastal Carolina Medical Center, Inc.

The South Carolina Court of Appeals

Phillip Flexon, M.D.,

Respondent,

v.

PHC-Jasper, Inc., d/b/a Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc., and Tenet
Healthsystems,

Defendants,

Of whom, Coastal Carolina Medical
Center, Inc., is,

Appellant.

The Honorable Perry M. Buckner
Jasper County
Trial Court Case No. 2009-CP-27-00331

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

Paul E. Shortz, Jr.

H. B. Wain

John D. Stearns, Jr.

Columbia, South Carolina



cc: James D. Myrick, Esquire
John C. Hawk, Esquire
Dana W. Lang, Esquire
William Harvey, Esquire

FILED
23 July 2012



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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August 29, 2012

The Honorable Margaret Bostick
P.O. Box 248
Ridgeland, SC 29936-0248

REMITTITUR

Re: Flexon, Phillip v. PHC (C C Medical Ctr)
Lower Court Case No. 2009CP2700331
Appellate Case No. 2010-168427

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: John C. Hawk, IV
Dana Woodrum Lang
James Dunbar Myrick
William B. Harvey, III



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF JASPER	)	CIVIL CASE NO.: 2009-CP-27-0331
Philip Flexon, M.D.,	)	
	)	
Plaintiff,	)	
	)	DEFENDANT LIFEPOINT HOSPITALS,
vs.	)	INC.'S REPLY TO PLAINTIFF'S
	)	MEMORANDUM IN OPPOSITION
PHC-Jasper, Inc., d/b/a/ Coastal Carolina Medical	)	TO LIFEPOINT HOSPITALS, INC.'S
Center, Coastal Carolina Medical Center, Inc.,	)	MOTION TO COMPEL ARBITRATION
Lifepoint Hospitals, Inc. and	)	
Tenet Healthsystems,	)	
	)	
Defendants.	)	

In addition to legal grounds and facts set forth in Lifepoint Hospitals, Inc.'s ("Lifepoint") Renewed Motion to Compel Arbitration and Stay Action ("Arbitration Motion"), Lifepoint herein submits its Reply to the Plaintiff's Memorandum in Opposition to Lifepoint's Renewed Motion to Compel Arbitration (the "Opposition Memorandum").

I. Key Timeline for Lifepoint's Arbitration Motion

- October 21, 2009: Co-Defendant Coastal Carolina Medical Center, Inc.'s ("CCMC") Motion to Compel Arbitration and Stay
- June 9, 2010: Hearing on CCMC's Motion to Compel Arbitration and Stay
- June 9, 2010: Court instructs Lifepoint to file its own Motion to Compel Arbitration
- June 16, 2010: Court signs Consent Scheduling Order with Reservation and Non-Waiver language on arbitration (as quoted hereafter)
- June 17, 2010: Lifepoint files its Motion to Compel Arbitration and to Stay
- July 7, 2010: Court (Judge Buckner) denies CCMC's Motion to Compel Arbitration and Stay

- CCMC's appeal follows through Remittitur on August 29, 2012; Circuit Court case stayed during pendency of appeal, Lifepoint's Motion to Compel Arbitration and Stay never set for a hearing prior to or during appeal period
- September 18, 2012: Court signs Amended Consent Scheduling Order with Reservation and Non-Waiver language on arbitration
- February 1, 2013: Court signs Second Amended Consent Scheduling Order with Reservation and Non-Waiver language on arbitration
- Lifepoint's Motion to Compel Arbitration and Stay set for hearing on February 20, 2013 and withdrawn without prejudice and without a hearing
- Plaintiff deposed April 30, 2013
- Lifepoint renews its Arbitration Motion on May 31, 2013, following receipt of deposition transcript
- July 2, 2013: Court signs Third Amended Consent Scheduling Order with Reservation and Non-Waiver language on arbitration (the Consent Scheduling Orders are collectively referred to hereafter as the "Consent Orders")

With this background, Lifepoint highlights the following points in further support of its Arbitration Motion and in reply to Plaintiff's Opposition Memorandum.

II. Consent Scheduling Orders

The Plaintiff has entered into four (4) Consent Orders (as outlined above) which specifically address the ability of Lifepoint to file its motion to compel arbitration and conduct discovery without waiver or prejudice. The Consent Orders state¹: "The parties and this Court recognize that one of the Defendants may move to compel arbitration, and that this consent order in no way constitutes a waiver of Defendant's asserted right to compel arbitration. The parties agree that the conduct of written discovery or depositions will not be evidence of a waiver of Defendant's asserted right to arbitration. The Plaintiff also agrees that engaging in discovery

¹ The June 16, 2010 Consent Scheduling Order initially says "the parties and this Court recognize that the Defendant has moved to compel arbitration" rather than "the parties and this Court recognize that one of the Defendants may move to compel arbitration" as provided in the other three Consent Orders.

pursuant to this order does not constitute prejudice or undue burden.” (Copies of the Consent Orders are attached hereto as **Exhibit A**.)

As advocated by the Plaintiff in his Opposition Memorandum² and specifically consented to in the Consent Orders, Lifepoint pursued discovery, including obtaining the deposition testimony of the Plaintiff which revealed previously undisclosed facts that support arbitration. Lifepoint is before this Court fully prosecuting its Arbitration Motion pursuant to prior directives and orders of this Court.

III. CCMC’s Motion to Compel Arbitration

Lifepoint was expressly instructed by this Court to file its own motion if Lifepoint wanted to pursue enforcing the arbitration provision against the Plaintiff. The following exchange occurred at the June 9, 2010 hearing on CCMC’s Motion to Compel arbitration (**Exhibit B**, Transcript of Record Page 17, ll. 20-25; Page 18, ll. 1-12):

Robertson: “I’m not presenting argument. This is not our motion today, but we pled this as an affirmative defense as well, that this matter should be submitted to arbitration. I think it goes to arbitration and it should. We support this motion. It goes as to all parties. If I have to separately move, I can do that”

Court: “I think you ought to do that, because obviously the plaintiff isn’t on notice of that. I understand that’s your position, but all I can deal with is this motion today. But I understand that. I think you need to file your own motion. And I realize you pled it.”

Robertson: “Yes, sir.”

Lifepoint thereafter on June 17, 2010 files its Motion to Compel Arbitration. CCMC’s Motion for Arbitration is denied on July 7, 2010 and the appeal of CCMC’s ruling ensues. The

² See the Opposition Memorandum at Page 6, ll. 3-6.

case was stayed without Lifepoint's Motion for Arbitration being heard or ruled upon, and Lifepoint is not a party to CCMC's appeal. Plaintiff acknowledges that Lifepoint is not a party to the appeal in his appellate filings. (**Exhibit C**, February 21, 2011 Final Appeal Brief at Page 8, l. 11.) Following remittitur, Lifepoint withdraws its motion for arbitration without prejudice upon the motion being noticed for a hearing in February 2013 subject to its discovery and motion rights in the Consent Orders (Letter of February 14, 2013). Lifepoint is now before the Court on its Arbitration Motion.

IV. Law of the Case

Plaintiff's argument on the "law of the case" does not apply to Lifepoint's Arbitration Motion. The facts and circumstances are materially different than what was before Judge Buckner.³ The Plaintiff's prior record representations related to the arbitration provision and interstate commerce were as follows: "in this case . . . it is a local contract . . . it involved employment of a Jasper County doctor to a Jasper County hospital to render services to Jasper County residents." (**Exhibit D**, Transcript of Record, p. 12, ll. 17-21). In contrast, Plaintiff's deposition testimony in March 2013, as highlighted in Lifepoint's Arbitration Motion, are materially different. The Plaintiff testified (cited testimony was attached as Exhibit A to the Lifepoint's Arbitration Motion and is not reattached here):

[t]he practice always existed in both states before and after. It really did. I mean, it was -- you know, it -- by -- by accident there's a river and a state line, but the practice always involved both states. [Plaintiff's Depo. p. 269 ll. 20-24]. [The Plaintiff stated that he had] "plenty of patients coming from Georgia. [Plaintiff's Depo. p. 373 ll 1-2].

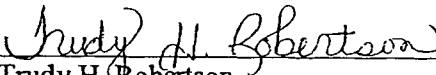
³ "Of course, the doctrine of 'the law of the case' has no application where the facts relating to the question decided are substantially different" Nelson v. Charleston & W. C. Ry. Co., 98 S.E.2d 798, 800, 231 S.C. 351 (1957).

Here, the terms of the arbitration provision and the surrounding facts, as demonstrated from Plaintiff's deposition testimony, clearly evidence that the employment transaction involved and affected interstate commerce. The medical services provided by the Plaintiff under the terms of his employment agreement were not simply contained to a local clinic, with privileges at a local hospital, and treating local patients. As evidenced in the recent deposition testimony of the Plaintiff, it is clear that the Plaintiff would be providing medical services to patients in both Georgia and South Carolina – involving interstate commerce.

V. Right to Arbitration and Facts Demonstrate Interstate Commerce

The facts of this case demonstrate interstate commerce. The South Carolina Supreme Court utilizes a "commerce in fact" test to determine if the transaction involves interstate commerce for the FAA to apply. In other words, the transaction must turn out, in fact, to have involved interstate commerce. Zabinski v. Bright Acres Associates, 553 S.E.2d 110, 115, 346 S.C. 580 (2001). This transaction has turned out, in fact, to involve interstate commerce.

For the reasons stated herein and in its Arbitration Motion, Lifepoint's Arbitration Motion should be granted.


Trudy H. Robertson

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Attorneys for Defendant Lifepoint Hospitals, Inc.

September 4, 2013

Charleston, SC

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

Philip Flexon, M.D.,

Plaintiff,

vs.

PHC-Jasper, Inc., d/b/a Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc., and Tenet
Healthsystems, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. NO.: 2009-CP-27-331

CERTIFICATE OF SERVICE

2013 SEP 10 PM 6:24
JASPER COUNTY SC

The undersigned hereby certifies that a copy of *Defendant Lifepoint Hospitals, Inc.'s Reply to Plaintiff's Memorandum in Opposition to Lifepoint Hospitals, Inc.'s Motion to Compel Arbitration and Stay Action with Exhibits* was served upon the following by U.S. Mail and Electronic Mail:

James D. Myrick
Dana W. Lang
Womble Carlyle Sandridge & Rice LLP
5 Exchange Street
Charleston, SC 29402

William B. Harvey, III
Harvey & Battey P.A.
P.O. Drawer 1107
Beaufort, SC 29901-1107

Heather Morin
Heather Morin

CHARLESTON, SC

September 4, 2013

EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

Philip Flexon, M.D.,

Plaintiff,

vs.

PHC-Jasper, Inc., d/b/a/ Coastal Carolina
Medical Center, Coastal Carolina Medical
Center, Inc., Lifepoint Hospitals, Inc. and
Tenet Healthsystems,

Defendants.

) IN THE COURT OF COMMON PLEAS

) CASE NO. 2009-CP-27-331

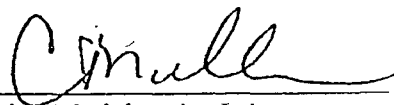
) Consent Scheduling Order of the Parties

FILED
CLERK OF COURT
JASPER COUNTY, SC
2010 DEC 16 PM 3:27

This matter comes before the Court, pursuant to Rules 16(e) and 26(f) of the South Carolina Rules of Civil Procedure. With the consent of all counsel of record, the following Scheduling Order is hereby established in this case:

1. Discovery shall be completed on or before November 22, 2010.
2. Mediation shall be completed by November 1, 2010.
3. This case is subject to being called for trial on or after December 6, 2010.
4. Depositions for use at trial may be taken until the case is called to trial.
5. This order may be modified by order of the Chief Administrative Judge upon Motion of a party.
6. The parties and this Court recognize that Defendant has moved to compel arbitration, and that this consent order in no way constitutes a waiver of Defendant's asserted right to compel arbitration. The parties agree that the conduct of written discovery or depositions will not be evidence of a waiver of Defendants asserted right to arbitration. The Plaintiff also agrees that engaging in discovery pursuant to this order does not constitute prejudice or undue burden.

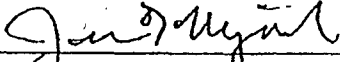
IT IS SO ORDERED.


Chief Administrative Judge

6/16, 2010
Charleston, South Carolina

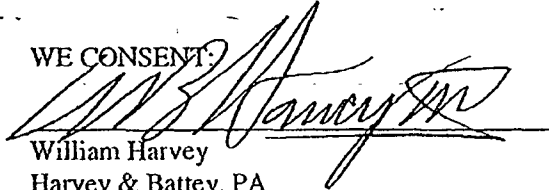
Consent Scheduling Order
Flexon v. PHC-Jasper, Inc. et al.
CASE NO. 2009-CP-27-331

WE CONSENT:


James D. Myrick, S.C. Bar No. 012004
Dana W. Lang, S.C. Bar No. 77546
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Attorneys for Tenet Healthsystems and Coastal Carolina Medical Center, Inc.

Consent Scheduling Order
Flexon v. PHC-Jasper, Inc. et al.
CASE NO. 2009-CP-27-331

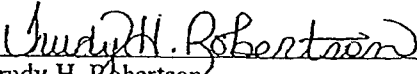
WE CONSENT:



William Harvey
Harvey & Battey, PA
1001 Craven Street
P.O. Drawer 1107
Beaufort, SC 29901-1107
Attorney for the Plaintiff

Consent Scheduling Order
Flexon v. PHC-Jasper, Inc. et al.
CASE NO. 2009-CP-27-331

WE CONSENT:


Trudy H. Robertson
Charles M. Jordan, Jr.
Moore & Van Allen, PLLC
40 Calhoun Street, Suite 300
P.O. Box 22828
Charleston, SC 29413-2828
Telephone: (843) 579-7000
Facsimile: (843) 579-7099
Attorneys for LifePoint Hospitals, Inc.

) IN THE COURT OF COMMON PLEAS

) CASE NO. 2009-CP-27-331

)

)

1

Amended Consent Scheduling Order 4

1

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)

)

i)

This matter comes before the Court, pursuant to Rules 16(e) and 26(f) of the South Carolina Rules of Civil Procedure. With the consent of all counsel of record, the following Scheduling Order is hereby established in this case:

1. Discovery shall be completed on or before February 15, 2013.
2. Mediation shall be completed by February 28, 2013.
3. This case is subject to being called for trial on or after March 18, 2013.
4. Depositions for use at trial may be taken until the case is called to trial.
5. This order may be modified by order of the Chief Administrative Judge upon Motion of a party.
6. The parties and this Court recognize that one of the Defendants may move to compel arbitration, and that this consent order in no way constitutes a waiver of Defendant's asserted right to compel arbitration. The parties agree that the conduct of written discovery or depositions will not be evidence of a waiver of Defendant's asserted right to arbitration. The Plaintiff also agrees that engaging in discovery pursuant to this order does not constitute prejudice or undue burden.

IT IS SO ORDERED.


Chief Administrative Judge

9-18, 2012
Charleston, South Carolina

WCSR 7393907v1

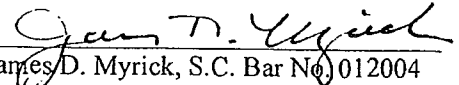
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Amended Consent Scheduling Order

Flexon v. PHC-Jasper, Inc. et al.

CASE NO. 2009-CP-27-331

WE CONSENT:


James D. Myrick, S.C. Bar No. 012004
Dana W. Lang, S.C. Bar No. 77546
5 Exchange Street
P.O. Box 999
Charleston, SC 29402
(843) 722-3400
Attorneys for Tenet Healthsystems and Coastal Carolina Medical Center, Inc.

Amended Consent Scheduling Order

Flexon v. PHC-Jasper, Inc. et al.

CASE NO. 2009-CP-27-331

WE CONSENT:

William B. Harvey III with permission by JDM.

William B. Harvey, III
Harvey & Battey, PA
1001 Craven Street
P.O. Drawer 1107
Beaufort, SC 29901-1107
Attorney for the Plaintiff

Amended Consent Scheduling Order

Flexon v. PHC-Jasper, Inc. et al.

CASE NO. 2009-CP-27-331

WE CONSENT:

Trudy H. Robertson with pro se by JDM
Trudy H. Robertson
Charles M. Jordan, Jr.
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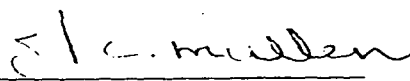
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF JASPER	)	CASE NO. 2009-CP-27-331
	)	
Philip Flexon, M.D.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Second Amended Consent
	)	Scheduling Order
PHC-Jasper, Inc., d/b/a/ Coastal Carolina	)	
Medical Center, Coastal Carolina Medical	)	
Center, Inc., Lifepoint Hospitals, Inc. and	)	
Tenet Healthsystems,	)	
	)	
Defendants.	)	
	)	

2013 FEB 13 AM 9:41
 MARGARET L. BLOTT
 CLERK OF COURT
 JASPER COUNTY SC

This matter comes before the Court, pursuant to Rules 16(e) and 26(f) of the South Carolina Rules of Civil Procedure. With the consent of all counsel of record, the following Scheduling Order is hereby established in this case:

1. Discovery shall be completed on or before May 29, 2013.
2. Mediation shall be completed by June 14, 2013.
3. This case is subject to being called for trial on or after July 1, 2013.
4. Depositions for use at trial may be taken until the case is called to trial.
5. This order may be modified by order of the Chief Administrative Judge upon Motion of a party.
6. The parties and this Court recognize that one of the Defendants may move to compel arbitration, and that this consent order in no way constitutes a waiver of Defendant's asserted right to compel arbitration. The parties agree that the conduct of written discovery or depositions will not be evidence of a waiver of Defendant's asserted right to arbitration. The Plaintiff also agrees that engaging in discovery pursuant to this order does not constitute prejudice or undue burden.

IT IS SO ORDERED.


 Chief Administrative Judge

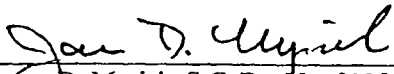
Dated: 2-1-2013
 Charleston, South Carolina

Second Amended Consent Scheduling Order

Flexon v. PHC-Jasper, Inc. et al.

CASE NO. 2009-CP-27-331

WE CONSENT:


James D. Myrick, S.C. Bar No. 012004
Dana W. Lang, S.C. Bar No. 77546

5 Exchange Street

P.O. Box 999

Charleston, SC 29402

(843) 722-3400

Attorneys for Tenet Healthsystems and Coastal Carolina Medical Center, Inc.

Second Amended Consent Scheduling Order

Flexon v. PHC-Jasper, Inc. et al.

CASE NO. 2009-CP-27-331

WE CONSENT:

William B Harvey III with express permission
no email by JDU
William B. Harvey, III
Harvey & Battey, PA
1001 Craven Street
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Beaufort, SC 29901-1107
Attorney for the Plaintiff

Second Amended Consent Scheduling Order

Flexon v. PHC-Jasper, Inc. et al.

CASE NO. 2009-CP-27-331

WE CONSENT:

Trudy H. Robertson with express permission
Charles M. Jordan, Jr. via email *CMJ*
Moore & Van Allen, PLLC
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Facsimile: (843) 579-7099
Attorneys for LifePoint Hospitals, Inc.

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

Philip Flexon, M.D.,

Plaintiff,

vs.

PHC-Jasper, Inc., d/b/a/ Coastal Carolina
Medical Center, Coastal Carolina Medical
Center, Inc., Lifepoint Hospitals, Inc. and
Tenet Healthsystems,

Defendants.

IN THE COURT OF COMMON PLEAS

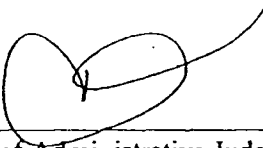
CASE NO. 2009-CP-27-331

Third Amended Consent Scheduling Order

This matter comes before the Court, pursuant to Rules 16(e) and 26(f) of the South Carolina Rules of Civil Procedure. With the consent of all counsel of record, the following Scheduling Order is hereby established in this case:

1. Discovery shall be completed on or before September 23, 2013.
2. Mediation shall be completed by October 1, 2013.
3. This case is subject to being called for trial on or after November 1, 2013.
4. Depositions for use at trial may be taken until the case is called to trial.
5. This order may be modified by order of the Chief Administrative Judge upon Motion of a party.
6. The parties and this Court recognize that one of the Defendants may move to compel arbitration, and that this consent order in no way constitutes a waiver of Defendant's asserted right to compel arbitration. The parties agree that the conduct of written discovery or depositions will not be evidence of a waiver of Defendant's asserted right to arbitration. The Plaintiff also agrees that engaging in discovery pursuant to this order does not constitute prejudice or undue burden.

IT IS SO ORDERED.



Chief Administrative Judge

7-2, 2013
Charleston, South Carolina

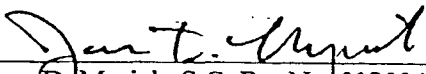
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2013
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Third Amended Consent Scheduling Order

Flexon v. PHC-Jasper, Inc. et al.

CASE NO. 2009-CP-27-331

WE CONSENT:


James D. Myrick, S.C. Bar No. 012004
Dana W. Lang, S.C. Bar No. 77546
5 Exchange Street
P.O. Box 999
Charleston, SC 29402
(843) 722-3400
Attorneys for Tenet Healthsystems and Coastal Carolina Medical Center, Inc.

Third Amended Consent Scheduling Order

Flexon v. PHC-Jasper, Inc. et al.

CASE NO. 2009-CP-27-331

WE CONSENT:

William B. Harvey, III *with express permission by John.*
William B. Harvey, III
Harvey & Battey, PA
1001 Craven Street
P.O. Drawer 1107
Beaufort, SC 29901-1107
Attorney for the Plaintiff

Third Amended Consent Scheduling Order

Flexon v. PHC-Jasper, Inc. et al.

CASE NO. 2009-CP-27-331

WE CONSENT:

Trudy H. Robertson with express permission by JPM.

Trudy H. Robertson

Charles M. Jordan, Jr.

Moore & Van Allen, PLLC

40 Calhoun Street, Suite 300

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Charleston, SC 29413-2828

Telephone: (843) 579-7000

Facsimile: (843) 579-7099

Attorneys for LifePoint Hospitals, Inc.

EXHIBIT B

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Perry Buckner, Circuit Court Judge

Case No. 2009-CP-27-331

Phillip Flexon, M.D.

Respondent,

v.

PHC-Jasper, Inc., d/b/a/ Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc. and
Tenet Healthsystems,

Defendants,

Of whom, Coastal Carolina Medical
Center, Inc., is

Appellant.

RECORD ON APPEAL

James D. Myrick, SC Bar No. 12004
John C. Hawk IV, SC Bar No. 74786
Dana W. Lang, SC Bar No. 77546

BUIST MOORE SMYTHE MCGEE P.A.
P.O. Box 999
Charleston, SC 29402
(843) 722-3400

Attorneys for Appellant Coastal Carolina
Medical Center, Inc.

1 enough, even those minor things that the diagnostic center
2 showed were enough to evidence interstate commerce. It was
3 not enough for this Court, but I would like to turn your
4 attention to footnote five.

5 THE COURT: All right. Hold on a second and let me get
6 there, please. You got a page?

7 MS. LANG: No, I don't, because of the way that it's
8 printed out, it does not.

9 MR. HARVEY: On the copy I gave to you, Judge, it would
10 be page 8, or at the top, page 9 of 11, I think.

11 THE COURT: I'm with you at footnote 5, Ms. Lang.

12 MS. LANG: All right. Essentially, the opinion is
13 stating that the circuit court got to the right result for
14 the wrong reason. It says, "The Circuit Court, in making
15 its decision, relied more on contemplation of the parties,
16 rather than whether the transaction itself involved
17 commerce." That's where we are. It's not about what the
18 contract says or doesn't say, though that's certainly
19 something that you will consider.

20 MS. ROBERTSON: Judge, if I may; I'm not presenting
21 argument. This is not our motion today, but we pled this as
22 an affirmative defense as well, that this matter should be
23 submitted to arbitration. I think it goes to arbitration
24 and it should. We support this motion. It goes as to all
25 parties. If I have to separately move, I can do that,

1 but ---

2 THE COURT: I think you ought to do that, because
3 obviously the plaintiff isn't on notice of that. I
4 understand that's your position, but all I can deal with is
5 this motion today. But I understand that. I think you need
6 to file your own motion. And I realize you pled it.

7 MS. ROBERTSON: Yes, sir.

8 THE COURT: But he wasn't prepared to argue, except as
9 against this motion today. It might be an identical
10 argument, but ---

11 MS. ROBERTSON: I think that likely it is. So I will
12 make it.

13 THE COURT: Ms. Lang, I want to thank you. It's
14 interesting. I run into this it seems like everywhere that
15 I'm in a border county like Jasper; you run into this every
16 now and then.

17 I'm going to ask you both to submit proposed Orders to
18 me. Please let's stay right on point on this. The issue is
19 whether or not the Federal Arbitration Act applies. No need
20 to go into anything else. I understand you want to argue
21 about -- Bill wants to distinguish the Thornton case, and he
22 wants me to --- and I'm taking the Arkansas case with me.
23 Obviously, I have Thornton. I'm very familiar with it. So
24 seven days from today. Submit them to me at P.O. Drawer
25 470. That's drawer 470, Walterboro, 29488. Copy opposing

R52

R0317

EXHIBIT C

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM JASPER COUNTY

Perry Buckner, Circuit Court Judge

Case No. 2009-CP27-331

PHILLIP FLEXON, M.D., ...Respondent

v.

PHC-JASPER, INC., d/b/a
Coastal Carolina Medical Center,
Coastal Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc., and
Tenet Healthsystems, ...Defendants

Of whom
Coastal Carolina Medical Center, Inc., is, ...Appellant

RESPONDENT'S FINAL BRIEF

Dated: February 21, 2011

HARVEY & BATTEY, P.A.
William B. Harvey, III
S.C. Bar Number 2792
Post Office Drawer 1107
Beaufort, South Carolina 29901-1107
Telephone 8443-524-3109
Telefax 843-524-6973
Attorney for Respondent
Phillip Flexon, M.D.

an employment agreement between a Jasper County hospital and a Jasper County resident for services to Lowcountry South Carolina patients. *See, Bruner*, 155 P.3d at 31.

