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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley. Circuit Court Judge

Case No. 06-CP-32-0371

J. Kevin Baugh, M.D., and Barry J.
Feldman, M.D., ... Respondents.

V.

Columbia Heart Clinic, P.A., ... Appellant.

RECORD ON APPEAL
Volume II

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Keith M. Babcock
Ariail E. King
LEWIS & BABCOCK, L.L.P.
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Post Office Box 11208
Columbia, South Carolina 29211
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Columbia, South Carolina 29201
(803) 254-3300

ATTORNEYS FOR RESPONDENTS

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SC Court of Appeals

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State of South Carolina) Court of Common Pleas
County of Lexington) 11th Judicial Circuit
No.: 06-CP-32-0371

J. Kevin Baugh, M.D.)
and Barry J. Feldman,)
M.D.,)

Plaintiff,)

vs.)

Columbia Heart Clinic,)
P.A.,)

Defendant.)

Deposition of
ROBERT SCHULZE, M.D.

June 25, 2008

Deposition on oral examination of Robert Schulze, M.D., reported by Deborah S. Thomas, Certified Verbatim Reporter and Notary Public in and for the State of South Carolina; said deposition taken pursuant to agreement and in accordance with the South Carolina Rules of Civil Procedure, at the Offices of Malone, Thompson, Summers & Ott, LLC, 330 Heyward Street, Suite 200, Columbia, South Carolina, on June 25, 2008, at the hour of 3:00 p.m.

GARBER REPORTING SERVICE, INC.
POST OFFICE BOX 12348
COLUMBIA, SOUTH CAROLINA 29211
(803) 256-4500

Garber Reporting Service
803-256-4500

EXHIBIT

8

1 A. I wasn't involved in that. I don't know
2 anything about it other than I voted to approve it
3 when it was brought to the Board.

4 Q. Do you recall the 1999 agreement having a
5 non-competition agreement in it?

6 A. I believe there was a -- an agreement
7 where by accounts receivable would be forfeited for
8 a competition. I don't remember the details of it
9 off the top of my head. I'm sure it's in the
10 contract.

11 Q. Do you know if any consideration was paid
12 for physicians signing the 1999 agreement?

13 A. I don't think so.

14 Q. Going back to the 2004 agreement, did the
15 Board discuss the agreements before approving them?

16 A. I remember we had meetings about it. I
17 don't remember any details of the meetings.

18 Q. Do you remember Mr. Summer telling the
19 group that non-competition agreements are difficult
20 or tough to enforce?

21 A. I don't.

22 Q. Let's just take a look at Exhibit 5 which
23 appears to be a set of slides. Do you recall a
24 meeting at which these slides were reviewed?
25 Mr. Summer may or may not have been there?

1 A. I don't recall these specific slides, but
2 I presume if these represent slides that -- I
3 remember for sure a Power Point presentation that
4 Steve Humphrey made to us about this plan, so these
5 may be the slides that Steve used in that
6 presentation.

7 Q. Okay. Well, take a look at Exhibit 6
8 which is the letter -- I believe it's the letter
9 that you mentioned earlier.

10 A. Yes. I'm sure this is it.

11 Q. Okay. Were you a recipient of this letter
12 on or about the time that it was -- shortly after it
13 was received?

14 A. I don't think so.

15 Q. It mentions a telephone conference the day
16 before. You weren't a participant in that telephone
17 conference?

18 A. Where does it mention that, what
19 paragraph?

20 Q. If you look at the second paragraph --

21 A. Second paragraph? I don't think that I
22 was.

23 Q. Do you recall any other significant
24 reasons why the 2004 agreement was approved other
25 than the purchase of the new building? Were there

75 Cotton Grove Lane
Columbia, South Carolina 29209

January 22, 2006

HAND DELIVERED

Benjamin R. Jones, M.D.
President
Columbia Heart Clinic, P.A.
Columbia, South Carolina 29203

RE: Resignation of Employment

Dear Ben:

This is to formally notify you of my decision to resign my employment with the Columbia Heart Clinic, P.A., pursuant to Section 4.4 of my Employment Agreement, effective ninety (90) days from today.

I have enjoyed my professional association with you and the other cardiologists affiliated with the Columbia Heart Clinic, P.A. but believe the time has come for me to pursue my chosen profession in a smaller organization.

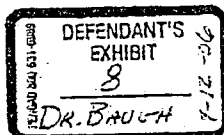
It is my intent to fulfill all of my contractual and professional responsibilities over the next ninety (90) days. Similarly, I intend to do everything reasonably possible to make my transition as smooth as possible both for you and my colleagues at Columbia Heart Clinic, P.A. and for my patients.

As we move forward, I hope we can all work together, in good faith, to minimize the financial impact of my decision and keep quality patient care in the forefront of our discussions.

With kindest regards, I am

Sincerely,

J. Kevin Baugh
J. Kevin Baugh, M.D.



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Confidential

5 Casile Hall Court
Columbia, South Carolina 29209

January 22, 2006

HAND DELIVERED

Benjamin R. Jones, M.D.
President
Columbia Heart Clinic, P.A.
Columbia, South Carolina 29203

RE: Resignation of Employment

Dear Ben:

This is to formally notify you of my decision to resign my employment with the Columbia Heart Clinic, P.A., pursuant to Section 4.4 of my Employment Agreement effective ninety (90) days from today.

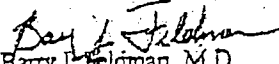
I have enjoyed my professional association with you and the other cardiologists affiliated with the Columbia Heart Clinic, P.A. but believe the time has come for me to pursue my chosen profession in a smaller organization.

It is my intent to fulfill all of my contractual and professional responsibilities over the next ninety (90) days. Similarly, I intend to do everything reasonably possible to make my transition as smooth as possible both for you and my colleagues at Columbia Heart Clinic, P.A. and for my patients.

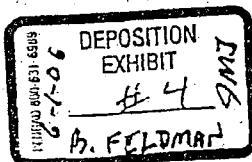
As we move forward, I hope we can all work together, in good faith, to minimize the financial impact of my decision and keep quality patient care in the forefront of our discussions.

With kindest regards, I am

Sincerely,


Barry J. Feldman, M.D.

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THIS AGREEMENT IS SUBJECT TO ARBITRATION
PURSUANT TO SC CODE § 15-48-10 ET SEQ. AS MODIFIED HEREIN

PHYSICIAN EMPLOYMENT AGREEMENT

THIS PHYSICIAN EMPLOYMENT AGREEMENT (the "Agreement") is entered into as of this 1st day of March, 2003, between COLUMBIA HEART CLINIC, P.A., a South Carolina professional corporation ("Medical Group"), and JENNIFER FELDMAN, M.D. ("Physician").

PREMISES:

- A. Medical Group is a group medical practice providing medical services to its patients in the State of South Carolina.
- B. Physician is a physician duly licensed to practice medicine in the State of South Carolina.
- C. Medical Group desires to employ Physician, and Physician desires to be employed by Medical Group, on the terms set forth herein.

NOW, THEREFORE, in consideration of the promises herein contained and other good and valuable consideration, the receipt and legal sufficiency of which are hereby acknowledged, the parties agree as follows:

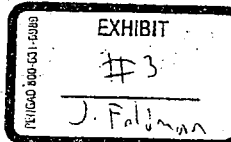
ARTICLE I

COMPENSATION AND BENEFITS

- 1.1. Compensation. Throughout the term of this Agreement, Medical Group shall pay to Physician compensation as provided in Exhibit A attached hereto and incorporated by reference herein.
- 1.2. Employee Benefits. To the extent eligible, Physician shall participate in all employee benefits as are provided by Medical Group and as established and modified from time to time by the Board of Directors of Medical Group as long as Physician is otherwise eligible to participate and desires to be covered and so participate. Nothing contained in this Section shall be construed to obligate Medical Group in any manner to provide special benefits to Physician.
- 1.3. Vacations and Professional Meetings. Physician shall be entitled each year to such time out of the office and away from Physician's professional duties for vacation and attendance at professional meetings as shall be consistent with policies established and modified from time to time by the Board of Directors of Medical Group. The policies for vacation and professional meetings in effect at the commencement of the initial term of this Agreement, which

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may be amended from time to time by the Board of Directors, are set forth on Exhibit B attached hereto and incorporated by reference herein.

1.4. Disability. The Board of Directors of Medical Group shall establish from time to time the standards for and provisions concerning the benefits, if any, to be provided upon the temporary or permanent disability of physician employees of Medical Group. Physician shall comply with all such standards and provisions.

1.5. Malpractice Insurance; Tail Insurance Coverage.

(a) Medical Group shall carry malpractice insurance covering Physician with minimum limits of \$1,000,000 per incident and \$3,000,000 in the aggregate, or such higher limits and including such terms and conditions as the Board of Directors of Medical Group may from time to time determine to be reasonable and necessary. Physician shall at all times cooperate with the malpractice insurance carrier by providing in a timely manner any information, records or data reasonably requested.

(b) Upon the expiration or termination of this Agreement due to the death or total and permanent disability of Physician, in the event Medical Group has in force "claims made" insurance covering Physician at the time of the expiration or termination of this Agreement, Medical Group shall pay for the appropriate reporting endorsement (known as "Tail Coverage") for medical malpractice insurance carried by Medical Group on Physician if determined to be necessary by Medical Group.

1.6. Other Business Expenses. Medical Group shall pay all fees associated with Physician's obtaining and maintaining South Carolina licensure and hospital privileges at those hospital where Physician is required to maintain privileges under this Agreement. Medical Group shall also pay Physician's professional society dues, limited to the South Carolina Medical Association, Columbia Medical Society, NASPE, and the American College of Cardiology.

1.7. Relocation Expenses. [This paragraph intentionally left blank].

ARTICLE 2

DUTIES AND RESPONSIBILITIES

2.1. Physician Duties. Physician shall actively practice medicine on behalf of Medical Group and perform such other clinical, administrative and management duties as may be assigned to Physician from time to time by Medical Group. Physician acknowledges that certain rules and regulations must be established and maintained by the Board of Directors of Medical Group from time to time for the efficient operation of a quality group practice. Physician therefore agrees that:

(a) The Board of Directors of Medical Group shall have the authority to establish policies, procedures and operational guidelines regarding the acceptance and treatment

of patients of Medical Group. Physician shall perform services for those patients assigned to Physician and advise and assist any of the other physicians or employees of Medical Group in the diagnosis or treatment of any case as reasonably directed by the Board of Directors of Medical Group in accordance with such guidelines.

(b) The Board of Directors of Medical Group, or a subcommittee of physicians as delegated by the Board of Directors of Medical Group, shall establish quality assurance procedures for the Medical Group from time to time, and Physician agrees to comply with and be bound by the recommendations and requirements of any quality assurance program so established.

(c) The Board of Directors of Medical Group, in consultation with Physician, shall establish the office location(s) where and the schedule according to which Physician shall perform Physician's duties under this Agreement; provided, however, Physician shall devote fulltime efforts to the practice of medicine on behalf of Medical Group. "Fulltime" shall be defined from time to time by the Board of Directors of Medical Group.

(d) Physician shall adhere faithfully to all professional ethics and customs, shall avoid all acts, habits and usages which might injure in any way, directly or indirectly, the professional reputation of Medical Group or any of the physicians or other employees of Medical Group, and shall follow and abide by all federal, state and municipal ordinances and laws relating to or regulating the practice of medicine in the State of South Carolina and shall comply with all requirements of liability insurance policies of Medical Group insuring Physician.

2.2. Exclusive Service. Physician shall devote Physician's full, entire, and undivided professional time and attention to the practice of medicine with Medical Group. The parties acknowledge that beginning July 1, 2003, Physician shall assume a reduced work schedule of thirty (30) hours per week. Physician shall not engage in professional work in Physician's individual capacity or in association with others not employed by Medical Group, nor receive any compensation therefor, without the express written consent of the Board of Directors of Medical Group or as otherwise set forth on Exhibit C attached hereto and incorporated by reference herein. Medical Group, however, shall, from time to time, establish and/or modify policies regarding the treatment of honoraria, royalties, reasonable gifts, military reserve duty compensation, and all similar activities undertaken by physician employees.

2.3. Representations and Warranties of Physician. Physician represents and warrants to Medical Group that:

(a) Physician is a physician duly licensed to practice medicine in the State of South Carolina and is Board Certified in cardiology and electrophysiology in Australia, and Physician will maintain such licensure during the term of this Agreement. Physician has never had Physician's license to practice medicine in any state or Physician's State Drug Enforcement Agency number revoked, suspended (or otherwise restricted), or terminated, and Physician has never surrendered Physician's license to practice medicine in any state.

(b) Physician has, and will maintain during the term of this Agreement, all necessary staff privileges, permits and credentials necessary for Physician to practice medicine (including an unrestricted right to prescribe controlled substances and medication) in such ambulatory, acute and tertiary care settings within the State of South Carolina as may be designated from time to time by the Board of Directors of Medical Group, including during the term of this Agreement the maintenance of active staff privileges at Palmetto Richland Hospital, Palmetto Baptist Hospital, Providence Hospital, and Lexington Medical Center.

(c) Physician is not currently a party to any lawsuits involving Physician's medical practice, except as previously disclosed to Medical Group, and knows of no facts which would cause Physician reasonably to believe that such an action would be filed.

(d) Physician has never been censured, reprimanded or placed on probation for reasons relating to professional competence or conduct by any medical licensing board, any federal, state or local government agency, or any professional society or specialty board.

(e) Physician is not now and has never been the object of any investigation or other proceeding by any payor involving claims of fraudulent billing practices or any violation of the Medicare or Medicaid laws or regulations.

(f) Physician has not had Physician's clinical privileges at any hospital or other health care facility suspended, terminated, restricted or revoked (other than suspensions of thirty (30) days or less as a sanction for administrative infractions) or surrendered such clinical privileges while Physician was under an investigation relating to possible incompetence or improper professional conduct or in return for not concluding such investigation.

2.4. Compliance with Rules and Regulations. Physician shall comply with all resolutions, directives, rules and regulations as may be established and modified by Medical Group pertaining to the business operation and the medical practice of Medical Group. Physician further shall comply with all laws and regulatory requirements applicable to the practice of medicine. Physician agrees to provide medical services at least consistent with generally accepted professional standards for the practice of medicine in the community in which Physician practices.

2.5. Physician-Patient Relationships. Medical Group agrees that none of the terms of this Agreement shall interfere, or are intended to interfere, with the physician-patient relationship, or to interfere with the practice of medicine by Physician in accordance with applicable laws and professional medical standards.

ARTICLE 3

ADMINISTRATIVE MATTERS

3.1. Fees, Collections and Billings. Medical Group shall establish, and modify from time to time, all professional fees for services rendered by Physician or any other physician employee of Medical Group, and Physician agrees to cooperate on all billing matters and assist in collection efforts as necessary. Medical Group shall own and control all collections and billings arising pursuant to the rendering of medical services by Physician or any other employee. All fees and compensation received or realized by Medical Group as a result of the rendering of services by Physician and other employees shall belong, be paid and be delivered to Medical Group.

3.2. Custodial Responsibility With Respect to Records and Accounts. Physician shall keep full and accurate medical records and accounts and records of all professional work performed by Physician or under Physician's supervision in a timely fashion in accordance with guidelines established by the Board of Directors of Medical Group. All such records are the exclusive property of Medical Group. Physician holds such records in trust for Medical Group and shall promptly relinquish any such records in Physician's control to the Medical Group on demand.

3.3. Provision of Office Space, Equipment, and Other Necessary Items. Medical Group shall furnish, as Medical Group deems necessary and appropriate, office space, equipment, instruments, supplies, medicines, and support personnel for the practice of Physician under the terms of this Agreement. The Board of Directors of Medical Group shall establish policies from time to time regarding payment for Physician's professional license fees for the State of South Carolina and related expenses.

3.4. Administration and Hiring of Personnel. Medical Group shall have full and complete authority and responsibility with respect to the administration of the business of the Medical Group and the hiring of personnel for the operation of Medical Group.

ARTICLE 4

TERM AND TERMINATION

4.1. Term. The term of this Agreement hereunder shall commence on March 1, 2003 and shall continue for a period of twenty-eight (28) months to expire at midnight on June 30, 2005, unless terminated sooner as provided in this Agreement.

4.2. Termination for Cause. This Agreement may be terminated for Cause (as hereinafter defined) by the party not providing such Cause, immediately upon written notice. "Cause" means:

(a) Failure of Physician to comply with reasonable directives of Medical Group, or the policies, standards and regulations established from time to time by Medical

Group, provided any such violation has continued uncured for a period of more than ten (10) days after Medical Group has given written notice of such violation to Physician;

(b) Willful misconduct of Physician resulting in damage to Medical Group;

(c) Determination by any entity or governmental agency of competent jurisdiction that Physician has committed any criminal, unethical or fraudulent act;

(d) Final determination of loss, suspension or restriction of the license of Physician to practice medicine in the State of South Carolina;

(e) Suspension, revocation, or restriction of Physician's license or permit to prescribe controlled drugs;

(f) Permanent loss, after all appeals, of any hospital staff privileges by Physician at any hospital for reasons of professional conduct and competence;

(g) Termination of active medical staff privileges for any reason, including resignation, at any hospital at which Physician is required by this Agreement to maintain active staff privileges;

(h) Inability to insure Physician against medical malpractice as provided in Section 1.5. hereof on reasonable financial terms; or

(i) Material breach or default of either party under the terms of this Agreement, which shall remain uncured ten (10) days after receipt of written notice of default from the non-defaulting party.

4.3. Termination upon Death or Disability of Physician.

(a) This Agreement shall terminate immediately upon the death of Physician.

(b) Medical Group may terminate this Agreement upon any disability of Physician in accordance with the standards and provisions concerning disability established from time to time by Medical Group pursuant to Section 1.4. of this Agreement. Disability, and the procedures for determining disability, shall be defined in the long term disability insurance policy insuring Physician, if any, or as otherwise defined by the Board of Directors of Medical Group. In the event this Agreement is terminated pursuant to this Section 4.3.(b), Physician shall continue to be entitled to all short term and long term disability benefits as provided in Physician's disability insurance policy. If Physician's disability should cease at any time after the termination of this Agreement, the rehiring of the Physician shall be consistent with all applicable state and federal laws and regulations.

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4.4. Termination Without Cause. Either party may terminate this Agreement without cause on one hundred twenty (120) days' prior written notice to the other party.

4.5. Effect of Termination or Expiration. Upon the termination or expiration of this Agreement, Physician shall have no right to any payment for services Physician renders or orders beyond that payable by Medical Group in its ordinary course of business as of the last regular pay period covering Physician's final period of employment or association. If Physician is terminated by Medical Group pursuant to Section 4.4 above, Physician shall be entitled to receive Physician's regular salary for the 120 day notice period or until such time as Physician obtains other full-time employment, whichever is sooner. Physician shall be required to continue to perform services under this Agreement during the 120 day period unless directed otherwise by Medical Group; provided, however, that if Physician is directed by Medical Group to cease performing services during the notice period, Physician shall still receive Physician's regular salary for the 120 day notice period or until such time as Physician obtains other employment, whichever is sooner.

ARTICLE 5

COVENANTS

5.1. Covenant Not to Disclose Confidential Information. Physician acknowledges and stipulates that: (A) during the term of this Agreement, Physician will be placed in a position by Medical Group to become acquainted with various aspects of the Confidential Information (defined below); (B) the use or disclosure of the Confidential Information by Physician except as expressly authorized by Medical Group is prohibited and would seriously damage Medical Group; and (C) in addition to being given access to the Confidential Information, Physician will receive material benefits as a result of this Agreement, including compensation and experience. Therefore, Physician agrees as follows:

(a) During the term of this Agreement and thereafter, Physician shall not, without the prior written consent of Medical Group, directly or indirectly:

(i) Divulge, furnish or make accessible to any Person or copy, take or use in any manner any of the Confidential Information; or

(ii) Take any action which might reasonably be foreseen to compromise the confidentiality or proprietary nature of any of the Confidential Information.

(b) "Confidential Information" means all of the materials, information and ideas of the Medical Group, including, without limitation: patient names, patient lists, patient records, patient information, operation methods and information, accounting and financial information, marketing and pricing information and materials, internal publications and memoranda, and other matters considered confidential by Medical Group.

(c) The provisions of this Section 5.1 shall survive the expiration or termination of this Agreement for any reason.

5.2. Covenant Not to Compete. During the term of Physician's employment hereunder, Physician shall not (i) engage in any business activity or employment related to the provision of health care services or products except as expressly permitted by this Agreement or (ii) take any action which would interfere with or prevent Physician's performance of the duties assigned to Physician by Medical Group or be inconsistent with or detrimental to Medical Group's business. In the event this Agreement is terminated pursuant to Section 4.2(i) upon a material breach by Medical Group, this Covenant Not to Compete shall not apply.

5.3. Remedies. Remedies shall be available to Medical Group in the event of a breach of the provisions of Section 5.1. and/or Section 5.2 according to the following provisions:

(a) The parties agree that a breach by Physician of any of the provisions of Section 5.1. and/or Section 5.2 of this Agreement would cause irreparable damage to Medical Group.

(b) The provisions of this Section 5.3. shall survive the expiration or termination for any reason of this Agreement.

(c) If either party attempts to enforce any of its rights under this Section 5 as against the other party, the prevailing party shall be entitled to recover from the other party reasonable attorneys' fees, court costs and other expenses incurred by the prevailing party in connection with such enforcement or attempted enforcement of those rights.

5.4. Acknowledgment of Reasonableness. Physician has carefully read and considered the provisions of this Agreement and agrees that the restrictions set forth herein, particularly those in Sections 5.1. and 5.2., are fair and reasonably required for the protection of Medical Group.

ARTICLE 6

GENERAL PROVISIONS

6.1. Notices. Any notices, requests and other communications hereunder shall be in writing and shall be deemed duly given if hand delivered or mailed first class, postage prepaid, certified mail, return receipt requested, addressed as set forth hereinafter, or to such other address as any person or entity may designate in writing, and delivered as herein provided:

To Medical Group:

Columbia Heart Clinic, P.A.
1655 Bernardin Avenue, Suite 220
Columbia, SC 29204
Attention: President

To Physician:

Jennifer Feldman, M.D.

6.2. Severability. The provisions of this Agreement are deemed by the parties to be severable, and the invalidity or unenforceability of any one or more of the provisions of this Agreement shall not affect the validity or enforceability of any other provision.

6.3. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of South Carolina.