Appellant attempts to focus on the allegations that the Respondent's primary practice was located in Savannah prior to the commencement of his employment under the Agreement. This argument overlooks the nature of that allegation. The second cause of action in the Complaint is for fraud in the inducement. In paragraph 8, Respondent alleges that "Plaintiff was enticed to sign Exhibit 1 by the representations of employees and agents of Lifepoint that he would enjoy a long relationship with Lifepoint and Coastal Carolina Medical Center." (R. p. 9) Defendant Lifepoint is not a party to this appeal – Appellant is Defendant Coastal Carolina Medical Center, Inc. Further, there is nothing in the Agreement that conditions the employment of the Respondent upon the cessation of his practice in Savannah; the Agreement does not contain any language that mentions this medical practice. Respondent's allegation of his practice in Savannah is in connection with the cause of action for fraud in the inducement. Appellant's attempt to focus on this to create an issue affecting commerce in connection with the Agreement is misplaced.

The case of *Libby Corporation v. Skelly and Loy, Inc.* 910 F. Supp.195 (M.D. Pa. 1995) involved a lawsuit over construction of a shopping center between the contractor (Libby) and the project engineer (Skelly and Loy, Inc.). The

EXHIBIT D

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Perry Buckner, Circuit Court Judge

Case No. 2009-CP-27-331

Phillip Flexon, M.D.

Respondent,

v.

PHC-Jasper, Inc., d/b/a/ Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc. and
Tenet Healthsystems,

Defendants,

Of whom, Coastal Carolina Medical
Center, Inc., is

Appellant.

RECORD ON APPEAL

James D. Myrick, SC Bar No. 12004
John C. Hawk IV, SC Bar No. 74786
Dana W. Lang, SC Bar No. 77546

BUIST MOORE SMYTHE MCGEE P.A.
P.O. Box 999
Charleston, SC 29402
(843) 722-3400

Attorneys for Appellant Coastal Carolina
Medical Center, Inc.

1 THE COURT: If you don't, I'll give you the site so you
2 can write it down.

3 MR. HARVEY: It's in our Brief, Your Honor.

4 THE COURT: It's 257, Southwest 3rd, 884. It's a 2007
5 Supreme Court of Arkansas case. Arkansas Diagnostics Center
6 v. Tahiri, let me spell that for you, T-A-H-I-R-I, who's the
7 M.D. Dr. Abdullah Tahiri. Yes, sir?

8 MR. HARVEY: In the Arkansas Diagnostics Case, the tort
9 analyzed and distinguished the Thornton case, because the
10 very facts and circumstances that we have here. We have a
11 local doctor, a local hospital, it was an employment
12 agreement that had no mention at all of any interstate
13 activities.

14 THE COURT: As opposed to an inducement.

15 MR. HARVEY: As opposed to an inducement contract,
16 which was the case in the Thornton case, and in the other
17 case, they were inducement activities as well. Now, in this
18 case, in dealing with the employment agreement, it is a
19 local contract. It does not involve -- I mean it involved
20 employment of a Jasper County doctor to a Jasper County
21 hospital to render services to Jasper County residents. I
22 mean, in point of fact, that's what we're talking about.

23 In the Arkansas case, the Arkansas Supreme Court case
24 is dead on point. I would point out that in the Arkansas
25 Supreme Court case, the Arkansas Diagnostic case, it pointed

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF JASPER	)	CASE NO. 2009-CP-27-331
	)	
Philip Flexon, M.D.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	DEFENDANT PHC- JASPER, INC., d/b/a
	)	COASTAL CAROLINA MEDICAL
PHC-Jasper, Inc., d/b/a/ Coastal Carolina	)	CENTER, COASTAL CAROLINA
Medical Center, Coastal Carolina Medical	)	MEMORANDUM IN SUPPORT OF
Center, Inc., Lifepoint Hospitals, Inc. and	)	MOTION FOR RELIEF PURSUANT TO
Tenet Healthsystems,	)	RULE 60(b)
	)	
Defendants.	)	
	)	

Defendant PHC-Jasper, Inc., d/b/a Coastal Carolina Medical Center, Coastal Carolina Medical Center, Inc. (hereinafter "CCMC"), submits this memorandum in support of its motion for relief from judgment pursuant to Rules 60(b)(1), 60(b)(2), 60(b)(3), and 60(b)(5) of the South Carolina Rules of Civil Procedure and respectfully states as follows:

BACKGROUND

Dr. Flexon once worked as an ENT doctor in Savannah, Georgia. He negotiated a contract with CCMC in Jasper County, where he signed a five year employment contract. His CCMC employment contract contained an arbitration clause. It lacked the front-page notice required by South Carolina's Arbitration Act, but would be subject to the Federal Arbitration Act if interstate commerce were affected.¹

Flexon quit CCMC after less than two years there to return to Savannah, Georgia. Pursuant to the terms of his employment agreement, CCMC sent notice of a demand for

¹ South Carolina recognizes that the FAA preempts the notice requirements of the S.C. Arbitration Act. When interstate commerce is implicated in fact by a contract, the contracts' arbitration provision is enforceable even in the absence of the front page notice required by South Carolina's Act. Thornton v. Trident Medical Center, 357 S.C. 91, 94 592 S.E.2d 50, 51 (Cl. App. 2004).

repayment of the hospital's losses incurred on Flexon's account for those two years, which would have been forgiven had Flexon worked out the full term of the contract. Flexon then filed this lawsuit alleging breach of contract and fraud, and alternatively alleging that Flexon's employment contract was improperly assigned, and seeking more than \$1 Million in damages.

Within a few months of the filing of the Complaint, CCMC filed a Motion to Stay and for Arbitration. On July 6, 2010 the Court executed an Order denying the motion. The Court ordered that on the facts as presented, the contract at issue did not involve interstate commerce. (Ex. A, Order of Perry Buckner.) Specifically the order found that Flexon's employment was "local medical services to be performed by a Hardeeville resident at a medical facility located in Hardeeville" and that interstate commerce was not implicated. *Id.* at Page 4, lines 5-6.

CCMC appealed the decision to the Court of Appeals, and the case was stayed during the pendency of that appeal. The Court of Appeals denied CCMC's appeal on briefs on March 7, 2012. CCMC filed a petition for rehearing, which was also denied. The case was remitted to the lower court thereafter, and the parties took the Plaintiff's deposition on April 30, 2013.

At his deposition, Plaintiff testified to circumstances contrary to those presented to the Court during the hearing. This motion followed.

ARGUMENT

I. CCMC IS ENTITLED TO RELIEF FROM THE ORDER PURSUANT TO RULE 60(B), SCRCP.

CCMC is entitled from relief from the order denying arbitration pursuant to Rule 60b, sections 1-3 and 5. Specifically, Dr. Flexon's sworn testimony at deposition contradicted the

information presented to and relied upon the Court in denying arbitration. Noticeably absent from Plaintiff's Memorandum in Opposition is any refutation that Dr. Flexon has now admitted interstate commerce activity while performing duties under his employment contract.

The Order was based upon incorrect statements of made at the hearing that interstate commerce was not affected. At the hearing, Plaintiff's counsel emphasized the "local nature" of Dr. Flexon and his practice at CCMC. (See Ex. B, Transcript of Hearing.) The trial court found, and the Court of Appeals affirmed, that the transaction evidenced only intrastate commerce, relying primarily on the purported fact that the parties' agreement "calls for local medical services to be performed by a Hardeeville resident at a medical facility located in Hardeeville." (Ex. A, Buckner, J., Order Denying Arbitration (July 6, 2010).) This language was borrowed almost word for word from Plaintiff's representations to the Court during the hearing on CCMC's motion to compel arbitration.

17	Now, in this
18	case, in dealing with the employment agreement, it is a
19	local contract. It does not involve -- I mean it involved
20	employment of a Jasper County doctor to a Jasper County
21	hospital to render services to Jasper County residents. I
22	mean, in point of fact, that's what we're talking about.

(Ex. B, Pg. 12, lines 17 - 22, Excerpt of Hearing Transcript.)

Plaintiffs' testimony at deposition was entirely contrary to this representation. Dr. Flexon testified that during contract negotiations, he knew that retaining and serving his Savannah, Georgia clients at CCMC was critical to his success. Flexon testified: "...I had a substantial group of patients from Beaufort County and from Savannah that would come to that office

[Hardeeville, SC] if it were managed well. So while I wanted to—to be part of the growth of Jasper County, I—one of the tricks—the tricks of being successful there was just simply to keep my established practice.” (Ex. C, Exerpts from Flexon Dep. 76:17-21.) When asked about his office hours at CCMC, Dr. Flexon testified, “Remember I was –and also at Eric Deaton’s, you know, suggestion and insistence, I was on the hospital staff at Memorial [in Savannah Georgia]. So I often had to make rounds at two hospitals.” (Ex. C, Excerpts from Flexon Dep. 179:15-19.):

II. “Failure” to Take Deposition is a Diversion

In his Memorandum in Opposition to this motion, Plaintiff’s counsel argues that CCMC is at fault for failing to request a deposition of Plaintiff prior to filing a Motion to Compel Arbitration. His argument, in essence, is that while Dr. Flexon admitted facts at his deposition that would have compelled arbitration, CCMC was in error for failing to take that deposition prior to moving for arbitration and is estopped from doing so now.

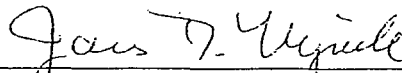
CCMC would have endangered its own chance of success had it taken that Dr. Flexon’s deposition prior to filing its motion to compel arbitration. A motion to compel must be filed expeditiously, and substantial discovery prior to filing constitutes waiver of the right to arbitrate. A party “may waive its right to compel arbitration if a substantial length of time transpires between the commencement of the action and the commencement of the motion to compel arbitration. What is “a substantial length of time” varies from one case to the next, depending on the extent of discovery conducted and the corresponding presence or absence of prejudice to the party opposing arbitration.” Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007).

Very little discovery can constitute waiver. One court found that a nineteen month period where the parties exchanged written interrogatories, requests to produce, and the party requesting arbitration took two depositions demonstrated waiver. *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 548, 575 S.E.2d 74, 75-76 (Ct. App. 2003). While no Court has set an absolute rule, generally cases where the moving party has not taken depositions are not vulnerable to waiver issues. See *Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) & *Rich v. Walsh*, 357 S.C. 64, 67, 590 S.E.2d 506, 507 (Ct.App.2003) (finding a thirteen month period where "[l]imited discovery was conducted" and the party requesting arbitration took one deposition lasting fifteen minutes did not demonstrate waiver).

The inequity of Plaintiff's position on this matter is apparent. Had CCMC taken depositions of Plaintiff on these matters, it would arguably have waived its right to assert arbitration. CCMC presented the facts, as it knew them from written discovery responses, to the Court in a timely fashion. Flexon's attorney argued successfully that the performance of the contract was entirely local. After appeal, Flexon admitted in his deposition that both the contemplated and actual performance of the contract regularly crossed state lines into Georgia in at least the following particulars:

- 1) One fact surrounding the employment contract is that Flexon intended to and did bring clients into his South Carolina practice from Georgia; and
- 2) Dr. Flexon fulfilled his contract in part by performing surgery and maintaining rounds at Savannah Memorial Hospital.

WOMBLE CARLYLE SANDRIDGE & RICE, LLP



James D. Myrick, , S.C. Bar No. 012004

Dana W. Lang, S.C. Bar No. 77546

5 Exchange Street (29401)

P.O. Box 999

Charleston, SC 29402

(843) 722-3400

September 14th, 2013
Charleston, South Carolina

CERTIFICATE OF SERVICE

I do hereby certify that on the 4th day of September, 2013, I served a copy of the within *Defendant PHC-Jasper, Inc., d/b/a Coastal Carolina Medical Center, Coastal Carolina Medical Center, Inc.'s Memorandum in Support of Motion for Relief Pursuant to Rule 60(b)* to Counsel of Record in the within entitled matter by sending same electronically via email and by United States mail with correct postage attached addressed to:

William B. Harvey, III, Esq.
Harvey & Battey, PA
1001 Craven Street
P.O. Drawer 1107
Beaufort, SC 29901-1107
bharvey@harveyandbattey.com
lbender@harveyandbattey.com
Attorneys for Plaintiff

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P. O. Box 22828 (29413-2828)
Charleston, SC 29401
trudyrobertson@mvalaw.com
jbelton@mvalaw.com
Attorneys for Defendant Lifepoint Hospitals, Inc.

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

Karla Kester

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2009-CP-27-331

Phillip Flexon, M.D.,

Plaintiff,

v.

PHC-Jasper, Inc., d/b/a Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc., and Tenet
Healthsystems, Inc.,

Defendants.

ORDER DENYING MOTION TO
COMPEL ARBITRATION

FILED
2010 JUL -7 AM 9:
MARGARET BOSTON
CLERK OF COURT
JASPER COUNTY S

HC
PMB
This case came before me for a hearing on June 9, 2010, on the motion by Defendant Coastal Carolina Medical Center, Inc. (CCMC) to stay this action and for an order compelling arbitration. All parties were represented. For the reasons set forth herein, the Court denies this motion.

This controversy arises out of an employment agreement between the Plaintiff and Coastal Carolina Medical Center. Contained in this agreement are the following provisions:

13.4 This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of South Carolina. Any action or claim arising from, under or pursuant to this Agreement shall be brought in the courts, state or federal, within the State of South Carolina, and the parties expressly waive the right to bring any legal action or claims in any other courts.

13.5 Except as to the provisions contained in Articles VIII and IX, the exclusive jurisdiction of which shall rest with a court of competent jurisdiction in the state where the hospital is located, any controversy or claim arising out

Proposed Order.wpd

Exhibit A

R0331

of or related to this Agreement, or any breach thereof, shall be settled by arbitration in the County, in accordance with the rules and procedures of alternative dispute resolution established by the Alternative Dispute Resolution Service of the American Health Lawyers Association ("AHLA"), and judgment upon any award rendered may be entered in any court having jurisdiction thereof. Such arbitration shall be conducted before a single AHLA arbitrator selected jointly by the parties, or in the event the parties are unable to agree, designated by the AHLA.

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Under South Carolina law, an arbitration provision is unenforceable unless the contract states in capitalized, underlined typeface, on the first page of the contract that the agreement is subject to arbitration. S.C. Code Ann. §15-48-10. The parties stipulate that the arbitration provision in the Agreement at issue fails to comply with the South Carolina statute. They further agree that this provision is enforceable only if it falls under the Federal Arbitration Act, 9 U.S.C. §2. When a contract affects interstate commerce, the FAA preempts a state arbitration act's requirements. *Doctor's Assocs. V. Casarotto*, 517 U.S. 681, 683 S.Ct. 1652 (1996). South Carolina recognizes that the FAA preempts the notice requirements of the South Carolina Arbitration Act when interstate commerce is involved. *Thornton v. Trident Medical Center*, 357 S.C.91, 592 S.E.2d 50 (Ct. App. 2004).

In its brief, CCMC argues that *Thornton* mandates that the court grant it's motion. To ascertain whether a transaction involves commerce within the FAA, the court must examine the agreement, the complaint, and the surrounding facts. "In all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case." *Thornton, supra*, 592 S.E.2d at 52. I find *Thornton* to be distinguishable from the present case.

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Thornton involved a "recruiting agreement" in which the plaintiff agreed to relocate his medical practice as a surgeon from Michigan to Charleston, SC. The agreement expressly provided that Thornton was being recruited from out of state to an existing medical practice. The South Carolina Court of Appeals noted that an essential requirement for performance under the agreement was Thornton's relocation from Michigan to South Carolina within a fixed period of time. Thornton was a resident of Michigan when the contract was entered. *Thornton v. Trident Medical Center, supra*, 592 S.E.2d at 53. The Court further noted the contract was denominated as and was intended as a recruiting agreement to induce Thornton's move across state lines. "The express purpose of the recruiting agreement was to provide a monetary incentive to induce Thornton to relocate his professional medical services practice from Michigan to South Carolina." *Id.*

In distinguishing its decision from the United States Supreme Court's decision in *Bernhardt v. Polygraphic Co.*, 350 U.S.198, 76 S.Ct. 273, 100 L.Ed. 199, the Court of Appeals in *Thornton* stated:

Unlike the recruiting agreement in the case *sub judice*, the agreement in *Bernhardt* did not contemplate any actions affecting commerce outside of Vermont. Performance under the contract in *Bernhardt* was-by its terms-confined to a single state. 592 S.E.2d at 53.

It is this analysis that similarly distinguishes *Thornton* from the present case. The agreement in question is clearly and expressly denominated an employment agreement, not a recruiting agreement. Secondly, nowhere in the plaintiff's employment agreement is there any mention of inducement or financial reward depending upon out-of-state activity. At the

hearing, the parties stipulated that, unlike the plaintiff in *Thornton* who was a resident of another state, Plaintiff Phillip Flexon was a resident of Jasper County at the time he entered into this Employment Agreement. As an example, on page 9 of the Employment Agreement, it states that notice to the physician is to be given at his home address at 2712 Levy Road, Hardeeville, South Carolina. The contract in question calls for local medical services to be performed by a Hardeeville resident at a medical facility located in Hardeeville.

Additionally, unlike the Recruiting Agreement in *Thornton*, the Employment Agreement at issue contains, at paragraph 13.4, the following language:

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Any action or claim arising from, under or pursuant to this Agreement shall be brought in the courts, state or federal, within the State of South Carolina, and the parties expressly waive the right to bring any legal action or claims in any other courts. The parties hereby consent to venue in any state or federal court within the State of South Carolina, having jurisdiction over the county for all purposes in connection with any action or proceeding commenced between the parties hereto in connection with or arising from this Agreement. (emphasis added)

This case is more closely aligned with the facts of the recent case of *Arkansas Diagnostic Center, P.A., v. Tahiri*, 370 Ark. 157, 257 S.W.3d 884 (2007). The contract in question in *Tahiri* was an employment agreement to provide medical services similar to the contract at issue herein. Indeed, in specifically distinguishing the case of *Thornton v. Trident Medical Center, supra.*, the Arkansas Supreme Court stated as follows:

The [South Carolina] court observed that an essential requirement for the performance under the agreement was Thornton's relocation from Michigan to South Carolina within a fixed period of time. It then noted that the contract "was

denominated as and was intended as a recruiting agreement to induce Thornton's move across state lines. (592 S.E.2d at 53.) We note that, here, it is only an employment agreement at issue which obligates Dr. Tahiri to perform medical services, and not a recruiting agreement.
257 S.W.3d at 891.

Like Plaintiff Phillip Flexon, the defendant in *Tahiri* was a resident of the community where the medical clinic was located. In ruling that the F.A.A. was not applicable, the Arkansas Supreme Court ruled as follows:

#5
p.6
Most specific to the employment contract at issue is that A.D.C. was a *local* clinic which contracted with Dr. Tahiri to perform medical services to its *local* patients. Based upon these factors, we hold that Dr. Tahiri's employment agreement did not facilitate A.D.C.'s alleged interstate business activities and did not evidence a transaction involving commerce. ...(emphasis in original)

Were this Court to hold otherwise, it would equate to a finding that the F.A.A. is applicable to any contract containing an arbitration clause, as it could be argued that every contract involves some nexus to interstate commerce, *i.e.* use of interstate telephone lines or of interstate mail. We do not interpret the jurisprudence concerning the F.A.A. to include any and every contract.
257 S.W.3d at 892.

There is no language in the physician employment agreement at issue which mentions, conditions, requires, affects or involves interstate commerce. It is this critical fact which distinguishes this case from *Thornton*. Further, unlike *Thornton*, the parties to this employment agreement specifically agreed to litigate any dispute arising from, under or pursuant to this agreement in the courts of South Carolina. The employment agreement at

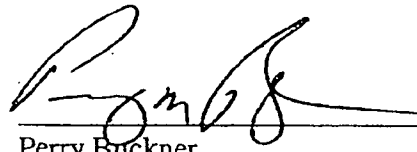
issue is between a Hardeeville resident and a Hardeeville medical center to provide specialized care to patients of Lowcountry South Carolina.

The party seeking to compel arbitration has the burden to prove that the contract at issue involves interstate commerce. *See, Arkansas Diagnostics Center, P.A., v. Tahiri, supra.*

On the record before this Court, Defendant fails to meet this burden.

Defendant's Motion to Stay and to Compel Arbitration is therefore **DENIED**.

AND IT IS SO ORDERED.



Perry Buckner
Presiding Judge, 14th Judicial Circuit

Walterboro, South Carolina

Dated: June 30, 2010

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER) FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-27-331

PHILLIP FLEXON, M.D.)

PLAINTIFF)

v.)

TRANSCRIPT OF RECORD

TENET HEALTHSYSTEMS, ET AL.)

DEFENDANTS.)

JUNE 9th, 2010
RIDGELAND, SOUTH CAROLINA

B E F O R E

THE HONORABLE PERRY M. BUCKNER, JUDGE.

A P P E A R A N C E S:

MS. DANA LANG, ESQUIRE

BUIST, MOORE, SMYTHE, MCGEE, P.A.

Attorney for Defendant, Coastal Carolina Medical Center

MR. WILLIAM B. HARVEY, III, ESQUIRE

Attorney for Plaintiff, Dr. Phillip Flexon

MS. TRUDY H. ROBERTSON, ESQUIRE

Attorney for the defendant, Life Point Hospitals, Inc.

Rebecca H. Hill
522 Dowling Avenue
Walterboro, SC 29488
Official Court Reporter

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EXHIBITS

NONE.

1 THE COURT: All right. I've had a chance now to review
2 this motion. This is 2009 at 331, Phillip Flexon v. Coastal
3 Carolina Medical Center, Inc. I'd ask that the parties
4 identify themselves and who they represent, beginning with
5 counsel for the plaintiff.

6 MR. HARVEY: Your Honor, Bill Harvey from Beaufort. I
7 represent Dr. Flexon.

8 THE COURT: Counsel for the defendant.

9 MS. LANG: Your Honor, Dana Lang, with Buist Moore in
10 Charleston. I'm representing Coastal Carolina Medical
11 Center, today.

12 MS. ROBERTSON: Your Honor, Trudy Robertson with Moore
13 and Van Allen in Charleston. We represent Life Point
14 Hospitals, Inc.

15 THE COURT: I see there's also Tenet, who was a party
16 at one time. Is Tenet represented by anyone?

17 MS. LANG: We're also counsel of record for Tenet.

18 THE COURT: So I have counsel for all the defendants
19 present?

20 MS. LANG: That's correct, Your Honor.

21 THE COURT: All right. Mr. Harvey, I understand that
22 you are the moving party; is that right?

23 MR. HARVEY: I am not, Your Honor.

24 THE COURT: Oh, I'm sorry. I assumed that you were.
25 Ms. Lang, you're the moving party?

1 MS. LANG: That's correct.

2 THE COURT: Happy to hear from you. You asked for
3 thirty minutes. Your fifteen begin now.

4 MS. LANG: Thank you, Your Honor. May it please the
5 Court.

6 THE COURT: Thank you for your patience.

7 MS. LANG: Just to give you a little bit of context,
8 this is essentially an employment contract dispute. Dr.
9 Flexon, the plaintiff, was a practicing Savannah ENT. He
10 was ---

11 THE COURT: ENT?

12 MS. LANG: Yes, sir. Ear, nose and throat. He signed
13 an employment contract to come to Hardeeville, South
14 Carolina, to work at Coastal Carolina Medical Center. The
15 employment agreement did have an arbitration provision in it
16 and the scope of that arbitration provision, with a couple
17 of very particular exceptions, was -- and I'm quoting from
18 it, "Any controversy or claims arising out of, or related to
19 this agreement, or any breach thereof, shall be settled by
20 arbitration."

21 Dr. Flexon resigned before his term was up and he
22 subsequently filed suit against us, and against Life Point,
23 for breach of contract, negligent misrepresentation, breach
24 of good faith, and he's also asked the Court for declaratory
25 judgment, under the contract.

1 We have also filed counter claims for breach of
2 contract against Dr. Flexon; but we're before the Court
3 today seeking to enforce the parties' arbitration agreement
4 and to stay these judicial proceedings until the arbitration
5 is complete.

6 The question before the Court is whether the Federal
7 Arbitration Act, in this instance, supplants South Carolina
8 Law, such as the notice provisions for arbitration, which
9 are a part of the South Carolina Arbitration Act, are pre-
10 empted.

11 The United States Supreme Court has said that "a
12 statute that conditions enforceability of arbitration
13 agreements ---

14 **THE COURT:** --- if it affects interstate commerce, the
15 Federal Act pre-empts. I'm aware of the case, Ms. Lang.
16 Now, tell me why it's circumstantial. You want to tell me
17 this is not a recruiting contract, as opposed to an
18 employment contract?

19 **MS. LANG:** Well, I think that it's important to note
20 that when we are determining whether arbitration, or rather,
21 a contract involves interstate commerce, we don't look
22 simply at the contract, we look at the contract, we look at
23 the Complaint, and the surrounding fact of the case; and
24 that is from Thornton, which a case I cited to you, and you
25 probably have a copy of, and also Towles v. United

1 Healthcare, which is another Court of Appeals case, that's
2 524 S.E. 2d, 839.

3 So when you're reviewing whether or not interstate
4 commerce is involved, we're going to look at all of those
5 things. For example, in the Towles case, that was a South
6 Carolina case. It was a doctor that joined United
7 Healthcare. The governing arbitration provision wasn't even
8 in a contract; it was actually in an employee handbook. The
9 doctor signed an acknowledgement of this employee handbook
10 that lacked the requisite notice provision of South
11 Carolina.

12 The Court ultimately determined that the agreement did,
13 in fact, involve interstate commerce, and in so determining,
14 the Court did not rely at all on the language that was
15 actually in the handbook, or in our case, in the contract;
16 instead, they looked at Dr. Towles's activity that were
17 requisite in performing his job. And those were things like
18 attending out of state conferences or participating in sales
19 presentations, reviewing claims from out of state insurance
20 providers, and that sort of thing.

21 I bring that up to you for illustration purposes to
22 kind of bring forth a point. South Carolina does not rely
23 solely on the language of a contract in order to determine
24 whether interstate commerce is involved. So let's look at

1 this particular case and what facts we have that support
2 interstate commerce.

3 Again, agreement, complaint, and facts. In the
4 complaint, Dr. Flexon alleges in Paragraph Eight, and I'll
5 quote, "In order to sign Exhibit One," which is the
6 employment agreement, he had to "discontinue, close, and
7 leave an established practice in Savannah, Georgia, where he
8 had privileges at surgical hospitals."

9 THE COURT: And came to Hardeeville?

10 MS. LANG: And came to Hardeeville.

11 THE COURT: All right.

12 MS. LANG: In Paragraph Thirteen of the Complaint,
13 Flexon alleges that Life Point "knew that plaintiff would
14 have to close and terminate an established practice in
15 Savannah in order to fulfill his obligations under the
16 employment contract." In his recitation of damages, which
17 begins in Paragraph Twenty-six of the Complaint, but
18 continues on, he repeatedly cites the time he spent for loss
19 of income-producing services to move his practice from
20 Savannah to Hardeeville.

21 Let's see, in his misrepresentation claim, which I
22 believe is against Life Point, he alleges that duties arose
23 to Life Point because of the "Nature of the pending
24 employment relationship and the appealable that such a
25 relationship would cause the plaintiff's then existing

1 practice of medicine," which we know from prior allegations
2 was in Savannah.

3 Further, when we look at the contract itself, the
4 notice that is to the employer in the employment contract,
5 which is actually in Brentwood, Tennessee, not in South
6 Carolina, and then we can also look at surrounding facts.

7 Obviously, there's an awful lot of facts in dispute,
8 but I would like to turn your attention to some of Dr.
9 Flexon's interrogatory answers through the limited discovery
10 that we have exchanged.

11 For example, in an answer to an interrogatory that we
12 filed, he said that many Savannah doctors stopped referring
13 patients to Dr. Flexon after a stop purchase agreement
14 occurred between our clients. I think the implication here
15 is that he was getting business across state lines, and was
16 relying on that business in order to have a successful
17 practice.

18 On Interrogatory Four, which was a particularized
19 statement of damages, he mentions that he lost six weeks of
20 his salary while he had to move his practice from Savannah
21 to Coastal, and then move it back again once he quit.

22 Interrogatory Nine, which was about availability of
23 equipment in the E.R., which is one of the complaints Dr.
24 Flexon had against my client. He said that availability of
25 equipment became so unreliable, the plaintiff, Dr. Flexon,

1 began taking his complicated cases to Memorial. I'm fairly
2 certain Memorial means Savannah Memorial Hospital. So,
3 while he was working for our client, he was sending his
4 complicated cases and performing those surgeries that were
5 being billed by our hospital, performing that surgery in
6 Savannah.

7 I think that we've shown that interstate commerce has
8 been effective. There's a strong ---

9 **THE COURT:** Ms. Lang, that's a new one for me. You can
10 perform surgery in Savannah and bill it from a hospital in
11 Hardeeville; is that what you're contending to me?

12 **MS. LANG:** That's the way I understand that it
13 happened, Your Honor.

14 **THE COURT:** I don't think I've ever seen that before.

15 **MS. LANG:** There's a strong presumption favoring
16 arbitration in both our state and our Federal Jurisprudent.
17 The intent of -- the intent of all of our efforts,
18 especially under the FAA, is to exercise the commerce clause
19 to its fullest. We don't have to show a substantial effect
20 on commerce, merely that it's within the flow of commerce,
21 in order for the FAA to apply.

22 **THE COURT:** All right. Is there anything else you want
23 to tell me?

24 **MS. LANG:** That's all right now, although I might have
25 some reply later.

1 **THE COURT:** Thank you very much. Mr. Harvey, happy to
2 hear from you.

3 **MR. HARVEY:** Your Honor, thank you. First of all, I
4 would point out that we have alleged as to defendant Life
5 Point, a fraud in the inducement claim which deals with the
6 fact that they induced Dr. Flexon to enter into this
7 agreement. Now, this is Life Point. This is not Ms. Lang's
8 client. A fraud in the inducement that they induced him to
9 come into -- to leave his practice in Savannah and come to
10 Beaufort in order to ---

11 **THE COURT:** Not Beaufort.

12 **MR. HARVEY:** I mean, Hardeeville.

13 **THE COURT:** Jasper County.

14 **MR. HARVEY:** In order to enter into this employment
15 relationship. So, the allegations that she's pointed to are
16 in relation to that.

17 Now, what we have here is Dr. Flexon, at all points in
18 time, was a resident of Hardeeville, Jasper County. He
19 lives in the Leevy area, over near the Pink Pig, on the way
20 to Savannah; right in the Leevy area. He's a Jasper County
21 resident. He's always been a Jasper County resident. His
22 contract was entered into in Jasper County. It has, the
23 contract itself, has no mention at all of any ---

24 **THE COURT:** Tell me why, Mr. Harvey, whether the
25 Federal Arbitration Act applies or the South Carolina

1 Arbitration Provisions apply; it's of such significance you
2 believe. I mean, it's Ms. Lang's motion to stay and to
3 compel arbitration as against her client, I assume. Tell me
4 -- you oppose it, obviously. Tell me why and why the
5 significance of the Federal versus the State Act.

6 MR. HARVEY: It does not fall under the State act
7 because of the notice provision.

8 THE COURT: So it fails under the State Act because of
9 notice.

10 MR. HARVEY: Fails totally under the State Act. So,
11 the only way that this survives, this arbitration provision
12 enforceable,

13 THE COURT: Is under the Federal Act.

14 MR. HARVEY: Is under the Federal Act.

15 THE COURT: And it would have to be interstate commerce
16 in order for the Federal Act to apply completely.

17 MR. HARVEY: Now, I took the Thornton case, which they
18 relied on in their Brief.

19 THE COURT: I'm familiar with the Thornton case.

20 MR. HARVEY: And I Shepardized it. And I found the
21 Arkansas case, which is cited in our brief, which is
22 absolutely dead on.

23 THE COURT: Ms. Lang, do you have a copy?

24 MS. LANG: I don't ---

1 THE COURT: If you don't, I'll give you the site so you
2 can write it down.

3 MR. HARVEY: It's in our Brief, Your Honor.

4 THE COURT: It's 257, Southwest 3rd, 884. It's a 2007
5 Supreme Court of Arkansas case. Arkansas Diagnostics Center
6 v. Tahiri, let me spell that for you, T-A-H-I-R-I, who's the
7 M.D. Dr. Abdullah Tahiri. Yes, sir?

8 MR. HARVEY: In the Arkansas Diagnostics Case, the tort
9 analyzed and distinguished the Thornton case, because the
10 very facts and circumstances that we have here. We have a
11 local doctor, a local hospital, it was an employment
12 agreement that had no mention at all of any interstate
13 activities.

14 THE COURT: As opposed to an inducement.

15 MR. HARVEY: As opposed to an inducement contract,
16 which was the case in the Thornton case, and in the other
17 case, they were inducement activities as well. Now, in this
18 case, in dealing with the employment agreement, it is a
19 local contract. It does not involve -- I mean it involved
20 employment of a Jasper County doctor to a Jasper County
21 hospital to render services to Jasper County residents. I
22 mean, in point of fact, that's what we're talking about.

23 In the Arkansas case, the Arkansas Supreme Court case
24 is dead on point. I would point out that in the Arkansas
25 Supreme Court case, the Arkansas Diagnostic case, it pointed

1 out that the United States Supreme Court, in the Bernhardt
2 v. Polygraphic case, said that the Federal Arbitration Act
3 in that case did not apply because it was based upon the
4 absence of any proof demonstrating that the plaintiff, while
5 performing duties under the employment contract, was working
6 in commerce with producing goods for commerce, or was
7 engaging in activities that affected commerce. That was an
8 employment agreement as well. This is an employment
9 agreement, and if you look at the contract itself, it fails
10 admittedly under the South Carolina Act, and the only way
11 that it survives is under the Federal Act. And we contend
12 that under the analysis of the Arkansas Diagnostic Case,
13 that the motion should be denied.

14 THE COURT: Thank you, sir. Ms. Lang, briefly in
15 reply?

16 MS. LANG: Well, first off, I don't think that there's
17 any reason that this Court needs to look to an Arkansas case
18 right now when we've got an awful lot of South Carolina law
19 that's directly on point. The Arkansas Court, though ---

20 THE COURT: Ms. Lang, it's interesting to me, if you
21 have a case for another jurisdiction that doesn't apply,
22 then I shouldn't look at it; if it hurts you, I shouldn't
23 look at it. If it helps you, I should look at it, regardless
24 of South Carolina law, but I understand.

25 MS. LANG: That's probably fair enough.

1 THE COURT: I understand that completely. I've been
2 there before.

3 MS. LANG: There are some distinguishing facts though.

4 THE COURT: I'm not bound by Arkansas law, but it could
5 be persuasive. Mr. Harvey knows that and you know that, Ms.
6 Lang. I don't ignore it.

7 MS. LANG: No, absolutely not, Your Honor. And I won't
8 ignore it either. In the Tahiri case, though, the doctor
9 that was within the employment agreement did not move his
10 practice across state lines. The Arkansas Diagnostics was
11 trying to predicate its interstate commerce solely on acts
12 of the hospital. I think that they ---

13 THE COURT: Do you agree with Mr. Harvey that the only
14 way arbitration survives here is if the Federal Arbitration
15 Act applies because of the notice provision in the South
16 Carolina Act?

17 MS. LANG: Yes, Your Honor.

18 THE COURT: All right. So the issue truly becomes then
19 -- both of you agree that the issue for the Court is whether
20 or not the Federal Arbitration Act applies, and that is
21 predicated on whether or not interstate commerce is
22 affected.

23 Mr. Harvey argues this is purely a Jasper County
24 resident entered into an agreement with a Jasper County
25 hospital for services at the Jasper County hospital. It is

1 true, however, that you tell me, although, I assume you've
2 taken -- have you had any discovery in this case?

3 MS. LANG: We've had some limited written discovery,
4 Your Honor.

5 THE COURT: It amazes me how when we get to motions
6 like this, because I have to treat it, if I go outside the
7 pleadings, it's a motion to stay and compel arbitration, but
8 you argue to me, and I have no way of knowing that he was a
9 staff privileged doctor in Savannah, and then came to
10 Hardeeville, and therefore, crossed state lines; although
11 his residency, according to Mr. Harvey, who is his lawyer,
12 never left South Carolina and Jasper County. Do you agree
13 with that as a fact?

14 MS. LANG: Well, Your Honor, in Dr. Flexon's Complaint,
15 the facts that I presented before the Court today are the
16 facts that Mr. Harvey has pled ---

17 THE COURT: Well, I understand that. That are pled in
18 the Complaint, which he says are part of a fraud and the
19 inducement against your co-defendant over here, Life Point
20 Hospitals. But, I'm asking you factually, regardless of
21 what's alleged in the Complaint. Factually, do you agree
22 for purposes of my hearing this motion, and I'll ask Mr.
23 Harvey, because he didn't mention this in his argument. You
24 agree that he was always a resident of South Carolina, but

1 he practiced in Georgia and came to South Carolina as a
2 result of this agreement; is that what you're ---

3 MR. HARVEY: That's correct, Your Honor. I concede
4 that.

5 MS. LANG: I'm not sure of what his residency was.

6 THE COURT: I'm asking her, too. I know you will. I'm
7 asking her. That's what your understanding of the facts
8 are?

9 MS. LANG: That's my understanding right now, and I
10 believe Mr. Harvey did say that he was always a Jasper
11 County resident. But residency itself is not ---

12 THE COURT: Oh, I agree that that's not necessarily
13 binding. I understand that. I don't want you to believe
14 that. I'm just asking so that I'll understand where we are.

15 MS. LANG: That's the way that I understand it.
16 Anyway, in the Tahiri case by the Arkansas Court, Dr. Tahiri
17 did not have to move his practice across state lines and I
18 think that's a really important point and a really important
19 distinction. It said, the diagnostic center predicated that
20 interstate argument on things that the hospital had done.
21 They had seen a couple of, I think, three out of state
22 claims in total. They bought like janitorial and medical
23 supplies across state lines and this sort of thing. The
24 Arkansas Court said you know, that's enough even for some
25 other courts. It's not going to be enough for us, but it is

1 enough, even those minor things that the diagnostic center
2 showed were enough to evidence interstate commerce. It was
3 not enough for this Court, but I would like to turn your
4 attention to footnote five.

5 THE COURT: All right. Hold on a second and let me get
6 there, please. You got a page?

7 MS. LANG: No, I don't, because of the way that it's
8 printed out, it does not.

9 MR. HARVEY: On the copy I gave to you, Judge, it would
10 be page 8, or at the top, page 9 of 11, I think.

11 THE COURT: I'm with you at footnote 5, Ms. Lang.

12 MS. LANG: All right. Essentially, the opinion is
13 stating that the circuit court got to the right result for
14 the wrong reason. It says, "The Circuit Court, in making
15 its decision, relied more on contemplation of the parties,
16 rather than whether the transaction itself involved
17 commerce." That's where we are. It's not about what the
18 contract says or doesn't say, though that's certainly
19 something that you will consider.

20 MS. ROBERTSON: Judge, if I may; I'm not presenting
21 argument. This is not our motion today, but we pled this as
22 an affirmative defense as well, that this matter should be
23 submitted to arbitration. I think it goes to arbitration
24 and it should. We support this motion. It goes as to all
25 parties. If I have to separately move, I can do that,

1 but ---

2 THE COURT: I think you ought to do that, because
3 obviously the plaintiff isn't on notice of that. I
4 understand that's your position, but all I can deal with is
5 this motion today. But I understand that. I think you need
6 to file your own motion. And I realize you pled it.

7 MS. ROBERTSON: Yes, sir.

8 THE COURT: But he wasn't prepared to argue, except as
9 against this motion today. It might be an identical
10 argument, but ---

11 MS. ROBERTSON: I think that likely it is. So I will
12 make it.

13 THE COURT: Ms. Lang, I want to thank you. It's
14 interesting. I run into this it seems like everywhere that
15 I'm in a border county like Jasper; you run into this every
16 now and then.

17 I'm going to ask you both to submit proposed Orders to
18 me. Please let's stay right on point on this. The issue is
19 whether or not the Federal Arbitration Act applies. No need
20 to go into anything else. I understand you want to argue
21 about -- Bill wants to distinguish the Thornton case, and he
22 wants me to --- and I'm taking the Arkansas case with me.
23 Obviously, I have Thornton. I'm very familiar with it. So
24 seven days from today. Submit them to me at P.O. Drawer
25 470. That's drawer 470, Walterboro, 29488. Copy opposing

1 counsel on your transmittal to the Court. Please include a
2 self-addressed, stamped envelope, with sufficient postage
3 affixed thereto for the return of your proposed Order. You
4 have seven days to submit it to me. You can e-mail it to me
5 to comply with the seven day requirement for your
6 convenience; however, you'll still need to mail to me the
7 envelope with sufficient postage affixed thereto, so that I
8 can return your proposed Order.

9 Any question about the proposed Order procedure from
10 counsel for the plaintiff?

11 MR. HARVEY: No, sir.

12 THE COURT: Any questions about the proposed Order
13 procedure from counsel for the moving party?

14 MS. LANG: No questions. I would like to hand up a
15 copy of the Towles case that I mentioned earlier.

16 THE COURT: This is my copy, right?

17 MS. LANG: Yes, Your Honor.

18 THE COURT: Let the record reflect I'm being handed
19 524, S.E. 2d, 839. I now have the Arkansas case, that I
20 previously put on the record, and that case, and I have
21 copies of both your Memorandums, and I'm looking forward to
22 receiving your proposed Orders. I want to thank you both
23 for your patience.

24 MR. HARVEY: Your Honor, the motion is to stay and
25 compel arbitration. I am concerned that if the Court were

1 to grant this, that we might - it might impact further
2 discovery in the case.

3 THE COURT: Well, in that case, while I have the motion
4 under advisement, because I have a little reading to do.
5 I'm assuming that you both agree there will be no discovery
6 in this case until I can rule.

7 MR. HARVEY: Well, I mean ---

8 THE COURT: That way, it isn't going to impact
9 anything, and nobody waives anything. I mean, I don't want
10 anything being delayed; you agree to that, Ms. Lang?

11 MS. LANG: I do.

12 THE COURT: You agree to that, counsel?

13 MS. ROBERTSON: I do, Your Honor.

14 THE COURT: You agree to that, bill?

15 MR. HARVEY: I do.

16 THE COURT: Until I can rule.

17 MR. HARVEY: But my concern is after you rule; if you
18 were to stay and compel arbitration. I had earlier filed
19 interrogatories and requests for production as to both
20 defendants, and actually filed a motion to compel
21 interrogatories.

22 THE COURT: Well, obviously, because I don't know how
23 I'm going to rule yet, I can't anticipate that. It's like
24 what if we have a hurricane this year, and I understand
25 that, Bill. I don't blame you for being concerned. I'm

1 assuming that you do not believe there is any discovery
2 available to you if the Federal Arbitration Act applies?

3 MR. HARVEY: I'm concerned about it. If we could have
4 an understanding with counsel that irrespective of your
5 ruling that discovery moves forward afterwards, then I'm
6 fine.

7 THE COURT: Are you willing to answer his discovery
8 regardless of my ruling; it's not directed to me. He's
9 asking this to you, but Bill, you're taking up time

10 MR. HARVEY: I apologize.

11 THE COURT: That's okay, Bill. You need to talk to
12 them because I can't make a ruling on that, other than if
13 they want to put it on the record.

14 He's asking if you're willing, of course, y'all would
15 also have the ability to serve him with discovery and he
16 would have to answer it as well, because what's good for the
17 goose is good for the gander. He didn't mention that, but
18 that would obviously be implied as well. Are you all
19 willing to make a decision on that?

20 MS. ROBERTSON: Your Honor, motions to compel were
21 filed previously by these two parties. They were withdrawn
22 and we entered into a consent protective order to get Bill,
23 Mr. Harvey, some documents. We did that with the stop
24 purchase agreement. It had confidentiality provisions in
25 it. He wants some additional documents now, having received

1 the stop purchase agreement that he did ask for in discovery
2 that we also asserted as subject to confidentiality.

3 THE COURT: But you got a protective Order?

4 MS. ROBERTSON: We have a protective Order, as to the
5 stop purchase agreement and others, but we do have some
6 issues.

7 THE COURT: I understand. The answer is subject to a
8 protective order, are you willing to at least complete
9 discovery both sides? He has to answer y'all's, regardless
10 of whether you go into arbitration or you remain in Court.

11 MS. ROBERTSON: He owes us discovery as well.

12 THE COURT: The answer is "yes" or "no". Not whether
13 he owes it to you.

14 MS. ROBERTSON: We have some issues with the school of
15 correspondence that he's requesting.

16 THE COURT: Is the answer "no", ma'am?

17 MS. ROBERTSON: The answer may be no. I told ---

18 THE COURT: Great God, lawyers can't give a straight
19 answer.

20 MS. ROBERTSON: It is a "no", right now, but ---

21 THE COURT: It's "yes" or "no". Is it "yes" or "no"?

22 MS. ROBERTSON: No.

23 THE COURT: All right. Bill, that's the answer to your
24 question, you'll have to wait on me to rule.

25 MR. HARVEY: Thank you.

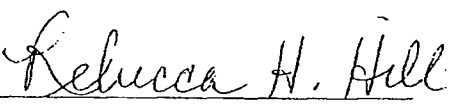
STATE OF SOUTH CAROLINA)
COUNTY OF COLLETON)

CERTIFICATE

I, REBECCA H. HILL, Official Court Reporter for the Judicial Department of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had in the hearing of the captioned case, in the Court of Common Pleas for Jasper County, South Carolina, on the 9th day of June 2010.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

August 18, 2010


Rebecca H. Hill,
Official Court Reporter

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF JASPER

3 PHILLIP FLEXON, MD,

4 Plaintiff,

5 vs. CASE NO. 2009-CP-27-331

6 PHC-JASPER, INC. D/B/A COASTAL

CAROLINA MEDICAL CENTER,

7 COASTAL CAROLINA MEDICAL CENTER,

INC., LIFEPOINT HOSPITALS, INC.,

8 and TENET HEALTHSYSTEMS,

9 Defendants.

10

11 DEPOSITION OF: PHILLIP FLEXON, MD

12 DATE: April 30, 2013

13 TIME: 10:04 AM

14

15 LOCATION: Law Offices of Harvey & Battey, PA

1001 Craven Street

Beaufort, SC

16

17 TAKEN BY: Counsel for the Defendants

18 REPORTED BY: KELLY A. BALL, Court Reporter

19

20 A. WILLIAM ROBERTS, JR., & ASSOCIATES

Fast, Accurate & Friendly

21 Charleston, SC Hilton Head, SC Myrtle Beach, SC

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23 Columbia, SC Greenville, SC Charlotte, NC

(803) 731-5224 (864) 234-7030 (704) 573-3919

24

25

1 of the risks of the contract?

2 A. He probably did. I -- I'm not sure
3 specifically of what --

4 Q. Okay.

5 A. -- what we talked about in terms of the
6 risk.

7 Q. I'm going to get to that more
8 specifically in a minute, so I'm going to invite
9 your -- and I'll even direct your attention to the
10 paragraph I have referenced to, but did you think
11 in -- when you were negotiating the contract in
12 2008 -- that's not clear. Let me start that over.

13 Did you think that the Hardeeville
14 Hospital, CCMC, in 2008 would have enough
15 population to support an ENT? And this is what
16 you're envisioning, to be more clear, what you're
17 envisioning when you're negotiating the contract in
18 late 2006, you're looking forward to 2008 in your
19 mind?

20 A. Uh-huh. I'm sorry, ask the question
21 again now.

22 Q. I note in the 6th paragraph you talk
23 about the population that's going to be coming to
24 Jasper County?

25 A. Correct.

1 Q. And you quote Jim Ramsey and you say he
2 feels like 2009, 2010 is the year that Jasper
3 County will fully support an otolaryngologist.

4 A. That -- that -- that -- that paragraph
5 is correct. And I don't know what the population
6 of Jasper County is. The part that's not here
7 though, and I think you can see from -- if you look
8 at the -- the pro formas I give to -- to -- to Eric
9 Deaton --

10 Q. Uh-huh.

11 A. -- and actually to some extent it
12 surprised me how -- that -- I mean, it was -- it
13 was pretty good, but I already had the -- I had a
14 substantial group of patients from Beaufort County
15 and from Savannah --

16 Q. Uh-huh.

17 A. -- that would come to that office if it
18 were managed well. So while I wanted to -- to be
19 part of the growth of Jasper County, I -- one of
20 the -- the tricks of being successful there was
21 just simply keep my established practice.

22 Q. Uh-huh.

23 A. And that should have been easy.

24 Q. So you were going to import --

25 A. I brought them a really mature great

1 practice. I handed it to them.

2 Q. Okay. And in this later here that
3 you've written, this e-mail letter, you've written
4 two ways to mitigate your risk. Could you read
5 those into the record for us. And that's the last
6 paragraph on the first page.

7 A. The last -- about my thoughts and
8 concerns -- oh, you're saying the second to last
9 one?

10 Q. I'm -- after talking with Jim Ramsey --
11 MR. HARVEY: On the first page.

12 BY MR. MYRICK:

13 Q. -- he suggested --

14 A. Oh, I'm sorry.

15 Q. After talking -- I'm -- middle of the
16 last paragraph. After talking --

17 A. Okay. And continue in the area or
18 leave the community. Cannot support or modify the
19 recruiting agreement to --

20 Q. I don't think she can get that and it
21 won't --

22 A. Okay. All right.

23 Q. -- be --

24 A. All right. Yeah.

25 Q. Can you start with the sentence

1 Q. But could you? Do you have them?

2 A. No, I -- I couldn't -- I don't think I
3 could give you specific names now.

4 Q. Okay.

5 A. And the -- and the one -- and as far as
6 the -- the -- the deductible goes, that -- that
7 issue, one patient clear remember (sic) like a --
8 like night -- like it was yesterday. And the other
9 two were -- were -- just sent letters that I
10 referred on. I couldn't pull their names. I had
11 three maybe four people who actually brought that
12 issue up and actually saw it.

13 Q. Uh-huh.

14 A. And had a -- you know, in the same
15 calendar fiscal year had a -- another medical
16 problem and found that their payment was not
17 applied to their deductible and they were forced to
18 pay it again.

19 Q. Were they reimbursed?

20 A. I don't know.

21 Q. Okay. So about four on the deductible
22 issue and others who you --

23 A. Chose to --

24 Q. -- can't give me names but --

25 A. -- chose to go elsewhere.

1 Q. -- wouldn't come to you because you
2 were at Tenet?

3 A. Uh-huh. Well, they didn't want to have
4 surgery done at -- at -- at -- at that hospital.

5 Q. Okay. Do you have any documents or
6 letters to that affect?

7 A. No.

8 Q. Okay. I'm going to ask you some
9 questions about your work day. What -- what were
10 your office hours at --

11 A. I don't recall.

12 Q. How many hours a day did you work when
13 you were in Hardeeville?

14 A. Oh, I don't know if I could put an
15 exact number on that. Remember I was -- and also
16 at Eric Deaton's, you know, suggestion and
17 insistence, I was at -- on the hospital staff at
18 Memorial. So I often had to make rounds at two
19 hospitals, take call at two hospitals.

20 Q. All right. But no estimate as to your
21 office hours in Hardeeville?

22 A. No. I think that, you know, basically
23 we would -- we probably started at 9:00 and -- and
24 then would finish when we finished, you know.
25 But...

1 Q. Was -- was it a 40-hour week or half of
2 a 40-hour week or a 60-hour week?

3 A. Oh, as far as in the office or just --

4 Q. Uh-huh.

5 A. Well, I -- I don't know how much time
6 was in the office. It was much more than a 40-hour
7 week. Of course, I want to spend time in the
8 operating room.

9 Q. Uh-huh.

10 A. I'm a surgical specialist.

11 Q. Uh-huh.

12 A. The more I'm in the -- in the operating
13 room, the better --

14 Q. Uh-huh.

15 A. -- for everybody.

16 Q. Right. Right.

17 A. So that's where -- so I can't break
18 that down. But usually I -- I would have two days
19 of surgery and three days in the office or two and
20 a half days surgery, three days in the office.