6.4. Entire Agreement/Prior Agreements. This Agreement sets forth the entire understanding between the parties with respect to the subject matter hereof and cannot be amended except by a writing signed by both parties. No waiver of any term or provision of this Agreement shall be deemed to be a waiver of any subsequent breach of such term or provision of this Agreement. This Agreement supersedes all prior agreements, oral or written, between the parties covering the same subject matter.

6.5. Assignment. Physician acknowledges that the services to be rendered by Physician are unique and personal, and Medical Group acknowledges that Physician is willing to sign this Agreement only if Physician's employment is with Medical Group. Accordingly, neither Medical Group nor Physician may assign any of that party's rights or delegate any of that party's duties or obligations under this Agreement. Any assignment or attempted assignment, transfer or pledge of this Agreement or of the interest of either party herein shall be null and void, and at the option of the other party, this Agreement may be terminated immediately upon the occurrence of such an event. The rights and obligations of the parties under this Agreement shall inure to the benefit of and shall be binding upon the successors, heirs and assigns of the parties hereto, whenever the context admits or requires.

6.6. Contract Modifications for Prospective Legal Events. In the event any state or federal laws or regulations, now existing or enacted or promulgated after the effective date of this Agreement, are interpreted by judicial decision, a regulatory agency or legal counsel to a party in such a manner as to indicate that the structure of this Agreement may be in violation of such laws or regulations, Medical Group and Physician shall amend this Agreement as necessary. To the maximum extent possible, any such amendment shall preserve the underlying economic and financial arrangements between Medical Group and Physician.

6.7. Arbitration. Except as set forth in Section 5.3, for any other controversy or claim arising out of or relating to this Agreement (whether pre or post-termination), or the breach, termination or validity of this Agreement (a "Dispute"), the parties will attempt in good faith to resolve the Dispute. If the Dispute has not been resolved within sixty (60) days of the commencement of such discussions (which period may be extended by mutual agreement), then the parties hereby agree to immediately submit the Dispute to binding arbitration. The arbitration shall be conducted by a single arbitrator if the amount in controversy is \$100,000.00 or less or non-monetary in nature or by a panel of three arbitrators if the amount at issue is more than \$100,000.00, in accordance with the American Health Lawyers Association Alternative

Dispute Resolution Rules of Procedure for Arbitration. Judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction thereof. Each party shall bear its own expenses and attorneys' fees incurred in the arbitration, except that all expenses and attorneys' fees incurred in any appeal shall be borne by the party not prevailing on such appeal. The place of arbitration shall be Columbia, South Carolina.

6.8 No Expectation of Shareholder Status. Physician acknowledges that neither this Agreement nor Physician's employment by Medical Group for all or any portion of the term of this Agreement entitles Physician to be a shareholder of Medical Group and that any consideration for shareholder status is in the sole discretion of the Medical Group.

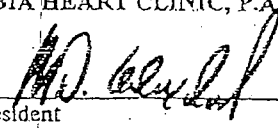
6.9. Captions. The captions or titles to the various sections of this Agreement are for convenience and ease of reference only and do not define, limit, augment or describe the scope, content or intent of this Agreement or of any parts thereof.

6.10. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original.

IN WITNESS WHEREOF, Medical Group has caused this Agreement to be executed by its duly authorized officers, and Physician has executed this Agreement as of the day and year first above written.

MEDICAL GROUP:

COLUMBIA HEART CLINIC, P.A.

By: 
President

PHYSICIAN:

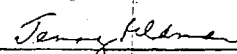

Jennifer Feldman, M.D.

EXHIBIT A

COMPENSATION

Physician shall be paid a salary equal to \$ 325,000 annually for the period March 1, 2003 through June 30, 2003. Beginning July 1, 2003 in anticipation of Physician's assuming a reduced work schedule of thirty (30) hours per week, Physician shall be paid a salary equal to \$255,000 per calendar year for the remainder of the term of this Agreement.

Physician may be eligible for such bonuses, to be based on productivity and performance, as may be awarded from time to time in the sole discretion of Medical Group.

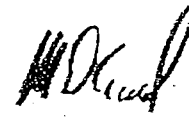
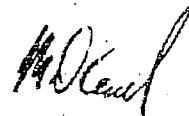


EXHIBIT B

VACATION AND PROFESSIONAL MEETINGS

Physician may take a maximum of eight (8) weeks plus one week at Christmas/Passover off from Physician's duties each calendar year for vacation and continuing medical education, plus such legal holidays as Medical Group establishes from time to time. In addition, if Physician has 17 or more years of combined experience with Medical Group, Columbia Cardiovascular Clinic, P.A., or Columbia Cardiology Associates, P.A., then Physician is entitled to an additional week of vacation. Such time off may be taken at such times or from time to time in a manner most convenient to the business of Medical Group as determined by the Board of Directors of Medical Group. Physician may carry forward into the next calendar year a maximum of five days of unused vacation and professional meeting time. Except as described in the preceding sentence, unused vacation and professional meeting time may not be carried forward to the next calendar year.

Medical Group shall pay up to \$1500 yearly during the term of this Agreement to support Physician's attendance at professional meetings and continuing education seminars; provided, however, that Physician presents documentation of actual expenses incurred. Attendance at such professional meetings shall be counted against Physician's vacation time unless otherwise specified by Medical Group.



00174

EXHIBIT C

APPROVED OUTSIDE ACTIVITIES

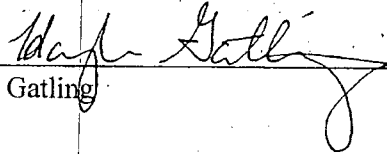
1. Participation on medical-related boards and committees.
2. Proctoring activities related to interventional procedures peculiar to the practice of cardiology.
3. Educational speaking engagements.
4. Expert witness testimony.

MD Cecal

CERTIFICATE OF SERVICE

I, Haylen Gatling, employee with the law firm of Lewis & Babcock, L.L.P., hereby certify that I have served Defendant Columbia Heart Clinic's Memorandum in Support of the Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment by hand-delivering a copy of same to counsel for Plaintiffs, addressed as follows:

Michael D. Malone, Esquire
Malone Thompson & Summers, LLC
339 Heyward Street, Suite 200
Columbia, South Carolina 29201



Haylen Gatling

Columbia, South Carolina

July 8, 2008

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

J. Kevin Baugh, M.D., and Barry J.
Feldman, M.D.,

Plaintiffs,

V.

Columbia Heart Clinic, P.A.

Defendant.

IN THE COURT OF COMMON PLEAS
IN THE ELEVENTH JUDICIAL CIRCUIT

C/A NUMBER: 2006-CP-32-0371

**DEFENDANT COLUMBIA HEART
CLINIC'S PRE-TRIAL BRIEF**

Defendant Columbia Heart Clinic, P.A. submits this pretrial brief in accordance with Rule 16(c), SCRCP:

**I. A CONCISE, NON-ARGUMENTATIVE STATEMENT
OF THE FACTS OF THE CASE**

Defendant Columbia Heart Clinic, P.A. ("Columbia Heart") is a professional medical practice association that provides comprehensive services for the prevention, diagnosis, and treatment of cardiovascular disease. When this case was filed, Columbia Heart had offices in Lexington County¹ and Richland County.² Plaintiffs J. Kevin Baugh, M.D., and Barry J. Feldman, M.D. are Board certified physicians specializing in cardiology. Baugh began employment with Columbia Heart in 1996 and Feldman in 1993. At the time of their departure, both Plaintiffs had

¹As a result of the Plaintiffs' departure from the practice, the Defendant's Lexington office has now closed.

²At the time, Columbia Heart had offices at Palmetto Richland and Providence Hospitals. Now, all of Columbia Heart's Richland County offices are located in a new office building at Palmetto Richland, and the Providence office has been closed. Columbia Heart also has small clinics at some hospitals in nearby counties, but no other offices.

been shareholders in Columbia Heart for over 5 years.

Columbia Heart opened a new office building in Lexington County in the year 2000, in part at the request of Plaintiffs.³ Under the terms of the lease, the rent was \$14,591.09 per month, or \$175,093.10 per year. In addition, Columbia Heart purchased equipment including nuclear machine for \$250,000.00 and an echo machine for \$200,000.00 for use in the Lexington office. Columbia Heart also employed sufficient staff to assist Baugh and Feldman at a significant cost.

In 2004, Columbia Heart decided to build, and in fact did build, a new building in Richland County. To do so, Columbia Heart had to incur a significant debt. CHC MOB Manager, LLC ("CHC MOB"), was created and all shareholders in Columbia Heart, including Plaintiffs, were members and shareholders of CHC MOB. CHC MOB owns 92.8% of Palmetto Heart MOB, LLC the company that owns the building. In 2004, Columbia Heart entered into a fifteen year lease for the new medical office building ("Richland Office") upon completion of construction. The building was constructed in 2004 and 2005, and Columbia Heart moved in to the new office building in late 2005. Columbia Heart leases space in the building for \$1,122,513.00 per year for the first five years. Plaintiffs, as shareholders of Columbia Heart and members of CHC MOB, were at all times aware of the plans for the new building and the associated costs. The new Richland County location cost approximately \$20 million to build. All of the twelve shareholder physicians at Columbia Heart Clinic (including the Plaintiffs) signed personal guaranties for the construction loan.

At the time the new building was planned, all shareholder physicians entered into new Employment Agreements that contained provisions regarding the termination of their employment

³Columbia Heart had an earlier office location in Lexington, but it was not the fully staffed office that was created in 2000.

by Columbia Heart.⁴ The Employment Agreement restricted shareholder physicians from employment with any other provider of cardiology services for one year within a 20-mile radius of any Columbia Heart at which the physician routinely provided services. In the alternative, the exiting physician could pay a contractually agreed upon price to compete:

In the event that Physician, at his or her option, desires to practice in violation of the provisions contained in Section 5.1, Physician shall pay Medical Group liquidated damages in advance of practicing in violation of that Section in an amount equal to One Hundred Percent (100%) of Physician's Income (defined below). Medical Group may offset any amounts owed to Physician against amounts owed by Physician to Medical Group hereunder. For purposes of this Agreement, "Physician's Income" shall mean the average W-2 compensation of the Physician shareholders of Medical Group in the calendar year prior to the date of termination or expiration of this Agreement.

Employment Agreement, Section 5.4.⁵

The shareholder physicians approved the language of the contracts. In fact, there was a provision in the Employment Agreement in which the shareholder physicians specifically acknowledged the reasonableness of that section:

Acknowledgment of Reasonableness. Physician has carefully read and considered the provisions of this Agreement and agrees that the restrictions set forth herein, particularly those in Sections 5.1, 5.2, 5.3, and 5.4 (together with the remedy set forth in Article 4), are fair and reasonably required for the protection of Medical Group.

Section 5.5.⁶

Another provision of the Employment Agreement granted a departing physician the right to

⁴The previous employment agreements also contained covenants not to compete with regard to accounts receivable payments.

⁵The Employment Agreements Dr. Baugh is attached as Exhibit A. Dr. Feldman's agreement is identical.

⁶There is another provision acknowledging the reasonableness of provisions involving accounts receivable which is discussed, *infra*.

a percentage of the accounts receivable, as determined by a certain formula, provided that the departing physician did not start a competing practice. Section 4.5. Again, the Plaintiffs contractually agreed to reasonableness of that provision:

Acknowledgment of Reasonableness. Physician acknowledges that the forfeiture described in Section 4.5(i) is intended as partial restitution for the damages which Medical Group will suffer as a result of competition by Physician with Medical Group. Physician further acknowledges that such forfeiture, together with the remedies set forth in Article 5 below, is fair and reasonably required for the protection of Medical Group.

Section 4.6.

The Employment Agreement also specifically provided that if a court found the provisions of the Employment Agreement to be inappropriate as to time period, scope of activity, and geographical location, the parties agreed that a court could revise the Employment Agreement as to appropriate time period, scope of activity and geographical location. Employment Agreement, Section 5.5. Finally, the new Employment Agreement was supported by consideration, in that each shareholder physician that left Columbia Heart's employment but did not join a competing practice would receive a payment of \$5,000 per month for twelve months

Prior to the construction of the new facility and the execution of the new agreements, Columbia Heart's then-existing employment contracts contained some restrictive language. For example, Plaintiff Baugh's prior Employment Agreement stated:

Notwithstanding any other provision of the Agreement in the event Physician continues or commences the active practice of medicine in the field of cardiology within Richland or Lexington Counties, South Carolina at any time during the twelve (12) month period immediately following termination (for any reason, whether with or without Cause) of this Agreement, then Physician shall forfeit any monies payable to Physician....

*Baugh's 1999 Employment Agreement.*⁷ However, in light of the major investment being undertaken in constructing the new building, Columbia Heart needed to strengthen and clarify the covenants. Because of the size of the investment and importance of the covenants, Columbia Heart retained a lawyer, David Summer of Parker Poe Adams & Bernstein, LLP, to draft the Employment Agreements. Both Summer and his firm have expertise in the field of employment law and are well-respected in the community.

The shareholder physicians needed to ensure that all other shareholder physicians would continue work for, and not against, Columbia Heart, or that, in the alternative, the physician would pay Columbia Heart compensation to provide the necessary income stream for Columbia Heart to cover the burden of the new building and the loss to the practice.⁸ The shareholder physicians had meetings in which drafts of the Employment Agreements were discussed. At one such meeting, the changes to the former employment agreement proposed by Summer were presented as a powerpoint presentation by one of the shareholder physicians. As additional consideration for the covenants, the Employment Agreements provided that any physician who leaves and does not compete with Columbia Heart would receive \$5,000 per month for one year, a portion of his accounts receivable, and any accrued, but unpaid, salary. The Plaintiffs signed the new Employment Agreements on July 15, 2004. The new Richland County facility was opened in December 2005, just weeks prior to Plaintiffs' announcement in January 2006 that they were leaving Columbia Heart. Around the same

⁷Feldman's 1997 Employment Agreement contained an identical provision.

⁸The overhead for each shareholder is \$1.1 million per year. The amount required for a departing physician to pay to compete was based, in part, on the amount of overhead caused by the new building.

time, Plaintiffs began taking steps to open a practice in Lexington County.⁹ In addition, while still employed with Columbia Heart, Plaintiffs spoke to staff members about coming to work for the new practice. Through Dr. Feldman's wife Jennifer, Plaintiffs recruited and hired most of the staff from Columbia Heart's Lexington office. In fact, at least 12 employees of Baugh and Feldman's new practice had been employed by Columbia Heart just prior to Plaintiffs' departure. As of June 1, 2006, just one month after Lexington Heart Clinic opened, only two employees were not former employees of Columbia Heart.

Plaintiffs tendered their resignations on January 22, 2006, providing Defendant with 90 days notice. Plaintiffs continued to work for Columbia Heart after providing notice of their resignations.¹⁰ Each Plaintiff received 7 semi-monthly checks in 2006 on the following dates: January 13, January 31, February 15, February 28, March 15, March 31 and April 15. Dr. Baugh's January 13th check was for \$19,944.55 and the next 6 checks were in the amount of \$20,237.93. Dr. Feldman was paid \$20,157.50 for each of the seven checks. The Plaintiffs' resignation with Columbia Heart was effective on April 21, 2006, and both Plaintiffs ceased all work for Columbia Heart at that time.

On or around May 1, 2006, the new medical practice formed by Baugh and Feldman, Lexington Heart Clinic, LLC, opened to patients. However, the Employment Agreement prohibits Plaintiffs from opening a medical practice in Lexington County for one year unless the Plaintiffs pay the required amount of money, which they have refused to do.

⁹Baugh and Feldman had already formed Lexington Heart Clinic, LLC prior to their resignation and they also began scouting locations, meeting with banks regarding financing, and making other plans. Articles of Organization for Lexington Heart Clinic, LLC, filed January 4, 2006.

¹⁰Dr. Baugh did take vacation from April 10-21, 2009, but was still technically employed by Columbia Heart.

II. AN OBJECTIVE STATEMENT OF THE FACTS IN CONTROVERSY

Plaintiffs' causes of action include Declaratory Judgment, breach of contract, violation of state wage payment statute (§ 41-10-10 et seq.), quantum meruit and declaration of rights and to recover the value of shares. Defendant has counterclaimed for breach of contract and breach of fiduciary duty. This court bifurcated the case to decide the non-jury issues first. Thus, the issues before this court are the validity and enforceability of the covenant not to compete within the Employment Agreement. Plaintiffs maintain that the contractual provision at issue is an unenforceable non-compete clause and ask that this court declare it void. Defendant asserts that the covenant is reasonable and valid, and that it is enforceable.

Plaintiffs also assert a claim under the South Carolina Wage Payment Act, S.C. Code § 41-10-10, *et seq.* Defendant asserts that 1) the Wage Payment Act does not apply in this case; and 2) even if it does, Plaintiffs have been paid all monies to which they are entitled, and in fact, owe money to Columbia Heart.

III. THE LEGAL ISSUES INVOLVED

Declaratory Judgment

The issue for the declaratory judgment is the validity of the covenant not to compete. Covenants not to compete are valid if they are 1) necessary for the protection of the legitimate interest of the employer 2) reasonably limited in its operation with respect to time and place; 3) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood; 4) reasonable from the standpoint of sound public policy; and 5) supported by a valuable consideration. *Oxman v. Sherman*, 239 S.C. 218, 122 S.E.2d 559 (1961). Plaintiffs entered into the written Employment Agreement, which contained a non-compete clause. The Plaintiffs

acknowledged the reasonableness of the non-compete clause in two separate provisions of the Employment Agreement. Furthermore, the Employment Agreement was supported by valid consideration. Plaintiffs claim that the noncompete covenant is not enforceable. As set forth below, the contractual provision is reasonable and valid and it is enforceable.¹¹

A. The contractual provision is neither a covenant nor a penalty.

The contractual provision at issue in this case is one that applies only to shareholder physicians. The Employment Agreement allows for competition, provided that Plaintiffs pay a contractually agreed upon price in order to open a new medical practice in Lexington County. Specifically, Section 5.4 provides:

In the event that Physician, at his or her option, desires to practice in violation of the provisions contained in Section 5.1, Physician shall pay Medical Group liquidated damages in advance of practicing in violation of that Section in an amount equal to One Hundred Percent (100%) of Physician's Income (defined below). Medical Group may offset any amounts owed to Physician against amounts owed by Physician to Medical Group hereunder. For purposes of this Agreement, "Physician's Income" shall mean the average W-2 compensation of the Physician shareholders of Medical Group in the calendar year prior to the date of termination or expiration of this Agreement.

Employment Agreement, Sec. 5.4. Thus, it is not a covenant not to compete but simply "a [contractual] business arrangement incident to the continuing practice of the parties" *J.W. Hunt and Co. v. Davis*, 313 S.C. 352, 355-356, 437 S.E.2d 557, 560 (Ct. App. 1993). While Plaintiffs argue that *Hunt* does not apply because it involved a partnership agreement, the Employment Agreement at issue here is between professional shareholders (physicians), and it is virtually

¹¹Plaintiffs' actions are not contested. Therefore, if the covenant is upheld, Plaintiffs have clearly breached the covenant.

identical to an agreement between partners. Like a partnership, a professional association such as Defendant has shareholders who are all physicians, which is distinguishable from the normal hierarchical formation in a company with typical employees. Since the provision is nothing more than a term of an ordinary contract, the "reasonableness" test typically applied to covenants not to compete is not necessary. *Id.*

Furthermore, the contractually agreed upon amount does not constitute a penalty. A penalty is one that is for an arbitrary amount, irrespective of the damages sustained; however, where the payment arises out of the nature of the contract and is designed a fair measure of the harm, it will be enforced. *Kirkland Distributing Co. v. United States*, 276 F. 2d 138, 145 (4th Cir. 1960).

Here, the formula in the contract is related to the harm Columbia Heart sustained.¹² Columbia Heart entered into a lease in the new Richland County facility for which Columbia Heart must pay rent of \$1,122,513.00 per year for the first five years. Prior to that, Columbia Heart made substantial investments in the Lexington office for Baugh and Feldman, including \$450,000 in equipment; \$175,093.10 per year in rent(for five years); and a substantial amount in staffing the office. Finally, Columbia Heart has lost the referrals from Lexington physicians, which provided a source of income to the practice in excess of \$3 million. Thus, the contractually agreed upon payment of \$591,710.00 by each Plaintiff is significantly below the harm Columbia Heart sustained, and it cannot be considered an arbitrary penalty.

¹²An almost identical formula was upheld in a North Carolina case involving departing cardiologists. See, *Calhoun v. WHA Medical Clinic, PLLC*, 632 S.E.2d 563 (N.C.App. 2006).

B. The covenant not to compete should be upheld as it is reasonable and supported by adequate consideration.

A covenant will ordinarily be upheld if: 1) it is necessary for protection of the legitimate interest of the employer; 2) it is reasonably limited with respect to time and place; 3) it is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood; 4) it is reasonable from the standpoint of sound public policy; and 5) it is supported by a valuable consideration. *Oxman v. Sherman*, 239 S.C. 218, 122 S.E.2d 559 (1961); *Rental Uniform Service of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983).

In a case virtually on point with the facts of this case, the North Carolina Court of Appeals upheld the enforcement of a covenant not to compete in a cardiologist's contract. *Calhoun v. WHA Medical Clinic, PLLC*, 632 S.E.2d 563 (N.C.App. 2006). In evaluating the covenant, North Carolina applied a test similar to South Carolina: covenants not to compete are valid and enforceable if they are (1) in writing, (2) made part of a contract of employment, (3) based on valuable consideration, (4) reasonable both as to time and territory, and (5) not against public policy. *Id.* In applying those standards, the *Calhoun* court held that the non-compete covenants in contracts between doctors and their former employer were not against public policy because there was no potential harm to the public health and the doctors were able to pay the liquidated damages provisions in the covenants. *Id.*

1. The covenant is necessary to protect the interest of Columbia Heart.

Plaintiffs freely entered into the Employment Agreements that contained the covenants. The covenant was included in the Employment Agreement specifically because Columbia Heart was preparing to build a new facility in Richland County which would incur significant costs, and all

shareholder physicians would be responsible for significant debt. Such an investment was dependant upon the continued employment and income production of Columbia Heart's physician shareholders. As previously noted, Plaintiffs' previous employment contracts contained restrictions on competing. It was crucial that the employment agreements be strengthened because of the construction of the \$20 million medical office building.