21 And --

22 Q. Do you remember which two days were
23 devoted to surgery or --

24 A. I don't.

25 Q. -- usually?

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

Philip Flexon, M.D.,

Plaintiff,

vs.

PHC-Jasper, Inc., d/b/a/ Coastal Carolina Medical
Center, Coastal Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc. and
Tenet Healthsystems,

Defendants.

) IN THE COURT OF COMMON PLEAS

) CIVIL CASE NO.: 2009-CP-27-0331

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DEFENDANT

LIFEPOINT HOSPITALS, INC.'S

**NOTICE OF MOTION AND MOTION TO
ALTER OR AMEND JUDGMENT**

YOU WILL PLEASE TAKE NOTICE that pursuant to Rules 52 and 59(e) of the South Carolina Rules of Civil Procedure, the Defendant, Lifepoint Hospitals, Inc. ("Lifepoint"), by and through its undersigned counsel, hereby moves this Court to Alter and Amend the Order of the Honorable Brooks. P. Goldsmith, Jr., received by Lifepoint on September 24, 2013 (the "Order") with respect to certain findings and rulings related to (1) Lifepoint's preservation of its right to independently seek to enforce the arbitration provision contained in the subject employment agreement and present its own motion to compel arbitration to this Court; (2) any litigation by Lifepoint and/or any opportunity to litigate any of the facts and arbitration issues presented to this Court at Defendant, PHC-Jasper, Inc., d/b/a/ Coastal Carolina Medical Center's ("CCMC") June 9, 2010, arbitration motion hearing before Judge Perry Buckner, or subsequently on CCMC's appeal; and (3) this Court's application of the 'commerce in fact' test to facts presented by Lifepoint at the September 9, 2013, arbitration motion hearing (the "Hearing").¹

¹ Lifepoint reserves these and all other issues for appeal purposes should appeal be pursued.

I. Preservation of Right to Independently Seek Arbitration

Lifepoint has never waived and has continuously preserved its right to independently seek arbitration in this matter. The Plaintiff has entered into four (4) Consent Scheduling Orders² (the "Consent Orders") which specifically address the ability of Lifepoint to file its own motion to compel arbitration and conduct discovery without waiver or prejudice. In addition, counsel for the Plaintiff specifically stated during the Hearing that he was not claiming or arguing that Lifepoint had waived any of these rights.

However, there are a number of findings throughout the Order which insinuate that Lifepoint failed to preserve its right to independently seek arbitration and conduct discovery without waiver or prejudice:

- "Nowhere in any of these discovery requests, or in any correspondence or email communication before the court was there any mention that these requests were in any way limited because of the affirmative defenses alleged by all defendants that this action was subject to mandatory arbitration." (Page 2 of the Order)
- "Defendant Lifepoint responded to Plaintiff's initial discovery requests on October 30, 2009, and on November 13, 2009, without any reservation or limitation." (Page 2 and 3 of the Order)
- "On October 21, 2009, CCMC filed a Motion to Compel Arbitration . . . prior to the hearing on this Motion to Compel Arbitration, neither counsel made any attempt to take the deposition of the Plaintiff" (Page 3 of the Order)
- "As with the motion by CCMC . . . the motion and supporting memorandum by Lifepoint did not mention the need or attempt to depose the Plaintiff as a condition to a ruling thereon." (Page 4 of the Order)

² The four Consent Orders are dated June 16, 2010, September 18, 2012, February 1, 2013, and July 2, 2013, and state: "The parties and this Court recognize that one of the Defendants may move to compel arbitration, and that this consent order in no way constitutes a waiver of Defendant's asserted right to compel arbitration. The parties agree that the conduct of written discovery or depositions will not be evidence of a waiver of Defendant's asserted right to arbitration. The Plaintiff also agrees that engaging in discovery pursuant to this order does not constitute prejudice or undue burden." The June 16, 2010 Consent Scheduling Order initially says "the parties and this Court recognize that the Defendant has moved to compel arbitration" rather than "the parties and this Court recognize that one of the Defendants may move to compel arbitration" as provided in the other three Consent Orders.

- “Further, if the Defendants believe that the Plaintiff’s deposition was necessary for a full review of this issue, they could have sought to present that contention to the lower and appellate courts when this issue was before them. Defendants could have taken a limited deposition of Plaintiff prior to the earlier rulings without invoking any issue of waiver or prejudice.” (Page 8 of the Order)

It is clear from the Consent Orders that Lifepoint has never waived and has continuously preserved its right to independently seek arbitration and conduct discovery in this matter. This Court ruled at the Hearing that Lifepoint was not bound by any of the prior findings and ruling against CCMC with respect to Lifepoint’s right to independently seek to enforce the arbitration provision contained in the Agreement and present facts which could demonstrate that the Agreement and surrounding circumstances affected or involved interstate commerce. As such, we request that the above-referenced bullet point statements contained in the Order either be struck from the Order or amended to reflect the facts presented to this Court and findings of this Court at the Hearing concerning Lifepoint’s arbitration motion.

II. No Previous Litigation or Opportunity to Litigate Right to Arbitration

Lifepoint did not present any argument or have the opportunity to litigate any of the facts and arbitration issues presented to this Court at CCMC’s June 9, 2010, arbitration motion hearing before Judge Buckner, or subsequently on CCMC’s appeal. On October 21, 2009, CCMC filed its own independent motion to compel arbitration and stay. On June 9, 2010, CCMC’s motion came before Judge Perry Buckner for a hearing. Lifepoint was expressly instructed by Judge Buckner to file its own motion if Lifepoint wanted to pursue enforcing the arbitration provision in the employment agreement against the Plaintiff. The record also clearly reflects that Lifepoint was not a party to CCMC’s appeal and this fact was also acknowledged by the Plaintiff in his appellate filings.

Subsequent to the June 9, 2010, hearing, Lifepoint did file its own motion to compel arbitration and to stay this matter pending arbitration on June 17, 2010. However, Lifepoint

withdrew its motion without prejudice and subject to its discovery and motion rights in the Consent Orders. Thereafter on May 31, 2013, Lifepoint renewed its motion for arbitration which was substantially different from its June 17, 2010, motion. The Order incorrectly includes references to language contained in Lifepoint's June 17, 2010, motion, which was withdrawn, and was not part of Lifepoint's May 31, 2013 motion or the factual record. Specifically, Lifepoint's May 31, 2013, arbitration motion did not "adopt by reference as if fully set forth herein, the Motion to Stay and for Order Compelling Arbitration and accompanying memorandum in support filed on October 23, 2009, by co-Defendant Coastal Carolina Medical Center, Inc." (Page 4 of the Order)

In addition, there are a number of findings throughout the Order which indicate that Lifepoint has previously presented argument and/or had the opportunity to litigate the merits of its right to enforce the arbitration provision contained in the employment agreement:

- "As with the motion by CCMC, and the arguments by both counsel at the hearing before Judge Buckner, the motion . . ." (Page 4 of the Order)
- "There is no mention that the Defendants' motions, or the court's consideration, was in any way hampered or impacted by the failure or inability to take the deposition of the Plaintiff." (Page 5 of the Order)
- "Although the Motion to Compel Arbitration was filed, argued, and appealed by CCMC, as acknowledged by counsel for Lifepoint' the issues and argument are identical for Lifepoint." (Page 6 of the Order)
- "That they did not then cannot now be grounds for reargument of issues about which the parties spent two years litigating in the Court of Appeals." (Page 8 of the Order)

The record is clear that Lifepoint did not present any argument or have the opportunity to litigate any of the facts and arbitration issues presented to this Court at CCMC's June 9, 2010, arbitration motion hearing before Judge Buckner, or subsequently on CCMC's appeal. The record is also clear that Lifepoint's arbitration motion and argument at the Hearing was not

identical to the motion and argument of CCMC to this Court on June 9, 2010. As such, we request that the above-referenced statements contained in the Order either be struck from the Order or amended to reflect the factual record.

III. Application of the 'Commerce in Fact' Test

The Order fails to rule on the application of the 'commerce in fact' test to the facts presented by Lifepoint at the Hearing to determine whether or not the employment transaction with the Plaintiff involved and affected interstate commerce.

To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110, (2001). The South Carolina Supreme Court utilizes a 'commerce in fact' test to determine if the transaction involves interstate commerce for the FAA to apply. In other words, the transaction must turn out, in fact, to have involved interstate commerce. Id. at 115.

It was the contention of Lifepoint that the terms of the employment agreement and the surrounding facts evidence that the employment transaction with the Plaintiff involved and affected interstate commerce. However, this Court ruled at the Hearing that after examining the employment agreement, the complaint, and the surrounding facts now presented by Lifepoint, that the facts presented by Lifepoint now are not substantially different from the facts presented by CCMC and the Plaintiff to this Court at the June 9, 2010, hearing. As a result, the factual record now before this Court still does not establish that the Plaintiff's performance of his employment agreement involved or affected interstate commerce.

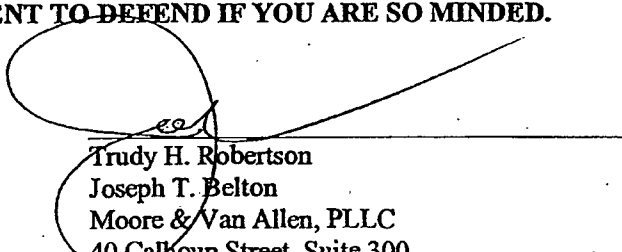
Conversely, the ruling in the Order only compares the facts presented by Lifepoint now to the facts presented by CCMC previously:

- "I find that the facts and testimony from the Plaintiff's deposition argued by the Defendants herein are not substantially different than those before the court in the prior rulings." (Page 7 and 8 of the Order)
- "The surrounding facts are not substantially different now than they were before the earlier courts." (Page 8 of the Order)

The Order, unlike the ruling at the Hearing, fails to make a ruling that the factual record now before this Court still does not establish that the Plaintiff's performance of his employment agreement involved or affected interstate commerce.

This motion will be based on the entire record in the within matter and any Memorandum of Law which may hereafter be filed.

PLEASE BE PRESENT TO DEFEND IF YOU ARE SO MINDED.



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Facsimile (843) 579-7099

Attorneys for Defendant Lifepoint Hospitals, Inc.

October 1, 2013

Charleston, SC

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF JASPER)

C.A. NO.: 2009-CP-27-331

Philip Flexon, M.D.,)

Plaintiff,)

vs.)

PHC-Jasper, Inc., d/b/a Coastal
Carolina Medical Center, Coastal
Carolina Medical Center, Inc.,
Lifepoint Hospitals, Inc., and Tenet
Healthsystems, Inc.,)

Defendants.)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of *Defendant Lifepoint Hospitals, Inc.'s Notice of Motion and Motion to Alter or Amend Judgment* was served upon the following by U.S. Mail:

James D. Myrick
Dana W. Lang
Womble Carlyle Sandridge & Rice LLP
5 Exchange Street
Charleston, SC 29402

William B. Harvey, III
Harvey & Battey P.A.
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The Honorable Brooks P. Goldsmith
P O Box 2227
104 N. Main St.
Lancaster, SC 29721

Beaufort County Clerk of Court
Attention: The Honorable Brooks P. Goldsmith
102 Ribaut Rd #208
Beaufort, SC 29902

A copy with also to be emailed to The Honorable Brooks P. Goldsmith at
bgoldsmithj@sccourts.org

Heather Morin
Heather Morin

CHARLESTON, SC

October 2, 2013

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER) FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-27-331

PHILLIP FLEXON, M.D.)

PLAINTIFF)

v.)

TRANSCRIPT OF RECORD

TENET HEALTHSYSTEMS, ET AL.)

DEFENDANTS.)

JUNE 9th, 2010
RIDGELAND, SOUTH CAROLINA

B E F O R E

THE HONORABLE PERRY M. BUCKNER, JUDGE.

A P P E A R A N C E S:

MS. DANA LANG, ESQUIRE

BUIST, MOORE, SMYTHE, MCGEE, P.A.

Attorney for Defendant, Coastal Carolina Medical Center

MR. WILLIAM B. HARVEY, III, ESQUIRE

Attorney for Plaintiff, Dr. Phillip Flexon

MS. TRUDY H. ROBERTSON, ESQUIRE

Attorney for the defendant, Life Point Hospitals, Inc.

Rebecca H. Hill
522 Dowling Avenue
Walterboro, SC 29488
Official Court Reporter

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EXHIBITS

NONE.

1 **THE COURT:** All right. I've had a chance now to review
2 this motion. This is 2009 at 331, Phillip Flexon v. Coastal
3 Carolina Medical Center, Inc. I'd ask that the parties
4 identify themselves and who they represent, beginning with
5 counsel for the plaintiff.

6 **MR. HARVEY:** Your Honor, Bill Harvey from Beaufort. I
7 represent Dr. Flexon.

8 **THE COURT:** Counsel for the defendant.

9 **MS. LANG:** Your Honor, Dana Lang, with Buist Moore in
10 Charleston. I'm representing Coastal Carolina Medical
11 Center, today.

12 **MS. ROBERTSON:** Your Honor, Trudy Robertson with Moore
13 and Van Allen in Charleston. We represent Life Point
14 Hospitals, Inc.

15 **THE COURT:** I see there's also Tenet, who was a party
16 at one time. Is Tenet represented by anyone?

17 **MS. LANG:** We're also counsel of record for Tenet.

18 **THE COURT:** So I have counsel for all the defendants
19 present?

20 **MS. LANG:** That's correct, Your Honor.

21 **THE COURT:** All right. Mr. Harvey, I understand that
22 you are the moving party; is that right?

23 **MR. HARVEY:** I am not, Your Honor.

24 **THE COURT:** Oh, I'm sorry. I assumed that you were.
25 Ms. Lang, you're the moving party?

1 MS. LANG: That's correct.

2 THE COURT: Happy to hear from you. You asked for
3 thirty minutes. Your fifteen begin now.

4 MS. LANG: Thank you, Your Honor. May it please the
5 Court.

6 THE COURT: Thank you for your patience.

7 MS. LANG: Just to give you a little bit of context,
8 this is essentially an employment contract dispute. Dr.
9 Flexon, the plaintiff, was a practicing Savannah ENT. He
10 was ---

11 THE COURT: ENT?

12 MS. LANG: Yes, sir. Ear, nose and throat. He signed
13 an employment contract to come to Hardeeville, South
14 Carolina, to work at Coastal Carolina Medical Center. The
15 employment agreement did have an arbitration provision in it
16 and the scope of that arbitration provision, with a couple
17 of very particular exceptions, was -- and I'm quoting from
18 it, "Any controversy or claims arising out of, or related to
19 this agreement, or any breach thereof, shall be settled by
20 arbitration."

21 Dr. Flexon resigned before his term was up and he
22 subsequently filed suit against us, and against Life Point,
23 for breach of contract, negligent misrepresentation, breach
24 of good faith, and he's also asked the Court for declaratory
25 judgment, under the contract.

1 We have also filed counter claims for breach of
2 contract against Dr. Flexon; but we're before the Court
3 today seeking to enforce the parties' arbitration agreement
4 and to stay these judicial proceedings until the arbitration
5 is complete.

6 The question before the Court is whether the Federal
7 Arbitration Act, in this instance, supplants South Carolina
8 Law, such as the notice provisions for arbitration, which
9 are a part of the South Carolina Arbitration Act, are pre-
10 empted.

11 The United States Supreme Court has said that "a
12 statute that conditions enforceability of arbitration
13 agreements ---

14 **THE COURT:** --- if it affects interstate commerce, the
15 Federal Act pre-empts. I'm aware of the case, Ms. Lang.
16 Now, tell me why it's circumstantial. You want to tell me
17 this is not a recruiting contract, as opposed to an
18 employment contract?

19 **MS. LANG:** Well, I think that it's important to note
20 that when we are determining whether arbitration, or rather,
21 a contract involves interstate commerce, we don't look
22 simply at the contract, we look at the contract, we look at
23 the Complaint, and the surrounding fact of the case; and
24 that is from Thornton, which a case I cited to you, and you
25 probably have a copy of, and also Towles v. United

1 Healthcare, which is another Court of Appeals case, that's
2 524 S.E. 2d, 839.

3 So when you're reviewing whether or not interstate
4 commerce is involved, we're going to look at all of those
5 things. For example, in the Towles case, that was a South
6 Carolina case. It was a doctor that joined United
7 Healthcare. The governing arbitration provision wasn't even
8 in a contract; it was actually in an employee handbook. The
9 doctor signed an acknowledgement of this employee handbook
10 that lacked the requisite notice provision of South
11 Carolina.

12 The Court ultimately determined that the agreement did,
13 in fact, involve interstate commerce, and in so determining,
14 the Court did not rely at all on the language that was
15 actually in the handbook, or in our case, in the contract;
16 instead, they looked at Dr. Towles's activity that were
17 requisite in performing his job. And those were things like
18 attending out of state conferences or participating in sales
19 presentations, reviewing claims from out of state insurance
20 providers, and that sort of thing.

21 I bring that up to you for illustration purposes to
22 kind of bring forth a point. South Carolina does not rely
23 solely on the language of a contract in order to determine
24 whether interstate commerce is involved. So let's look at

1 this particular case and what facts we have that support
2 interstate commerce.

3 Again, agreement, complaint, and facts. In the
4 complaint, Dr. Flexon alleges in Paragraph Eight, and I'll
5 quote, "In order to sign Exhibit One,' which is the
6 employment agreement, he had to "discontinue, close, and
7 leave an established practice in Savannah, Georgia, where he
8 had privileges at surgical hospitals."

9 THE COURT: And came to Hardeeville?

10 MS. LANG: And came to Hardeeville.

11 THE COURT: All right.

12 MS. LANG: In Paragraph Thirteen of the Complaint,
13 Flexon alleges that Life Point "knew that plaintiff would
14 have to close and terminate an established practice in
15 Savannah in order to fulfill his obligations under the
16 employment contract." In his recitation of damages, which
17 begins in Paragraph Twenty-six of the Complaint, but
18 continues on, he repeatedly cites the time he spent for loss
19 of income-producing services to move his practice from
20 Savannah to Hardeeville.

21 Let's see, in his misrepresentation claim, which I
22 believe is against Life Point, he alleges that duties arose
23 to Life Point because of the "Nature of the pending
24 employment relationship and the appealable that such a
25 relationship would cause the plaintiff's then existing

1 practice of medicine," which we know from prior allegations
2 was in Savannah.

3 Further, when we look at the contract itself, the
4 notice that is to the employer in the employment contract,
5 which is actually in Brentwood, Tennessee, not in South
6 Carolina, and then we can also look at surrounding facts.

7 Obviously, there's an awful lot of facts in dispute,
8 but I would like to turn your attention to some of Dr.
9 Flexon's interrogatory answers through the limited discovery
10 that we have exchanged.

11 For example, in an answer to an interrogatory that we
12 filed, he said that many Savannah doctors stopped referring
13 patients to Dr. Flexon after a stop purchase agreement
14 occurred between our clients. I think the implication here
15 is that he was getting business across state lines, and was
16 relying on that business in order to have a successful
17 practice.

18 On Interrogatory Four, which was a particularized
19 statement of damages, he mentions that he lost six weeks of
20 his salary while he had to move his practice from Savannah
21 to Coastal, and then move it back again once he quit.

22 Interrogatory Nine, which was about availability of
23 equipment in the E.R., which is one of the complaints Dr.
24 Flexon had against my client. He said that availability of
25 equipment became so unreliable, the plaintiff, Dr. Flexon,

1 began taking his complicated cases to Memorial. I'm fairly
2 certain Memorial means Savannah Memorial Hospital. So,
3 while he was working for our client, he was sending his
4 complicated cases and performing those surgeries that were
5 being billed by our hospital, performing that surgery in
6 Savannah.

7 I think that we've shown that interstate commerce has
8 been effective. There's a strong ---

9 THE COURT: Ms. Lang, that's a new one for me. You can
10 perform surgery in Savannah and bill it from a hospital in
11 Hardeeville; is that what you're contending to me?

12 MS. LANG: That's the way I understand that it
13 happened, Your Honor.

14 THE COURT: I don't think I've ever seen that before.

15 MS. LANG: There's a strong presumption favoring
16 arbitration in both our state and our Federal Jurisprudent.
17 The intent of -- the intent of all of our efforts,
18 especially under the FAA, is to exercise the commerce clause
19 to its fullest. We don't have to show a substantial effect
20 on commerce, merely that it's within the flow of commerce,
21 in order for the FAA to apply.

22 THE COURT: All right. Is there anything else you want
23 to tell me?

24 MS. LANG: That's all right now, although I might have
25 some reply later.

1 **THE COURT:** Thank you very much. Mr. Harvey, happy to
2 hear from you.

3 **MR. HARVEY:** Your Honor, thank you. First of all, I
4 would point out that we have alleged as to defendant Life
5 Point, a fraud in the inducement claim which deals with the
6 fact that they induced Dr. Flexon to enter into this
7 agreement. Now, this is Life Point. This is not Ms. Lang's
8 client. A fraud in the inducement that they induced him to
9 come into -- to leave his practice in Savannah and come to
10 Beaufort in order to ---

11 **THE COURT:** Not Beaufort.

12 **MR. HARVEY:** I mean, Hardeeville.

13 **THE COURT:** Jasper County.

14 **MR. HARVEY:** In order to enter into this employment
15 relationship. So, the allegations that she's pointed to are
16 in relation to that.

17 Now, what we have here is Dr. Flexon, at all points in
18 time, was a resident of Hardeeville, Jasper County. He
19 lives in the Leevy area, over near the Pink Pig, on the way
20 to Savannah; right in the Leevy area. He's a Jasper County
21 resident. He's always been a Jasper County resident. His
22 contract was entered into in Jasper County. It has, the
23 contract itself, has no mention at all of any ---

24 **THE COURT:** Tell me why, Mr. Harvey, whether the
25 Federal Arbitration Act applies or the South Carolina

1 Arbitration Provisions apply; it's of such significance you
2 believe. I mean, it's Ms. Lang's motion to stay and to
3 compel arbitration as against her client, I assume. Tell me
4 -- you oppose it, obviously. Tell me why and why the
5 significance of the Federal versus the State Act.

6 MR. HARVEY: It does not fall under the State act
7 because of the notice provision.

8 THE COURT: So it fails under the State Act because of
9 notice.

10 MR. HARVEY: Fails totally under the State Act. So,
11 the only way that this survives, this arbitration provision
12 enforceable,

13 THE COURT: Is under the Federal Act.

14 MR. HARVEY: Is under the Federal Act.

15 THE COURT: And it would have to be interstate commerce
16 in order for the Federal Act to apply completely.

17 MR. HARVEY: Now, I took the Thornton case, which they
18 relied on in their Brief.

19 THE COURT: I'm familiar with the Thornton case.

20 MR. HARVEY: And I Shepardized it. And I found the
21 Arkansas case, which is cited in our brief, which is
22 absolutely dead on.

23 THE COURT: Ms. Lang, do you have a copy?

24 MS. LANG: I don't ---

1 THE COURT: If you don't, I'll give you the site so you
2 can write it down.

3 MR. HARVEY: It's in our Brief, Your Honor.

4 THE COURT: It's 257, Southwest 3rd, 884. It's a 2007
5 Supreme Court of Arkansas case. Arkansas Diagnostics Center
6 v. Tahiri, let me spell that for you, T-A-H-I-R-I, who's the
7 M.D. Dr. Abdullah Tahiri. Yes, sir?

8 MR. HARVEY: In the Arkansas Diagnostics Case, the tort
9 analyzed and distinguished the Thornton case, because the
10 very facts and circumstances that we have here. We have a
11 local doctor, a local hospital, it was an employment
12 agreement that had no mention at all of any interstate
13 activities.

14 THE COURT: As opposed to an inducement.

15 MR. HARVEY: As opposed to an inducement contract,
16 which was the case in the Thornton case, and in the other
17 case, they were inducement activities as well. Now, in this
18 case, in dealing with the employment agreement, it is a
19 local contract. It does not involve -- I mean it involved
20 employment of a Jasper County doctor to a Jasper County
21 hospital to render services to Jasper County residents. I
22 mean, in point of fact, that's what we're talking about.

23 In the Arkansas case, the Arkansas Supreme Court case
24 is dead on point. I would point out that in the Arkansas
25 Supreme Court case, the Arkansas Diagnostic case, it pointed

1 out that the United States Supreme Court, in the Bernhardt
2 v. Polygraphic case, said that the Federal Arbitration Act
3 in that case did not apply because it was based upon the
4 absence of any proof demonstrating that the plaintiff, while
5 performing duties under the employment contract, was working
6 in commerce with producing goods for commerce, or was
7 engaging in activities that affected commerce. That was an
8 employment agreement as well. This is an employment
9 agreement, and if you look at the contract itself, it fails
10 admittedly under the South Carolina Act, and the only way
11 that it survives is under the Federal Act. And we contend
12 that under the analysis of the Arkansas Diagnostic Case,
13 that the motion should be denied.

14 THE COURT: Thank you, sir. Ms. Lang, briefly in
15 reply?

16 MS. LANG: Well, first off, I don't think that there's
17 any reason that this Court needs to look to an Arkansas case
18 right now when we've got an awful lot of South Carolina law
19 that's directly on point. The Arkansas Court, though ---

20 THE COURT: Ms. Lang, it's interesting to me, if you
21 have a case for another jurisdiction that doesn't apply,
22 then I shouldn't look at it; if it hurts you, I shouldn't
23 look at it. If it helps you, I should look at it, regardless
24 of South Carolina law, but I understand.

25 MS. LANG: That's probably fair enough.

1 **THE COURT:** I understand that completely. I've been
2 there before.

3 **MS. LANG:** There are some distinguishing facts though.

4 **THE COURT:** I'm not bound by Arkansas law, but it could
5 be persuasive. Mr. Harvey knows that and you know that, Ms.
6 Lang. I don't ignore it.

7 **MS. LANG:** No, absolutely not, Your Honor. And I won't
8 ignore it either. In the Tahiri case, though, the doctor
9 that was within the employment agreement did not move his
10 practice across state lines. The Arkansas Diagnostics was
11 trying to predicate its interstate commerce solely on acts
12 of the hospital. I think that they ---

13 **THE COURT:** Do you agree with Mr. Harvey that the only
14 way arbitration survives here is if the Federal Arbitration
15 Act applies because of the notice provision in the South
16 Carolina Act?

17 **MS. LANG:** Yes, Your Honor.

18 **THE COURT:** All right. So the issue truly becomes then
19 -- both of you agree that the issue for the Court is whether
20 or not the Federal Arbitration Act applies, and that is
21 predicated on whether or not interstate commerce is
22 affected.

23 Mr. Harvey argues this is purely a Jasper County
24 resident entered into an agreement with a Jasper County
25 hospital for services at the Jasper County hospital. It is

1 true, however, that you tell me, although, I assume you've
2 taken -- have you had any discovery in this case?

3 MS. LANG: We've had some limited written discovery,
4 Your Honor.

5 THE COURT: It amazes me how when we get to motions
6 like this, because I have to treat it, if I go outside the
7 pleadings, it's a motion to stay and compel arbitration, but
8 you argue to me, and I have no way of knowing that he was a
9 staff privileged doctor in Savannah, and then came to
10 Hardeeville, and therefore, crossed state lines; although
11 his residency, according to Mr. Harvey, who is his lawyer,
12 never left South Carolina and Jasper County. Do you agree
13 with that as a fact?

14 MS. LANG: Well, Your Honor, in Dr. Flexon's Complaint,
15 the facts that I presented before the Court today are the
16 facts that Mr. Harvey has pled ---

17 THE COURT: Well, I understand that. That are pled in
18 the Complaint, which he says are part of a fraud and the
19 inducement against your co-defendant over here, Life Point
20 Hospitals. But, I'm asking you factually, regardless of
21 what's alleged in the Complaint. Factually, do you agree
22 for purposes of my hearing this motion, and I'll ask Mr.
23 Harvey, because he didn't mention this in his argument. You
24 agree that he was always a resident of South Carolina, but

1 he practiced in Georgia and came to South Carolina as a
2 result of this agreement; is that what you're ---

3 MR. HARVEY: That's correct, Your Honor. I concede
4 that.

5 MS. LANG: I'm not sure of what his residency was.

6 THE COURT: I'm asking her, too. I know you will. I'm
7 asking her. That's what your understanding of the facts
8 are?

9 MS. LANG: That's my understanding right now, and I
10 believe Mr. Harvey did say that he was always a Jasper
11 County resident. But residency itself is not ---

12 THE COURT: Oh, I agree that that's not necessarily
13 binding. I understand that. I don't want you to believe
14 that. I'm just asking so that I'll understand where we are.

15 MS. LANG: That's the way that I understand it.
16 Anyway, in the Tahiri case by the Arkansas Court, Dr. Tahiri
17 did not have to move his practice across state lines and I
18 think that's a really important point and a really important
19 distinction. It said, the diagnostic center predicated that
20 interstate argument on things that the hospital had done.
21 They had seen a couple of, I think, three out of state
22 claims in total. They bought like janitorial and medical
23 supplies across state lines and this sort of thing. The
24 Arkansas Court said you know, that's enough even for some
25 other courts. It's not going to be enough for us, but it is

1 enough, even those minor things that the diagnostic center
2 showed were enough to evidence interstate commerce. It was
3 not enough for this Court, but I would like to turn your
4 attention to footnote five.

5 **THE COURT:** All right. Hold on a second and let me get
6 there, please. You got a page?

7 **MS. LANG:** No, I don't, because of the way that it's
8 printed out, it does not.

9 **MR. HARVEY:** On the copy I gave to you, Judge, it would
10 be page 8, or at the top, page 9 of 11, I think.

11 **THE COURT:** I'm with you at footnote 5, Ms. Lang.

12 **MS. LANG:** All right. Essentially, the opinion is
13 stating that the circuit court got to the right result for
14 the wrong reason. It says, "The Circuit Court, in making
15 its decision, relied more on contemplation of the parties,
16 rather than whether the transaction itself involved
17 commerce." That's where we are. It's not about what the
18 contract says or doesn't say, though that's certainly
19 something that you will consider.

20 **MS. ROBERTSON:** Judge, if I may; I'm not presenting
21 argument. This is not our motion today, but we pled this as
22 an affirmative defense as well, that this matter should be
23 submitted to arbitration. I think it goes to arbitration
24 and it should. We support this motion. It goes as to all
25 parties. If I have to separately move, I can do that,

1 but ---

2 THE COURT: I think you ought to do that, because
3 obviously the plaintiff isn't on notice of that. I
4 understand that's your position, but all I can deal with is
5 this motion today. But I understand that. I think you need
6 to file your own motion. And I realize you pled it.

7 MS. ROBERTSON: Yes, sir.

8 THE COURT: But he wasn't prepared to argue, except as
9 against this motion today. It might be an identical
10 argument, but ---

11 MS. ROBERTSON: I think that likely it is. So I will
12 make it.

13 THE COURT: Ms. Lang, I want to thank you. It's
14 interesting. I run into this it seems like everywhere that
15 I'm in a border county like Jasper; you run into this every
16 now and then.

17 I'm going to ask you both to submit proposed Orders to
18 me. Please let's stay right on point on this. The issue is
19 whether or not the Federal Arbitration Act applies. No need
20 to go into anything else. I understand you want to argue
21 about -- Bill wants to distinguish the Thornton case, and he
22 wants me to --- and I'm taking the Arkansas case with me.
23 Obviously, I have Thornton. I'm very familiar with it. So
24 seven days from today. Submit them to me at P.O. Drawer
25 470. That's drawer 470, Walterboro, 29488. Copy opposing

1 counsel on your transmittal to the Court. Please include a
2 self-addressed, stamped envelope, with sufficient postage
3 affixed thereto for the return of your proposed Order. You
4 have seven days to submit it to me. You can e-mail it to me
5 to comply with the seven day requirement for your
6 convenience; however, you'll still need to mail to me the
7 envelope with sufficient postage affixed thereto, so that I
8 can return your proposed Order.

9 Any question about the proposed Order procedure from
10 counsel for the plaintiff?

11 MR. HARVEY: No, sir.

12 THE COURT: Any questions about the proposed Order
13 procedure from counsel for the moving party?

14 MS. LANG: No questions. I would like to hand up a
15 copy of the Towles case that I mentioned earlier.

16 THE COURT: This is my copy, right?

17 MS. LANG: Yes, Your Honor.

18 THE COURT: Let the record reflect I'm being handed
19 524, S.E. 2d, 839. I now have the Arkansas case, that I
20 previously put on the record, and that case, and I have
21 copies of both your Memorandums, and I'm looking forward to
22 receiving your proposed Orders. I want to thank you both
23 for your patience.

24 MR. HARVEY: Your Honor, the motion is to stay and
25 compel arbitration. I am concerned that if the Court were

1 to grant this, that we might - it might impact further
2 discovery in the case.

3 THE COURT: Well, in that case, while I have the motion
4 under advisement, because I have a little reading to do.
5 I'm assuming that you both agree there will be no discovery
6 in this case until I can rule.

7 MR. HARVEY: Well, I mean ---

8 THE COURT: That way, it isn't going to impact
9 anything, and nobody waives anything. I mean, I don't want
10 anything being delayed; you agree to that, Ms. Lang?

11 MS. LANG: I do.

12 THE COURT: You agree to that, counsel?

13 MS. ROBERTSON: I do, Your Honor.

14 THE COURT: You agree to that, bill?

15 MR. HARVEY: I do.

16 THE COURT: Until I can rule.

17 MR. HARVEY: But my concern is after you rule; if you
18 were to stay and compel arbitration. I had earlier filed
19 interrogatories and requests for production as to both
20 defendants, and actually filed a motion to compel
21 interrogatories.

22 THE COURT: Well, obviously, because I don't know how
23 I'm going to rule yet, I can't anticipate that. It's like
24 what if we have a hurricane this year, and I understand
25 that, Bill. I don't blame you for being concerned. I'm

1 assuming that you do not believe there is any discovery
2 available to you if the Federal Arbitration Act applies?

3 MR. HARVEY: I'm concerned about it. If we could have
4 an understanding with counsel that irrespective of your
5 ruling that discovery moves forward afterwards, then I'm
6 fine.

7 THE COURT: Are you willing to answer his discovery
8 regardless of my ruling; it's not directed to me. He's
9 asking this to you, but Bill, you're taking up time

10 MR. HARVEY: I apologize.

11 THE COURT: That's okay, Bill. You need to talk to
12 them because I can't make a ruling on that, other than if
13 they want to put it on the record.

14 He's asking if you're willing, of course, y'all would
15 also have the ability to serve him with discovery and he
16 would have to answer it as well, because what's good for the
17 goose is good for the gander. He didn't mention that, but
18 that would obviously be implied as well. Are you all
19 willing to make a decision on that?

20 MS. ROBERTSON: Your Honor, motions to compel were
21 filed previously by these two parties. They were withdrawn
22 and we entered into a consent protective order to get Bill,
23 Mr. Harvey, some documents. We did that with the stop
24 purchase agreement. It had confidentiality provisions in
25 it. He wants some additional documents now, having received

1 the stop purchase agreement that he did ask for in discovery
2 that we also asserted as subject to confidentiality.

3 THE COURT: But you got a protective Order?

4 MS. ROBERTSON: We have a protective Order, as to the
5 stop purchase agreement and others, but we do have some
6 issues.

7 THE COURT: I understand. The answer is subject to a
8 protective order, are you willing to at least complete
9 discovery both sides? He has to answer y'all, regardless
10 of whether you go into arbitration or you remain in Court.

11 MS. ROBERTSON: He owes us discovery as well.

12 THE COURT: The answer is "yes" or "no". Not whether
13 he owes it to you.

14 MS. ROBERTSON: We have some issues with the school of
15 correspondence that he's requesting.

16 THE COURT: Is the answer "no", ma'am?

17 MS. ROBERTSON: The answer may be no. I told ---

18 THE COURT: Great God, lawyers can't give a straight
19 answer.

20 MS. ROBERTSON: It is a "no", right now, but ---

21 THE COURT: It's "yes" or "no". Is it "yes" or "no"?

22 MS. ROBERTSON: No.

23 THE COURT: All right. Bill, that's the answer to your
24 question, you'll have to wait on me to rule.

25 MR. HARVEY: Thank you.

STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)

CERTIFICATE

I, REBECCA H. HILL, Official Court Reporter for the Judicial Department of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had in the hearing of the captioned case, in the Court of Common Pleas for Jasper County, South Carolina, on the 9th day of June 2010.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

August 18, 2010


Rebecca H. Hill,
Official Court Reporter

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF JASPER

PHILLIP FLEXON, MD,

Plaintiff,

vs.

CASE NO. 2009-CP-27-331

PHC-JASPER, INC. D/B/A COASTAL
CAROLINA MEDICAL CENTER,
COASTAL CAROLINA MEDICAL CENTER,
INC., LIFEPOINT HOSPITALS, INC.,
and TENET HEALTHSYSTEMS,

Defendants.

DEPOSITION OF: PHILLIP FLEXON, MD

DATE: April 30, 2013

TIME: 10:04 AM

LOCATION: Law Offices of Harvey & Battey, PA
1001 Craven Street
Beaufort, SC

TAKEN BY: Counsel for the Defendants

REPORTED BY: KELLY A. BALL, Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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(INDEX AT REAR OF TRANSCRIPT)

1 STIPULATION

2 It is stipulated by and among Counsel
3 that this deposition is being taken in accordance
4 with the South Carolina Rules of Civil Procedure,
5 Rule 30; that all objections as to Notice of this
6 deposition are hereby waived; that all objections
7 except as to form are reserved until the time of
8 trial; and that the deponent does not waive reading
9 and signing of this deposition.

10 * * * * *

11 PHILLIP FLEXON, MD

12 being first duly sworn, testified as follows:

13 EXAMINATION

14 BY MR. MYRICK:

15 Q. Mr. Flexon, we've just met. My name is
16 Jim Myrick. I appreciate you coming in today to
17 speak with me in this deposition. Have you ever
18 given a deposition before?

19 A. I have.

20 Q. Okay. Can you tell me how many times?

21 A. I would -- I would estimate somewhere
22 between, oh, 8 and 12.

23 Q. 8 and 12?

24 A. Yeah.

25 Q. And -- and do those generally relate to

1 medical treatment of patients who later have legal
2 claims?

3 A. Yes.

4 Q. Okay. Have there been any that have
5 involved your personal activities, business or --
6 personal?

7 A. In terms of my -- in terms of like a --
8 a business or something that I've -- I've operated
9 or something not medical?

10 Q. Yes.

11 A. No.

12 Q. Okay.

13 A. No, I don't think I've -- I don't
14 believe so.

15 Q. So none domestic and none related to
16 any professional organizations you've been in and
17 businesses?

18 A. Not that I can remember.

19 Q. Okay.

20 A. Okay.

21 Q. Let me just --

22 A. That's -- no, let me qualify that, I
23 think that there was one related to a business I
24 might have been deposed, but I -- I'm not certain
25 on it.

1 Q. All right. And what was that matter?

2 A. Oh, it was over the racetrack on
3 Hutchinson Island.

4 Q. When was this?

5 A. Maybe 1996 or something.

6 Q. What was the dispute?

7 A. Oh, the dispute was over a -- a company
8 that I put an investment in that had unpaid bills.
9 I was a minority silent investor, but -- and I -- I
10 don't recall specifically if I was deposed. I
11 think I -- I was though, I just don't remember.

12 Q. Okay. Where was that lawsuit pending,
13 do you know?

14 A. Where did it happen? Georgia.

15 Q. Where in Georgia?

16 A. Oh, Savannah.

17 Q. Savannah Georgia.

18 A. Yes.

19 Q. Was it in state court?

20 A. I -- I guess it was, yeah.

21 Q. Okay. Were you represented in the
22 matter or were you called as a witness separately?

23 A. I may have been called as a witness,
24 but...

25 Q. You were neither a plaintiff nor a

1 defendant?

2 A. Well, the company was a defendant and I
3 was an owner of it, so I -- I -- you know, I --
4 and, again, I don't remember the details of it, you
5 know.

6 Q. What was the name of the company?

7 A. I'm not sure. It didn't last very
8 long. But it was -- it had to do with putting on a
9 race on Hutchinson Island.

10 Q. Okay.

11 A. I just don't recall.

12 Q. Okay. I want to --

13 MR. MYRICK: Yeah.

14 MR. HARVEY: Let me stop. Will -- the
15 Levy Trail, was that -- did --

16 THE WITNESS: I don't think I was
17 deposed in that.

18 MR. HARVEY: I don't think you were.

19 THE WITNESS: Yeah.

20 MR. HARVEY: Okay.

21 THE WITNESS: No, I wasn't deposed.

22 BY MR. MYRICK:

23 Q. Okay. So this was another matter that
24 you had that you were not deposed in. Were you a
25 plaintiff or defendant? That was one of my next

1 questions.

2 A. A defendant.

3 Q. Okay. And what was the name of that
4 lawsuit?

5 A. I guess it was Monroe versus Flexon.

6 Q. Okay. And what was that about?

7 A. It was over a right-of-way of an
8 access -- an easement right of way in South
9 Carolina.

10 Q. Was it here in Beaufort?

11 A. It was Jasper County.

12 Q. In Jasper County. Was there a lawsuit
13 filed over it?

14 A. Yes.

15 Q. And were you represented?

16 A. Yes.

17 Q. And who represented you?

18 A. (Indicating.)

19 Q. All right. Big man, Bill. All right.

20 MR. HARVEY: I just -- I just wanted to
21 clarify.

22 MR. MYRICK: I appreciate that very
23 much. It helps, because it -- it probably didn't
24 go nowhere, but it's the thoroughness and
25 completeness of it which can be very important.

1 BY MR. MYRICK:

2 Q. Just a few ground rules for depositions
3 as far as I'm concerned. If you have a question,
4 please stop me and say I don't understand your
5 question. I think that's perfectly legitimate and
6 you've already done it once, so it comes naturally
7 to you as unclear questions sometimes occur
8 naturally to me. So any time you have a situation
9 like that, stop and I'll make sure I --

10 A. Uh-huh.

11 Q. -- I've related the question to you in
12 a form that you can understand.

13 And if you -- it's not an endurance
14 test. If you want to take a break or anything like
15 that, just tell me and we'll arrange such a break.

16 If I've asked you a question and it's
17 clear, I will -- and you provide an answer, I will
18 assume the question was clear and you did
19 understand it. Right?

20 A. Okay.

21 Q. Fair enough?

22 A. Right.

23 Q. And unless your attorney instructs you
24 not to answer a question, I'm entitled to answers
25 to my questions here today. Fair enough?

1 A. I understand.

2 Q. Okay. Other rules, we don't -- there
3 may be breaks during the day, we don't discuss the
4 substance of deposition testimony with anyone
5 outside the context of the deposition. And if
6 there's any question that you have along this path,
7 you can ask me now.

8 A. Uh-huh.

9 Q. Do you have any question about the
10 process?

11 A. I don't believe so.

12 Q. Okay. My first question is: What is
13 the goal of your lawsuit? What are you hoping to
14 accomplish with the lawsuit you filed against
15 LifePoint and Tenet?

16 A. Well, my -- my goal is to recover
17 damages which I felt were -- occurred to me from
18 the loss of my practice that -- that I think I had
19 established the time I entered into the contract
20 with LifePoint.

21 Q. So the -- is it for the loss of your
22 practice in Savannah?

23 A. Loss of my practice in -- well, it was
24 South Carolina as well. I mean, probably
25 40 percent to 50 percent of my practice was already

1 established in South Carolina. That's an estimate.

2 Q. And do you have a number that you
3 ascribe to that loss?

4 A. We -- I believe we do.

5 Q. Okay. What would it be composed of in
6 your mind without giving me a number -- I take it
7 you don't recall the number off the top of your
8 head?

9 A. No, I don't recall the number off the
10 top of my head. But essentially it would be the
11 income that I think that I would have made over the
12 years had a -- the contract been -- you know, I --
13 the contract been followed, you know, fairly and --
14 and, you know, we established a -- or I established
15 a practice that I had envisioned in -- in -- in
16 South Carolina.

17 Q. And how many years of damages do you
18 think you're entitled to under your theory?

19 A. That remains to be seen. The -- The
20 contract was for five years. I mean, but actually
21 when I spoke with Eric Deaton we talked about
22 long-term relationship, you know, ten years or
23 until I retire.

24 Q. Uh-huh.

25 A. I had intended this to be my ultimate

1 final, you know, place to practice and grow a --
2 my -- my practice.

3 Q. I see. The contract term was five
4 years?

5 A. I believe so. I'm not -- I'm not
6 exactly certain, but I believe it was five years.

7 Q. Okay.

8 A. It may have been longer, but I don't
9 think so.

10 Q. Okay. And your hope was to renew that
11 contract?

12 A. My hope was to work there until I
13 retired in a -- in a thriving growing medical
14 practice.

15 Q. Okay. And you talk about -- you're
16 not -- you don't -- you're not asking for the total
17 amount of your billings, you're asking for what
18 your profit would have been, do I understand that?

19 A. Well, the income I would have made
20 from -- from that kind of practice.

21 Q. Right. The income you would have made
22 from it, not necessarily gross revenues from it?

23 A. Correct.

24 Q. Okay. And you understand that from
25 gross revenues you always have to take away

1 expenses before there'd be any profit to --

2 A. Correct.

3 Q. -- provide, to -- to split up? All
4 right.

5 What did you do to prepare for the
6 deposition here today?

7 A. Oh, I spoke with my attorney. I looked
8 over some -- some -- you know, some paperwork that
9 I had, and tried to get a good night sleep.

10 Q. Okay. Very good.

11 A. Yeah.

12 Q. Smart. Now, what paperwork did you
13 look over?

14 A. Oh, I looked over the deposition
15 that -- of -- of Eric Deaton.

16 Q. Yes.

17 A. I -- I looked over these things, some
18 of the things that -- that I brought with me.
19 (Indicating.) And I looked over my contract. And,
20 again, I -- and I came -- Bill and I talked, you
21 know.

22 Q. Okay. Have you seen any documents from
23 Savannah Memorial Hospital?

24 A. I did this morning.

25 Q. Okay. Do -- can I look at that

1 notebook?

2 A. Yes.

3 MR. MYRICK: Is that okay, Bill?

4 MR. HARVEY: Sure.

5 BY MR. MYRICK:

6 Q. There's a book in here called Coronary,

7 A True Story of Medicine Gone Awry by Stephen

8 Klaidman. Does that relate --

9 A. It does. It does. And it's actually
10 for -- you can have that copy.

11 Q. Oh, well, tell me about it. What --
12 how does it relate to --

13 A. It's just a --

14 Q. -- the controversy here?

15 A. -- a story about Tenet and what was
16 going on. And I have several copies, so I brought
17 that one for you.

18 Q. Okay. Oh, okay, thanks. All right.

19 Then this is -- what's this first document,

20 LifePoint Hospitals, Inc., Retirement Plan?

21 A. Oh, that's just my -- my retirement
22 plan when I signed on the first three months with
23 LifePoint. Just things demonstrating that, you
24 know, I -- I was employed by LifePoint. I believed
25 I had a contract with LifePoint. You know, it's

1 a -- again, a copy of a -- my retirement benefits.
 2 I think in that folder is my health -- or my --
 3 it's in that little slot right there, is my Blue
 4 Cross Blue Shield healthcare card. (Indicating.)

5 Q. Oh, there's a card.

6 A. Yeah, yeah, and it says LifePoint.
 7 Just to demonstrate -- I mean, I -- I didn't think
 8 there was anyone involved in it other than
 9 LifePoint with my contract --

10 Q. Okay.

11 A. -- and it was with LifePoint.
 12 LifePoint was -- so these are things that, you
 13 know, I believe I had a contract with LifePoint.
 14 I -- and I -- and also things to kind of show you
 15 the frame of mind I was -- that I had learning that
 16 I, you know, was to be -- an attempt was being made
 17 to hand me off to Tenet.

18 Q. Do you still believe you had a contract
 19 for five years with LifePoint there?

20 A. I think that they -- they breached, but
 21 I -- yeah, my contract was with LifePoint, yeah,
 22 that's what I believe.

23 Q. So the card we've described as a Blue
 24 Cross Blue Shield card in Phillip Flexon's name --

25 A. That says LifePoint.

1 Q. -- with LifePoint Hospitals, Inc., also
2 on the card, a PPO.

3 The other thing is LifePoint Hospitals,
4 Inc., Retirement Plan sheet, account statement
5 April 1, 2008 to June 30th, 2008. Reflecting a
6 balance of \$1,030.69.

7 Tab 2 looks like excerpts from --

8 A. Newspapers.

9 Q. -- newspapers. The Island Packet
10 online, an article entitled: Hardeeville Hospital
11 Has New Owner, published July 2nd, 2007.

12 A. That's how -- basically how I learned
13 about the sale of the hospital.

14 Q. Then there was another article dated
15 June 30th, 2007 called: Hospital Sale Moves
16 Forward.

17 Another article: Protesters Try to
18 Spread Word Against Tenet's Purchase of Coastal
19 Carolina Medical Center dated July 24th, 2007. I
20 think I'm familiar with that.

21 A. Yeah, my --

22 Q. Your resume.

23 A. -- my patients had to walk across the
24 picket line, yeah.

25 Q. Your resume.

1 A. Yeah.

2 Q. Amendment to an -- an assignment of
3 physician employment agreement.

4 A. Yeah.

5 Q. Signed by Elizabeth Lamkin on July 3rd,
6 2007 -- signed by Coastal Carolina Physician
7 Practices, LLC, by Elizabeth Lamkin, president,
8 July 3rd, 2007 and not signed by Phillip B. Flexon,
9 physician, correct?

10 A. Correct.

11 Q. Then under Tab D we've got, again, an
12 Island Packet online article: Who Really Benefits
13 if Tenet Buys Coastal Carolina Medical Center.

14 These seem to be written by the same
15 guy, Peter Frost, throughout; is that -- that
16 correct?

17 A. Yeah. That one was brought to me by a
18 patient.

19 Q. Okay.

20 A. The one your finger is on.

21 Q. This one is dated June 27th, 2007.

22 The next is a letter September 14th,
23 2007, a letter to you from an Alston & Bird
24 attorney called Dawnmarie Matlock. This looks like
25 there was a deletion from your employment agreement

1 with CCMC which had to prevent --

2 A. A start violation.

3 Q. -- a start violation?

4 A. I think so, although I don't think they
5 were aware that it would have prevented me from
6 having an audiologist which is, of course, a -- a
7 spelled out safe haven, but I didn't have an
8 audiologist so it was a moot point. It just -- it
9 was in the notebook.

10 Q. And the paragraph that was coming out
11 was Section 1A of the employment agreement which
12 is: A, net practice revenues --

13 A. Right.

14 Q. -- right?

15 A. Right. And, of course, with an
16 audiologist you can -- that -- that -- they're
17 wrong on that. But that's the -- that's not
18 relevant I don't think to anything --

19 Q. Right. It's just --

20 A. -- we're talking about.

21 Q. -- it's a letter --

22 A. It's -- yeah.

23 Q. -- you got from Alston & Bird.

24 Then August 15th, 2008, a letter from
25 Friedman, Dever & Merlin. This looks like a copy

1 of the letter that Lawrence Merlin wrote --

2 A. Right.

3 Q. -- on your behalf to CCMC. And when I
4 use that I mean Coastal Carolina Medical Center.
5 There are three different recipients it looks like.
6 One in all CCMC, one at Brentwood, Tennessee. The
7 second in a different office at Brentwood,
8 Tennessee. The former for the vice president for
9 physicians services. The latter for general
10 counsel. And then another one to the local office
11 at Hardeeville, CEO.

12 Right?

13 A. Correct.

14 Q. Okay. And there's a sheet here in the
15 back. It's an excerpt from Deaton's deposition,
16 Plaintiff's Exhibit 6.

17 A. Oh, I don't know. That --

18 Q. Do you know what that's about?

19 A. No -- well, I -- no, that -- you
20 already have this. I don't know how this got stuck
21 in there.

22 Q. Okay. We may get copies of these at a
23 later time.

24 A. Yeah. Okay.

25 Q. Thank you for showing it to me.

1 A. Sure.

2 Q. All right. Did you have any other
3 discussions, outside discussions with Mr. Harvey,
4 your attorney, about today's testimony?