With Plaintiffs' departure, Columbia Heart has lost significant income, and in fact, has had to close the Lexington County office.¹³ Columbia Heart has lost referrals from Lexington physicians and the loss of collections from these referrals is in excess of \$3 million. Thus, the provision requiring payment of an agreed-upon amount to compete was clearly designed to protect the interest of Columbia Heart, as acknowledged by the parties in Section 5.5 of the Agreement itself:

5.5 Acknowledgment of Reasonableness. Physician has carefully read and considered the provisions of this Agreement and agrees that the restrictions set forth herein, particularly those in Section 5.1, 5.2, 5.3, 5.4 (together with the remedy set forth in Article 4) **are fair and reasonably required for the protection of Medical Group.**

Employment Agreement, Section 5.5 (emphasis added).

The Employment Agreement also provided a contractual right to a portion of the accounts receivable as determined by a formula set forth in the agreement. Section 4.5(f). However, if a departing physician chose to compete, he would "forfeit any monies payable to Physician pursuant to this Section 4.5...." Again, the reasonableness of that provision was acknowledged:

Acknowledgment of Reasonableness. Physician acknowledges that the forfeiture described in Section 4.5(i) is intended as partial restitution for the damages which

¹³Defendant attempted to keep the Lexington office open after Plaintiffs' departure. However, Plaintiffs took almost of all of the existing patients and also hired almost the entire staff of the Lexington office for its new, competing practice. At least twelve Columbia Heart employees were lured away by Plaintiffs just prior to the opening of Plaintiffs' new office.

Medical Group will suffer as a result of competition by Physician with Medical Group. Physician further acknowledges that such forfeiture, together with the remedies set forth in Article 5 below, is fair and reasonably required for the protection of Medical Group.

Section 4.6.

Both of the Plaintiffs read and signed the contract, and thus cannot now claim that the provisions of the Employment Agreement are unreasonable.

2. The covenant is reasonably limited in time and space.

Covenants must be reasonably limited in time and place, and the covenant here is so limited.¹⁴ *Rental Uniform Service of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983).

The covenant is limited in time to one year. In South Carolina, covenants of two and three years have been found to be reasonable. *Delmar Studios of the Carolinas v. Kinsey*, 233 S.C. 313, 104 S.E.2d 338 (1958). In fact, a covenant up to five years has been found to be reasonable. *Metts v. Wenberg*, 158 S.C. 411, 155 S.E. 734 (1930) (5 years upheld). A covenant restricting the Plaintiffs for only one year is certainly well within the range of reasonableness.

The South Carolina courts have upheld territorial restrictions of 25 miles. *South Carolina Finance Corp. of Anderson v. West Side Finance Co.*, 236 S.C. 109, 113 S.E.2d 329 (1960). A geographic restriction is generally reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers. *Standard Register Company v. Kerrigan*, 238 S.C. 54, 119 S.E.2d

¹⁴Furthermore, if the court finds the covenant is unenforceable as written, the parties have expressly agreed that the court can modify the covenant. Section 5.5 of the Employment Agreement.

533 (1961). As that court noted,

it has been said that the most important single asset of most business is their stock of customers. Protection of this asset against appropriation by an employee is recognized as a legitimate interest of the employer. A restrictive covenant, therefore, is reasonable if it is designed to protect the employer against loss of his customers.

Id., 119 S.E.2d at 539. Here, Columbia Heart has, in effect, lost its "customers" as it has lost Lexington patients and the referrals from Lexington physicians.

Here, the covenant only applies to a twenty (20) mile radius. By opening an office in Lexington County within 20 miles of Columbia Heart's Lexington office, Plaintiffs have violated the covenant. As Plaintiffs have recognized, Columbia Heart's patients are within a twenty-mile radius; thus, the geographic limitation is rationale and reasonable. In other words, the geographic restriction is limited to the territory from which Columbia Heart's receives referrals and patients.

Plaintiffs' reliance on *Hogan Management Services, Inc. v. Martino*, 530 S.E.2d 508(Ga. App. 2000) is misplaced. The Court of Appeals did not actually consider the reasonableness of the territorial limitation. In that case, the territorial limitation was a "radius of ten (10) miles of any practice site(s) at which Provider has practiced under this Agreement." While the appellate court noted that the trial court found the covenant not enforceable because the term "practice site(s)" was ambiguous, the appellate court never reached the issue. Instead, the appellate court first noted that *Hogan Management's* appeal (which sought injunctive relief) was moot because the duration of the covenant had expired. The court then found that the covenant not to compete also included a nonsolicitation clause that had no time limitation, no territorial limitation, and prohibited Martino from soliciting *any* patient, not just the patients he had contact with at Hogan. The court held that "this unenforceable nonsolicitation clause...thus rendered the entire covenant not to compete

unenforceable.” *Id.* at 511. The appellate court did not even consider the territorial provision regarding the practice sites in rendering its opinion.

3. The covenant is not unduly harsh or oppressive.

The covenant here does not prevent Plaintiffs from working at all, only from joining another cardiology practice within the time and geographical limitations. Columbia Heart provides comprehensive services for the prevention, diagnosis, and treatment of cardiovascular disease. The non-compete restricts Plaintiffs from providing those same services in the territory “within a twenty (20) mile radius.” Plaintiffs are free to practice outside the geographical limit. The covenant is reasonably related to the needs of Columbia Heart and therefore should not be considered harsh or oppressive.

Plaintiffs claim that the 20 mile radius is actually greater because they are interventional cardiologists who must practice near a hospital in which they can perform certain procedures. However, Plaintiffs can perform heart catheterizations at most hospitals in South Carolina, including hospitals in Sumter, Orangeburg, and Camden. They can also continue to perform other procedures such as implanting pacemakers, conducting stress nuclear studies, and performing electrocardiograms. In fact, only procedures involving stents or angioplasty are required to be performed at hospitals that are authorized to perform invasive procedures (such as Palmetto Richland), and stenting and angioplasty comprise only a small portion of Plaintiffs’ caseload. Thus, for Plaintiffs to maintain they would be forced to practice many miles away in order to continue practicing cardiology is disingenuous.

Plaintiffs also take absurd positions, such as the claim that the covenant would prevent them from even taking a position as a pharmaceutical sales representative selling cardiac medication.

However, Section 5.1 of the Employment Agreement defines "Business as the practice of medicine in the field of cardiology." Under Section 5.2, Plaintiffs are restricted from competing by engaging in the "Business," or assisting anyone engaging in the "Business." A pharmaceutical company is not engaging in the practice of medicine in the field of cardiology, i.e., engaging in the "Business," so Plaintiffs are free to accept employment with such a company.¹⁵

Furthermore, the non-compete clause is not an absolute restriction in that it allows the Plaintiffs to work within the 20 mile restricted area without waiting for one year, provided that Plaintiffs pay the contractually-agreed upon sum to Columbia Heart. South Carolina courts have upheld similar restrictions. In *Caine & Estes Ins. Agency, Inc. v. Watts*, 278 S.C. 207, 209, 293 S.E.2d 859,860 - 861 (1982), the court upheld a covenant that restricted an employee from selling insurance to an employer's customers for three years unless the employee paid the employer part of the commission received. The geographical restriction was for the area where the employer's clients were located. *Id.* The court noted that the employee was free to sell anywhere else, and thus the agreement was not unduly harsh or oppressive.

Likewise, the Plaintiffs here are free to either pay Columbia Heart and remain in the restricted area or to practice outside the area. As already noted, the time and geographical locations

¹⁵Because the only thing prohibited here is engaging in or assisting in the practice of medicine in the field of cardiology, the *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995) does not apply. In that case, the employer attempted to restrict its employee, who was trained to perform facials, from working for any business that providing facials, spa services, cosmetic application or selling cosmetics. Because there employer attempted to categorize selling of cosmetics and multiple other services as "competition", the court found the covenant exceeded protection of "any legitimate business interest[.]" Here, however, there is only one service being restricted -- the practice of medicine in the field of cardiology. Even under the *Faces Boutique* logic, it is obvious that Defendant only seeks protection of its "legitimate business interest."

are well within the accepted range and the contractually agreed-upon sum is reasonable; in fact, as noted above, Plaintiffs have already acknowledged the reasonableness of the agreement and the contractual provision at issue when they entered into the agreement itself. Significantly, both Baugh and Feldman admit they read the Employment Agreements and objected to them, but ultimately signed them, and now are bound by those contracts. *Maw v. McAlister*, 252 S.C. 280, 166 S.E.2d 203 (1969); *Sims v. Tyler*, 276 S.C. 640, 281 S.E.2d 229 (1981).

Parties to a contract may stipulate as to the amount owed in the event of nonperformance. *Tate v. Le Master*, 231 S.C. 429, 99 S.E.2d 39 (1957). A stipulated sum will be upheld as long as it is not plainly disproportionate to any probable damage resulting from breach of contract. *Id.*

Here, it would have been impossible for Columbia Heart to determine, at the time the Employment Agreements were executed, the exact amount of damage to it if the covenant was breached; however, Columbia Heart did know that the loss of shareholder physicians would certainly have a large fiscal impact on it.¹⁶ Thus, the contractual amount required for a departing physician to compete in violation of the covenant was “an amount equal to One Hundred Percent (100%) of the Physician’s Income” which is “the average W-2 compensation of physician-shareholders” in the medical group. This formula is almost identical to the one in the covenant enforced for the cardiologists in *Calhoun v. WHA Medical Clinic, PLLC*, 632 S.E.2d 563 (N.C.App. 2006). The formula selected as the payment was determined by reviewing, among other things, the annual salary of each shareholder physician, the loss of collections, and the cost of overhead. If a departing physician takes all of his patients with him to a competing practice, the loss of that income to

¹⁶For example, reducing the number of shareholder physicians from 12 to 10 increases the amount of overhead for the remaining shareholder physicians.

Columbia Heart is substantial.

In this case, the amount due has been computed to be \$591,710.00 for each Plaintiff. This amount is reasonable in light of the investments Columbia Heart made on the basis of Plaintiffs' continued employment with Columbia Heart and the amount of damage to Columbia Heart. First, Columbia Heart has lost the referrals from Lexington physicians, which provided a source of income to the practice in excess of \$3 million per year. The investments include the building of the new Richland County facility for which Columbia Heart must pay rent of \$1,122,513.00 per year for the first five years. In April 2006, the amount of debt for each physician shareholder was \$350,878. Moreover, Columbia Heart made substantial investments in the Lexington office, including \$450,000 in equipment and \$175,093.10 per year in rent for five years. In addition, Columbia Heart paid to staff the Lexington County office and made other investments in reliance on the continued employment of Plaintiffs. A payment of \$591,710.00 by each Plaintiff when Columbia Heart has lost over \$3 million in income and incurred substantial debt is a reasonable payment.

In fact, Plaintiffs acknowledged the possible damage to Columbia Heart and the need for a covenant, not once, but twice, in the Employment Agreement itself. In Section 5.4 of the Employment Agreement that noted that these monies would be for "partial restitution for the loss or damage which Medical Group will suffer as a result of such breach and in partial recovery of its investment in the practice of Physician[.]" Again, in Section 5.5, there is an acknowledgment that Plaintiffs have read the provisions of the Agreement and the restrictions set forth therein and that such restrictions "are fair and reasonably required for the protection" of Columbia Heart. This section states that:

5.5 Acknowledgment of Reasonableness. Physician has carefully read and considered the

provisions of this Agreement and agrees that the restrictions set forth herein, particularly those in Section 5.1, 5.2, 5.3, 5.4 (together with the remedy set forth in Article 4) **are fair and reasonably required for the protection of Medical Group.** If any provision of Sections 5.1 or 5.2 relating to the restrictive periods, scope of activity restricted and/or the territory described therein shall be declared by a court of competent jurisdiction to exceed the maximum time period, scope of activity restricted or geographical area such court deems reasonable and enforceable under applicable law, the time period, scope of activity restricted and/or area of restriction held reasonable and enforceable by the court shall thereafter be the restrictive period, scope of activity restricted and/or the territory applicable to the restrictive covenant provisions in this Agreement.

(emphasis added).

In South Carolina, courts have continually held that a person cannot avoid a contract by claiming he did not read it or understand it. By signing the agreement, it is presumed that Plaintiffs have read and agreed to the contract, including the reasonableness provisions. *Maw v. McAlister*, 252 S.C. 280, 166 S.E.2d 203 (1969)(One who enters an agreement has a duty to protect himself by reading the agreement); *Sims v. Tyler*, 276 S.C. 640, 281 S.E.2d 229 (1981)(One who is capable of reading and understanding an agreement but fails to read the contract before signing is bound by its terms). See also, *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 39, 340 S.E.2d 786, 789 (1986); *Sanders v. Allis Chalmers Mfg. Co.*, 237 S.C. 133, 139-40, 115 S.E.2d 793, 796 (1960); *Stanley Smith & Sons v. D.M.R. Inc.*, 307 S.C. 413, 417, 415 S.E.2d 428, 430 (Ct.App.1992).

This rule is subject to the exception that if the party is ignorant and unwary, his failure to read the document may be excused. *Burwell, supra*. However, our Supreme Court very strictly construes this exception. *Id.* In determining whether a party can be classified as ignorant and unwary, an individual's education, business experience and intelligence are all considered. *Burwell*, 288 S.C. at 40, 340 S.E.2d at 789-90. It cannot be said that two highly-educated cardiologists, who had previously entered Employment Agreements with non-compete provisions, are ignorant or unwary.

Furthermore, both Plaintiffs had the opportunity to have an attorney review the Employment Agreement before signing, but chose not to do so.

4. The covenant does not violate public policy.

Freedom to contract is a fundamental right. It is not absolute and unlimited, but is subject to such restrictions as the General Assembly may impose under the police power of the state. *Ex parte Hollman*, 79 S.C. 9, 960 S.E. 19 (1908). In South Carolina, there are no legislative restrictions on covenants not to compete. The restrictions as set forth by the case law only require the covenants to be reasonable. Other courts have stressed the importance of freedom to contract and stated that "it is to the best interest of the public that persons should not be unnecessarily restricted in their freedom of contract and that their agreements are not to be held void as against public policy, unless they are clearly contrary to what the constitution, the legislature, or the judiciary have declared to be the public policy or unless they clearly tend to the injury of the public in some way." *Hodnick v. Fidelity Trust Co.*, 183 N.E. 488, 491 (Ind. App. 1932).

In the case of *Calhoun v. WHA Medical Clinic, PLLC*, 632 S.E.2d 563, 573 (N.C.App. 2006), with facts almost identical to this case, the North Carolina Court of Appeals examined restrictive covenants between physicians and a medical practice to determine if public policy was violated.¹⁷ In that case, like this one, the employment agreements included restrictive covenants with liquidated damages provisions that enabled an employee-physician to stay and compete through payment of a fixed sum designed to compensate the medical practice for its investment in the

¹⁷While Plaintiffs claim that the North Carolina Court of Appeals has rejected covenants as contrary to public policy, the *Calhoun* case specifically found that the covenants there were "not against public policy and should be enforced." *Calhoun*, 632 S.E.2d at 573.

physician and the expenses associated with the physician's departure. It included as one formula for the liquidated damages the "physician's annual average income as shown on the W-2 or K-1 forms...for the two most recent years preceding termination of Physician's employment...." *Calhoun* at 567. The Court noted that in determining whether a covenant not to compete violates public policy, the following test must be applied:

If ordering the covenantor to honor his contractual obligation would create a substantial question of potential harm to the public health, that the public interests outweigh the contract interests of the covenantee, and the court will refuse to enforce the covenant. But if ordering the covenantor to honor his agreement will merely inconvenience the public without causing substantial harm, then the covenantee is entitled to have his contract enforced.

Calhoun at 572, citing *Iredell Digestive Disease Clinic v. Petrozza*, 373 S.E.2d 449, 453 (1988).

Ultimately, the Court held that:

Given that there is no potential harm to public health on these facts, there is strong public policy in favor of enforcing the provisions at issue: [P]ublic policy requires the enforcement of contracts deliberately made which do not clearly contravene some positive law or rule of public morals. Since the right of private contract is no small part of the liberty of the citizen, the usual and most important function of courts is to enforce and maintain contracts rather than to enable parties to escape their obligations[.]

Calhoun v. WHA Medical Clinic, PLLC, 632 S.E.2d 563, 573 (N.C.App. 2006)(citing *Tanglewood Land Co. v. Wood*, 252 S.E.2d 546 (N.C. 1979). Moreover, South Carolina has approved of contractual provisions that require a departing partner to pay substantial fees in order to compete. *J.W. Hunt and Co. v. Davis*, 313 S.C. 352, 437 S.E.2d 557 (Ct. App. 1993). In *Hunt*, the court held valid a contractual provision that required a withdrawing partner to pay the partnership two times amount of the partnership's annual gross billings to former or existing client for any work the withdrawing partner did for former or existing clients. Using that contractual formula, the amount

that the departing accountant was required to pay was \$879,068, which the court upheld.

The covenant here is not contrary to public policy.¹⁸ There is no interference with the patient-physician relationship because Plaintiffs are not totally prohibited from practicing medicine. They could have continued in their employment with Columbia Heart. Having chosen to leave Columbia Heart and compete, the Plaintiffs should pay the amount specified in the Employment Agreement, which permits them to continue to practice within Lexington and Richland Counties.¹⁹

5. The Agreement is supported by valuable consideration.

The Supreme Court of South Carolina has held that continued employment with an employer can provide sufficient consideration to support a covenant not to compete in an employment agreement. *Standard Register Company v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961). In *Standard Register*, the employee had been employed for several years, but at the time he signed the covenant, his positions and duties had changed. The Court found that this change was sufficient consideration. The employee received the benefit of continued employment with a promotion; in return the employer received the services of the employee and the benefit of the restrictive covenant.

Id.

¹⁸Furthermore, while Plaintiffs may argue that the American Medical Association discourages covenants not to compete (under CEJA Policy E-9.02), the AMA has not prohibited the use of covenants. This argument was rejected in *Calhoun v. WHA Medical Clinic* as well. In fact, the use of covenants in physician contracts is common, as noted in an article by the Office of General Counsel for the AMA: "Most physician contracts include a restrictive covenant." See, "Restrictive Covenants in Physician Contracts." (<http://www.ama-assn.org/ama/pub/category/12716.html>)

¹⁹There is no injury to the citizens of Lexington County either. Had Plaintiffs left Lexington County upon their departure from Columbia Heart, there were other cardiologists in Lexington to serve the public. Furthermore, other physicians from Columbia Heart would have provided care for the patients in Lexington County. However, Columbia Heart could not continue operating in Lexington County after Plaintiffs set up a competing practice because they siphoned off patients and referrals.

The case upon which Plaintiffs rely, *Poole v. Incentives Unlimited, Inc.*, 345 S.C. 378, 548 S.E.2d 207 (2001), does not apply. In *Poole*, the court found that continued at-will employment was not sufficient consideration for a covenant not to compete entered into during an ongoing employment relationship where the employee's duties, position and salary did not change. Moreover, in *Poole*, the employee, unlike the Plaintiffs in this case, was not already bound by a covenant not to compete.

In this case, the Plaintiffs entered into an Employee Agreement in order to continue employment, while Columbia Heart would receive the services and the covenant. Prior to executing the 2004 Employment Agreement, each Plaintiff had already signed a previous Employment Agreement. Dr. Feldman's Employment Agreement was signed in 1997 and Dr. Baugh's in 1999. Each of these Agreements contained a covenant not to compete. Under the old Agreements, the Plaintiffs were contractually granted a portion of the accounts receivable. However, if either Plaintiffs opened a competing practice, Columbia Heart would not allow them to collect the accounts receivable.²⁰ Feldman's Agreement, Sec. 4.5(h); Baugh's Agreement, Sec. 4.5(i). Since Plaintiffs had already signed a covenant not to compete, additional consideration was not needed when the Agreement was revised.

However, in an abundance of caution, and to ensure the validity of the covenant, additional consideration was included. The Agreement provides that any physician who leaves and does not

²⁰Plaintiffs argue that forfeiture provisions must be subject to a reasonableness review. However, Plaintiffs have already conceded that the provisions are reasonable in that the Employment Agreement contained not one, but two, acknowledgments of the reasonableness of Agreement (in particular the covenant) and the forfeiture provisions. Section 4.6 of the agreement acknowledges that the "forfeiture, together with the remedies set forth in Article 5 below is fair and reasonably required for the protection of Medical Group."

compete with Columbia Heart receives \$5,000 per month for one year, a portion of his accounts receivable, and any accrued, but unpaid, salary. This is executory consideration, which is permitted in contract law. See, 17 C.J.S. Contracts § 92 ("Executory consideration is a promise to do or to give something, or to forbear from doing something, in return for some other promise or act."); *Evatt v. Campbell*, 234 S.C. 1, 106 S.E.2d 447, 451 (1959) ("Mutual promises also constitute good consideration").

Future payments can be sufficient consideration to support a covenant not to compete. *Aon Consulting, Inc. v. Midlands Financial Benefits, Inc.*, 748 N.W.2d 626 (Neb. 2008). In *Aon*, after the employee had worked for the employer for some time, he signed a covenant not to compete. Later, the covenant was challenged, including the argument that the employee had not received a bonus or compensation for signing the covenant, and that continued employment alone was not sufficient consideration. The court held that it did not have to decide if continued employment constituted sufficient consideration because the agreement also provided that the employer would provide severance pay at the termination of employment. The court held that:

[t]his undertaking constituted a benefit of [employee] and a detriment to [employer] which would not have otherwise existed in their employment relationship. The fact that [employee] claims not to have received a severance payment following termination does not alter the fact that [employer's] agreement to make such payment constituted valid consideration for the nonsolicitation agreement.

Id. at 639.

In this case, while the accounts receivable and salary provisions were a part of the previous employment agreement, the \$5,000 monthly stipend was a new benefit to Plaintiffs and a detriment to Columbia Heart that would not have existed in their employment relationship but for the new Employment Agreement. Thus, it provides ample consideration to support a covenant not to

compete.

Furthermore, as detailed above, the reason for the covenants was the construction of the new \$20 million building. CHC MOB Manager, LLC, an entity in which Plaintiffs were members and shareholders, owns 92.8% of Palmetto Heart MOB, LLC the company that owns the building. Thus, Plaintiffs received shares of CHC MOB Manager, LLC as an additional benefit (consideration) for signing the 2004 Employment Agreement. Plaintiffs later sold these shares back to Columbia Heart, with each Plaintiff receiving \$200,000 in August 2006.

C. Alternatively, if this Court finds that the covenant is unreasonable as written, it can modify the terms so as to render the covenant reasonable and enforceable.