5 A. Did I have other --

6 Q. With anyone?

7 A. Oh, with -- with anyone else?

8 Q. Uh-huh.

9 A. No.

10 Q. Okay. Let's mark -- I'm going to show
11 you Exhibit 1. I'm going to share with you --

12 MR. MYRICK: And, Joe, if you look on
13 with me I've got them in order here.

14 (DFT. EXH. 1, Notice of deposition, was
15 marked for identification.)

16 MR. BELTON: Okay.

17 BY MR. MYRICK:

18 Q. That's the notice of deposition. And
19 maybe what I can do is show it first to your
20 attorney and get him to hand it to you.

21 MR. MYRICK: Is that okay, Bill?

22 MR. HARVEY: Uh-huh.

23 MR. MYRICK: Are we good with that?

24 BY MR. MYRICK:

25 Q. Okay. I just want to mark that as an

1 exhibit to the deposition, the notice of
2 deposition.

3 A. Okay.

4 Q. That's -- that's a copy of what you've
5 got?

6 A. Okay. You want --

7 Q. Just put it right here. (Indicating.)

8 A. Right here, okay.

9 Q. Okay. Did you bring any other
10 documents with you other than the ones that we've
11 looked at?

12 A. No.

13 Q. Okay. Now, I just want to ask you some
14 questions if I could about your background.
15 Where -- where are you from?

16 A. You mean where I was born?

17 Q. Yeah.

18 A. Oh, I was born in West Virginia.

19 Q. West Virginia.

20 A. Yeah, but only lived there two months.

21 Q. Yeah?

22 A. Yeah, so I have no recollection.

23 When -- my father's job moved -- moved us a lot, so
24 from there we went to Toledo, Ohio. And from there
25 we went to Charlotte, North Carolina. And then

1 Annapolis, Maryland. Then South America. Then
2 back to Toledo, Ohio. So I moved around a -- a
3 bunch. I guess of all -- most -- the place I lived
4 the longest would be Ohio.

5 Q. Okay. What did your father do that
6 took you around in that way?

7 A. He was a chemical engineer for
8 Owens-Illinois Glass Company. And worked for the
9 same company his whole life, but he -- his job just
10 moved him in different -- different places.

11 Q. I got it. And what about your wife,
12 where is she from?

13 A. Savannah, Georgia.

14 Q. Savannah. How -- do you have any
15 people that live in Jasper County?

16 A. Do I have any people?

17 Q. That live in Jasper County.

18 A. Well, I --

19 Q. I said -- that means relatives. That's
20 Lowcountry for --

21 A. At the present time?

22 Q. Yeah.

23 A. My daughter and son-in-law and my
24 grandson.

25 Q. Okay. What are their names?

1 A. Jason and Lauren Marcinkosky and Sam is
2 their -- is my grandson.

3 Q. Marcinkoski?

4 A. Yeah, M-A-R-C-I-N-K-O-S-K-Y (sic) --
5 Marcinkoski, I hope I spelled that right.

6 Q. M-A-R-C-I-N-K-O-S-K-I?

7 A. Y, I think. Y.

8 Q. Y, okay.

9 A. Yeah.

10 Q. And what do they do there?

11 A. Well, my -- my daughter runs a show
12 barn, an equestrian that she teaches horseback
13 riding.

14 Q. Okay. What's the name of that
15 business?

16 A. Swamp Fox.

17 Q. And where is it located?

18 A. It's in Levy, section of -- Levy in
19 Hardeeville, South Carolina.

20 Q. Okay. And it's called the Swamp Fox?

21 A. Swamp Fox Farms.

22 Q. Farms?

23 A. Yeah.

24 Q. Okay.

25 A. And my son-in-law is a real estate

1 appraiser.

2 Q. And what company does he work with?

3 A. I think technically he's self-employed
4 so I -- and I don't know what -- what his name of
5 his -- his company is specifically, but he's
6 self-employed.

7 Q. Okay. Any other relatives in Jasper
8 County?

9 A. Not -- not -- presently living there,
10 not that I -- no. I -- I don't think -- I'm trying
11 to think, there's -- there's some property that the
12 family members own but I don't think anyone has --
13 claims a residence on it, so --

14 Q. Okay.

15 A. -- no. No.

16 Q. Did you -- I don't know -- Hardeeville,
17 is that in Jasper County?

18 A. It is.

19 Q. Okay. Do you have any close friends
20 still living in Hardeeville?

21 A. Oh, yeah.

22 Q. All right.

23 A. Yeah.

24 Q. Who are they?

25 A. Who are my friends?

1 Q. Yeah.

2 A. Oh, I don't know.

3 Q. Closest friends.

4 A. I guess, let's see, Jim and Mary Davis.

5 Q. Uh-huh.

6 A. Cam Adams. John Carswell. Well,
7 actually -- well, I don't know if that's
8 Bluffton -- or Beaufort County or -- no, he's -- I
9 think he's -- it's in Jasper County. Gordie,
10 Gordon Gale.

11 Q. Okay. Are these physicians of some --

12 A. No, they're friends.

13 Q. Just friends, okay.

14 A. Yeah, they're friends.

15 Q. Is -- Bluffton's in Beaufort County,
16 right?

17 A. Correct.

18 Q. And so -- but Hardeeville's in Jasper
19 County?

20 A. Yeah. It's close.

21 Q. Okay.

22 A. The line is pretty close.

23 Q. And what is the distance between
24 Bluffton and Hardeeville?

25 A. I'm not sure. I'm not sure.

1 Q. About? How --

2 A. Yeah. You know, I think the Bluffton,
3 you know, city limits pretty far -- goes almost to
4 county line. In Hardeeville, they -- they annexed
5 huge clumps of vacant land. So I think that
6 they're -- they're within just a few miles of each
7 other.

8 Q. Okay.

9 A. Maybe just, yeah, two or three miles,
10 if that.

11 Q. When you had an office, your office --
12 in that area, where was your office located?

13 A. It was on the -- right next to the
14 campus of Coastal Carolina.

15 Q. All right.

16 A. Yeah.

17 Q. So within one mile?

18 A. Of the -- of the hospital?

19 Q. Uh-huh.

20 A. Oh, within 200 yards.

21 Q. Okay.

22 A. 200 yards of the hospital, yeah.

23 Q. And you never had an office in
24 Bluffton?

25 A. I wanted one and it was originally

1 where we were going to go, but never got -- never
2 got an office there.

3 Q. So your office was always right by the
4 hospital?

5 A. Yes.

6 Q. In Hardeeville. And your residence
7 was...

8 A. In Hardeeville, yeah.

9 Q. In Hardeeville. How many people were
10 in Hardeeville then?

11 A. I don't know now. It's -- they've
12 grown and they annexed a lot of -- of -- of
13 territory. I'm going to guess, I -- 10,000 people
14 maybe. 5, 10,000 people.

15 Q. Okay.

16 A. It has grown but never -- it never grew
17 to 100,000 like some people claimed it was going
18 to.

19 Q. Did you ever believe it was going to
20 grow to 100,000?

21 A. No -- no, I thought that was -- that
22 was generous, but I -- I thought it would maybe --
23 maybe grow more than it did.

24 Q. Uh-huh. What do you think prevented
25 it?

1 A. Oh, I think the economic downturn.
2 The, you know, 2008, 2009, their slowdown of
3 retirees coming to the area.

4 Q. Yeah.

5 A. But there still is considerable growth.
6 And particularly just on -- Bluffton got it. I
7 think south Beaufort County, but Jasper less so.
8 Jasper County less so.

9 Q. Does an ENT -- I don't know this, does
10 an ENT, a lot of your patient makeup comes from
11 senior citizens?

12 A. No, it comes from a pretty wide
13 spectrum. I mean, it can come from, you know,
14 children all the way up to senior citizens. So
15 it's -- it's -- you know, you -- generally you see
16 the full spectrum of patients.

17 Q. Uh-huh. I was just curious about that.
18 I didn't know. What -- were you a member of any
19 church in -- in Hardeeville?

20 A. No.

21 Q. Okay. Any civic clubs in Hardeeville?

22 A. Not that -- no, I'm not even aware
23 there are any civic clubs in Hardeeville.

24 Q. Okay. What were your outside practice
25 activities --

1 A. What did I do --

2 Q. -- in Hardeeville?

3 A. -- what I do -- well, I -- I hunt. You
4 know, I'm kind of a -- sort of a -- I guess a
5 part-time bad farmer. But I don't play golf.
6 But -- and I think that that was kind of, in -- in
7 that area, that united most of the friends in the
8 Levy area and -- and that part of Jasper County was
9 hunting and farming and horses.

10 Q. Did you have involvement in Beaufort
11 County medical associations or Jasper County
12 medical associations?

13 A. Well, I -- while I was there, I was on
14 the staff, you know, of Coastal and had a -- you
15 know, a buildup of at least a -- when I came I had
16 built up of pretty good referral base already from
17 that area.

18 Q. Uh-huh.

19 A. But I had not -- was not a member -- I
20 don't believe I was a member. I may have joined
21 one -- one -- one or two societies while I -- you
22 know, while I was there. But I think -- but I -- I
23 don't recall.

24 Q. Was there any referral source who did
25 not send you referrals after LifePoint became a

1 Tenet Hospital?

2 A. Yes.

3 Q. Could you give me their names, please?

4 A. Paul Long and his group.

5 Q. Paul Long.

6 A. Yeah, I don't even --

7 Q. And where does he practice?

8 A. He was in the Hilton Head, Bluffton
9 area. I don't know if he's even practicing still.
10 He had a big internal medicine practice though at
11 one time.

12 Q. Okay. Who else?

13 A. You know, I can't specifically recall,
14 but there were other physicians who had
15 reservations about sending patients to a Tenet
16 Hospital.

17 Q. But Paul Long is the only name that you
18 can give me now?

19 A. I still -- his group and I think at the
20 time I think he had a -- you know, a couple of
21 doctors associated with his -- I mean, there
22 were -- there was probably -- it was a big group.
23 He had a big -- big practice.

24 Q. Do you remember any names of others who
25 refused to send you a case because --

1 A. I can't, but there were -- there were
2 others.

3 Q. -- LifePoint changed to Tenet?

4 It will help both of us -- you're --
5 you're naturally very smart, it's obvious to me,
6 and that leads to a tendency to stop me in the
7 question because you know where I'm going with the
8 question, but it makes it very difficult for her.

9 A. I'm sorry, did I interrupt you? Okay.

10 Q. Because I --

11 A. Yeah.

12 Q. Okay. Because if I don't complete a
13 question, she can't --

14 A. Okay.

15 Q. -- transcribe that.

16 A. Right, okay.

17 Q. So let me finish the question --

18 A. Yes, sir.

19 Q. -- then I'll do my best to let --

20 A. Yes, sir.

21 Q. -- you finish the answers.

22 A. Okay.

23 Q. So was there any other doctor that you
24 can name for me today that refused to send you
25 referrals because LifePoint sold stock in CCMC to

1 Tenet?

2 A. I can't specifically come up with --
3 except that one group. There was a family practice
4 group and I can't recall their -- their name,
5 but...

6 Q. Okay. What reason would Paul Long give
7 you for that?

8 A. I believe he had a bad experience
9 with -- in association with the -- this -- the
10 Hilton Head Hospital and for that reason had a --
11 had issues with -- with Tenet. And it -- that was
12 probably the peak of Tenet's national just
13 horrible, horrible reputation.

14 Q. Uh-huh.

15 A. They had -- they had -- in two thousand
16 and -- 2006, and I'm not exactly sure, it could
17 have been 2005, could -- they received a
18 \$900 million fine from the federal government for,
19 you know, fraud and abuse which got a lot of
20 publicity. And there were other national, you
21 know, national news events that Tenet was involved
22 in with poor patient care. And that -- I think it
23 was -- it was probably the worst thought of, you
24 know, hospital corporation in the country.

25 Q. Did you ever ask Dr. Long his reasons?

1 A. I never did.

2 Q. Okay. So --

3 A. I'm guessing.

4 Q. Okay. In your experience with Tenet
5 while you were there, did you see fraud?

6 A. I did.

7 Q. Okay.

8 A. Well, I saw potential fraud. I don't
9 know whether they corrected it.

10 Q. What was it?

11 A. This was specifically with my own
12 practice. They, without my knowledge, never sent
13 from the time they took over my practice until --
14 you know -- they never sent any bills in. They
15 were --

16 Q. Is that --

17 A. -- they were --

18 Q. -- is that what you're calling fraud,
19 that they didn't send the bills?

20 A. No, no.

21 Q. Okay.

22 A. Okay. Yet what they did was they
23 collected co-pays and they collected deductibles up
24 front in cash on Medicare patients, Blue -- you
25 know, Blue Cross, whatever insurance, you know, the

1 person, you know, had. And then these patients if
2 they had in the same calendar fiscal year for their
3 insurance had another medical claim or another, you
4 know -- because they never sent their bills in,
5 they got no credit for the -- the out of pocket
6 deductions they paid and they were billed twice for
7 that.

8 Now, some of the patients were
9 sophisticated enough and they came back to me,
10 that's how I found out about it. And -- and one or
11 two insisted on funds that the hospital fought them
12 on, which was kind of incredible. And I actually
13 had a meeting with Teresa Urquhart and said you
14 have to refund all of those patients their money,
15 you're committing -- you're committing fraud. And
16 I don't know that she -- that was corrected, but
17 I -- you know, that was -- yes.

18 Q. How many incidents of this did you see
19 where people were charged a co-payment --

20 A. A co-payment.

21 Q. -- or a deductible?

22 A. I don't -- well, I'd have to assume it
23 was almost every patient that I -- that I took to
24 surgery --

25 Q. Uh-huh.

1 A. -- that they did that with.

2 Q. And do you know that Tenet did not
3 refund those monies or you don't know if Tenet
4 refunded those monies?

5 A. I don't know that they did or did not
6 refund the money. And I don't know when they
7 actually sat -- you know, actually took the
8 paperwork and -- and submitted bills and tried to
9 collect on -- on them and at least have notice that
10 they, in fact, you know, received, you know,
11 something from those -- those patients. I -- I
12 don't know.

13 Q. Has that type of incident ever happened
14 to you at your practice at Savannah Memorial?

15 A. Never. Never.

16 Q. Never has someone not been credited for
17 a co-payment by the time of a second procedure?

18 A. Or by the time that they would go to
19 a -- another hospital? There might be a lag in it,
20 but -- but it was in the system. I have never
21 heard of anyone -- I mean, I've never heard of
22 anyone not -- not posting, you know --

23 Q. Uh-huh.

24 A. -- bills. It's just -- it's kind of --
25 that was incredulous to me.

1 Q. Uh-huh. So that -- my understanding of
2 your answer is that's never happened at Savannah
3 Memorial where there has been --

4 A. Not to my knowledge.

5 Q. -- a lag which would have resulted in
6 one person paying co-payment and not having been
7 credited from a -- for an earlier co-payment?

8 A. Well, specifically a deductible. The
9 co-payment you're going to get regardless --

10 Q. Okay.

11 A. -- the deductible --

12 Q. Co-payment -- go ahead.

13 A. Yeah, the deductible is what -- you
14 know, someone might have a big deductible, you
15 know, \$5,000 and let's say they paid almost all of
16 some minor procedure out of pocket with me --

17 Q. Uh-huh.

18 A. -- and then they go thinking that --
19 that now this is -- my insurance is going to kick
20 in and of course none of it's credited to them.

21 Q. And have you -- have you -- did you
22 study this while you were providing services in
23 Hardeeville?

24 A. I did -- well, I studied it -- it came
25 to my attention from one patient who was very

1 sophisticated who brought it to my attention. I --
2 I, you know, went to kind of a -- became an
3 advocate that she -- this patient was a woman was
4 entitled to a refund and that's when I met and
5 said -- told -- with Teresa and said that you need
6 to refund everybody --

7 Q. Uh-huh.

8 A. -- because that's -- that is fraud.

9 Q. So how many times did it actually occur
10 where somebody had to pay more of a deductible
11 because they hadn't been credited the -- with their
12 earlier payment on part of their deductible?

13 A. I don't know but it probably happened
14 many times.

15 Q. Okay. And what's the name of this
16 patient --

17 A. I can't tell you.

18 Q. -- this sophisticated patient?

19 A. I can't tell you the name of the
20 patient.

21 Q. Because of privacy interests?

22 A. Yes. Yeah. Well --

23 Q. Or because --

24 A. -- it's a patient. No, it's a -- my
25 patient. I can't reveal you the name of a -- yeah.

1 Q. Okay. But you know the name?

2 A. I do.

3 Q. Okay. Well, we'll get that. And when
4 did that happen?

5 A. That would have happened in 2008, I
6 believe the spring but I'm not exactly certain.

7 Q. Okay. And Teresa Urquhart knows about
8 this because you brought it immediately to her
9 attention?

10 A. I brought it, yeah, to her attention.

11 Q. Okay. Any other incidents that you can
12 tell me about?

13 A. I don't -- I don't know incidents
14 specifically. I -- I got notification and I
15 could -- I -- this -- these individuals I couldn't
16 tell you the names, but I -- I was contacted by at
17 least two other individuals who had a similar type
18 of complaint and I just referred them to the -- to
19 the administration office.

20 Q. So I'm hearing so far three that you
21 are certain of?

22 A. Yeah.

23 Q. Okay.

24 A. I'm certain it happened more than that,
25 though. It took some sophistication to -- to

1 figure it out.

2 (DFT. EXH. 2, Curriculum Vitae, was
3 marked for identification.)

4 BY MR. MYRICK:

5 Q. Okay. I'll -- the next exhibit is your
6 resume. Can you identify what's been marked as
7 Exhibit 2?

8 A. I can.

9 Q. What is it?

10 A. It's my resume.

11 Q. All right. Tell me about your
12 educational path after -- after high school.

13 A. You were born in 1954?

14 A. Right.

15 Q. Which makes you...

16 A. 59.

17 Q. 59 years old, so --

18 A. I'm old.

19 Q. -- so tell me just -- start with
20 undergraduate.

21 A. Went to Kenyon College.

22 Q. And any distinctions you have on the
23 way would be appreciated too.

24 A. Well, I graduated in cum laude with
25 distinction. Distinction means that in the -- in

1 your major you -- you -- I -- there was a -- kind
2 of traditional school, you had to pass a -- a -- a
3 huge -- or a large body of tests your senior year
4 and if you did well on them you got distinction so
5 that's -- that's what that is.

6 I actually went to Vanderbilt after
7 that. I was actually in a PhD program, which --
8 change of plans, then I left with a masters and
9 went to medical school.

10 Q. You got a masters in genetics?

11 A. Correct.

12 Q. I have one --

13 A. I really have a PhD in genetics.

14 Q. PhD, okay. All right.

15 A. Yeah.

16 Q. And what -- what's -- what does it mean
17 to be a nominee of the Harold Sterling Vanderbilt
18 Scholar?

19 A. Oh, they would -- it's a -- it's an
20 award that was specific to -- to Vanderbilt. It
21 was a -- it was a money award for graduate
22 students. And it was a -- if -- to be nominated
23 was a -- was an honor and to actually receive it
24 was a -- a bigger honor. I was a nominee but I
25 didn't receive the award.

1 Q. Okay.

2 A. But, you know, you got to be -- be a
3 nominee, that's all.

4 Q. And what about medical school?

5 A. I went to Case Western in Cleveland.

6 Q. Okay. And what year did you graduate
7 there?

8 A. 1984.

9 Q. What happened next?

10 A. Oh, I did general surgery residency.

11 Q. Where?

12 A. Intern at University Hospitals in
13 Cleveland.

14 Q. Okay.

15 A. And then I did my ENT residency in --
16 at -- in Boston at Harvard.

17 Q. Okay.

18 A. That's my education background.

19 Q. Okay. And then how long have you been
20 practicing by the time you came to Hardeeville?

21 A. I'd have to do the math. I started
22 practice in the -- the late 1989 when I finished my
23 residency in Savannah. And so I came to
24 Hardeeville in two -- what, 2007, March, so -- so
25 it's -- I'm just going to do the math in my head,

1 so it's 1, 10 -- so it's 18 years -- 17 years. 17
2 years.

3 Q. So for 18 years before coming to
4 Hardeeville?

5 A. Yeah. Or 17, yeah.

6 Q. Okay. Somewhere around there. And you
7 had previously been at Savannah Hospital?

8 A. Well, Memorial.

9 Q. Memorial?

10 A. Yeah, Georgia Ear -- yeah.

11 Q. Tell me -- tell me about these two
12 posts.

13 A. Which one?

14 Q. The Anderson Cancer Institute at
15 Memorial Health University Medical Center, 2002 to
16 2007. What is that?

17 A. 2002...

18 Q. I'm looking at appointments here.

19 (Indicating.) Here, it's on the second page.

20 (Indicating.)

21 A. Second page, appointments.

22 Q. Chairman, head --

23 A. Oh, yeah, that -- that was a -- the --
24 they had an oncology head and neck program, a
25 panel, and I was the chairman of that -- that

1 group. It was a treatment...

2 Q. Why don't you read it into the record
3 first and then explain it.

4 A. A chairman, head and neck oncology,
5 Anderson Cancer Institute at Memorial. And --

6 Q. Health University?

7 A. Health -- yeah, Medical Center. And
8 that's, of course, Memorial Hospital and the
9 Anderson Cancer Institute was a -- a division I
10 guess of Memorial that specifically dealt with
11 cancer treatment. And they, under their director,
12 put together treatment teams for various areas of
13 cancer and I was chairman of the head and neck
14 treatment teams. And we met once a month and --
15 and made sure that -- tried to make all our cases,
16 you know, presented in tumor board and that kind of
17 thing.

18 Q. All right. And what's the next entry?

19 A. Section chief of Otolaryngology,
20 Department of Surgery. And --

21 Q. What were the dates for that?

22 A. 2003 to 2007.

23 Q. What does that mean?

24 A. That it was a -- it allowed me, I
25 guess, as sections chief I was a person who, oh,

1 signed off on the call schedule. It was kind of an
2 administrative medical staff position.

3 Q. And during this period from 1999 to
4 2007, you were also an associate professor of the
5 surgery section of otolaryngology at Mercer School
6 of Medicine; is that true?

7 A. Yeah, I -- you know, I -- okay, that --
8 that's correct, yes. I was -- I couldn't remember
9 when I became a -- from an assistant to an
10 associate, but 1999 to 2000, yes.

11 Q. Okay. And how was it that you came to
12 leave there, Memorial? Well -- that's Savannah
13 Memorial. We'll just call it Memorial.

14 A. Right, Memorial. Yeah, we -- there
15 was a group of us that formed the Georgia Ear
16 Institute and I had been there a long time.

17 Q. Georgia Ear?

18 A. Ear Institute.

19 Q. -- Institute, uh-huh.

20 A. Part of Memorial. I had been there a
21 long time. Courtney and I had built a farm and
22 kind of almost our dream place in Hardeeville where
23 I -- I -- we moved to in 2000. And that's where I
24 was part of the community. And -- and I think the
25 actual incident that started a topic of -- of me

1 going over and -- and working at that hospital was
2 there was a member of the -- their board who had
3 a -- a teenage son who suffered a laryngeal injury,
4 blunt trauma to his larynx and he was over at -- at
5 Memorial and I treated his son and he -- I think he
6 may have been the liaison and Eric contacted me,
7 Eric Deaton.

8 Q. Okay. So Eric contacted you or you
9 contacted Eric about coming to Hardeeville?

10 A. I think he -- I think I talked to --
11 that I would be interested and I said that to the
12 board member and then Eric Deaton contacted me.

13 Q. And who was the board member?

14 A. I can't remember. All I know is he
15 worked for the -- the electric company. I -- I
16 know he's an executive for one of the -- but I
17 cannot remember his name.

18 Q. Okay. I neglected to ask you, did
19 you -- what was your wife's maiden name?

20 A. Sprague.

21 Q. Does she have family in Jasper County?

22 A. No.

23 Q. Okay.

24 A. No.

25 Q. So you decided to purchase property in

1 Hardeeville and that started your love relationship
2 with Hardeeville?

3 A. Right, I purchased the property in '97.

4 Q. Okay.

5 A. Yeah, so I owned that property for a
6 long time.

7 Q. And then you told them you'd be willing
8 to move there?

9 A. Well, the hospital wasn't even -- when
10 I moved there, the hospital wasn't even --

11 Q. Right.

12 A. -- there. But -- but I already lived
13 there and -- for many years before they even broke
14 ground on the hospital.

15 Q. Okay. Your post immediately before
16 CCMC was with Savannah Medical Hospital -- I mean,
17 Savannah Memorial Hospital, correct?

18 A. Actually -- it was with Memorial, but
19 it was through Georgia Ear Institute.

20 Q. Okay. And what was your salary at
21 Georgia Ear Institute?

22 A. I can't recall what my salary was.

23 Q. And how would we find that out?

24 A. We could look I guess -- I don't -- I'm
25 not -- I'm not sure. One could find out about it.

1 But I -- I had a -- for a while with the Ear
2 Institute, I had a -- a contract that had a base
3 minimum --

4 Q. Okay.

5 A. -- for \$425,000 a year. And that
6 contract was over though in I think 2003, 2004.

7 Q. Okay. And is Georgia Ear Institute
8 still operational?

9 A. It's private now, but it -- it's still
10 going on. They -- they -- some of the doctors in
11 it bought the name, but they have no affiliation
12 with Memorial. So it's not a Memorial entity
13 anymore. Before it was completely a Memorial
14 entity.

15 Q. Tell me about the decision to leave
16 Georgia Ear Institute.

17 A. Well, I had been there a long time and
18 I had lived in South Carolina already I -- for many
19 years in -- in Hardeeville. Hardeeville was my
20 home. I had a significant number of patients
21 already coming from Hardeeville and Bluffton and
22 Hilton Head and I wanted to build a practice in --
23 in my community.

24 Q. Uh-huh. And who did you negotiate your
25 departure with from Georgia -- Georgia Ear

1 Institute?

2 A. I don't remember who the person was at
3 the time who -- who I talked with about the
4 departure, but there -- there wasn't much in --
5 in -- in my leaving.

6 Q. The contract expired --

7 A. Uh-huh.

8 Q. -- and you decided to move on?

9 A. Uh-huh.

10 Q. Is that correct?

11 A. Yes.

12 Q. Okay. Did they try to persuade you to
13 stay?

14 A. Yeah, they -- they -- they did try to
15 persuade me to stay to some extent, but I think,
16 you know, it was amicable and --

17 Q. Uh-huh.

18 A. -- and...

19 Q. Okay. You said 425 as a base salary.
20 Did you also receive bonuses there?

21 A. I did.

22 Q. Okay. And what was the amount of those
23 bonuses say in the last three years leading up to
24 your departure?

25 A. Oh, I -- I don't know. In the contract

1 it expired before I departed, so that -- that
2 contract I think went from nineteen -- again, I'm
3 not exactly certain, but from 1994 to 2004
4 thereabouts. So before that it was just a year --
5 year-to-year basis for the -- the -- you know, '05,
6 '06.

7 Q. '05, '06. So, were there bonuses that
8 were -- that you achieved in '05 and '06?

9 A. I don't think so.

10 Q. Okay.

11 A. I'm not sure. I'm not -- I'm not
12 100 percent certain of that.

13 Q. Okay.

14 A. I don't remember the -- the basics.

15 Q. But the contract structure would have
16 controlled the amount of the bonus for the period
17 of '94 to 2004?

18 A. You know, that's -- that's what I'm not
19 certain of. I don't even know if we were working
20 under a contract. I mean, it might have just been
21 an extension of some of the extent of the -- I just
22 don't recall that, what -- what kind of contract
23 was at -- at play at that point.

24 Q. Yeah. What office in Georgia would I
25 contact to find this information?

1 A. I -- I suppose it would be Memorial if
2 they have it from that far back.

3 Q. All right. Because at that time it was
4 a division of Memorial. It's since --

5 A. Yeah.

6 Q. -- spun off and become private?

7 A. Yeah, Georgia Ear Institute now, the --
8 the label has -- has -- is -- is a -- is a group of
9 ENT doctors and they would have no records --

10 Q. Okay.

11 A. -- and -- yeah.

12 Q. So as best you recollect, what did you
13 make in 2006 before you moved over to CCMC?

14 A. I would guess in the neighborhood of --
15 of, you know, mid to high 300,000.

16 Q. Why would that have been lower than
17 your base salary of 425?

18 A. Well, if you go through the -- the --
19 some of the information that I submitted to Eric, I
20 think it has a lot to do with -- with the hospital
21 not able -- able to -- to collect, you know, a huge
22 value and huge postings. And I guess that was also
23 an issue for me leaving, that I made a substantial
24 amount of -- or I generated a substantial amount of
25 -- of -- of work and the hospital was not able to

1 officially, you know, bill and -- and capture what
2 -- what they should have. They were way below any
3 type of -- of guidelines.

4 Q. Why couldn't they collect?

5 A. I think they were -- there was some
6 incompetence and -- and -- and lack of interest
7 in -- in trying to -- to do that.

8 Q. Okay. When you negotiated your
9 contract with CCMC, did you tell Eric Deaton that
10 you had no interest in working for a hospital that
11 was ever under Tenet ownership?

12 A. I can't recall I specifically said I
13 had no interest working under a hospital that was
14 owned by Tenet. I -- we had multiple conversations
15 about how awful Tenet was. That -- the Hilton Head
16 Hospital, their problems, and that I -- that I was
17 glad that I wasn't working for them.

18 We had multiple conversations about
19 that. And -- and conversations where I certainly
20 stated and -- and said that I believed to be an
21 employee of LifePoint. And I had actually done a
22 lot of research on LifePoint and thought they were
23 a good company, and that was important to me. I
24 mean, they had -- well, though he had just died
25 before I signed the contract, they had for a -- a

1 period of time an individual who seemed to be a
2 visionary in corporate, you know, hospital
3 management that seemed to be -- to be someone that
4 I -- and -- and perpetuated philosophy that I
5 thought I would -- I would fit in and -- and be
6 part of.

7 Q. Okay. And what was his name?

8 A. I can't recall.

9 Q. Okay.

10 A. If you go on the Internet and read the
11 LifePoint story, he's there.

12 Q. Okay.

13 A. I just don't -- I right now can't think
14 of his name.

15 Q. So back at the salary, I asked you
16 about 2006 at the hospital in Georgia --

17 A. Uh-huh.

18 Q. -- and you said in the neighbor of mid
19 to high 300s --

20 A. Uh-huh.

21 Q. -- because largely of their inability
22 to collect on the billings you were posting?

23 A. Correct.

24 Q. What about 2007?

25 A. Well, I was at Coastal.

1 Q. Right. Okay.

2 A. I started in March --

3 Q. You started in --

4 A. -- of 2007.

5 Q. -- March.

6 A. Yeah. Yeah.

7 Q. So the same problem with collectability

8 would have happened in the first part of 2007

9 before you left the Georgia Eye --

10 A. Presumably, yeah. Yeah.

11 Q. Okay.

12 A. I don't know what --

13 Q. Okay.

14 A. -- what -- how that year split up.

15 Q. Okay. Now --

16 A. But most of my -- my salary was from
17 Coastal at that -- that year.

18 Q. I understand. I understand. Thank
19 you. I want to talk to you more specifically now
20 about your negotiations and your decision to go to
21 CCMC.

22 MR. HARVEY: Can we take a quick break?

23 MR. MYRICK: Sure. Absolutely.

24 MR. HARVEY: Restroom break.

25 MR. MYRICK: Absolutely.

1 (A recess transpired.)

2 BY MR. MYRICK:

3 Q. All right. We're back to negotiations
4 with CCMC. And you said you started discussing it
5 with a board member who you thought served on some
6 sort of electric company or utility --

7 A. He was -- he was employed by an
8 electric utility company.

9 Q. Uh-huh.

10 A. Yes.

11 Q. And -- and you expressed interest that
12 if ever there was something around Hardeeville you
13 might be interested in that and he created the link
14 with Eric Deaton?

15 A. Uh-huh. Yeah, and, you know, I think
16 it came up as have you ever considered working over
17 at our hospital and then -- and then that -- yeah,
18 that's how the -- the connection occurred, yes.

19 Q. Okay. And Eric Deaton, he started off
20 with Province, right, before he was with LifePoint?

21 A. I think that's right.

22 Q. Okay. Did y'all talk about that when
23 you had conversations with him?

24 A. No.

25 Q. Okay. Were you aware that Province had

1 sold to LifePoint?

2 A. Well, I was. Actually that -- that
3 was, you know, in the newspaper.

4 Q. Yeah.

5 A. And -- and what it was characterized
6 was that they -- that they merged.

7 Q. Uh-huh.

8 A. That's -- so not -- not one company
9 bought the other, but, I guess, in reality that's
10 what happened.

11 Q. Uh-huh.

12 A. But the way I think the paper presented
13 it was that it was a merger of the two companies.

14 Q. And was that a thing -- when did that
15 happen in relation to your coming to CCMC?

16 A. That happened a year or two before I --
17 and, you know, was thinking of going over.

18 Q. Uh-huh. Uh-huh.

19 A. Maybe even -- yeah, at least a year. I
20 can't remember when they -- because it happened
21 right just as the hospital opened. And I think
22 they opened as a LifePoint Hospital.

23 Q. Yeah.

24 A. I don't think they ever opened as a --
25 a Province --

1 Q. I think you're right.

2 A. Yeah.

3 Q. What -- and you said during the time
4 you had interest in coming to the Hardeeville
5 Hospital, CCMC --

6 A. Right.

7 Q. -- you knew that Province had -- was in
8 the process of conveying it to LifePoint or had
9 conveyed it to LifePoint? I'm trying to get --

10 A. When I -- yeah, when I -- when I was
11 negotiating, it was past history. And it was -- it
12 was portrayed to the public as the two companies
13 merged and that happened probably two or three --
14 maybe three years before we even -- Eric Deaton and
15 I ever talked.

16 Q. Okay.

17 A. It happened before the -- the hospital
18 actually opened although -- or right as they
19 opened.

20 Q. Yeah.

21 A. Whenever that was. 2003?

22 Q. Yeah. Yeah.

23 A. 2002? Thereabouts, yeah --

24 Q. I think that's right in that area.

25 A. -- we talked -- maybe we started

1 talking in two thousand -- early 2006 or something.

2 Q. Okay.

3 A. Or, no, maybe summer 2006 I think.

4 Q. Did you ever talk to Eric Deaton about
5 the impact of that on the hospital itself?

6 A. I did not.

7 Q. Okay. Well, he -- so he gets the word
8 from the utility guy and Eric Deaton contacts you
9 while you're at Savannah Memorial Hospital. Am I
10 understanding that properly?

11 A. That -- that more or less is correct.
12 There could be some details that --

13 Q. Yeah.

14 A. -- yeah, but more or less.

15 Q. Okay.

16 A. I don't recall the details of that --
17 the actual initial meeting or...

18 Q. When did you decide that you would join
19 CCMC?

20 A. I think it would have been in the fall
21 of 2006. The contract starts March of 2007, so it
22 would be right around I think -- well, winter I
23 guess. I think I -- I decided -- we discussed the
24 contract in earnest in the -- the late fall and I
25 think I signed the contract just about -- just

1 before the first of the year in 2007 is -- the
2 date's on the contract.

3 Q. The date is on the contract --

4 A. Yeah.

5 Q. -- in December of 2007?

6 A. That's right. '06.

7 MR. HARVEY: '06.

8 THE WITNESS: 2006.

9 BY MR. MYRICK:

10 Q. 2006 --

11 A. Uh-huh.

12 Q. -- I'm sorry. So you consummated that
13 in December of '06?

14 A. Uh-huh.

15 Q. All right. And you have to say yes or
16 no, just for the record.

17 A. Yes.

18 Q. Okay. And it looks like that signing
19 date is 12/18/06. Does that sound correct to you?

20 A. That sounds correct, yes.

21 Q. How long would you say it took you to
22 negotiate that deal? You said --

23 A. I -- I -- there was correspondence as
24 early as the summer going back and forth of 2006.

25 Q. The summer of '06?

1 A. Yeah.

2 Q. Uh-huh.

3 A. And I -- I think it -- it seems like
4 there was -- there was a lag in it and then it
5 started again in earnest in -- in late autumn of
6 2006.

7 Q. Okay. What did you know about CCMC
8 prior to recruitment there? What was your --

9 A. Well, it was a brand new hospital. It
10 was a -- it was a LifePoint Hospital. Eric seemed
11 to have a good reputation in the community. They
12 seemed to be committed. It was the first hospital
13 in Jasper County. I thought that was a -- well,
14 that's not true, there was one in Ridgeland. It
15 was the first real hospital in Jasper County.

16 There was a hospital before that in
17 Ridgeland that was one step up, in my opinion, from
18 a walk-in clinic. And it was -- so I thought it
19 was significant and it was the -- the first real
20 hospital of Jasper County. And so those -- those
21 are the things. And I -- I did research on
22 LifePoint, I thought that it was a good hospital
23 company as -- as those things exist.

24 Q. Did you do any research on Province --

25 A. No, I did not.

1 Q. -- realizing they had just turned over
2 in about a year?

3 A. No. When they merged, I did not do
4 research on Province. And it -- it was more than a
5 year. I mean, we could look at -- find a timeline.
6 But, as I said, I think that that merger occurred
7 before -- before they opened and I think there
8 might have been some final. But my guess is, you
9 know, we're talking three years after that. I --
10 I --

11 Q. I think Coastal opens --

12 A. Two thousand --

13 Q. -- in 2005?

14 A. Oh, was it that late? I don't
15 remember. Okay. But you -- you probably know that
16 better than me. Okay.

17 Q. And I think that -- that --

18 A. So that's right when the merger, so
19 the -- I guess it occurred a year before that. No,
20 I did not. I did not, yeah.

21 Q. And what was the reason for not doing
22 that? You thought it was ancient history?

23 A. I did. I actually thought they merged
24 and that was, you know, one company. That's
25 probably -- maybe that was not -- not a good thing

1 on my part, but LifePoint was what I focused on.

2 Q. Okay. Okay. And how was Eric Deaton?

3 You say he had a good reputation in the community?

4 A. He did.

5 Q. Okay. Did he negotiate seemingly to
6 you in good faith at the time?

7 A. I thought he did.

8 Q. Did he have -- was he thorough in
9 his -- the way he handled the negotiation aside
10 from the LifePoint Tenet issue which I understand
11 you have difficulty with, but were there -- was he
12 upfront with you in the negotiation?

13 A. I think in hindsight he was not.

14 Q. All right. At the time you thought --
15 at the time you thought he was?

16 A. At the time I thought he was.

17 Q. Uh-huh. Had you negotiated contracts
18 with other hospitals, other groups you were coming
19 to be employed by in the past?

20 A. Just one, yes, Memorial.

21 Q. Memorial.

22 A. Uh-huh.

23 Q. Was your Memorial contract a negotiated
24 contract?

25 A. It was a negotiated contract but it was

1 negotiated by another group. My -- at that -- it
2 was done by -- it was a group of doctors together
3 and then we had a -- we had a lead business partner
4 who did the negotiations.

5 Q. Did you have input into that
6 negotiation?

7 A. Some, uh-huh. Sure. I had, you know,
8 veto power but it was done by another individual.

9 Q. Okay. Was the -- your employment
10 agreement with CCMC, was it a negotiated contract?

11 A. It -- it was --

12 Q. Okay.

13 A. -- to some extent. Some parts -- yeah,
14 it was, it was negotiated. Absolutely, yes.

15 Q. You made your points and they included
16 some of them?

17 A. That's right.

18 Q. Okay.

19 A. Yeah.

20 Q. And they made their points and they
21 included --

22 A. Some -- most of them.

23 Q. Okay. Okay.

24 A. Yes.

25 Q. There was definitely a back and forth?

1 A. Yes.

2 Q. When you began your discussions, it
3 sounds to me like you understood that LifePoint
4 owned CCMC?

5 A. Yes.

6 Q. Okay. Did you understand whether they
7 owned the stock in CCMC?

8 A. I -- my understanding was that CCMC was
9 only a name. It had no -- it was not -- the
10 hospital was owned by LifePoint. There was no
11 stock in Coastal Carolina. It wasn't a
12 corporation, it was just the name of a hospital.

13 Q. Did you make inquiries about that at
14 all?

15 A. No, I didn't. I mean, I worked under
16 the assumption I was negotiating with LifePoint.

17 Q. Okay. Did you know about an earlier
18 CON dispute in the area?

19 A. I do now. I did not then.

20 Q. You did not know then?

21 A. I did not know that there was a CON --
22 the only CON dispute I knew of at the time was over
23 an MRI.

24 Q. All right.

25 A. I did not know of a CON dispute with

1 Tenet at the time.

2 Q. What did you know about the CON dispute
3 about the MRI?

4 A. That a -- a free standing MRI -- a
5 group of -- of owners of an MRI in the Bluffton
6 corridor disputed the CON for a -- an MRI at
7 Coastal and I -- it was settled ultimately that
8 Coastal got an MRI.

9 Q. Uh-huh. Did you understand at the time
10 of negotiating with Eric Deaton that a hospital had
11 to have its own CON?

12 A. I did.

13 Q. Okay. But my understanding is you had
14 no idea that that had been contested for -- for --

15 MR. HARVEY: By Tenet.

16 THE WITNESS: Not -- not at the time I
17 signed --

18 BY MR. MYRICK:

19 Q. By anyone.

20 A. The -- the -- the CON for -- let me
21 just clarify the question.

22 Q. For the hospital.

23 A. The CON for the hospital, at the time I
24 signed the contract I did not know there had been a
25 dispute for their CON, no.

1 Q. Okay. Did you think you would make
2 more money at the Hardeeville Hospital than you did
3 in Savannah?

4 A. I thought ultimately I -- I could make
5 more money.

6 Q. Was that part of the reason for moving?

7 A. It -- it was part of the -- the reason
8 for moving and also wanting to build my own
9 practice.

10 Q. Was your income on the decline in
11 Savannah?

12 A. You know, my income -- I think that
13 would be a mischaracterization. My activity and my
14 billings were on the increase and my practice was
15 growing and the proportion of collections based on
16 that activity was declining or had declined and
17 that was -- that was -- that was an important
18 factor for me.

19 Q. And this was the hospital's fault?

20 A. I believe it was, yes.

21 Q. Did you visit and tour the hospital in
22 Hardeeville?

23 A. I did.

24 Q. Did you tour the surgery centers?

25 A. The operating rooms inside the

1 hospital?

2 Q. Uh-huh.

3 A. Yes, yes.

4 Q. Okay. And did you look at potential

5 office space too?

6 A. I -- no, I didn't. We -- we were -- we
7 were looking at office space and locations were --
8 were, you know, thrown out to me. And the location
9 that was verbally committed to me was in a place
10 called Plantation Park in -- in Bluffton, but
11 that -- you know, once I signed the contract I was
12 put in the location at Hardeeville.

13 Q. It -- are you saying that was a breach
14 of the contract?

15 A. No.

16 Q. Okay.

17 A. There was nothing -- there was nothing
18 in the contract that -- that said where I had to --
19 you know, where I was going to be. They had
20 that --

21 Q. Okay.

22 A. -- distinction. It wasn't where I
23 wanted to be.

24 Q. Would it have been better for your
25 practice to be in Hardeeville or to be in Bluffton?

1 A. I thought it would have been better to
2 be at the -- the initial place we -- we -- we
3 identified in -- in Bluffton, but --

4 Q. What reason?

5 A. -- that's...

6 Oh, I -- I -- you know, it -- it was I
7 think easier for a lot of -- of patients to get to.
8 And, you know, a more traveled area. Better
9 visibility.

10 Q. Okay.

11 A. I thought it was a better location for
12 the office.

13 Q. Do you remember when you toured CCMC
14 and with whom?

15 A. I don't.

16 Q. Do you remember with whom? Do you
17 remember that part?

18 A. I think it was with Eric Deaton, but
19 I -- I can't be certain of that. I don't remember.

20 Q. You say you did your own investigation
21 on LifePoint. Did you ask any questions to Eric
22 Deaton about LifePoint?

23 A. I did.

24 Q. All right. What were your questions
25 and what did he tell you?

1 A. That he enjoyed working for the
2 company. That he planned on staying in Hardeeville
3 to -- to -- in a long period of time as the CEO.
4 All which were answered to me affirmative. Now, he
5 made no guarantees about how long he was going to
6 stay. I envisioned possibly, you know, sending
7 another CEO at some point. Never envisioned them
8 selling it. That was a shock.

9 Q. Do you have information now that --
10 that convinces you Eric Deaton knew Tenet was going
11 to acquire the stock in CCMC when he was
12 negotiating with you?

13 A. I do.

14 Q. What is that -- what are those facts?

15 A. His deposition.

16 Q. Well, tell me the facts that are
17 contained in that that convinces you of that.

18 A. And I'd have to refer specifically to
19 the deposition, but it's clear that the -- one, the
20 facts are there was a dispute over the certificate
21 of need of the hospital. And as a part of the
22 settlement of that dispute, Tenet had the right of
23 first refusal for any sale of the hospital. And it
24 was not known to me and that piece of information
25 was not available to the public.

1 You couldn't go on the Internet -- when
2 you went on the Internet you could find that the
3 CON dispute occurred, you could -- and it just said
4 private resolution. It was not available -- that
5 information was not available.

6 Two, he stated in his deposition that
7 the hospital was going to be sold and they were
8 courting people in 2006. He knew -- I believe he
9 said in early fall, maybe September or August of
10 2006 that it was for sale. And even the -- the
11 purchase and sales agreement I think was signed
12 maybe the day before or the day after my contract
13 started. That's -- so he clearly knew that while
14 he was negotiating with me that the hospital was
15 being sold.

16 Q. Are there any other reasons than the
17 ones you just listed, those four?

18 A. There maybe, but I -- I -- right now
19 off the top of my head I can't recall.

20 Q. Okay.

21 A. And may I add an answer, another --

22 Q. Yeah.

23 A. -- part of --

24 Q. Sure.

25 A. I think it's important also with the

1 CON resolution of Tenet having the right of first
2 refusal, as soon as they were courting people to
3 buy the hospital, it was almost certainly going to
4 be Tenet. So he knew it was going to be Tenet
5 and -- I -- I think as soon as he knew the hospital
6 was for sale he knew it was going to be most
7 likely, highly likely, it was Tenet.

8 Q. Do you believe he had a duty to
9 disclose that to you?

10 A. I absolutely do.

11 Q. And is that part of the contract
12 anywhere?

13 A. That he had a duty to disclose the -- I
14 think that -- you know, I -- I -- does it
15 specifically say in my contract he had a duty to
16 tell me if the hospital was going to be sold to
17 another entity or -- or company? No.

18 But I have a contract with LifePoint.
19 It's a nonassignable contract. And if they sell
20 the hospital, there -- there's a -- there's a
21 problem with the contract. The contract also
22 doesn't -- doesn't really -- I mean, it's -- it's
23 almost a breach of the contract. I mean, they
24 don't -- they're not practicing, they're not
25 operating any medical facilities in the state of

1 South Carolina. That's -- that's -- so the -- I
2 guess you could say it's inferred in the contract
3 that a -- a -- a -- a -- a sale would certainly
4 be -- need to be -- to be stated or -- or told to
5 me and either I have a chance to -- you know, to
6 back out of the contract or once the contract was
7 signed, they maybe had to renegotiate it or buy me
8 out. But clearly they had, I think, an obligation
9 to tell me something of that magnitude.

10 Q. And you said they didn't have another
11 hospital in the state. I don't understand how that
12 fits in.

13 A. Well, the -- the contract states
14 that -- that they are in breach of the contract if
15 they no longer do --

16 Q. Who?

17 A. LifePoint.

18 Q. Okay.

19 A. Okay. If they don't -- they don't --
20 they don't -- well, Coastal Carolina --

21 Q. Okay.

22 A. -- but, I mean, that don't exist --
23 that doesn't exist as a entity, so, you know,
24 LifePoint is in breach of the contract if they do
25 not operate a medical facility in the state of

1 South Carolina. And I'm summarizing in so many
2 words, but that's kind of what the contract states.

3 Q. Okay.

4 A. So you sign a contract with a
5 physician. Before he starts, you've sold it and
6 you pack up and move away, that's a -- I mean,
7 that's sort of what happened.

8 Q. Did you ever ask Eric about Tenet in
9 any way?

10 A. Did I ask him about Tenet?

11 Q. In any way.

12 MR. HARVEY: Ask or discuss?

13 MR. MYRICK: Ask.

14 THE WITNESS: I -- I don't believe so.
15 I -- I -- once I found out that Tenet had --

16 BY MR. MYRICK:

17 Q. I'm talking about during the
18 negotiation period.

19 A. Oh, never.

20 Q. Okay.

21 A. I didn't think we -- I did not ask him
22 about Tenet's potential buying the hospital. We
23 did discuss Tenet but only to talk about the --
24 the --

25 Q. To say that you two didn't like them?

1 A. Didn't like them and wouldn't want to
2 work for them.

3 Q. Okay.

4 A. He knew that. Didn't like the behavior
5 of -- of them and from their national reputation I
6 thought that their CEO at -- at Hilton Head had
7 alienated a lot of good physicians in the
8 community.

9 Q. Did you --

10 A. And we talked about that.

11 Q. Did you ever ask him about the
12 potential sale of the hospital to anyone?

13 A. I did not.

14 Q. Did you have an attorney help you
15 negotiate the employment agreement with CCMC?

16 A. I did.

17 Q. Who was that?

18 A. Larry Merlin.

19 Q. Okay. Anybody else advise you on it?

20 A. No.

21 Q. What about this guy Jim Ramsey?

22 A. Oh, Jim Ramsey was a consultant. He's
23 a practice consultant. And I just discussed with
24 him the -- the -- the issue. And he's not an
25 attorney.

1 Q. Okay. But the guy who helped you
2 negotiate it was -- was Merlin?

3 A. Yes.

4 Q. Merlin.

5 A. Yes.

6 Q. From whom we have a letter in the file?

7 A. Yes.

8 Q. Okay. And how early did he get
9 involved with it?

10 A. I don't recall.

11 Q. Okay. But he was there for the whole
12 negotiation of the contract?

13 A. I think he -- he got involved later --

14 Q. Uh-huh.

15 A. -- when we looked like we were going to
16 do it. But early on he was not.

17 Q. And you wanted to make sure your terms
18 were included and Merlin would have communicated in
19 part to make sure that they were included?

20 A. That's right.

21 (DFT. EXH. 3, E-mail dated July 25,
22 2006 from Courtney Flexon to Eric Deaton, was
23 marked for identification.)

24 BY MR. MYRICK:

25 Q. Okay. Let's look at this next exhibit,

1 which I've marked as Exhibit 3. That is an e-mail
2 from Courtney Flexon, I think you're behind her
3 e-mail address there, it looks like one you might
4 have had at home, to Eric Deaton. Did you author
5 this e-mail --

6 A. Yes.

7 Q. -- dated July 25th, 2006, 7:43 AM?

8 A. I did.

9 Q. Okay. And he -- although Jim Ramsey
10 wasn't an attorney, he was a consultant. What's
11 his background?

12 A. Well, he's a medical practice
13 consultant and that's -- and I actually had a
14 casual meeting with him one time about this.

15 Q. Okay. Did he have a background in
16 helping negotiate terms of contracts like this?

17 A. He -- he was a consultant more directed
18 at -- at -- at practice economics. And, you know,
19 what -- you know, billing and -- and the actual
20 practice of the practice. Not so much in
21 negotiating contracts.

22 Q. Okay. Did he talk with you about any
23 of the risks of the contract?

24 A. Well, he did, yeah.

25 Q. Did Mr. Merlin talk with you about any

1 of the risks of the contract?

2 A. He probably did. I -- I'm not sure
3 specifically of what --

4 Q. Okay.

5 A. -- what we talked about in terms of the
6 risk.

7 Q. I'm going to get to that more
8 specifically in a minute, so I'm going to invite
9 your -- and I'll even direct your attention to the
10 paragraph I have referenced to, but did you think
11 in -- when you were negotiating the contract in
12 2008 -- that's not clear. Let me start that over.