Generally, courts cannot alter the covenant entered into by the parties, but can merely find it enforceable or unenforceable. *Somerset v. Reyner*, 233 S.C. 324, 104 S.E.2d 344 (1958) (“We cannot make a new agreement for the parties into which they did not voluntarily enter.”). However, the parties can agree to court modification if set forth expressly in the contract. *Cf., Rockford Mfg. Ltd. v. Bennet*, 296 F.Supp.2d 681 (D.S.C. 2003)(Recognizing that courts can, in certain situations, “blue pencil” any overbroad provisions of the covenant and enforce the narrowly tailored ones.) Such modification is known as “blue penciling,” which is “a process whereby a court will rewrite a covenant not to compete which is unreasonable in its restrictions as to time and territory, thereby transforming the covenant into a reasonable one which is then enforced.” *Broadway & Seymour, Inc. v. Wyatt*, 1991 WL 179084, 5 (4th Cir. 1991).

Here, the parties expressly agreed that a court could modify the covenant. Section 5.5 of the Employment Agreement states, in pertinent part:

If any provision of Sections 5.1 and 5.2 relating to the restrictive periods, scope of activity restricted and/or the territory described therein shall be declared by a court

of competent jurisdiction to exceed the maximum time period, scope of activity restricted or geographical area such court deems reasonable and enforceable under applicable law, the time period, scope of activity restricted and/or area of restriction held reasonable and enforceable by the court shall thereafter be the restrictive period, scope of activity restricted and/or the territory applicable to the restrictive covenant provisions in this Agreement.

Thus, even if this Court determines that the covenant is unenforceable as written, it can determine the appropriate time period, scope of activity and geographical location and, in effect, rewrite the covenant.

Wage Payment Act:

The Wage Payment Act, S.C. § 41-10-10, et seq., does not apply to this matter. Columbia Heart is professional association, which operates much like a partnership. As in a partnership, Plaintiffs were not being paid wages, but were receiving advances or draws on monies yet to be earned. At the end of the year, or the end of the doctor's employment, if he has not brought in sufficient earnings to exceed the draws, the doctor must repay Columbia Heart. This process is known as a "true-up." At the time that Plaintiffs left Columbia Heart Clinic, a true-up was performed. Dr. Baugh owed \$24,888 and Dr. Feldman owed \$55,273. Had Plaintiffs received another check, it would have only increased the amount due to Columbia Heart under the true-ups.

Plaintiffs have acknowledged that the use of true-ups was routine Columbia Heart's practice. Other doctors that have had a negative true-up have been required to pay monies back to Columbia Heart. For example, Dr. Humphrey retired in June 2006. Dr. Humphrey did not open a competing practice and therefore collected the \$5,000 benefit as well as his portion of the accounts receivable. However, because Dr. Humphrey was negative (in that he had received more draws than he had earned), the amount of accounts receivable paid to Dr. Humphrey was offset by the amount he owed

Columbia Heart.

Plaintiffs have received all monies to which they are entitled, and in fact, *owe* money to Columbia Heart. As detailed above, Plaintiffs were employed by Columbia Heart until April 21, 2006. During their term of employment during 2006, Plaintiffs were paid as follows:

Date of payment	Dr. Kevin Baugh	Dr. Barry Feldman
January 13, 2006	\$19,944.55	\$20,157.50
January 31, 2006	\$20,237.93	\$20,157.50
February 15, 2006	\$20,237.93	\$20,157.50
February 28, 2006	\$20,237.93	\$20,157.50
March 15, 2006	\$20,237.93	\$20,157.50
March 31, 2006	\$20,237.93	\$20,157.50
April 15, 2006	\$20,237.93	\$20,157.50

Plaintiffs' last day of employment with Columbia Heart was April 21, 2006, but the draws were not to be paid until April 30, 2006. If Columbia Heart had issued additional draw checks to Plaintiffs, it would only increase the amount that Plaintiffs were to pay back to Columbia Heart under the "true-ups." Thus, Plaintiffs were not entitled to any further checks.

Furthermore, even if the checks that Plaintiffs received could be considered "wages" under the Act, they contractually gave up the right to any additional pay. Section 4.5(f) states that if the departing physician terminates the Employment Agreement, Columbia Heart shall pay to the physician "all salary earned or accrued but unpaid as of the date of Physician's death[.]"²¹ However,

²¹The use of the word "death" in this paragraph was clearly a typographical error. A previous section, Section 4.5(b), contains almost identical provisions for the event of termination of the Agreement by the death of a physician, rather than resignation or withdrawal of a shareholder physician. Obviously, the word "death" was accidentally used in Section 4.5(f) instead of a more

Section 4.5(i) states that if a physician competes against Columbia Heart, he will forfeit the monies to which he would otherwise contractually be entitled under Section 4.5, which includes "all salary earned or accrued but unpaid" as of the date of Plaintiffs' termination. Thus, any salary that was earned from April 15, 2006 through April 21, 2006 is forfeited.

IV. EXHIBITS AND WITNESSES

Exhibits

1. Shareholder Physician Employment Agreement signed by Dr. Barry J. Feldman, October 6, 1997
2. Shareholder Physician Employment Agreement signed by Dr. J. Kevin Baugh, July 1, 1999
3. Physician Employment Agreement of Jennifer Feldman, M.D., March 1, 2003
4. Operating Agreement CHC MOB Manager, LLC, October 24, 2003
5. Letter from David B. Summer to Lynn D. Privette, July 15, 2004
6. Shareholder Physician Employment Agreement, signed by J. Kevin Baugh, July 15, 2004
7. Shareholder Physician Employment Agreement, signed by Barry J. Feldman, July 15, 2004
8. Photograph - MOB Ground Breaking Ceremony, December 2, 2004
9. Unanimous Written Consent of Members of Lexington Heart clinic, LLC in Lieu of an Organizational Meeting, January 3, 2006
10. Article of Organization of Lexington Heart Clinic, dated January 3, 2006
11. Letter of Resignation from Dr. J. Kevin Baugh, January 22, 2006

appropriate term. However, the meaning is clear. A departing physician who competes is not entitled to any salary accrued but unpaid as of the date of this termination, which, in this case, is April 21, 2006.

12. Letter of Resignation from Dr. Barry J. Feldman, January 22, 2006
13. Letter from Barry J. Feldman Re: Open Heart Surgery at Lexington Medical Center, March 30, 2006
14. Letter from J. Kevin Baugh to Representative. Lexington Medical Center, March 31, 2006
15. Terminations related to Lexington Heart, April/May 2006
16. *The State* editorial by Dr. Alexander, May 9, 2006
17. Photos of Columbia Heart Building, 2009
18. Charts by Marty Ouzts, CPA

List of Defendant's Witnesses:

- a. Ben Jones, M.D.
8 Medical Park, Suite 300
Columbia, SC 29203
- b. Robert Schulze, M.D.
8 Medical Park, Suite 300
Columbia, SC 29203
- c. Marty P. Ouzts, CPA
115 Atrium Way, Suite 110
Columbia, SC 29224
- d. David B. Summer, Esq.
1201 Main St.
Suite 1450
Columbia, SC 29201

V. UNUSUAL EVIDENTIARY PROBLEMS

Defendant does not anticipate any unusual evidentiary problems.

**VI. UNUSUAL QUESTIONS OR MATTER
WHICH SHOULD BROUGHT TO THE COURT'S ATTENTION :**

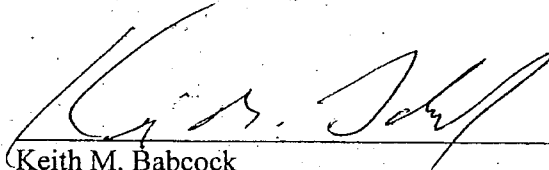
This case has been bifurcated with certain issues to be tried non-jury and other claims to be tried in a jury trial. The non-jury claims are the enforceability of the covenant and the Wage Payment Act claim. Defendants' counterclaims for breach of contract and breach of fiduciary duty are jury issues, as are Plaintiffs' claims for breach of contract, quantum meruit, and a declaration of rights and to recover the value of shares.

Defendant does not anticipate any unusual questions or matters that should be brought to the attention of the Court during the non-jury trial.

VII. STATUS OF SETTLEMENT NEGOTIATIONS

This case has been mediated twice, but the parties have been unable to reach a settlement. At the most recent mediation, Plaintiffs' last offer was \$400,000 and Defendants last demand was \$600,000.

LEWIS & BABCOCK, L.L.P.



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Ariail E. King
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000

Columbia, South Carolina

May 11, 2009

SHAREHOLDER PHYSICIAN EMPLOYMENT AGREEMENT

THIS SHAREHOLDER PHYSICIAN EMPLOYMENT AGREEMENT (the "Agreement") is entered into as of this 15 day of July, 2004, between COLUMBIA HEART CLINIC, P.A., a South Carolina professional corporation ("Medical Group"), and J. KEVIN BAUGH, M.D. ("Physician").

PREMISES:

A. Medical Group is a group medical practice providing medical and other health care services to its patients in the State of South Carolina.

B. Physician and Medical Group wish to enter into this Employment Agreement on the terms set forth herein.

NOW, THEREFORE, in consideration of the promises herein contained and other good and valuable consideration, the receipt and legal sufficiency of which are hereby acknowledged, the parties agree as follows:

ARTICLE 1

COMPENSATION AND BENEFITS

1.1. Compensation. Throughout the term of this Agreement, Medical Group shall pay to Physician basic compensation and incentive compensation in accordance with the policies regarding physician compensation adopted by the Board of Directors of Medical Group from time to time. The policies for physician compensation in effect at the commencement of the initial term of this Agreement, which may be amended from time to time by the Board of Directors, are set forth on Exhibit A attached hereto and incorporated by reference herein.

1.2. Employee Benefits. Physician shall participate in all employee benefits as are provided by Medical Group and as established and modified from time to time by the Board of Directors of Medical Group as long as Physician is otherwise eligible to participate and desires to be covered and so participate. Nothing contained in this Section shall be construed to obligate Medical Group in any manner to provide special benefits to Physician. Benefit plans in effect at the commencement of the initial term of this Agreement, which may be amended from time to time by the Board of Directors, are set forth on Exhibit B attached hereto and incorporated by reference herein.

1.3. Vacations and Professional Meetings. Physician shall be entitled each year to such time out of the office and away from Physician's professional duties for vacation and attendance at professional meetings as shall be consistent with policies established and modified from time to time by the Board of Directors of Medical Group. The policies for vacation and professional meetings in effect at the commencement of the initial term of this Agreement, which may be amended from time to time by the Board of Directors, are set forth on Exhibit C attached hereto and incorporated by reference herein. Physician shall meet the annual continuing medical

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education requirements as established by the Board of Directors.

1.4. Retirement, Death and Disability. The Board of Directors of Medical Group shall establish from time to time the standards for and provisions concerning retirement from Medical Group, including notice requirements for retirement. The Board of Directors of Medical Group shall establish from time to time the standards for and provisions concerning the benefits, if any, to be provided upon the temporary or permanent disability or death of physician employees of Medical Group. Physician shall comply with all such standards and provisions. The policies for retirement, death and disability in effect at the commencement of the initial term of this Agreement, which may be amended from time to time by the Board of Directors, are set forth on Exhibit D attached hereto and incorporated by reference herein.

1.5. Malpractice Insurance; Tail Insurance Coverage.

(a) Medical Group shall carry malpractice insurance covering Physician with minimum limits of \$1,000,000 per incident and \$3,000,000 in the aggregate, or such higher limits and including such terms and conditions as the Board of Directors of Medical Group may from time to time determine to be reasonable and necessary. Physician shall at all times cooperate with the malpractice insurance carrier by providing in a timely manner any information, records or data reasonably requested.

(b) Upon the expiration or termination of this Agreement due to the death, retirement or total and permanent disability of Physician, in the event Medical Group has in force "claims made" insurance covering Physician at the time of the expiration or termination of this Agreement, Medical Group shall pay for the appropriate reporting endorsement (known as "Tail Coverage") for medical malpractice insurance carried by Medical Group on Physician if determined to be necessary by Medical Group. Upon the expiration or termination of this Agreement for any other reason, Physician shall pay for any Tail Coverage deemed necessary by Medical Group and deliver to Medical Group a certificate evidencing same. In the event Physician fails to purchase such Tail Coverage, Medical Group may withhold from any funds due to Physician an amount sufficient to purchase such Tail Coverage.

ARTICLE 2

DUTIES AND RESPONSIBILITIES

2.1. Physician Duties. Physician shall actively practice medicine on behalf of Medical Group and perform such other clinical, administrative and management duties as may be assigned to Physician from time to time by Medical Group. Physician acknowledges that certain rules and regulations must be established and maintained by the Board of Directors of Medical Group from time to time for the efficient operation of a quality group practice. Physician therefore agrees that:

(a) The Board of Directors of Medical Group shall have the authority to establish policies, procedures and operational guidelines regarding the acceptance and treatment of patients of Medical Group. Physician shall perform services for those patients assigned to

Physician and advise and assist any of the other physicians or employees of Medical Group in the diagnosis or treatment of any case as reasonably directed by the Board of Directors of Medical Group in accordance with such guidelines.

(b) The Board of Directors of Medical Group, or a subcommittee of physicians as delegated by the Board of Directors of Medical Group, shall establish quality assurance procedures for the Medical Group from time to time, and Physician agrees to comply with and be bound by the recommendations and requirements of any quality assurance program so established.

(c) The Board of Directors of Medical Group, in consultation with Physician, shall establish the office location(s) where and the schedule, including the night and weekend "call" schedule, according to which Physician shall perform Physician's duties under this Agreement; provided, however, Physician shall devote fulltime efforts to the practice of medicine on behalf of Medical Group. "Fulltime" shall be defined from time to time by the Board of Directors of Medical Group. In addition, if Physician qualifies to stop taking night call according to the Medical Group policy attached as Exhibit E, Physician may opt to cease taking night call (on the terms set forth in such policy) by written notice to Medical Group.

(d) Physician shall adhere faithfully to all professional ethics and customs, shall avoid all acts, habits and usages which might injure in any way, directly or indirectly, the professional reputation of Medical Group or any of the physicians or other employees of Medical Group, and shall follow and abide by all federal, state and municipal ordinances and laws relating to or regulating the practice of medicine in the State of South Carolina and shall comply with all requirements of liability insurance policies of Medical Group insuring Physician.

2.2. Exclusive Service. Physician shall devote Physician's full, entire, and undivided professional time and attention to the practice of medicine with Medical Group. Physician shall not engage in professional work in Physician's individual capacity or in association with others not employed by Medical Group, nor receive any compensation therefor, without the express written consent of the Board of Directors of Medical Group or as otherwise set forth on Exhibit E attached hereto and incorporated by reference herein. Medical Group, however, shall, from time to time, establish and/or modify policies regarding the treatment of honoraria, royalties, reasonable gifts, military reserve duty compensation, and all similar activities undertaken by physician employees. Physician acknowledges that the Board of Directors of Medical Group has adopted a policy that payments for medical directorships are payments belonging to Medical Group and not to the individual physician receiving the payment, except as otherwise expressly agreed in writing by Medical Group.

2.3. Representations and Warranties of Physician. Physician represents and warrants to Medical Group that:

(a) Physician is a physician duly licensed to practice medicine in the State of South Carolina and is board certified in cardiology, and Physician will maintain such board certification and licensure during the term of this Agreement. Physician has never had Physician's license to practice medicine in any state or Physician's State Drug Enforcement

Agency number revoked, suspended (or otherwise restricted), or terminated, and Physician has never surrendered Physician's license to practice medicine in any state.

(b) Physician has, and will maintain during the term of this Agreement, all necessary staff privileges, permits and credentials necessary for Physician to practice medicine (including an unrestricted right to prescribe controlled substances and medication) in such ambulatory, acute and tertiary care settings within the State of South Carolina as may be designated from time to time by the Board of Directors of Medical Group.

(c) Physician is not currently a party to any lawsuits involving Physician's medical practice, except as previously disclosed to Medical Group, and knows of no facts which would cause Physician reasonably to believe that such an action would be filed.

(d) Physician has never been censured, reprimanded or placed on probation for reasons relating to professional competence or conduct by any medical licensing board, any federal, state or local government agency, or any professional society or specialty board.

(e) Physician is not now and has never been the object of any investigation or other proceeding by any payor involving claims of fraudulent billing practices or any violation of the Medicare or Medicaid laws or regulations.

(f) Physician has not had Physician's clinical privileges at any hospital or other health care facility suspended, terminated, restricted or revoked (other than suspensions of thirty (30) days or less as a sanction for administrative infractions) or surrendered such clinical privileges while Physician was under an investigation relating to possible incompetencies or improper professional conduct or in return for not concluding such investigation.

2.4. Compliance with Rules and Regulations. Physician shall comply with all resolutions, directives, rules and regulations as may be established and modified by Medical Group pertaining to the business operation and the medical practice of Medical Group. Physician further shall comply with all laws and regulatory requirements applicable to the practice of medicine. Physician agrees to provide medical services at least consistent with generally accepted professional standards for the practice of medicine in the community in which Physician practices.

2.5. Physician-Patient Relationships. Medical Group agrees that none of the terms of this Agreement shall interfere, or are intended to interfere, with the physician-patient relationship, or to interfere with the practice of medicine by Physician in accordance with applicable laws and professional medical standards.

ARTICLE 3

ADMINISTRATIVE MATTERS

3.1. Fees, Collections and Billings. Medical Group shall establish, and modify from time to time, all professional fees for services rendered by Physician or any other physician

employee of Medical Group, and Physician agrees to cooperate on all billing matters and assist in collection efforts as necessary. Medical Group shall own and control all collections and billings arising pursuant to the rendering of medical services by Physician or any other employee. All fees and compensation received or realized by Medical Group as a result of the rendering of services by Physician and other employees shall belong, be paid and be delivered to Medical Group.

3.2. Custodial Responsibility With Respect to Records and Accounts. Physician shall keep full and accurate medical records and accounts and records of all professional work performed by Physician or under Physician's supervision in a timely fashion in accordance with guidelines established by the Board of Directors of Medical Group. All such records are the exclusive property of Medical Group. Physician holds such records in trust for Medical Group and shall promptly relinquish any such records in Physician's control to the Medical Group on demand.

3.3. Provision of Office Space, Equipment, and Other Necessary Items. Medical Group shall furnish, as Medical Group deems necessary and appropriate, office space, equipment, instruments, supplies, medicines, and support personnel for the practice of Physician under the terms of this Agreement. The Board of Directors of Medical Group shall establish policies from time to time regarding payment for Physician's professional license fees for the State of South Carolina and related expenses.

3.4. Administration and Hiring of Personnel. Medical Group shall have full and complete authority and responsibility with respect to the administration of the business of the Medical Group and the hiring of personnel for the operation of Medical Group.

ARTICLE 4

TERM AND TERMINATION

4.1. Term. The term of this Agreement hereunder shall commence on July 15, 2004, and shall continue for a period up to one (1) year, unless otherwise terminated as provided in this Agreement. This Agreement shall be automatically renewed for additional terms of one (1) year each, unless one of the parties hereto notifies the other in writing of the intention not to renew this Agreement no less than ninety (90) days prior to the expiration of the then current term.

4.2. Termination for Cause. This Agreement may be terminated for Cause (as hereinafter defined) by the party not providing such Cause, at any time without notice. "Cause" means:

(a) Failure of Physician to comply with reasonable directives of Medical Group, or the policies, standards and regulations established from time to time by Medical Group, provided any such violation has continued uncured for a period of more than ten (10) days after Medical Group has given written notice of such violation to Physician;

(b) Willful misconduct of Physician resulting in damage to Medical

Group;

(c) Physician is determined to have committed any criminal, unethical or fraudulent act by any entity or governmental agency of competent jurisdiction;

(d) The final determination of loss, suspension or restriction of the license of Physician to practice medicine in the State of South Carolina;

(e) Physician's license to prescribe controlled drugs is suspended, revoked or restricted in any manner;

(f) Permanent loss, after all appeals, of any hospital staff privileges by Physician at any hospital for reasons of professional conduct or competence;

(g) Inability to insure Physician against medical malpractice as provided in Section 1.5. hereof on reasonable financial terms; or

(h) Material breach or default of either party under the terms of this Agreement, which shall remain uncured ten (10) days after receipt of written notice of default from the non-defaulting party.

4.3. Termination upon Death or Disability of Physician.

(a) This Agreement shall terminate immediately upon the death of Physician.

(b) Medical Group may terminate this Agreement upon any disability of Physician in accordance with the standards and provisions concerning disability established from time to time by Medical Group pursuant to Section 1.4. of this Agreement. Disability, and the procedures for determining disability, shall be defined in the long term disability insurance policy insuring Physician, if any, or as otherwise defined by the Board of Directors of Medical Group. In the event this Agreement is terminated pursuant to this Section 4.3.(b), Physician shall continue to be entitled to all short term and long term disability benefits as provided in Physician's disability insurance policy. If Physician's disability should cease at any time after the termination of this Agreement, the rehiring of the Physician shall be consistent with all applicable state and federal laws and regulations.

4.4. Termination Without Cause.

(a) Physician may terminate this Agreement without Cause (other than as provided in Section 4.3.) upon ninety (90) days' prior written notice to Medical Group.

(b) Medical Group may terminate this Agreement without Cause (other than as provided in Section 4.3.) upon thirty (30) days' prior written notice to Physician.

4.5. Effect of Termination or Expiration. Upon the termination or expiration of

this Agreement, the parties agree as follows:

(a) Except as provided in this Section 4.5., Physician shall have no right to any payment for services Physician renders or orders beyond that payable by Medical Group in its ordinary course of business as of the last regular pay period covering Physician's final period of employment or association.

(b) In the event of the termination of this Agreement under Section 4.3.(a) as a result of the death of Physician, Medical Group shall pay to the Physician's estate:

- (i) All salary earned or accrued but unpaid as of the date of Physician's death; and
- (ii) A death benefit equal to Physician's Prorata Share of the Current Year's Actual Collection Percentage of the accounts receivable of Medical Group, computed on the date of Physician's death. Medical Group shall pay 1/24th of this benefit each month for twelve (12) months commencing with the month following Physician's death and shall pay the remaining 12/24ths of this benefit in the thirteenth (13th) month following Physician's death.

(c) In the event of the termination of this Agreement under Section 4.3.(b) as a result of the disability of Physician, Medical Group shall pay to Physician Physician's Prorata Share of the Current Year's Actual Collection Percentage of the accounts receivable of Medical Group, computed on the last day of Physician's employment by Medical Group. Medical Group shall pay Physician 1/24th of this benefit each month for twelve (12) months commencing with the month following the termination of this Agreement and shall pay the remaining 12/24ths of this benefit in the thirteenth (13th) month following the termination of this Agreement. This benefit shall be in addition to any disability benefits payable to Physician pursuant to any other provision of this Agreement or pursuant to any disability insurance policy maintained for Physician's benefit.

(d) In the event of the termination of this Agreement as a result of the retirement of Physician from the active practice of medicine after the attainment of fifty (50) years of age, Medical Group shall pay to Physician:

- (i) All salary earned or accrued but unpaid as of the date of Physician's retirement; and
- (ii) Physician's Prorata Share of the Current Year's Actual Collection Percentage of the accounts receivable of Medical Group, computed on the date of Physician's retirement. Medical Group shall pay 1/24th of this benefit each month for twelve (12) months commencing with the month following

Physician's retirement and shall pay the remaining 12/24ths of this benefit in the thirteenth (13th) month following Physician's retirement.

(e) In the event of the termination of this Agreement by Medical Group for Cause as provided in Section 4.2., Medical Group shall pay to Physician the compensation provided in Section 4.5.(a) above as Physician's sole benefit.

(f) In the event of the termination of this Agreement (1) by Physician for Cause as provided in Section 4.2.(h), (2) by Physician without Cause under Section 4.4.(a) or (3) by Medical Group without Cause under Section 4.4.(b) other than for retirement, Medical Group shall pay to Physician:

- (i) All salary earned or accrued but unpaid as of the date of Physician's death; and
- (ii) Physician's Prorata Share of the Current Year's Actual Collection Percentage of the accounts receivable of Medical Group, computed on the date of termination of this Agreement. Medical Group shall pay 1/24th of this benefit each month for twelve (12) months commencing with the month following the termination of this Agreement and shall pay the remaining 12/24ths of this benefit in the thirteenth (13th) month following the termination of this Agreement.

(g) In the event that this Agreement is terminated for any reason prior to the payment in full by Physician of any amounts owed by Physician to Medical Group, then there shall be deducted from the amounts due to Physician pursuant to Sections 4.5 (a), (b), (c), (d), and (f) the amount owed to Medical Group.

(h) As used herein:

- (i) "Physician's Prorata Share" means that fraction, the numerator of which is the number of shares of stock in Medical Group which Physician owns and the denominator of which is the total number of shares of stock of Medical Group issued and outstanding at the time of the calculation.
- (ii) "Current Year's Actual Collection Percentage" means the amount determined as of the close of business on the last day of the fiscal year of Medical Group by dividing total payments of Medical Group by total charges of Medical Group to arrive at a percentage (rounded to the nearest whole percent). This percentage shall be the "Current Year's Actual Collection Percentage" for purposes of this Section 4.5. for the next fiscal year. For example, if a shareholder dies in 1998, the

collection percentage used will be that for 1997.

(i) Notwithstanding any other provision in this Agreement in the event at any time during the twelve (12) month period immediately following the expiration or termination (for any reason, whether with or without Cause) of this Agreement Physician continues or commences the active practice of medicine in the field of cardiology within a twenty (20) mile radius of any Medical Group office at which Physician routinely provided services during the year prior to the date of expiration or termination of this Agreement, then Physician shall forfeit any monies payable to Physician pursuant to this Section 4.5. following Physician's continuation or commencement of the practice of medicine in violation of this Section 4.5.(i). The provisions of this Section 4.5.(i) shall survive the expiration or termination of this Agreement for any reason.

(j) In the event Medical Group has in force "claims made" insurance covering Physician at the time of the termination or expiration of this Agreement, then in such event, the appropriate party shall pay the "Tail Coverage" for medical malpractice insurance as provided in Section 1.5. hereof.

(k) Upon the termination of this Agreement for any reason, with or without Cause, Physician shall sell and Medical Group shall purchase Physician's Stock as provided in the Shareholders' Agreement for Medical Group.

(l) Notwithstanding anything to the contrary stated herein, in addition to any other amounts payable upon termination, Physician shall be paid Five Thousand and No/100 Dollars (\$5,000.00) per month for each of the twelve (12) months following termination, so long as the Physician is not in violation of Article V of this Agreement. In the event that the Physician violates Article V, no amount shall be payable pursuant to this Section 4.5(l), and any amounts previously paid to Physician pursuant to this section shall be refunded to the Medical Group.

4.6. Acknowledgment of Reasonableness. Physician acknowledges that the forfeiture described in Section 4.5.(i) is intended as partial restitution for the damages which Medical Group will suffer as a result of competition by Physician with Medical Group. Physician further acknowledges that such forfeiture, together with the remedies set forth in Article 5 below, is fair and reasonably required for the protection of Medical Group.

ARTICLE 5

RESTRICTIVE COVENANT AND CONFIDENTIAL INFORMATION

5.1. Restrictive Covenant.

(a) The parties stipulate that Medical Group is engaged in the practice of medicine in the field of cardiology (the "Business") in the Territory (as defined in Section 5.2 below).

(b) Physician, in the event of termination or expiration of this Agreement for any reason, during the twelve (12) month period immediately following the date of termination or expiration of this Agreement, shall not Compete (defined in Section 5.2 below) with Medical Group.

(c) The provisions of this Section 5.1 shall survive the expiration or termination of this Agreement for any reason.

5.2. Definitions. For purposes of Article 5 of this Agreement, the terms defined below shall have the respective meaning specified, and the following definitions shall be equally applicable to the singular and plural forms of the terms defined:

(i) "Compete" means directly or indirectly, on his own behalf or on behalf of any other Person, other than at the direction of Medical Group and on behalf of Medical Group: (A) organizing or owning any interest in a business which engages in the Business in the Territory; (B) engaging in the Business in the Territory; or (C) assisting any Person (as a director, officer, employee, agent, consultant, lender, lessor or otherwise) to engage in the Business in the Territory.

(ii) "Person" means any entity, including, without limitation, any natural person, company, partnership, corporation, trust, association, organization or governmental unit.

(iii) "Territory" means the area within a twenty (20) mile radius of any Medical Group office at which Physician routinely provided services during the year prior to the date of termination or expiration of this Agreement.

5.3. Covenant Not to Disclose Confidential Information. Physician acknowledges and stipulates that: (A) during the term of this Agreement, Physician will be placed in a position by Medical Group to become acquainted with various aspects of the Confidential Information (defined below); (B) the use or disclosure of the Confidential Information by Physician except as expressly authorized by the Board of Directors is prohibited and would seriously damage Medical Group; and (C) in addition to being given access to the Confidential Information, Physician will receive material benefits as a result of this Agreement, including compensation and experience. Therefore, Physician agrees as follows:

(a) During the term of this Agreement and thereafter, Physician shall not, without the prior written consent of the Board of Directors, directly or indirectly:

(i) Divulge, furnish or make accessible to any Person or copy, take or use in any manner any of the Confidential Information;

(ii) Take any action which might reasonably or foreseeably be expected to compromise the confidentiality or proprietary nature of any of the Confidential Information, or

(iii) Fail to follow the reasonable suggestions made by the Board of Directors from time to time regarding the confidential and proprietary nature of the Confidential Information.

(b) "Confidential Information" means all of the materials, information and ideas of Medical Group, including, without limitation: patient names, patient lists, patient records, patient information, operation methods and information, accounting and financial information, marketing and pricing information and materials, strategic planning information, internal publications and memoranda, and other matters considered confidential by Medical Group.

(c) The provisions of this Section 5.3 shall survive the expiration or termination of this Agreement for any reason.

5.4. Remedies. Remedies shall be available to Medical Group in the event of a breach of the provisions of Section 5.1, 5.2 or 5.3 according to the following provisions:

(a) In the event that Physician, at his or her option, desires to practice in violation of the provisions contained in Section 5.1, Physician shall pay Medical Group liquidated damages in advance of practicing in violation of that Section in an amount equal to One Hundred Percent (100%) of Physician's Income (defined below). Medical Group may offset any amounts owed to Physician against amounts owed by Physician to Medical Group hereunder. For purposes of this Agreement, "Physician's Income" shall mean the average W-2 compensation of physician-shareholders of Medical Group in the calendar year prior to the date of termination or expiration of this Agreement.

These damages are in partial restitution for the loss or damage which Medical Group will suffer as a result of such breach and in partial recovery of its investment in the practice of Physician, which together constitute full payment of such losses or damages. Notwithstanding anything to the contrary stated herein, payment of such liquidated damages (together with the forfeiture described in Article 4 above) will entitle Physician to practice in breach of the provisions contained in Section 5.1 without further liability to Medical Group for such breach.

(b) The parties agree that a breach by Physician of any of the provisions of Section 5.3 of this Agreement would cause irreparable damage to Medical Group. Therefore, Medical Group shall be entitled to preliminary and permanent injunctions restraining Physician from breaching or continuing any breach of any of the provisions of Section 5.3 of this Agreement. The existence of any claim or cause of action on the part of Physician against Medical Group, whether arising from this Agreement or otherwise, shall not constitute a defense to the granting or enforcement of this injunctive relief.

(c) Except as provided in Section 5.4(a) above, the remedies available to Medical Group under this Agreement are cumulative. Medical Group may, at its sole discretion, elect to pursue all or any of such remedies. Such remedies are in addition to any given by law or

equity and may be enforced successively or concurrently.

(d) The provisions of this Section 5.4 shall survive the expiration or termination of this Agreement for any reason.

5.5. Acknowledgment of Reasonableness. Physician has carefully read and considered the provisions of this Agreement and agrees that the restrictions set forth herein, particularly those in Sections 5.1, 5.2, 5.3, and 5.4 (together with the remedy set forth in Article 4), are fair and reasonably required for the protection of Medical Group. If any provision of Sections 5.1 or 5.2 relating to the restrictive periods, scope of activity restricted and/or the territory described therein shall be declared by a court of competent jurisdiction to exceed the maximum time period, scope of activity restricted or geographical area such court deems reasonable and enforceable under applicable law, the time period, scope of activity restricted and/or area of restriction held reasonable and enforceable by the court shall thereafter be the restrictive period, scope of activity restricted and/or the territory applicable to the restrictive covenant provisions in this Agreement.

ARTICLE 6

GENERAL PROVISIONS

6.1. Notices. Any notices, requests and other communications hereunder shall be in writing and shall be deemed duly given if hand delivered or mailed first class, postage prepaid, certified mail, return receipt requested, addressed as set forth hereinafter, or to such other address as any person or entity may designate in writing, and delivered as herein provided:

To Medical Group: Columbia Heart Clinic, P.A.
1655 Brabham Avenue, Suite 220
Columbia, SC 29204
Attention: President

To Physician: J. Kevin Baugh, M.D.
10 Cotton Hope Lane
Columbia, SC 29209

6.2. Severability. The provisions of this Agreement are deemed by the parties to be severable, and the invalidity or unenforceability of any one or more of the provisions of this Agreement shall not affect the validity or enforceability of any other provision.

6.3. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of South Carolina.

6.4. Entire Agreement. This Agreement sets forth the entire understanding between the parties with respect to the subject matter hereof and cannot be amended except by a writing signed by both parties. No waiver of any term or provision of this Agreement shall be deemed to be a waiver of any subsequent breach of such term or provision of this Agreement. This

Agreement supersedes and replaces in their entirety any and all other employment agreements, oral or written, if any, between the parties hereto.

6.5. Assignment. Physician acknowledges that the services to be rendered by Physician are unique and personal, and Medical Group acknowledges that Physician is willing to sign this Agreement only if Physician's employment is with Medical Group. Accordingly, neither Medical Group nor Physician may assign any of that party's rights or delegate any of that party's duties or obligations under this Agreement. Any assignment or attempted assignment, transfer or pledge of this Agreement or of the interest of either party herein shall be null and void, and at the option of the other party, this Agreement may be terminated immediately upon the occurrence of such an event. The rights and obligations of the parties under this Agreement shall inure to the benefit of and shall be binding upon the successors, heirs and assigns of the parties hereto, whenever the context admits or requires.

6.6. Contract Modifications for Prospective Legal Events. In the event any state or federal laws or regulations, now existing or enacted or promulgated after the effective date of this Agreement, are interpreted by judicial decision, a regulatory agency or legal counsel to a party in such a manner as to indicate that the structure of this Agreement may be in violation of such laws or regulations, Medical Group and Physician shall amend this Agreement as necessary. To the maximum extent possible, any such amendment shall preserve the underlying economic and financial arrangements between Medical Group and Physician.

6.7. Attorney's Fees. If either party attempts to enforce any of its rights under this Agreement as against the other party, the prevailing party shall be entitled to recover from the other party reasonable attorneys' fees, court costs and other expenses incurred by the prevailing party in connection with such enforcement or attempted enforcement of those rights.

6.8. Medicare Reporting and Access Requirement. If applicable, until the expiration of four (4) years after the furnishing of the services pursuant to this Agreement, Physician shall make available, upon written request to the secretary of the U.S. Department of Health and Social Services, or upon request to the Comptroller General, or any of their duly authorized representatives, this Agreement, and all books, documents and records of Physician that are necessary to certify the nature and extent of the costs of such services, and, if the Physician carries out any of the duties of this Agreement through a subcontract, with a value of or cost of \$10,000 or more over a twelve-month period, with a related organization, such subcontract shall contain a clause to the effect that until the expiration of four (4) years after the furnishing of such services pursuant to such subcontract, the related organization shall make available, upon written request of the Secretary or upon request to the Comptroller General, or any of their duly authorized representatives, the subcontract and books, documents and records of such organization that are necessary to verify the nature and extent of the costs of such services. The provisions of this Section 6.8. shall survive the expiration or termination for any reason of this Agreement.

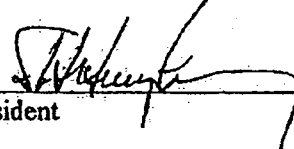
6.9. Captions. The captions or titles to the various sections of this Agreement are for convenience and ease of reference only and do not define, limit, augment or describe the scope, content or intent of this Agreement or of any parts thereof.

6.10. Counterparts. This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original.

IN WITNESS WHEREOF, Medical Group has caused this Agreement to be executed by its duly authorized officers, and Physician has executed this Agreement under seal, as of the day and year first above written.

MEDICAL GROUP:

COLUMBIA HEART CLINIC, P.A.

By: 
President

Dr. Stephen H. Humphrey, President

PHYSICIAN:

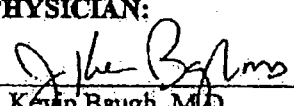
 (SEAL)
J. Kevin Baugh, M.D.

EXHIBIT A

GUIDELINES FOR COMPENSATION OF PHYSICIANS

[Attached]

00068

EXHIBIT B

BENEFIT PLANS

1. Profit Sharing Plan for Columbia Heart Clinic, P.A.
2. Medical insurance as provided by Medical Group from time to time.

EXHIBIT C

VACATION AND PROFESSIONAL MEETINGS

Physician may take a maximum of 8 weeks plus 1 week at Christmas/Passover off from Physician's duties each calendar year for vacation and continuing medical education, plus such legal holidays as Medical Group establishes from time to time. In addition, if Physician has 17 or more years of combined service with Medical Group, Columbia Cardiovascular Clinic, P.A. or Columbia Cardiology Associates, P.A., then Physician is entitled to an additional week of vacation. Such time off may be taken at such times or from time to time in a manner most convenient to the business of Medical Group as determined by the Board of Directors of Medical Group. Physician may carry forward into the next calendar year a maximum of five (5) days of unused vacation and professional meeting time, and Physician may borrow from the next calendar year up to a maximum of five (5) days of vacation and professional meeting time. Except as described in the preceding sentence, unused vacation and professional meeting time may not be carried forward to the next calendar year.

00070

EXHIBIT D

**POLICIES REGARDING BENEFITS
FOR DEATH, DISABILITY AND RETIREMENT**

1. Upon Physician's disability as determined in accordance with Sections 1.4. and 4.3.(b) of this Agreement and such other policies as the Board of Directors of Medical Group may adopt, Physician shall continue to receive basic compensation under Section 1.1. of this Agreement for a maximum period of three (3) months during any one calendar year and a maximum of six (6) months during any five (5) consecutive year period; provided, however, the Board of Directors of Medical Group, in its discretion, may waive the five (5) year restriction. Upon termination of this Agreement under Section 4.3.(b), Physician shall be entitled to the benefits under Section 4.5.(c).
2. Physician must have attained the age of fifty (50) to be entitled to retire.

EXHIBIT E

APPROVED OUTSIDE ACTIVITIES

1. Participation on medical-related boards and committees.
2. Proctoring activities related to interventional procedures peculiar to the practice of cardiology.
3. Educational speaking engagements.
4. Expert witness testimony.

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
)
)
J. Kevin Baugh, M.D., and Barry J.)
Feldman, M.D.,)
)
Plaintiffs,)
V.)
)
Columbia Heart Clinic, P.A.)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
IN THE ELEVENTH JUDICIAL CIRCUIT

C/A NUMBER: 2006-CP-32-0371

DEFENDANT COLUMBIA HEART
CLINIC'S POST-TRIAL BRIEF

FILED
JUN -3 P 12:20
BETH A. O'FRIGG
CLERK OF COURT
LEXINGTON, SC

2/11

This case was tried before the Court on May 12-14, 2009. The issues at trial were related to an Employment Agreement for shareholder physicians of Columbia Heart Clinic, P.A. ("Columbia Heart").¹ The Employment Agreement contains a new covenant not to compete, but also includes language from a covenant in a previous employment agreement that related to accounts receivable of Columbia Heart. As to the new covenant not to compete as well as the covenant covering accounts receivable, the Plaintiffs acknowledged the reasonableness of each covenant and the remedies for violations.

At the close of trial on May 14, 2009, the parties agreed to submit post-trial briefs on several issues raised by the Court.²

I. The Employment Agreements were supported by consideration.

The first critical question is whether Employment Agreement was supported by independent

¹Plaintiffs also asserted a claim under the Wage Payment Act.

²Defendant submitted a Pre-Trial Brief at the beginning of the trial and reasserts all arguments set forth therein. This Brief will focus on the issues raised by the Court.

consideration. When the Employment Agreements were executed in 2004, the Plaintiffs were already employed as shareholder physicians. The new Employment Agreement included a new covenant not to compete.³ As consideration for the new Agreement, Columbia Heart promised to pay a departing shareholder physician \$5,000 per month for 12 months provided that the departing physician did not compete.

It is well settled in South Carolina that, for a contract to be binding, it must be supported by consideration. *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct.App.1997). "A contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act." *Benya v. Gamble*, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct.App.1984).

Here, the consideration is executory -- Columbia Heart promised to pay a certain amount of money in the future if Plaintiffs agreed not to compete in the future. A promise can constitute consideration. In contract law in general, "... a promise which is bargained for is consideration if, but only if, the promised performance would be consideration." RESTATEMENT (SECOND) OF CONTRACTS § 75 (1981). "In modern times the enforcement of bargains is not limited to those partly completed, *but is extended to the wholly executory exchange in which a promise is exchanged for a promise.*" RESTATEMENT (SECOND) OF CONTRACTS § 75 cmt. a (1981) (emphasis added).

South Carolina case law clearly establishes South Carolina's adherence to this widely accepted contract principle. In *Carolina Chemical Equipment Co., Inc. v. Muckenfuss*, 322 S.C. 289,

³As noted above, the Plaintiffs had entered into previous Employment Agreements with Columbia Heart, and those agreements contained a covenant not to compete. Under the terms of old agreement, a departing physician would get a percentage of the accounts receivable unless he violated the covenant and competed against Columbia Heart.

471 S.E.2d 721 (1997), the Court of Appeals held “[c]learly, under contract law, mutual promises afford sufficient legal consideration for the support of each other.” *Id.* at 303, 728 (citing *Evatt v. Campbell*, 234 S.C. 1, 106 S.E.2d 447 (1959)).

This contract principle is not a novel one. In 1926, the court in *Callahan v. Ridgeway*, 138 S.C. 10, 135 S.E. 646 (1926), in finding the existence of valid consideration, stated that “ ‘valuable consideration,’ in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other. **Mutual promises also constitute a good consideration.**” *Id.* at 10, 649 (emphasis added). Even as early as 1855, South Carolina recognized that “[m]utual promises create reciprocal obligations which constitute a sufficient consideration to support such promises. They are not naked facts, but voluntary agreements resting on the mutuality of their obligations.” *Garret v. T.W. Malone*, 8 Rich. 335, 42 S.C.L. 335, 1855 WL 3118 (S.C. App. L. 1855). As one court stated:

If the agreement be a valid and enforceable contract in other respects, we are of the opinion that it was not ‘void for lack of consideration.’ Consideration, in the legal sense of the word, is the quid pro quo, that which the party to whom a promise is made does or agrees to do in exchange for a promise. (citations omitted). Consideration may be concurrent, executed, executory, and continuing. An executory consideration arises where a promise to do something in the future is given in return for another promise. (citations omitted). Here there were outstanding promises to do something on both sides, and so there was a valid executory consideration.

Blair Engineering Co. v. Page Steel & Wire, 288 F. 662, 664 (3rd Cir. 1923).

The principle has been upheld in more recent cases. In a 1986 case, *Reidman Corp. v. Jarosh*, 289 S.C. 191, 345 S.E.2d 732 (Ct. App. 1986), the Court of Appeals reversed the trial court’s order, which had sustained a former employee’s demurrer on the ground that no consideration

supported a covenant not to compete. In that case, Jarosh, an insurance agent, entered into a covenant not to compete that stated, among other things, that for two years from the date of termination, an employee could not solicit renewals of insurance within a 100-mile radius. *Id.* Jarosh argued, based on the fact that the employer could terminate employment at any time, that the contract lacked consideration. *Id.* at 193, 734. However, the Court of Appeals found that the covenant was enforceable because it was supported by valuable consideration described as a "reasonable expectation of . . . benefits." *Id.* at 192, 733. In finding sufficient consideration, the court noted the difference between the terms "consideration" and "mutuality of obligation" and stated, "[t]he doctrine of mutuality of obligation appears therefore to be merely one aspect of the **rule that mutual promises constitute consideration for each other.**" *Id.* at 194, 734 (emphasis added).

In this case, Columbia Heart promised to pay \$ 5,000 per month to a departing physician if the physician agreed not to compete. As is clearly shown by the case law, Columbia Heart's promise and the corresponding promise by each physician is sufficient consideration to support the contract.