13 Did you think that the Hardeeville
14 Hospital, CCMC, in 2008 would have enough
15 population to support an ENT? And this is what
16 you're envisioning, to be more clear, what you're
17 envisioning when you're negotiating the contract in
18 late 2006, you're looking forward to 2008 in your
19 mind?

20 A. Uh-huh. I'm sorry, ask the question
21 again now.

22 Q. I note in the 6th paragraph you talk
23 about the population that's going to be coming to
24 Jasper County?

25 A. Correct.

1 Q. And you quote Jim Ramsey and you say he
2 feels like 2009, 2010 is the year that Jasper
3 County will fully support an otolaryngologist.

4 A. That -- that -- that -- that paragraph
5 is correct. And I don't know what the population
6 of Jasper County is. The part that's not here
7 though, and I think you can see from -- if you look
8 at the -- the pro formas I give to -- to -- to Eric
9 Deaton --

10 Q. Uh-huh.

11 A. -- and actually to some extent it
12 surprised me how -- that -- I mean, it was -- it
13 was pretty good, but I already had the -- I had a
14 substantial group of patients from Beaufort County
15 and from Savannah --

16 Q. Uh-huh.

17 A. -- that would come to that office if it
18 were managed well. So while I wanted to -- to be
19 part of the growth of Jasper County, I -- one of
20 the -- the tricks of being successful there was
21 just simply keep my established practice.

22 Q. Uh-huh.

23 A. And that should have been easy.

24 Q. So you were going to import --

25 A. I brought them a really mature great

1 practice. I handed it to them.

2 Q. Okay. And in this later here that
3 you've written, this e-mail letter, you've written
4 two ways to mitigate your risk. Could you read
5 those into the record for us. And that's the last
6 paragraph on the first page.

7 A. The last -- about my thoughts and
8 concerns -- oh, you're saying the second to last
9 one?

10 Q. I'm -- after talking with Jim Ramsey --

11 MR. HARVEY: On the first page.

12 BY MR. MYRICK:

13 Q. -- he suggested --

14 A. Oh, I'm sorry.

15 Q. After talking -- I'm -- middle of the
16 last paragraph. After talking --

17 A. Okay. And continue in the area or
18 leave the community. Cannot support or modify the
19 recruiting agreement to --

20 Q. I don't think she can get that and it
21 won't --

22 A. Okay. All right.

23 Q. -- be --

24 A. All right. Yeah.

25 Q. Can you start with the sentence

1 beginning with after which is the third line down?

2 A. After talking with Jim Ramsey he
3 suggested two options: ' Do a straight three-year
4 employment contract, which allows me to buy my
5 equipment at the end and continue in the area or
6 leave if the community cannot support an
7 otolaryngologist or modify the recruiting agreement
8 to recognize our community's unique and tenuous
9 nature of population projections and give me a
10 failsafe mechanism for the first five years. The
11 first two years would guarantee a support of
12 300,000. The next three years a failsafe might
13 kick in which would not allow my income to fall
14 between 240,000 --

15 Q. To -- not to fall below?

16 A. Below, right, 240,000, not to exceed
17 35,000 a year.

18 Q. Okay. That's what I want to ask you
19 about. Did the contract in final capture either --
20 either of these two ways to mitigate risk?

21 A. Not really.

22 Q. The second one was not incorporated
23 into the contract?

24 A. In part, but most of what he did was he
25 offered me a bonus.

1 Q. So tell me first what part was caught
2 in that second option and then tell me what part
3 was not.

4 A. I -- I believe -- I have to refer to
5 the contract.

6 Q. Sure.

7 MR. HARVEY: Do you want to see the
8 contract?

9 THE WITNESS: Can I look at the
10 contract?

11 BY MR. MYRICK:

12 Q. Sure. Let me give you a copy.

13 A. Yeah.

14 MR. BELTON: The e-mail you're reading
15 from, which exhibit is that? Is that 4 or...

16 THE WITNESS: Exhibit 3.

17 MR. MYRICK: Exhibit 3.

18 MR. BELTON: Okay, thanks.

19 MR. MYRICK: We can go ahead and mark
20 this since he'll be referring to it. It'll be
21 Exhibit 4.

22 (DFT. EXH. 4, Physician Employment
23 Agreement, was marked for identification.)

24 THE WITNESS: Okay. All right.

25 MR. MYRICK: Here, we've got it right

1 here.

2 THE WITNESS: Oh. Oh.

3 MR. MYRICK: Let me just give it to
4 you, it's the next one in the series.

5 THE WITNESS: Oh, okay. All right.

6 MR. MYRICK: Yeah, you can take that,
7 that's Exhibit 4. (Indicating.)

8 THE WITNESS: Oh, okay.

9 BY MR. MYRICK:

10 Q. You want to cross reference Exhibit 4
11 with the previous exhibit, Exhibit 3. And my
12 question to you was: How was this second option
13 outlined to modify the recruiting agreement to give
14 you a failsafe mechanism in -- in -- for the
15 five-year period, to wit, a guaranteed support of
16 \$300,000 for the first two years and then the next
17 three years a failsafe that would not allow your
18 income to fall below 240,000, not to exceed 35,000
19 a year.

20 A. Right. There -- I guess the
21 compromised amount was 25,000.

22 Q. Instead of 35,000?

23 A. Yeah, in year --

24 Q. Okay.

25 A. -- three, four, and five.

1 Q. So it did -- it's close, it's not
2 exact, but it is close --

3 A. It did, yeah.

4 Q. -- way of mitigating --

5 A. Yeah. And he offered a -- a sign-on
6 bonus.

7 Q. Okay. And the sign-on bonus that you
8 got was \$25,000, right?

9 A. Right.

10 Q. Do you know what EBITDA is?

11 A. Well, it's an accounting format.

12 Q. Right.

13 A. Yes.

14 Q. What does it stand for?

15 A. Let's see, I have to say earnings,
16 what, based on something...

17 Q. Well, it's in the contract --

18 A. Yeah.

19 Q. -- but it's also -- I'll just refresh
20 your memory and you tell me if this is your
21 understanding. It's earnings before interest,
22 taxes and depreciation?

23 A. Correct.

24 Q. Is that correct?

25 A. That sounds right.

1 Q. Okay.

2 A. And it's actually based on cash.

3 Q. All right.

4 A. Yeah. This -- this specific one was
5 cash.

6 Q. And at the time of contracting, were
7 you familiar with that topic and understood the
8 topic of EBITDA?

9 A. I did understand the -- the -- the
10 accounting principle, yes.

11 Q. Okay. And you had discussed that with
12 Merlin?

13 A. Yes, and -- and with Deaton.

14 Q. Had you used it in your professional
15 compensation system before?

16 A. No.

17 Q. Okay.

18 A. No.

19 Q. How did you learn about it?

20 A. EBITDA?

21 Q. Uh-huh.

22 A. I'm not sure how I learned about
23 EBITDA. It's just been around forever.

24 Q. Okay.

25 A. You know, and I'd have to say the

1 details of it is something that when it comes up,
2 I -- you know, you have to sit down and have it --
3 you know, explained to you kind of again to refresh
4 yourself what it means.

5 Q. Fair enough.

6 A. I won't say every time.

7 Q. Fair enough.

8 A. But the one issue there it was based on
9 cash receipts, right? And I'm not sure where it
10 says that, but that was almost...

11 Q. Is it usually?

12 A. No. No, it's not.

13 Q. Earnings would be calculated on money
14 that didn't come through the door?

15 A. Correct and losses, uh-huh.

16 Q. Okay.

17 A. Yeah, it's usually based on -- well,
18 what's the term -- help me out, you guys probably
19 know this better than me, the accounting term that
20 almost all corporations use right now where they
21 book, you know, receipts and losses upfront before
22 they actually occur. It's called...

23 Q. Accrual?

24 A. Accrual, thank you. Accrual
25 accounting.

1 Q. Uh-huh.

2 A. Yeah. Most -- most large organizations
3 try to do your type of bonus or something on
4 accrual accounting.

5 Q. Do you feel like that paragraph that we
6 just talked about where we said, look, we're going
7 to pay you \$300,000 a year, you'll be an employee
8 of the hospital, and after that we're going to cap
9 your losses for the next three years, was a way to
10 cap some risk for you?

11 A. It -- it -- it was, yeah.

12 Q. Okay.

13 A. I -- yes, it was.

14 Q. And y'all talked about whether it would
15 be a smarter decision for you to come on
16 financially from your prospective about whether
17 you'd be an employee of the hospital versus being
18 an independent provider, right?

19 A. That's correct.

20 Q. And what did you decide?

21 A. As an employee of the hospital.

22 Q. Okay. Was there any -- you realized
23 that if your collections didn't meet a certain pace
24 that -- that you could be left owing the hospital
25 based on the EBITDA analysis, correct?

1 A. I could be left owing the hospital
2 money in the event that my collections didn't
3 meet -- come to a certain pace and I did not work
4 out a five-year term or there was a -- you know, a
5 material breach that would have, you know, negated
6 any obligation --

7 Q. And I understand you're saying breach
8 but that's outside the contract. I'm talking about
9 just inside the contract. And I think you --

10 A. I did -- yeah, I did not have to pay
11 anything if I worked out the five year --

12 Q. Right. You understood that at the time
13 if you stayed with them five years you wouldn't owe
14 them a penny --

15 A. That's correct.

16 Q. -- on negative EBITDA or not keeping up
17 the pace?

18 A. Correct.

19 Q. Okay. All of your debts would have
20 been forgiven after five years?

21 A. That's right.

22 Q. How did your bonus structure work under
23 this contract? And I'm -- I'll tell you where I'm
24 looking at, it looks like it's IVB.

25 A. Okay. I would refer to the contract.

1 Q. Yeah, please do. It looks like I've
2 got -- it'd be four -- it's Article 4, compensation
3 is subsection 4.1 and that refers us to Exhibit 1
4 in the back of the contract, right?

5 A. On Page 2 where it talks about bonus
6 and -- productivity bonus? This? (Indicating.)

7 Q. Yes, sir.

8 A. Yeah.

9 Q. Yes, sir.

10 A. Yeah.

11 Q. So that's -- so that's II, it says
12 bonus, and under that it's little A, productivity
13 bonus, and you're exactly where I want to be. So
14 tell -- tell me how that works, how the bonus
15 process was to work?

16 A. Well, the bonus draws were, again, 75
17 percent of year-to-date earned bonus and the bonus
18 was anything greater -- let's see...

19 Q. In short, is it not that you would be
20 entitled to an annual productivity bonus equal to
21 95 percent of positive EBITDA?

22 A. Yeah, what I -- what I basically bring
23 in over my cost and salary.

24 Q. Okay.

25 A. Uh-huh.

1 Q. Okay.

2 A. Yeah, that -- you know, that's correct.

3 Q. Let's say that Hardeeville -- that the
4 practice didn't get off the way you'd hoped it
5 would --

6 A. Uh-huh.

7 Q. -- in Hardeeville at CCMC and you were
8 going to stay the five years. Would you have to do
9 anything in addition to staying in the office for
10 five years in order for that negative EBITDA to go
11 away and do your job at Hardeeville?

12 A. For the negative EBITDA to go away --

13 Q. Uh-huh.

14 A. -- other than -- no, I don't believe I
15 would have to do anything else.

16 Q. Okay. And you understood that at the
17 time of contracting?

18 A. Sure.

19 Q. Okay. And if you had a negative EBITDA
20 and you did go away and there was no breach of the
21 contract, I understand you're saying there was a
22 breach of the contract but let's assume for a
23 moment that there was not a breach of the contract,
24 would you be responsible for that negative EBITDA
25 if you went away in that five years?

1 A. If I went away and -- and -- and there
2 was no breach in the contract?

3 Q. Correct.

4 A. I could be, you know, responsible for
5 that -- that -- that negative EBITDA, yes.

6 Q. Okay.

7 A. And if I might add though, of course
8 the last three years of support, okay, are
9 meaningless when you or -- trying to accrue a bonus
10 is meaningless when you have an institution that
11 doesn't send bills that have time clauses on them.
12 You -- you will have no cash receipts. They're not
13 sending any bills in.

14 Q. But if they did pursue and collect
15 those bills at a later date, would you have been
16 entitled to a bonus if it exceeded your EBITDA?

17 A. If they had done it at a later date,
18 but -- but most -- I mean, many of these have
19 time -- time -- timeliness clauses on it. You
20 can't -- you can't collect them --

21 Q. Do you --

22 A. -- after 90 days, 120 days. You can go
23 back after Medicare, but a lot of them you can't.

24 Q. Do you know what CCMC was able to
25 accomplish in terms of what they collected --

1 A. I don't.

2 Q. Okay.

3 A. I don't even know if they found all of
4 the old --

5 Q. Uh-huh.

6 A. They were just in boxes.

7 Q. Uh-huh. They way they were dropped off
8 at your office?

9 A. Apparently so.

10 Q. Okay. Now, tell me about how
11 collections work in a medical office in general. I
12 want to speak with you about that. That's the
13 topic I'd like to address now if that's okay with
14 you. Are you with me?

15 A. Well, we can speak about it, yeah.

16 Q. Okay.

17 A. It's not -- okay.

18 Q. Just in your experience, because how
19 long have you been an ENT doc?

20 A. 20 years or so.

21 Q. 20 years or so. What's the typical
22 percentage of gross bills that you can actually
23 recover? If you send out 100 percent, what are you
24 realistically looking at getting back in terms of
25 collections?

1 A. I would have to refer to, you know,
2 guidelines for that. And it's varied for year
3 and -- and -- year after year. But I think I --
4 I -- and you have those documents. I think I have
5 some standards at least for 2005.

6 Q. Okay.

7 A. And those would probably be applicable
8 for the immediate years afterwards.

9 Q. Can you find those so I can take a
10 look? Do you have a recollection of those?

11 A. I -- I think we can find them. It may
12 take me a little while.

13 Q. Let's -- I need to look at those if
14 you -- because I don't know where you're talking
15 about.

16 THE WITNESS: It's my handwritten notes
17 to him.

18 But it -- but it's -- it would be a --
19 you know, it'd be -- there's -- I think they're
20 referred to as the GMAC Guidelines and they're --
21 they're available --

22 BY MR. MYRICK:

23 Q. Do you have a range that would have
24 applied about in 2005? I don't need you to be very
25 specific. I want to understand the phenomena.

1 A. I think it was between 40 percent -- or
2 my guess would be about 45 percent to 55 percent of
3 gross collections --

4 Q. Okay.

5 A. -- should have been picked up in cash.

6 Q. Well, let's err on the side of
7 collecting as much of them as you possibly could
8 have under best case scenario to you. 55 percent
9 on average. Fair enough?

10 A. Sure.

11 Q. Okay. Now, is that the best case
12 scenario under managed care where insurers are
13 involved or is that the best case scenario on
14 Medicaid or that's a blend we're talking about?

15 A. That's a blend.

16 Q. All right. That's the blend. So if
17 that's the blend, I would presume Medicare,
18 Medicaid, and managed care you might have
19 different?

20 A. Yeah, at that time I would guess
21 that -- I'm guessing.

22 Q. Yeah.

23 A. Medicare might be 35 percent.

24 Q. Okay.

25 A. And Caid (sic) would have been maybe a

1 couple percentiles lower. Managed care would have
2 been probably maybe 5 to 10 percent higher. Then I
3 think your -- your -- your other payers would have
4 been substantially higher.

5 Q. Okay. So let me make sure I understand
6 that. Medicare about 35 percent, managed care 5 to
7 10 percent higher than Medicare?

8 A. Managed care being HMOs. Now, managed
9 care like a -- a -- a PPO or something would have
10 been substantially higher.

11 Q. Okay. And then there's -- all right.

12 A. Yeah. And so overall you're -- you're
13 running about somewhere probably 45 to 55 percent
14 at that time.

15 Q. Okay.

16 A. It's gone down a little bit.

17 Q. Okay.

18 A. It's gone down maybe more than a little
19 bit, yeah.

20 Q. Yeah. Uh-huh. But I want to talk
21 about this period --

22 A. Okay.

23 Q. -- because that was the period we had.
24 Are those the -- are those reasonably and with some
25 range fairly of the collection percentages that

1 might have applied to what was going on in 2007,
2 2008?

3 A. Yes, yes.

4 Q. Okay. In office time then, do you have
5 an idea about how much -- how many patients you
6 would have had to have seen to break even if that
7 was the collections ratio? And I'm going to call
8 it 55 percent just to give the benefit.

9 A. I don't. I don't.

10 Q. Okay.

11 A. And I don't -- and I'd be hard pressed
12 to tell you a blend of patients that -- you know,
13 private versus Medicare versus Medicaid, that --
14 that I would have had to have -- have seen.

15 Q. Okay. Do you remember what your blend
16 in fact was about that period? 2007?

17 A. I don't -- I don't know. I think -- I
18 think that per the hospital by -- by mid 2007, I --
19 I was the only ENT in -- in the -- in the -- you
20 know, Jasper County and -- and south Beaufort
21 County that took Medicaid, so I think that that --
22 and that -- that, you know, probably bumped that
23 percentage up, which was not a good payer. But I
24 can't give you, you know, specifics there.

25 Q. And Medicaid is not part of the

1 preferred mix, you want them --

2 A. It's a good -- it's a poor payer.

3 Q. It's a poor payer.

4 A. Medicaid, yeah, poor is --

5 Q. Okay. Is Medicare a good payer?

6 A. No. They're -- they're --

7 Q. So they're both poor payers?

8 A. Yeah, there's -- they're not as bad as
9 Medicaid. But Medicare is a prompt and efficient
10 reimbursing --

11 Q. Okay.

12 A. -- so there's a -- there's a good side
13 to them.

14 Q. There's an upside.

15 A. Yeah.

16 Q. Do you know how many patients you were
17 seeing on average a day in 2007?

18 A. I don't.

19 Q. Was the patient exceeding as far as you
20 were concerning, not -- I'm not talking about the
21 efficiency of the billing process --

22 A. The numbers?

23 Q. -- I'm talking about the numbers.

24 A. I don't think so.

25 Q. Okay. Why not?

1 A. I think for a number of reasons. I
2 think that the -- combined with the move, people
3 trying to locate me, the takeover of Tenet, I think
4 all those things hurt -- in fact I think you'd see,
5 and I don't know this for a fact, but I believe
6 you'd see that the first three months before the
7 announcement came out and -- and they took over the
8 hospital in July, I think that June, for example,
9 has a higher census, patient census than July. So
10 that -- that was a -- an issue.

11 Q. And you think that that's a significant
12 enough issue that Tenet acquired ownership that it
13 would have driven your patient numbers down?

14 A. I think it was.

15 Q. And -- and because patients would say
16 what?

17 A. They had a poor reputation and they --
18 I think they -- you know, an otolaryngologist is
19 primarily a surgeon. And, you know, where you go
20 have your surgery is -- is important to a lot of
21 people and I think going to have, you know, a
22 surgical procedure at Tenet Hospital was an issue
23 for some patients --

24 Q. Okay.

25 A. -- I believe that at that time.

1 Q. And we've talked about the names that
2 you're going to offer or -- on it earlier?

3 A. Well, this is just patients in the --
4 the national perception of Tenet was at an all time
5 low.

6 Q. I understand.

7 A. I mean, that book came out in 2007.
8 The events occurred in that book were widely known
9 and talked about in magazines and in national
10 newspapers for years before that. And, I mean,
11 Tenet was considered a -- a poor, poor, you know,
12 steward of the healthcare industry.

13 Q. I understand that that's your view of
14 it, but what I'm asking about is proof that
15 attaches to these particular facts. What
16 information you have about particular patients not
17 coming to you specifically because the hospital
18 where you work was Tenet owned.

19 A. I can't come up with patient names, but
20 there were numerous -- I think numerous patients
21 that found -- went other places because Tenet took
22 over that hospital.

23 Q. Okay. Back to the contract that's in
24 front of you now --

25 A. Uh-huh.

1 Q: -- as Exhibit 4, that is the contract
2 that covers the period, right, it's executed on
3 December 18th, 2006?

4 A. It -- is it -- that covered the
5 period -- I mean, it's my contract, yes.

6 Q. It's your contract?

7 A. Yes, yes.

8 Q. Okay. And the start date is
9 March 14th, 2007?

10 A. I think it's March 15th, 2007.

11 Q. All right. And when was your last day
12 at Memorial?

13 A. I think that -- a few days prior to
14 that. Maybe -- maybe -- or maybe a couple weeks
15 intervened between when I stopped and when I went
16 to work.

17 Q. Well, the part of your damages analysis
18 that's been supplied to us is six weeks of salary
19 for a period from moving your practice to Coastal?

20 A. Well, maybe it was six weeks. Okay. I
21 apologize.

22 Q. Is that right?

23 A. That -- that's correct, yeah.

24 Q. Okay. And what did you do during that
25 six-week period?

1 A. I think I -- well, I moved. Got my --
2 we -- part of it was spent locating and I think --
3 or deciding on where I would have an office and
4 then moving into it and setting it up.

5 Q. Okay. And according to that contract,
6 with -- who was the party with whom you contracted
7 according to the terms of that contract on the
8 first page.

9 A. Who was the party?

10 Q. Uh-huh.

11 A. You mean who was my contract with?

12 Q. Yes.

13 A. Coastal Carolina Medical Center.

14 Q. Okay. It does not say LifePoint there,
15 correct?

16 A. It does not say LifePoint.

17 Q. Nor does it say PHC-Jasper, correct?

18 A. No, it does not.

19 Q. Okay. Did you have a CPA look at your
20 contract before you signed it?

21 A. I did not.

22 Q. Would you look at Page 9, Article 13.7,
23 please?

24 A. 13.7 on -- 13.7 on Page 9 is that what
25 you --

1 Q. That's correct.

2 A. Yeah.

3 Q. All right. Would you -- and it's a
4 short paragraph, would you please read that into
5 the record for me.

6 A. The agreement contains -- contains
7 the --

8 Q. Well, I mean, read the title --

9 A. Entire --

10 Q. -- all of it.

11 A. -- Agreement Amendment.

12 Q. Okay.

13 A. Entire Agreement Amendment. This
14 agreement contains the entire agreement between the
15 parties hereto. No change, addition or amendment
16 shall be made except by written agreement executed
17 by all the parties hereto.

18 Q. What does that mean to you?

19 A. That this is the agreement. This is
20 it.

21 Q. Okay. Does that say it's the total
22 agreement?

23 A. It does.

24 Q. It says the entire agreement?

25 A. Correct.

1 Q. Did you understand that at the time
2 when you signed it?

3 A. I believe I did.

4 Q. Okay. Do you believe there are other
5 terms of the contract that govern your employment
6 there that were not contained in this written
7 agreement?

8 A. I -- I believe that there are -- that
9 this agreement in -- in -- you know, infers certain
10 things that perhaps are not spelled out, you know.

11 Q. Doesn't that --

12 A. Uh-huh.

13 Q. -- doesn't that contradict that
14 language there?

15 A. Not really. It -- why would it?

16 Q. Because this says this agreement
17 contains the entire agreement.

18 A. Well, for example, if you are -- have
19 in the agreement that you -- the -- in the -- that
20 Coastal Carolina will provide your office with
21 proper supplies, okay, that would be -- that
22 would -- that would infer that it's the certain
23 supplies necessary to conduct otolaryngology would
24 be supplied. It doesn't specifically say what they
25 are. But there would be a certain list that would

1 be inferred from that and it -- this follows in
2 accordance.

3 Q. Okay.

4 A. And that -- that's what this -- you
5 know, that doesn't exclude the basic sort of say
6 supplies or duties when they're generally specified
7 in the contract.

8 For example, Coastal Carolina, it's not
9 a -- it's not a registered name, but everybody who
10 signs it, other than me, is employed by LifePoint.
11 The address is in Brentwood, Tennessee. This
12 contract's with LifePoint.

13 Q. Well --

14 A. Correct? It's in there. I'm asking
15 you --

16 Q. You know, that's --

17 A. -- a question.

18 Q. -- that's a matter for us to resolve.
19 But right now I'm just trying to find out if there
20 were terms that you think were included in the
21 contract that aren't written out in the contract.

22 A. Well, I think when they -- when there
23 is an obligation on the part -- on the part of
24 Coastal Carolina for example to supply me with
25 employees --

1 Q. Reasonable?

2 A. -- reasonable.

3 Q. Uh-huh.

4 A. And equipment.

5 Q. Uh-huh.

6 A. That -- that there are certain basics
7 that from the negotiations and the discussions
8 that -- that are -- that this contract obligates
9 them to provide.

10 Q. Okay. And that's your interpretation
11 of --

12 A. I think it --

13 Q. -- that paragraph?

14 A. Yeah, I don't think that that excludes
15 it. I think it simply says that when they're
16 supposed to, you know, provide the basics for, you
17 know, your practice. That when --

18 Q. That's included in the contract, that
19 part you're talking --

20 A. Yeah, it is, but --

21 Q. -- about, right? Yeah.

22 A. -- when they don't specify it then I
23 think that then -- then the discussions and -- and
24 whatnot that occur, you know, up to, you know, the
25 contract and are part of the contract are very

1 important. When they don't supply the certain
2 basic equipment and whatnot that they state they're
3 going to.

4 Q. Uh-huh. Well, was the -- was the
5 equipment that you're talking about now, was it
6 specified in the contract anywhere that it would be
7 supplied?

8 A. The contract says they're going to
9 provide me with the means in which to -- to do
10 my -- my practice, so they're general -- they're
11 general specifications.

12 Q. Uh-huh.

13 A. And when you submit pro formas that
14 only could occur with those equipments (sic) --
15 pieces of equipment then -- then I think that the
16 contract, yes, does, you know, require that those
17 pieces of equipment be purchased or -- or supplied.

18 Q. Did you perform your job with
19 professional quality in 2007 while you were at
20 CCMC?

21 A. I did. I believe I did.

22 Q. Okay. Were there any -- this paragraph
23 contemplates that any changes, additions or
24 amendments, that none would be made except by
25 written agreement executed by all of the parties