Other courts have addressed cases similar to the facts present here and recognized that mutual promises constitute consideration. In *Modern Controls, Inc. v. Andreadakis*, 578 F.2d 1264 (8th Cir. 1978), a covenant not to compete was executed after Andreadakis had been employed for several weeks. The employer promised to pay Andreadakis' salary for two years if he would not compete for that time. In the suit brought by the employer to enforce the covenant, the court evaluated the consideration and noted that "Andreadakis' promise not to compete for two years and Modern Controls' promise to pay him his base salary for two years were both conditioned on Modern Controls' decision to enforce the covenant and both promises must be performed together or not at all." *Id.* at 1268. In other words, the court clearly recognized that the consideration was the promise

and that the promise itself, even if performance was not completed, was sufficient consideration. Likewise, in this case, the fact that Plaintiffs competed and therefore did not receive the monthly payment has no effect on the validity of the consideration that existed at the time the Employment Agreement was executed. The new promise of additional money by Columbia Heart (in exchange for Plaintiffs' promise not to compete) provided the consideration. There is no requirement that the physician actually receive the money.

A recent Nebraska case addresses the promise of future payments as consideration. *Aon Consulting, Inc. v. Midlands Financial Benefits, Inc.*, 748 N.W.2d 626 (Neb. 2008). In *Aon*, after the employee had worked for the employer for some time, he signed a covenant not to compete. Later, the covenant was challenged on various grounds, including the argument that the employee had not received a bonus or compensation for signing the covenant and that continued employment alone was not sufficient consideration. The court held that it did not have to decide if continued employment constituted sufficient consideration because the agreement also provided that the employer would provide severance pay at the termination of employment. The court held that:

[t]his undertaking constituted a benefit of [employee] and a detriment to [employer] which would not have otherwise existed in their employment relationship. The fact that [employee] claims not to have received a severance payment following termination does not alter the fact that [employer's] agreement to make such payment constituted valid consideration for the nonsolicitation agreement.

Id. at 639.

In this case, while the accounts receivable and salary provisions were a part of the previous employment agreement, the \$5,000 monthly stipend was a new benefit to each Plaintiff and a detriment to Columbia Heart that would not have existed in their employment relationship but for the new Employment Agreement. Thus, it provides ample consideration to support a covenant not

to compete.

Moreover, the Plaintiffs did not question the consideration at the time they entered the agreement. The adequacy of the consideration is for the parties to determine, not someone else. *Hejl v. Hood, Hargett & Associates, Inc.*, 674 S.E.2d 425 (N.C.App. 2009). The court stated:

...[T]he parties to a contract are the judges of the adequacy of consideration. The slightest consideration is sufficient to support the most onerous obligation, the inadequacy,...is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced. Where there is no fraud and the parties have dealt length and contracted, the Court cannot relieve one of them because the contract has proven to be a hard one.

Id. at 428 (internal citations and quotations omitted). The consideration for the Employment Agreement was the promise of the \$5,000 benefit and Plaintiffs acknowledged that consideration by entering the agreement:

NOW, THEREFORE, in consideration of the promises herein contained and other good and valuable consideration, the receipt and legal sufficiency of which are hereby acknowledged....

Employment Agreement, p. 1. The Plaintiffs should not now be relieved of their contractual obligations regardless of whether "the contract has proven to be a hard one." *Hejl, supra*.

II. The territorial restriction is reasonable and enforceable.

In order to be upheld, a covenant must be reasonably limited with respect to time and place and it cannot be unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood. *Oxman v. Sherman*, 239 S.C. 218, 122 S.E.2d 559 (1961).

Here, the territorial limitation is twenty miles.⁴ Article 5 contains the restrictive covenant and states the physician, during the twelve (12) months period immediately following the date of

⁴The Plaintiffs are not contesting the length of the covenant.

termination or expiration of the Agreement shall not compete. Section 5.1(b). The term "compete" is defined in Section 5.2 and prohibits certain activities in the "territory" which is also defined:

"Territory" means the area within a twenty (20) mile radius of any Medical Group office at which Physician routinely provided services during the year prior to the date of termination or expiration of this Agreement.

Section 5.2(iii). Similarly, Article 4 of the Employment Agreement addresses the accounts receivable and provides in the event the Agreement is terminated with or without cause, the departing physician is contractually granted salary accrued but not paid and a percentage of the accounts receivable. Section 4.5(f). However, a departing physician is not entitled to those payments if the departing physician "continues or commences the active practice of medicine in the field of cardiology within a twenty (20) mile radius of any Medical Group office at which Physician routinely provided services during the year prior to the date of expiration or termination of this Agreement[.]" Section 4.5 (i). In other words, both provisions of the Employment Agreement utilize the phrase: "within a twenty (20) mile radius of any Medical Group office at which Physician routinely provided services during the year prior to the date of expiration or termination of this Agreement[.]"

South Carolina courts have recognized that a radius of 25 miles is reasonable. *South Carolina Finance Corp. of Anderson v. West Side Finance Co.*, 236 S.C. 109, 113 S.E.2d 329 (1960). A geographic restriction is generally reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers. *Standard Register Company v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961). As that court noted,

...it has been said that the most important single asset of most business is their stock

of customers. Protection of this asset against appropriation by an employee is recognized as a legitimate interest of the employer. A restrictive covenant, therefore, is reasonable if it is designed to protect the employer against loss of his customers.

Id., 119 S.E.2d at 539.

The testimony at the trial indicated that the majority of Columbia Heart's patients, its "customers", came from Richland and Lexington County. Thus, the 20 mile radius was designed to protect Columbia Heart's patient base as Dr. Ben Jones testified at trial.

The covenant also specified that the radius stemmed from the "office" where the physician provided services, not a hospital or a clinic, but the Columbia Heart *office*.⁵ Columbia Heart had three offices at the time the Employment Agreement was executed -- Richland, Lexington and Providence. It is undisputed that Baugh and Feldman routinely provided services from the Lexington office (not the Providence or Richland offices) in the year prior to their departure from Columbia Heart. Therefore, it is clear that the twenty mile radius originated from the Lexington office and extended for a twenty mile radius.

Furthermore, the scope of prohibited activities is not unduly harsh or oppressive. The covenant here does not prevent Plaintiffs from working at all, only from joining or buying an interest in another cardiology practice within the time and geographical limitations. Columbia Heart provides comprehensive services for the prevention, diagnosis, and treatment of cardiovascular disease. The non-compete restricts Plaintiffs from providing those same services in the territory "within a twenty (20) mile radius." Plaintiffs are free to practice outside the geographical limit. The

⁵Office is defined as a room, set of rooms or building where the business of a commercial or industrial organization or of a professional person is conducted. Dictionary.com; Random House Dictionary 2009.

covenant is reasonably related to the needs of Columbia Heart and therefore should not be considered harsh or oppressive.

Significantly, Plaintiffs *agreed* to the reasonableness of the covenant, including the territorial limitation and scope of prohibited activities in the Employment Agreement itself:

Acknowledgment of Reasonableness. Physician has carefully read and considered the provisions of this Agreement and agrees that the restrictions set forth herein, particularly those in Sections 5.1, 5.2, 5.3, and 5.4 (together with the remedy set forth in Article 4), are fair and reasonably required for the protection of Medical Group.

Section 5.5.⁶ Plaintiffs cannot now, after competing, reject the territory or the scope of the covenant as unreasonable, especially where they affirmatively recognized the reasonableness when they executed the contract.

III. The accounts receivable covenant appeared in the old employment agreement and thus survives by itself.

Plaintiffs had previously entered into employment agreements with Columbia Heart. Dr. Barry Feldman's Employment Agreement was signed in 1997 and Dr. Baugh's in 1999. Each of these Agreements contained a covenant not to compete. Under the terms of both the old agreement and the 2004 Employment Agreement, all accounts receivable belonged to Columbia Heart, not the individual physician. Section 3.1. According to the both agreements, Plaintiffs were contractually granted a portion of the accounts receivable, but only if they did not compete. The old agreement provided:

Notwithstanding any other provision of this Agreement in the event Physician continues or commences the active practice of medicine in the field of cardiology within in Richland or Lexington Counties, South Carolina at any time during the

⁶By agreeing to this provision, Plaintiffs also agreed to the reasonableness of the time and scope, as well as the contractual price to compete.

twelve (12) month period immediately following the termination (for any reasons whether with or without Cause) of this Agreement, then Physician shall forfeit any monies payable to Physician pursuant to this Section 4.5. following Physician's continuation or commencement of the practice of medicine in violation of Section 4.5(i). The provisions of this Section 4.5(i) shall survive the expiration or termination of this Agreement for any reason.

Feldman's Agreement, Sec. 4.5(h); Baugh's Agreement, Sec. 4.5(i). When the new Employment Agreement was created in 2004, the covenant regarding the accounts receivable remained, with only slight changes:

Notwithstanding any other provision of this Agreement in the event at any time during the twelve (12) month period immediately following the expiration or termination (for any reasons whether with or without Cause) of this Agreement Physician continues or commences the active practice of medicine in the field of cardiology within a twenty (20) mile radius of any Medical Group office at which Physician routinely provided services during the year prior to the date of expiration or termination of this Agreement, then Physician shall forfeit any monies payable to Physician pursuant to this Section 4.5. following Physician's continuation or commencement of the practice of medicine in violation of Section 4.5(i). The provisions of this Section 4.5(i) shall survive the expiration or termination of this Agreement for any reason.

2004 Agreement 4.5(i).⁷

In other words, both the old agreements and the 2004 Employment Agreement set forth a contractual computation providing a departing physician with a share of Columbia Heart's accounts receivable if they do not compete. However, in order to collect that amount, the departing physician must first abide by the condition precedent, which is that the physician cannot compete within a specified territory. The 2004 Employment Agreement is actually less restrictive than the previous agreement as it *reduces* the size of the territorial limitation from all of Richland and Lexington

⁷In fact, the change in the 2004 Employment Agreement *reduces* the size of the territorial limitation from all of Richland and Lexington Counties to a twenty mile radius.

Counties to a twenty mile radius from the office where the doctor routinely provided services. Because this is not a new or more restrictive covenant, there is no need for independent consideration. Nevertheless, there was consideration as set forth in Section I.

Moreover, the Plaintiffs agreed to the reasonableness of this provisions and loss of the accounts receivable. The 2004 Employment Agreement provides:

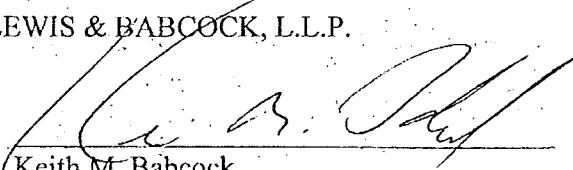
Acknowledgment of Reasonableness. Physician acknowledges that the forfeiture described in Section 4.5(i) is intended as partial restitution for the damages which Medical Group will suffer as a result of competition by Physician with Medical Group. Physician further acknowledges that such forfeiture, together with the remedies set forth in Article 5 below, is fair and reasonably required for the protection of Medical Group.

Section 4.6. Both of the Plaintiffs, highly educated individuals, read and signed the contract; therefore, they cannot now claim that the provisions of this covenant are unreasonable.

CONCLUSION

The Employment Agreement contained the promise of a new benefit to Plaintiffs in return for their promise not to compete. These mutual promises are sufficient consideration to support the contract. Furthermore, the covenant not to compete is reasonable in time, scope, and territorial limitations. As set forth above, the territorial radius of 20 miles (a distance that has been supported by South Carolina case law) extends from the Columbia Heart office in which Plaintiffs provided services, which all parties have admitted is the Lexington office. The scope of the restricted activities is limited to those necessary to protect Columbia Heart's interest. Finally, the covenant regarding accounts receivable was in the Plaintiffs' previous employment agreements and can be enforced, even with no additional consideration.

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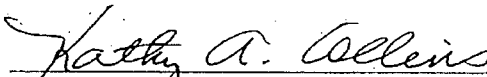
June 1, 2009

COPY

CERTIFICATE OF SERVICE

I, Kathy A. Collins, an employee with the law firm of Lewis & Babcock, L.L.P., hereby certify that I have this 1st day of June, 2009, served the foregoing Defendant Columbia Heart Clinic's Post-Trial Brief by placing a copy of same in the United States mail, first-class postage prepaid, to counsel for Plaintiffs, addressed as follows:

Michael D. Malone, Esquire
Charles F. Thompson, Jr., Esquire
Malone Thompson & Summers, LLC
339 Heyward Street, Suite 200
Columbia, South Carolina 29201


Kathy A. Collins

Columbia, South Carolina

June 1, 2009.

BETH A. CARRIG
CLERK OF COURT
LEXINGTON, SC

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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

J. Kevin Baugh, M.D., and Barry J.
Feldman, M.D.,

Plaintiffs,

V.

Columbia Heart Clinic, P.A.

Defendant.

IN THE COURT OF COMMON PLEAS
IN THE ELEVENTH JUDICIAL CIRCUIT

C/A NUMBER: 2006-CP-32-0371

**DEFENDANT COLUMBIA HEART
CLINIC'S REPLY TO
PLAINTIFFS' POST-TRIAL
BRIEF**

Defendant Columbia Heart Clinic, P.A. ("Columbia Heart") submits this reply brief in response to the post-trial brief filed by Plaintiffs.

Many of the issues raised in Plaintiffs' Post-Trial Brief have already been addressed in Defendant's Pre-Trial Brief submitted to the Court. Therefore, Defendant will not discuss those issues again, but it will just reply to the new arguments of Plaintiff.

I. The Wage Payment Act does not apply.

First, Plaintiffs completely misinterpret the Wage Payment Claim Act and its application to this case. Columbia Heart is a professional association, which operates much like a partnership. As with partners in a partnership, Plaintiffs were not being paid wages, but were receiving advances or draws on monies yet to be earned, under the contractual compensation plan. At the end of the year, or the end of a doctor's employment, if the doctor has not brought in sufficient earnings to exceed the draws, the doctor would repay Columbia Heart. This process is known as a "true-up," which the Plaintiffs acknowledged was routinely used by Columbia Heart. At trial, neither Plaintiff disputed the amount owed under the true-ups: Dr. Baugh owes \$24,888 and Dr. Feldman owes

\$55,273. Because the Plaintiffs both owed money back to Columbia Heart at the time they departed, they were not entitled to any further advances or draws.¹

In addition, the two other components Plaintiffs assert as part of their Wage Payment Claim do not come within the scope of the statute. Accounts receivable do not belong to the individual physician, but to Columbia Heart. Pl. Ex. 1, § 3.1. The accounts receivable are not paid to each physician for their performance under the contractual compensation plan. A physician only becomes eligible to receive a portion of the accounts receivable when he leaves the practice, for retirement or other reasons. Pl. Ex. 1, Article 4. Under the Employment Agreement, Plaintiffs are contractually granted a percentage of the accounts receivable, but only if they do not compete. Pl. Ex. 1, § 4.5(f) and 4.5 (i). Because Plaintiffs competed, they are not entitled to that percentage. Regardless, this claim is a contract matter and not one within the wage claim statute.

With regard to director's fees, Dr. Ben Jones explained at trial that director fees were not a part of the compensation formula. As such, they are not "amounts at which labor rendered is recompensed."² Therefore, this too does not fall under the wage claim statute.

II. There is sufficient consideration for the covenant.

In their Post-Trial Brief, Plaintiffs attack the covenant as void for lack of consideration and assert that it affects a forfeiture of accounts receivable.³ Plaintiffs' Post-Trial Brief, §III. However,

¹Plaintiffs were paid through the last regular draw period which ended April 15, 2006, but did not receive for draws for the week beyond that.

²Even if Dr. Feldman is owed directorship fees, which Columbia Heart has not disputed, the amount is offset by the amount that Dr. Feldman owes back to Columbia Heart under the true-up.

³Plaintiffs again attack the geographical limitation as being impermissibly expanded from the limitation that existed in the previous employment agreement. As noted above, the limitation was actually reduced because it only extends 20 miles from the Lexington office, rather than

the Employment Agreement provided for new and additional consideration and there is no forfeiture because Plaintiffs have no right to the accounts receivable.

The 2004 Employment Agreement was supported by executory consideration, which has long been recognized in South Carolina.⁴ *Evatt v. Campbell*, 234 S.C. 1, 106 S.E.2d 447, 451 (1959); See, also, 17 C.J.S. Contracts § 92 (“Executory consideration is a promise to do or to give something, or to forbear from doing something, in return for some other promise or act.”). “Mutual promises also constitute a good consideration.” *Callaham v. Ridgeway*, 138 S.C. 10, 135 S.E. 646, 649 (1926). In *Carolina Chemical Equipment Co., Inc. v. Muckenfuss*, 322 S.C. 289, 471 S.E.2d 721 (1997), the Court of Appeals held “[c]learly, under contract law, mutual promises afford sufficient legal consideration for the support of each other.” *Id.* at 303, 728 (citing *Evatt v. Campbell*, 234 S.C. 1, 106 S.E.2d 447 (1959)). Here, mutual promises are clearly present: Columbia Heart promised to pay \$ 5,000 per month to a departing physician if the physician agreed not to compete.

Furthermore, in South Carolina, the adequacy of the consideration is for the parties to determine at the time the contract is made. *Jackson v. Carter*, 128 S.C. 79, 121 S.E. 559 (1924). The court in *Jackson* noted that merely because party decided in hindsight that the consideration was lacking, the party was not relieved of his contractual duties. *Id.* See also, Am.Jur. Contracts §124 (“Persons ordinarily have the freedom of contract, and courts will not inquire into the adequacy of the consideration for their contracts”). Simply put, there is neither case law in South Carolina covering all of Richland and Lexington counties.

⁴In their Post-Trial Brief, Plaintiffs seem to imply that Dr. Feldman’s 1993 agreement and Dr. Baugh’s 1999 agreement were not supported by consideration. However, those agreements were supported valid consideration -- the employment of Drs. Feldman and Baugh (or the promotion from employee to shareholder). See, *Small v. Springs Industries, Inc.*, 292 S.C. 481, 357 S.E.2d 452 (1987); *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961).

requiring a certain type of consideration, nor is there case law prohibiting executory consideration.

The cases cited in Plaintiffs' Post-Trial Brief do not apply. For example, in *Black v. Gettys*, 238 S.C. 167, 119 S.E.2d 660 (1961), the plaintiff had entered into an agreement with her now deceased husband, in which she agreed that if he predecease her, she would place her stock in trust, with the income to be used for the benefit of her and her children. The agreement stated that it was in consideration of \$5.00, love and affection, and other consideration. However, the uncontradicted testimony was that Mrs. Black was never paid the stated consideration.

The other cited case, *McManus v. Little*, 251 S.C. 490, 163 S.E.2d 613 (1968), involved a car accident in which McManus was injured. Little's insurance carrier was placed into receivership, so Little was, in effect, an uninsured driver. McManus entered into a release, which recited the sole consideration as a recommendation by the Chief Insurance Commissioner to the court where the receivership proceeding was pending that McManus' \$9,000 claim be recognized. Before the recommendation was made, McManus decided to revoke the release and pursue her claim against her own carrier under an uninsured motorist theory. In *McManus*, the plaintiff simply decided to take another course of action; in other words, the court found that the release was optional and allowed the plaintiff to vitiate it. That case has nothing to do with this one. Here, the parties made mutual promises which were irrevocable upon the execution of the Employment Agreement.

Contrary to Plaintiffs' implication, there is no forfeiture of the accounts receivable, because Plaintiffs were not entitled to the accounts receivable. Under the Employment Agreement, Columbia Heart, not the individual physician, owns the accounts receivable. Pl. Ex. 1, § 3.1. Plaintiffs are only entitled to a percentage of accounts receivable as determined by a formula **because the Employment Agreement grants them that right.** Furthermore, Plaintiffs are only entitled to that percentage if

they do not compete against Columbia Heart. In other words, there is a condition precedent. A forfeiture only applies to "rights already existing... whereas in case of a condition precedent the right does not attach until it is performed." *Levan v. Metropolitan Life Ins. Co.*, 138 S.C. 253, 136 S.E. 304, 310 (S.C. 1927). Because Plaintiffs failed to perform the condition precedent, the right to a percentage of the accounts receivable never attached and there has been no forfeiture.

III. The covenant is reasonable.

Columbia Heart has already set forth, in great detail, why the covenant at issue is reasonable and valid and should be upheld. See, Defendant's Pre-Trial Brief. However, Defendant will address the specific issues raised by Plaintiffs' Post-Trial Brief.

Plaintiffs' main attack seems to focus on the scope of the covenant, claiming that it prevents them from earning a livelihood. Plaintiffs are exaggerating the covenant's meaning. At trial, Plaintiffs even went so far as to claim that a janitor that cleans a medical practice is assisting in the "practice of medicine in the field of cardiology." However, as David Summer testified at trial, the covenant was as narrowly drawn as possible to prevent Plaintiffs from doing indirectly what they could not do directly.

The Employment Agreement prohibits Plaintiffs from competing for twelve months within the twenty-mile radius. "Competing" is defined as engaging in the Business, owning an interest in a business which engages in the Business, or assisting any one else to engage in the Business, within the twenty-miles territory. Pl. Ex. 1, §5.2. "Business" is further defined as: "the practice of medicine in the field of cardiology." Pl. Ex. 1, §5.1.

As David Summer testified at trial, the term "practice of medicine" is statutorily defined, S.C. Code § 40-47-20(36). The definition includes activities such as: offering or undertaking to prescribe

medicine; offering or undertaking to diagnose, correct or treat any illness, wound, condition, etc.; and offering or undertaking to perform any surgical operation upon a person. Thus, Plaintiffs are prohibited from engaging in any of the practice of medicine or assisting someone else in the field of cardiology from engaging in the practice of medicine. There is no dispute that "the practice of medicine in the field of cardiology" means seeing patients and performing procedures. Thus, Plaintiffs have engaged in "the practice of medicine in the field of cardiology" only three hundred yards away from Columbia Heart's Lexington office, which was exactly what the covenant sought to prevent.

The case upon which Plaintiffs rely, *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (S.C. Ct. App. 1995), does not apply here. In that case, the employee was a facialist who was not only prohibited from performing facials, but also from being employed by any entity in the cosmetic industry, including selling cosmetics. Here, the covenant only prohibits the active practice of medicine in the field of cardiology.⁵ However, contrary to Plaintiffs overly broad interpretation of "assist," Plaintiffs could still sell pharmaceuticals to a medical practice, or taking Plaintiffs' extreme example, act as a janitor for a cardiology practice. Even under the *Faces Boutique* logic, it is obvious that Defendant only seeks protection of its legitimate business interest.

Plaintiffs also take issue with the restricted territory, claiming that it is overbroad. The geographical limitation was not extended from the covenant contained in the previous employment agreement, as Plaintiffs suggest, but reduced. Instead of including all of Richland and Lexington counties, the limitation only extended twenty miles from the Lexington, the office at which the

⁵As David Summer testified at trial, the term "practice of medicine" is statutorily defined, S.C. Code § 40-47-20(36).

physician regularly provided service during the year prior to his departure. Plaintiffs have also incorrectly assigned the origin of the twenty-mile radius as Columbia Heart's Richland and Lexington offices. The radius does not extend from all of Columbia Heart's offices, only the office in which the physician "routinely provided services during the year prior to the date of termination...." Pl. Ex. 1, § 5.2(iii). There has been no testimony disputing the fact that Plaintiffs regularly provided services from the Lexington office. Testimony of Barry Feldman. While Plaintiffs may have provided some services at Palmetto Richland or Providence hospitals, the geographic restriction is limited to Columbia Heart offices.⁶ Thus, the twenty-mile radius extends from Columbia Heart's Lexington offices. This radius was reasonable to protect Columbia Heart's patient base, which comes primarily from Richland and Lexington Counties, as indicated by the testimony of Dr. Ben Jones, although Columbia Heart also has patients from other counties.

Plaintiffs also wrongly assert that the limitation is greater than 20 miles because they are both interventional cardiologists and require frequent access to a hospital authorized for such invasive procedures. The evidence at trial, however, indicated that interventional procedures, such as stents and angioplasty, are only around 5% of cardiology practice. Testimony of Dr. Bob Schulze. Furthermore, the covenant did not prevent Plaintiffs from practicing medicine absolutely. Plaintiffs had multiple options; they could have opened a practice in Camden, Sumter, Orangeburg, which would allow them to practice all procedures but stenting and angioplasty; they could have opened

⁶Similarly, the clinics where Plaintiffs may have occasionally worked do not fall within the covenant as they are not Columbia Heart offices. Additionally, during the trial, Dr. Baugh did not dispute the fact that he only worked at a Columbia Heart clinic for a total of three times in the twelve months prior to his departure, showing that the clinics were not where they "regularly provided services." Testimony of Dr. Kevin Baugh. Similarly, Dr. Feldman did not dispute that he provided clinic services only twice in the twelve months prior to his departure. Testimony of Dr. Barry Feldman.

a practice in Greenwood, Aiken or Rock Hill; in which the hospitals are authorized for interventional procedures; or they could have paid the amount specified in the contract that would allow them to open a competing practice in Lexington County.⁷

Plaintiffs wrongly rely on *Cardiovascular v. Mammana*, 61 P.3d 210 (Okla. 2002). In that case, Mammana was a cardiovascular and thoracic surgeon with a covenant not to compete for two years within twenty-miles of his previous employer. Mammana argued that the radius was actually 100 miles because the closest hospitals were 100 miles away. There was also evidence that Mammana would not be able to practice his speciality (cardiovascular and thoracic surgery) at all, unless he moved 100 miles away. The court, putting heavy emphasis on the fact that the covenant was for two years, found that the covenant was not reasonable.

Here, however, Plaintiffs do not have to relocate 100 miles or more away in order to continuing practicing medicine in the field of cardiology. The radius here is 20 miles from the Lexington office. Some parts of Richland County are more than 20 miles away from the Lexington office, and Plaintiffs could have located their medical practice there and been able to perform all cardiology services, except stents and angioplasty, which only amount to small percentage of their practice. Similarly, they could have opened up a practice in Camden, Sumter, or Orangeburg, and performed all cardiology functions except for the interventional procedures. In contrast, the surgeon in *Mammana* would not be able to perform any of his functions as a surgeon without moving 100 miles away for two years. Furthermore, there was no provision in *Mammana*, as there is here, that would allow the doctor to pay an agreed upon amount to practice in the territory. The covenant and

⁷Apparently, there is no territorial restriction that would satisfy Plaintiffs. Plaintiffs' new office is only approximately 300 yards from Columbia Heart's Lexington office. Thus, even if the territory was limited to one mile, Plaintiffs would be in violation.

circumstances in that case cannot be compared to this one.

IV. The covenant may not even be subject to a reasonableness review.

Although Columbia Heart has already shown the covenant was reasonable, it has not conceded, as Plaintiffs suggest, that the provisions of the Employment Agreement are subject to a reasonableness review. Plaintiffs' Post Trial Brief, p. 20. First, Plaintiffs have again misconstrued the accounts receivable provision as a "forfeiture." As discussed above, there is no forfeiture here because Plaintiffs never had a right to the accounts receivable. Pl. Ex. 1, § 3.1. Next, Plaintiffs are not forfeiting the \$5,000 per month payment, because again, they did not have a right to that amount unless they did not compete. The promise of \$5,000 per month was in exchange for Plaintiffs' promise not to compete. This provision follows the South Carolina rule that "*mutual promises constitute consideration for each other.*" *Reidman Corp. v. Jarosh*, 289 S.C. 191, 194, 345 S.E.2d 732, 734 (Ct. App. 1986) (emphasis added). Both promises must be performed together or not at all. *Modern Controls, Inc. v. Andreadakis*, 578 F.2d 1264, 1268 (8th Cir. 1978). Because Plaintiffs have not performed their promise, Columbia Heart is not required to perform its promise; however, the fact that neither promise is performed does not amount to a forfeiture.

Moreover, this case is similar to *J.W. Hunt and Co. v. Davis*, 313 S.C. 352, 355-356, 437 S.E.2d 557, 560 (Ct. App. 1993). The agreement in that case was not subject to the reasonableness requirements of a covenant because it was merely "a [contractual] business arrangement incident to the continuing practice of the parties" *J.W. Hunt and Co. v. Davis*, 313 S.C. 352, 355-356, 437 S.E.2d 557, 560 (Ct. App. 1993). Plaintiffs try to distinguish *Hunt* by arguing that this case involves an Employment Agreement, not a partnership agreement. However, *Hunt* is analogous to the situation here. The Employment Agreement in this matter is not a typical employment agreement

in the hierarchical structure for an employer-employee relationship. In this case, Plaintiffs were two of twelve physician shareholders of a professional association, and the agreement is virtually identical to an agreement between professional partners. The agreement here, like the one in *Hunt*, is not subject to reasonableness requirements because it is merely an agreement between partners.

Moreover, *Hunt* recognized that even if the amount a partner is contractually required to pay to his former practice is large, it is valid. In *Hunt*, the court upheld the agreement that required the withdrawing partner to pay the partnership two times amount of the partnership's annual gross billings to former or existing clients for any work the withdrawing partner did for former or existing clients. Using that contractual formula, the amount that the departing accountant was required to pay was \$879,068, which the court upheld. Plaintiffs argue that the contractual amount to compete set forth in the contracts here is not tied to work performed for a former or existing patient. However, it was impossible for Columbia Heart to tie the contractual amount to patients because it was not simply an issue of loss of patients,⁸ but also involved lost referrals and the related income. David Summer testified that at the time the covenant was created, Columbia Heart had to attempt to calculate, in advance, its losses. Part of that loss is the "lost opportunity" or lost referrals. Summer Testimony. Columbia Heart attempted to quantify the amount of income stream Columbia Heart would lose if a departing physician competed. Summer Testimony. Columbia Heart did not utilize the formula in *Hunt*, which used **gross billings** to a client. David Summer testified that instead of gross billings, Columbia Heart created a reduced formula, which reflects both loss of patients and

⁸The loss of patients is clearly one aspect because, as noted by Dr. Shulze, patients follow their physicians. Testimony of Dr. Bob Schulze.

loss of referrals, and which consists of an average of the net income of all shareholder physicians.⁹

This matter is not like the case upon which Plaintiffs rely, *Mosner v. Gosnell*, 334 S.C. 425, 513 S.E.2d 123 (Ct. App. 1999), in which the payment to compete was not upheld. That case involved the sale of a business and the agreement required the seller to pay the entire purchase price of the business back if the seller competed. The court found such a payment was not compensation for damages, but to punish the seller for competing. However, in this case, the contractual amount was designed to compensate Columbia Heart for the various losses associated with a departing physician's competition, including the lost revenue stream, *which comes from patients and referrals*.¹⁰

⁹The case of *Calhoun v. WHA Medical Clinic, PLLC*, 632 S.E.2d 563, 557 (N.C. App. 2006), contains an almost identical formula which was to help compensate for "net contribution to corporate overhead, the volume of patients and patient revenues lost to the departing physician's new practice, the length of time and cost associated with recruiting replacement physicians, the time it takes a new replacement physician to become a fully productive contributor to the group, and the ability of the remaining physicians in the group to assume the care of the patients who wish to remain in the group...."

¹⁰Plaintiffs cite multiple other cases in support of the theory that liquidated damages must be tied to the damages caused by a breach. However, those cases do not apply to this situation for various reasons. For example, Plaintiffs cite *Cherry, Baekert & Holland v. LaSalle*, 413 So.2d 436 (Fla. App. 1982) for the proposition that amount was too great to be related to actual damages, the case does not actually use that language. The opinion is only 2 pages long and does not actually explain why there is inadequate consideration or analyze the penalty. The clause in *Seach v. Richards, Dieterle & Co.*, 439 N.E.2d 208 (Ind. App. 1982) was found to be a penalty because it required payment of three times actual billing of firm's client for previous 12 months not only if the former employee solicited client, but if the former employee even *contacted* the client. The court noted even if no harm came from contact, employee would have to pay treble damages and declined to uphold the clause. Some cases cited by Plaintiffs actually support Columbia Heart's position. In *South Carolina Dep't of Health and Env. Control v. Kennedy*, 289 S.C. 73, 344 S.E.2d 859 (Ct. App. 1986), a medical student accepted money under a statute which gave loans for medical school in exchange for a doctor agreeing to practice in certain area for three years. Under statutory terms, an unjustifiable violation would result in a doctor paying three times the amount borrowed, plus 7%

V. Plaintiffs' acknowledgment of reasonableness prevents them from now challenging the covenants.

The Employment Agreement contains two paragraphs in which Plaintiffs acknowledged the reasonableness of its provisions. Section 4.6 states:

Acknowledgment of Reasonableness. Physician acknowledges that the forfeiture described in Section 4.5(i) is intended as partial restitution for the damages which Medical Group will suffer as a result of competition by Physician with Medical Group. Physician further acknowledges that such forfeiture, together with the remedies set forth in Article 5 below, is fair and reasonably required for the protection of Medical Group.

Pl. Ex.1. Similarly, Section 5.5. states:

Acknowledgment of Reasonableness. Physician has carefully read and considered the provisions of this Agreement and agrees that the restrictions set forth herein, particularly those in Sections 5.1, 5.2, 5.3, and 5.4 (together with the remedy set forth in Article 4), are fair and reasonably required for the protection of Medical Group.

Pl. Ex. 1.

Plaintiffs, not surprisingly, try to run from any implication that they have conceded the reasonableness of these contractual provisions and waived any right to challenge the reasonableness. At the very least, however, these provisions serve as admissions that the Employment Agreement is reasonable and that Plaintiffs read and understood the documents when they signed them.

The cases cited by Plaintiffs do nothing to help their argument. In two of the cases, *Preferred*

per annum. The Court of Appeals upheld the payment for the doctor's violation of the agreement, noting that the doctor had agreed to the terms of the loan. *See also, Holloway v. Faw, Casson & Co.*, 572 A.2d 510 (Md. App. 1990)(Court upheld agreement in which departing partner who performed work for firm's client would pay amount equal to 100% of the firm's billing to that client for the previous 12 months back to the firm).

Research Inc. v. Reeve, 292 S.C. 545, 357 S.E.2d 489 (Ct. App. 1987) and *Koger Properties, Inc. v. Adams-Cates Company*, 274 S.E.2d 329 (Ga. 1981), there is no indication that an acknowledgment of reasonableness was even contained in the covenants at issue, and obviously, therefore, no discussion of the effect of reasonableness provisions. In *Hagermeyer North America v. Thompson*, 2006 WL 516733 (D.S.C. 2006), the court noted that the reasonableness clause countered Thompson's attempt to portray himself as unsophisticated underdog. Contrary to Plaintiffs' assertion though, the court did not go so far as to hold that such provisions could be used only to counter the employee's understanding of contract.¹¹

VI. The Plaintiffs have specifically agreed to allow the court to modify the covenant if necessary.

"Blue penciling" is the term given to judicial modification of a contract. *Broadway & Seymour, Inc. v. Wyatt*, 1991 WL 179084, 5 (4th Cir. 1991). Plaintiffs claim that blue-penciling is not allowed in South Carolina, yet they consistently ignore the provision of the Employment Agreement in which the parties agreed to allow the court to blue-pencil, if necessary. The cases cited in Plaintiffs' Post-Trial Brief simply state that a court cannot ordinarily re-write a covenant that fails in one aspect. However, none of those cases involves parties giving express consent to blue-penciling as the parties here have done.

Finally, the structure of the covenant lends itself to blue-penciling. For example, if it was determined that the geographical limitation was too broad, it could easily be reduced to a smaller

¹¹The last case cited by Plaintiffs, *Herring Gas Co. v. Magee*, 813 F.Supp. (S.D. Miss. 1993), contains a portion of the covenant at issue, which contained an acknowledgment of reasonableness. However, there is no indication that the party seeking to enforce the agreement asserted the reasonableness provision as controlling. That case provides no support for the Plaintiffs' position.

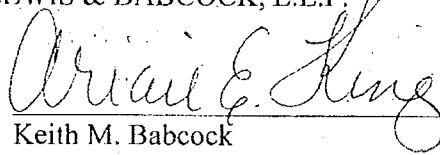
radius. Likewise, if the court determined that the covenant was too extensive, it could modify the scope of the covenant. However, in this case, Plaintiffs have already admitted that they are seeing and treating cardiology patients, which constitutes engaging in the practice of medicine, only 300 years away from Columbia Heart's Lexington office. Testimony of Dr. Barry Feldman, Dr. Kevin Baugh. Plaintiffs' actions are exactly what the covenant was designed to prevent, and no modification is necessary, especially since the year period for the covenant has now passed.

CONCLUSION

The Wage Payment Act does not apply because Plaintiffs were not being paid wages, but advances. Likewise, neither the director's fees nor accounts receivable constitute wages under the law. With regard to the Employment Agreement, it is properly supported by consideration, in the form of the mutual promises of Plaintiffs and Defendant. There is no forfeiture of accounts receivable because Plaintiffs had no right to those funds, which were the property of Columbia Heart. While the Employment Agreement is equivalent to a partnership agreement and may not even be subject to a reasonableness review, the covenant is reasonable in length of time, scope, and geographic limitation. Plaintiffs' acknowledged the reasonableness of the covenant when they signed the Employment Agreement, indicating that they read and understood its terms. Furthermore, because the parties specifically agreed to blue-penciling, this court can modify the covenant if it finds some portion to exceed the reasonableness standard.

For these reasons, and those set forth in Defendant's Pre-Trial Brief and Post-Trial Brief, Defendant respectfully requests that this Court find the covenant not to compete to be enforceable.

LEWIS & BABCOCK, L.L.P.

A handwritten signature in cursive script, reading "Ariail E. King". The signature is written in dark ink and is positioned above a horizontal line.

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ORIGINAL

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

J. Kevin Baugh, M.D., and Barry J.
Feldman, M.D.,

Plaintiffs,

V.

Columbia Heart Clinic, P.A.

Defendant.

IN THE COURT OF COMMON PLEAS
IN THE ELEVENTH JUDICIAL CIRCUIT

C/A NUMBER: 2006-CP-32-0371

DEFENDANT COLUMBIA HEART
CLINIC'S SUPPLEMENTAL
POST-TRIAL BRIEF

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Pursuant to the request of the Court, Defendant Columbia Heart Clinic, P.A. ("Columbia Heart") submits this supplemental post-trial brief.

This case involves agreements between two shareholder physicians and Columbia Heart Clinic, a professional association. It is in this context that the court should review the covenants within the agreements.

1. The court is not required to apply a reasonableness analysis.

A reasonableness review is not required in this matter because the contractual provision at issue in this case is one that applies only to shareholder physicians. The physicians have equal status, so the Employment Agreement is actually akin to a partnership agreement. In *J.W. Hunt and Co. v. Davis*, 313 S.C. 352, 355-356, 437 S.E.2d 557, 560 (Ct. App. 1993), the Court of Appeals found that a provision in an agreement between partners requiring the departing partner to pay a sum determined by formula was simply "a [contractual] business arrangement incident to the continuing practice of the parties" *J.W. Hunt and Co. v. Davis*, 313 S.C. 352, 355-356, 437 S.E.2d 557, 560 (Ct. App. 1993). Therefore, the *Hunt* court concluded that such an agreement between partners was not subject to the reasonableness test generally applied to

covenants not to compete. In particular, the court noted that the departing partner could continue to engage in competition against his former partners but would be required to pay certain monies under the agreement. The court also noted the agreement was negotiated between parties with equal bargaining power.

In this case, CHC is a professional association, with, at the time the agreements were executed, twelve shareholders. In other words, the arrangement was almost identical to a partnership. The agreements at issue were only entered into by shareholder physicians, not employee physicians. In addition, the agreements in this case are just like the partnership agreement in *Hunt*, in which Plaintiffs could engage in competition against CHC upon payment of the contractually agreed upon amount. Because the agreement was between shareholders, or people of equal bargaining power, and the practice, and not a typical employer-employee hierarchical arrangement, this case is almost identical to *Hunt*. Under the rationale of that case, a reasonableness test is not required.

2. Even if a reasonableness test is applied, the covenant is not overbroad but merely prohibits indirect as well as direct competition.

The covenant is not overbroad simply because it prohibits Plaintiffs from "assisting" another person in the practice of medicine in the field of cardiology. At trial, Plaintiffs argued that the covenant would prevent them from activities such as selling pharmaceuticals or providing janitorial services for a medical practice.¹ However, David Summer, who drafted the agreement, testified that the covenant was drawn as narrowly as possible to prevent a departing

¹At trial, Baugh and Feldman took the extraordinary position that any type of support, such as accounting or janitorial, would be "assisting the practice of medicine in the field or cardiology," although David Summer testified that no court looking at the covenant would interpret janitorial services as assisting. Tr. 453:25-454:11.

physician from doing indirectly what he cannot do directly. Tr. 420, 449. As Mr. Summer testified:

What you're trying to do is you're trying to be very definitive about the activities that are prohibited. And what we're trying to do is make it real clear that they can't go out there and actively compete to the injury of Columbia Heart. And we feel like those three definitions, and these are standard in our contracts, adequately covered that and were sufficiently narrow in scope.

Tr. 420:5-12.

The covenant only prohibits the active practice of medicine in the field of cardiology, or assisting the active practice of medicine in the field of cardiology, not selling pharmaceuticals or cleaning a medical office.² It does not prohibit the practice of medicine in another field, or assisting others in practicing medicine in another field. However, the covenant had to be written broadly enough to prevent a departing physician from using the "back door" to compete. As noted by David Summer, the agreement has to prevent an employee from doing indirectly what he cannot do directly:

You can't do indirectly and use your experience and expertise to the detriment of your employer.

Tr. 449, 455:13-15.

The restrictive language used in the covenants is not unusual. Similar covenants in other jurisdictions have been upheld. In *Idbeis v. Wichita Surgical Specialists, P.A.*, 112 P.2d 81 (Kan. 2005), the following covenant was upheld:

9. *Restrictive Covenant.* During the term of this Agreement and for a period of two (2) years after the termination of this Agreement for whatever reason, Doctor will not, without the prior consent of Employer, directly or indirectly engage in the practice of medicine and/or surgery, nor own, manage, operate, control, be

²As David Summer testified at trial, the term "practice of medicine" is statutorily defined, S.C. Code § 40-47-20(36).

employed by, invest in, participate in, advise, consult with, or be connected with the ownership, management, operation or control of any business engaged in the practice of medicine and/or surgery within 75 miles of the city of Wichita, Kansas.

Id. at 85. In that case, the covenant was even more extensive than the one here in that it prohibited the practice of medicine, not just the practice of cardiovascular surgery, the physicians' speciality in that case.³ *Id.* at 87. However, the court noted that while the covenant imposed a burden on the physicians, it did not impose an undue burden and therefore was enforceable. *Id.* at 87. In *Mohanty v. St. John Heart Clinic, S.C.*, 832 N.E.2d 940 (Ill. App. 2005), the court granted a preliminary injunction to enforce a covenant which provided, in part:

For a period of 5 years after the termination of this Agreement, the Employee shall not (within a radius of 5 miles from any of Corporation's offices in Illinois) directly or indirectly own, manage, operate, control, be employed by participating in or be connected in any manner with any office established for the practice of medicine....

Id. at 942. The court in *Prairie Eye Center Ltd. v. Butler*, 768 N.E.2d 414 (Ill. App. 2002) held the following covenant enforceable:

Upon the expiration or termination of this Agreement, employee covenants that he will not, for a period of two (2) years after expiration or termination, engage in, be associated with or have a financial interest in any medical practice or ophthalmology practice, either directly or indirectly, as employer, employee, principal agent, independent contractor, consultant, partner, stockholder, creditor in an other capacity, at any location(s) within Sangamon County, Illinois[,] or within ten (10) miles of Hillsboro, Illinois [,] and ten (10) miles of any branch office of Employer.

Id. at 417.

It is obvious that in order for a covenant to be effective, it has to prohibit the departing

³The covenant there was also twice as long in duration as the one in this case and covered a far greater territory.

physician from both direct and indirect competition against his former practice. Thus, Plaintiffs are prohibited from owning a business in the practice of medicine in the field of cardiology, engaging in the practice of medicine in the field of cardiology, or assisting someone else in the field of cardiology to engage in the practice of medicine. There is no dispute that "the practice of medicine in the field of cardiology" means seeing patients and performing procedures. The undisputed facts are that Plaintiffs: opened their own business within one month after leaving CHC; engaged in the practice of medicine in the field of cardiology; are seeing and treating patients in their new medical practice; and are assisting others (such as other shareholders and physician employees) in the practice of medicine in the field of cardiology. It is also undisputed that the practice operated by Plaintiffs was not outside the territorial restriction. Plaintiffs clearly engaged and assisted in "the practice of medicine in the field of cardiology" only three hundred yards away from Columbia Heart's Lexington office, which was exactly what the covenant sought to prevent. There is no need to look backward to determine if the covenant included selling pharmaceuticals or cleaning medical practices, as Plaintiffs did not attempt to engage in those activities.

3. Even if the covenant is overbroad, the court can blue-pencil under these circumstances.

However, if the court determines that the definition of "compete" is overly broad and unreasonable, it can modify that clause by using a "blue pencil."⁴ Plaintiffs have taken the position that blue-penciling is not allowed in South Carolina. However, that is an overstatement of the law. As noted by the South Carolina District Court, "*Eastern* and its progenitor, *Somerset*,

⁴Thus, if one portion of the covenant is unreasonable, it does not cause the entire covenant to fail.

suggest that South Carolina has not wholly rejected the 'blue pencil' test."⁵ *Rockford Mfg., Ltd. v. Bennet*, 296 F.Supp.2d 681, 687 -688 (D.S.C. 2003). The court explained that while an indivisible covenant could not be modified, a severable covenant could be modified. The court also found that just because "the particular agreements at issue in *Eastern* and *Somerset* did not lend themselves to severability" did not mean that there were not other covenants that were divisible so that a court could

honor the principles of *Somerset* and yet still, in effect, "blue pencil" any overbroad provisions of the covenant and enforce the narrowly tailored ones.

Rockford at 688. Ultimately, that court held that the employer showed a likelihood that the non-solicitation agreement was such a divisible covenant, and thus the employer had a strong possibility of prevailing on the merits, which warranted the preliminary injunction.

The court further explained that a covenant is severable where it "is in effect a combination of several distinct covenants." *Rockford* at 688, citing *Somerset*, 104 S.E.2d at 348. In *Rockford*, the covenant incorporated a definition of "Affiliated Companies" which could be altered without writing into the agreement something unintended by the parties, suggesting that the covenant operated more like several distinct covenants than a single indivisible one. *Id.* The definition of Affiliated Company expressly listed the companies that might have an interest in enforcing the covenant against the defendant; thus, the court could, using the "blue-pencil" method, strike companies that had *no* legitimate interest without disrupting the integrity, continuity, or intent of the remaining provisions. *Id.*

In addition to the structure of the covenant lending itself to severability, the *Rockford*

⁵The cases to which the District Court refers are *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 189 S.E.2d 22, 23-24 (1972) and *Somerset v. Reyner*, 233 S.C. 324, 104 S.E.2d 344 (1958).

court, relying on *Eastern*, also determined that the parties expressed the intent that the covenants be severable. The agreement there contained a severability clause which stated that the "invalidity or unenforceability of any provisions of the Agreement shall not affect the other provisions hereof, and this Agreement shall be enforced and construed as if such invalid or unenforceable provision were omitted." *Rockford* at 688-689.

Similarly, the physicians at CHC, including Drs. Baugh and Feldman, expressed their intention that the provisions be severable:

The provisions of this Agreement are deemed by the parties to be severable, and the invalidity of unenforceability of any one or more of the provisions of this Agreement shall not affect the validity or enforceability of any other provision.

Section 6.2, Employment Agreement of Dr. Baugh. In addition, the parties further agreed that if any provision of the covenant was deemed unreasonable or unenforceable as written, then the "time period, scope of activity restricted and/or area of restriction held reasonable and enforceable by the court" would be applied.⁶ Section 5.5, Baugh Employment Agreement. In other words, the parties expressly intended for the provisions to be severable and expressly agreed that the court could blue pencil.⁷ The parties contractually agreed that the court could determine the scope of activity if the covenant was deemed too broad. Thus, even if the court determined that it would otherwise be unable to blue-pencil, the parties have contractually agreed to allow the court to do so.

⁶ In this state, a party can waive a legal right. See, e.g., *Spoone v. State*, 319 S.C. 138, 665 S.E.2d 605 (2008)(acknowledging that a party can waive right to jury trial, right to counsel, and/or right to appeal). Here, Baugh and Feldman waived whatever right, if any, to not have blue penciling.

⁷ Even if the court would not have the authority to blue pencil an agreement on its own initiative, the fact that the parties specifically consented to such allows the court to do so here.

The covenant in this case has distinct definitions, which lends itself to blue-penciling, just at the covenant in *Rockford* did. The covenant separately defines the duration, the geographical location, and the scope of prohibited activity. In particular, the definition of compete is as follows:

“Compete” means directly or indirectly, on his own behalf or on behalf of any other Person, other than at the direction of Medical Group and on behalf of Medical Group: (A) organizing or owning any interest in a business which engages in the Business in the Territory; (B) engaging in the Business in the Territory; or (C) assisting any Person (as a director, officer, employee, agent, consultant, lender, lessor, or otherwise) to engage in the Business in the Territory.

Section 5.2(i), Employment Agreement of Dr. Baugh.⁸ This definition does not require the court to rewrite the definition; instead, the court can strike out the words or phrases it determines to be overly broad. For example, it could strike out specific words in section (C), such as “or otherwise”, should the court determine that phrase to be too vague. Alternatively, the court could strike the entire clause in section (C). The covenant would remain intact as to the prohibition against organizing or owning any interest in a business which engages in cardiology or practicing medicine in field of cardiology, both of which are legitimate concerns of CHC. Under either option, Plaintiffs have still violated the covenant.

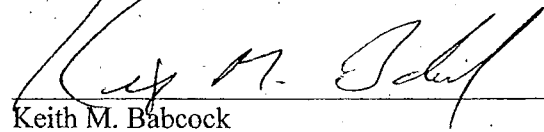
CONCLUSION

Because the covenant here is in is an agreement between shareholders and not a traditional employer-employee agreement, the reasonableness analysis does not apply. However, even under the reasonableness test, the covenant is reasonable and narrowly tailored and thus, is enforceable. Finally, because of the structure of the covenant and the intent of the parties for the provisions to be severable, this court can apply the blue-pencil method to strike portions of the

⁸The “Business” is defined as “the practice of medicine in the field of cardiology.”

definition of compete if the court find it necessary to make the covenant reasonable.

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March 10, 2010

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LEXINGTON, SC

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Section 5.1, Employment Agreement of Dr. Baugh.

ORIGINAL

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

J. Kevin Baugh, M.D., and Barry J.
Feldman, M.D.,

Plaintiffs,

v.

Columbia Heart Clinic, P.A.

Defendant.

IN THE COURT OF COMMON PLEAS
IN THE ELEVENTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 2006-CP32-0371

CERTIFICATE OF SERVICE

I, Connie W. Grugan, secretary to the law firm of Lewis & Babcock, L.L.P., hereby certify that I have served **Defendant Columbia Heart Clinic's Supplemental Post-Trial Brief** upon opposing counsel by mailing a copy of same, postage prepaid and return address clearly indicated, to said opposing counsel at the following address:

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Connie W. Grugan

Connie W. Grugan

This 10th day of March, 2010.

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CLERK OF COURT
LEXINGTON, SC

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

J. Kevin Baugh, M.D., and Barry J.
Feldman, M.D.,

Plaintiffs,

V.

Columbia Heart Clinic, P.A.

Defendant.

) IN THE COURT OF COMMON PLEAS
) IN THE ELEVENTH JUDICIAL CIRCUIT
)

) C/A NUMBER: 2006-CP-32-0371
)

) **DEFENDANT COLUMBIA HEART**
) **CLINIC'S REPLY TO**
) **PLAINTIFFS' SUPPLEMENTAL**
) **POST-TRIAL BRIEF**

Defendant Columbia Heart Clinic, P.A. ("Columbia Heart") submits this reply brief in response to the Supplemental Post-Trial brief filed by Plaintiffs.

I. The scope of the covenant is reasonable.

The portion of the covenant at issue deals with the scope of the prohibited activity and the type of business. In particular, Plaintiffs are not permitted to compete in the manner set forth in the employment agreement:

"Compete" means directly or indirectly, on his own behalf or on behalf of any other Person, other than at the direction of Medical Group and on behalf of Medical Group: (A) organizing or owning any interest in a business which engages in the Business in the Territory; (B) engaging in the Business in the Territory; or (C) assisting any Person (as a director, officer, employee, agent, consultant, lender, lessor, or otherwise) to engage in the Business in the Territory.

Pl. Ex. 2 (Section 5.2(i), Employment Agreement of Dr. Baugh). "Business" is further defined as: "the practice of medicine in the field of cardiology." Pl. Ex. 2, §5.1. Plaintiffs focus their arguments on subsection (C).

Plaintiffs attack the scope of the covenant, claiming that it prevents them from earning a livelihood. However, the provision was narrowly drawn and the prohibition is limited to actively

practicing cardiology or assisting another person to practice cardiology. As David Summer testified, "If you get outside the realm of the practice of medicine, it's not prohibitive (sic) conduct." Summer, Tr. 453:22-24. The scope of the covenant only prevented departing physicians from competing with CHC, and necessarily prohibited doctors from doing indirectly what was directly prohibited. As David Summer explained the relevant portions of the agreement in his testimony:

...The way [subsection] C reads is, Assisting any person to engage in the business. The person would have to be seeking to engage in the practice of medicine and you're assisting that individual in practicing medicine. You're getting--that individual would be getting the benefit of your knowledge, your experience, your knowledge of referral sources in the workplace and the market. So unless you're assisting the person to engage in the practice of medicine in the field of cardiology, anything else you could do. You could also work in almost any other field of medicine in the community.

Tr. 452:10-21. Mr. Summer explained the reason why the agreement prohibits departing physicians from serving as consultants or otherwise assisting:

B, They can't engage in the practice of medicine in the field of cardiology within the 20 miles of that locale. And C, they can't do it indirectly. They can't assist someone else. They can't put someone else into the practice of medicine and open up a practice and give them the benefit of their advice and counsel in the territory to practice cardiology in the area.

Tr. 419:19 - 420:1.

The first South Carolina case upon which Plaintiffs rely, *Faces Boutique, Ltd. v. Gibbs*, 318 S.C., 39, 455 S.E.2d 707 (S.C. Ct. App. 1995), does not apply at all. In that case, the employee was a facialist who was not only prohibited from performing facials, but also from being employed by any entity in the cosmetic industry, including those which only sold cosmetics. In other words; the employer there claimed that the employee was in violation of the covenant even though she had changed her professional field. Here, the covenant only prohibits

the active practice of cardiology or assisting the active practice of cardiology. Plaintiffs have not changed their professional field; instead, they set up a new medical practice offering the cardiology services identical to those performed while still members of CHC, and this new practice was only 300 yards away from CHC's Lexington office.

The other South Carolina case upon which Plaintiffs rely, *Preferred Research, Inc. v. Reeve*, 292 S.C. 545, 357 S.E.2d 489 (Ct. App. 1987), is also inapplicable. Plaintiffs cite this case for the proposition that a covenant that restricts an employee from being employed "in any capacity" by a competing business is always unreasonable. First, *Preferred Research* is a case that was analyzed under Georgia law. Secondly, the covenant in that case was overly broad because of the definition of both the "any capacity" language and the breadth of the definition of "business." The clause there stated that the employee:

shall not thereafter engage directly or indirectly as a principal or employee, alone or in association with others in a similar business, in any capacity....

Id. at 547, 357 S.E.2d at 490. The description of "business" was broadly drafted to include a variety of services:

...a national service in the fields of courthouse records research and verification, title searches, title insurance commitments and policies, loan closings, real estate appraising, credit investigations, examination of records affecting title to real estate and personal property and related services.

Id. at 548.

In the CHC agreement, "business" has a very limited and focused definition: "the practice of medicine in the field of cardiology." Pl. Ex. 1, §5.1. It does not prohibit the practice of medicine in some other field. Thus, the fact that Plaintiffs are prohibited from assisting in the practice of medicine in the field of cardiology as a director, officer, employee, agent, consultant,

lender, lessor, or otherwise is not unreasonable. That provision simply prevents Plaintiffs from being able to circumvent the agreement by competing in cardiology indirectly when they cannot compete directly.

II. The definition of compete is subject to the blue-pencil.

Plaintiffs claim that South Carolina courts can never reform or blue-pencil a non-competition provision. However, Plaintiffs ignore the fact that the parties specifically and contractually agreed that the court could do so at the time the agreement was executed. Instead, Plaintiffs argue that under *Faces Boutique*, the court cannot revise a non-competition provision even if a party is willing. Significantly, the "willingness" of the employer there was expressed only after the lawsuit had begun, and was only an expression from one party to the transaction. In contrast, both Plaintiffs and CHC contractually agreed that the court could blue pencil.¹ Furthermore, this agreement to allow blue-penciling was made at the time the covenant was executed, not after legal proceedings to enforce the covenant had begun, as was the situation in *Faces*.

The *Preferred Research* case also offers no support to Plaintiffs. That decision did state that the covenant was overbroad and thus unenforceable, but the court there did not even mention blue-penciling, and certainly performed no analysis of whether blue-penciling could apply. Furthermore, in that case, the court noted that the covenant was nonseverable. Finally, there was no contractual agreement to allow blue-penciling as the parties have done in this case.

¹The Agreement stated that if any provision of the covenant was deemed unreasonable or unenforceable as written, then the "time period, scope of activity restricted and/or area of restriction held reasonable and enforceable by the court" would be applied. Pl. Ex. 2 (Section 5.5, Baugh Employment Agreement)

Here, as discussed in detail in CHC's Supplemental Post-Trial Brief, the covenant is severable because the employment agreement specifically contains a severability clause. Pl. Ex. 2 (Section 6.2, Employment Agreement of Dr. Baugh). Furthermore, the structure of the agreement would easily permit the court to blue-pencil without actually re-writing the agreement. The court could simply strike the offensive phrase (which according to Plaintiffs seems to be "or otherwise") in the clause prohibiting Plaintiffs from "assisting any Person (as a director, officer, employee, agent, consultant, lender, lessor, or otherwise) to engage in the Business in the Territory."

III. CHC has not conceded that the agreement is subject to a reasonableness review.

Plaintiffs wrongfully claim that CHC has admitted or stipulated that a reasonableness review applies to the agreement. Plaintiffs cite certain sections of the trial transcript for support. However, a closer review of the record indicates that CHC, throughout the briefing² and at trial, has consistently argued that a reasonableness review is not necessary because the agreement here is akin to the partnership agreement in *J.W. Hunt and Co. v. Davis*, 313 S.C. 352, 355-356, 437 S.E.2d 557, 560 (Ct. App. 1993).

Mr. Babcock: ...In 2004, Columbia Heart Clinic has 12 shareholder physician employees. And that's an important point, Your Honor, because although they're structured like a professional--they are a professional association and that has a corporate side to it, in fact, this is like a professional partnership. It is a professional partnership that simply has a PA umbrella. When we look at it, when get down

²Section III.A., Defendant's Pre-Trial Brief is entitled "The contractual provision is neither a covenant nor a penalty" and argues the *Hunt* case applies and no reasonableness analysis is necessary. Section IV of Defendant's Reply to Plaintiffs' Post-Trial Brief again argues that the agreement here, like the one in *Hunt*, is not subject to reasonableness requirements because it is merely an agreement between partners. However, in both briefs, CHC explained why, in the event a reasonableness analysis did apply, the non-compete clause would pass muster.

to looking at things like the Hunt case and the accountants in Hunt, that same type of analysis we should --we submit applies.

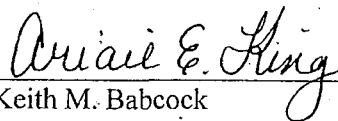
Tr. p. 20:1-12. See also, Section III.A., Defendant's Pre-Trial Brief; Section IV, Defendant's Reply to Plaintiffs' Post-Trial Brief.

In the alternative, CHC argued that even if a reasonableness test was required, it had been met.³ Clearly, CHC has had a two-pronged argument, but has never conceded the issue of reasonableness. Plaintiffs are disingenuous in claiming that CHC conceded or stipulated that a reasonableness review is required.

CONCLUSION

For these reasons, and those set forth herein, and in Defendant's previously submitted briefs, Defendant respectfully requests that this Court find the agreement to be enforceable.

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Columbia, SC
March 19, 2010

³Section III.B., Defendant's Pre-Trial Brief; Section III, Reply to Post-Trial Brief.

IN THE COURT OF COMMON PLEAS
IN THE ELEVENTH JUDICIAL CIRCUIT

J. Kevin Baugh, M.D., and Barry J. Feldman, M.D.,

V.

Columbia Heart Clinic, P.A.

I, Connie W. Grugan, secretary to the law firm of Lewis & Babcock, L.L.P., hereby certify that I have served **Defendant Columbia Heart Clinic's Reply to Plaintiffs' Supplemental Post-Motion Brief** upon opposing counsel by mailing a copy of same, postage prepaid and return address as indicated, to said opposing counsel at the following address:

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Connie W. Grugan

This 19th day of March, 2010.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 06-CP-32-0371

RECEIVED

OCT 27 2010

SC Court of Appeals

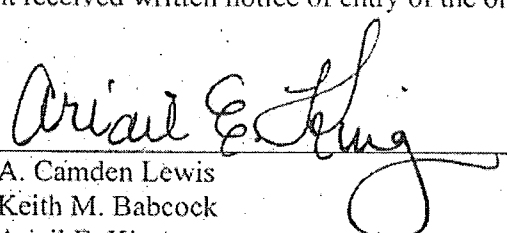
J. Kevin Baugh, M.D., and Barry J.
Feldman, M.D., ... Respondents.

V.

Columbia Heart Clinic, P.A., ... Appellant.

NOTICE OF APPEAL

Columbia Heart Clinic, P.A. appeals the order of the Honorable William P.
Keesley dated September 29, 2010. Appellant received written notice of entry of the order
on September 30, 2010.


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COURT OF COMMON PLEAS

2 COUNTY OF LEXINGTON

3
4
5 J. KEVIN BAUGH, M.D. AND)
BARRY FELDMAN, M.D.,)

6)
7 PLAINTIFFS,)

TRANSCRIPT OF RECORD

8 V.)

06-CP-32-371

9 COLUMBIA HEART CLINIC,)
P.A.,)

10 DEFENDANT.)

11
12 MAY 12, 2009

LEXINGTON, SOUTH CAROLINA

13
14 B E F O R E:

15 THE HONORABLE WILLIAM P. KEESLEY, JUDGE.

16
17 A P P E A R A N C E S:

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23
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25 STACY L. SHEPPARD
CIRCUIT COURT REPORTER

I N D E X

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1	E X H I B I T S			
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
3	Plaintiff's 1	B. Feldman's '04 Contract	89	90
4	Plaintiff's 2	Kevin Baugh's '04 Contract	290	371
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6	Plaintiff's 4	Spread Sheets	377	379
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20	Defendant's 11	Manager Agreement	491	
21	Defendant's 12	Photograph	501	
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25	Defendant's 16	Photograph	514	

E X H I B I T S

	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
1				
2				
3	Defendant's 17	Photograph		515
4	Defendant's 18	Photograph		515
5	Defendant's 19	List	521	523
6	Defendant's 20	Chart		605
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1 (The following proceedings were held on May
2 12, 2009.)

3 THE COURT: All right. Are you ready to
4 proceed?

5 MR. THOMPSON: Yes, Your Honor.

6 MR. BABCOCK: Defendant's ready.

7 THE COURT: Do you need to make an opening
8 statement? Would you like to make an opening
9 statement or not?

10 MR. THOMPSON: We would like to, Your Honor.

11 THE COURT: Go ahead.

12 MR. THOMPSON: It will be brief.

13 Your Honor, I'm Charles Thompson. We, of
14 course, met before in this case. With me is my
15 partner, Mike Malone, and the plaintiffs in the
16 case, Kevin Baugh and Barry Feldman to my far right.

17 Briefly, Your Honor, we're here today on the
18 nonjury portion of this case which involves two
19 issues, the primary one being the validity of the
20 employment agreement, specifically the
21 noncompetition provisions of the employment
22 agreements that Dr. Baugh and Dr. Feldman had with
23 the Columbia Heart Clinic, the defendant in this
24 case. The posture of that is that the plaintiffs
25 have brought a declaratory judgment action seeking

1 for the Court to declare the validity or invalidity
2 of that noncompetition provision of the agreement.

3 But the defendants have a counterclaim for
4 breach of contract and so the same issues, in our
5 view, Your Honor, are there in the counterclaim to
6 which we demanded jury trial rights. So we're here
7 just on, in our view, just the validity of the
8 noncompete for the Court to rule on as a legal
9 matter.

10 The only other nonjury claim in the case is the
11 plaintiff's wage payment claim and I'll get to that
12 in a moment.

13 Your Honor, would you like an opening argument?
14 I know you are familiar with this case.

15 **THE COURT:** It's completely up to you.

16 **MR. THOMPSON:** Well, I'll be brief as I can,
17 but try to forecast for you what we're going to try
18 to do today and the next couple of days. Basically,
19 Your Honor, as I said, the main issue in this case
20 is whether or not the noncompetition provisions of
21 the employment agreements are enforceable.

22 Just as background, and I think both sides are
23 going to cover a little bit of background for you,
24 it's not strictly relevant to that issue, but just
25 to explain how the contract came about, but we would

1 also like to briefly explain how the termination of
2 their employment came about, and that is it arose
3 from Jennifer Feldman, who is Barry Feldman's
4 spouse, she was also a physician at Columbia Heart
5 Clinic who was a nonshareholder employee. She
6 requested consideration to be considered as a
7 shareholder. And you'll hear the evidence --
8 testimony from her that she was -- there were some
9 accusations made and -- about her competence and
10 complication rates, that kind of thing that she
11 found shocking and humiliating and that led to their
12 decision, Dr. Barry Feldman and Dr. Jennifer
13 Feldman's, decision to leave the practice.

14 But Barry Feldman practiced in the Lexington
15 office of Columbia Heart Clinic, it's no longer
16 there, but, at the time, they had a Lexington office
17 and they had a close working relationship. There
18 were three physicians there, Barry Feldman, Kevin
19 Baugh and Dr. Ben Jones. Dr. Ben Jones was to leave
20 the Lexington office about that time because he had
21 been elected to be President of the practice. And
22 with Barry Feldman also leaving, Kevin Baugh felt
23 that he had no choice but to go along with them,
24 asked to do so, and so that is how the termination
25 of their employment came about.

1 Now, the agreements that are in question in
2 this case, Your Honor, were signed in 2004. There
3 were some predecessor agreements, but these were a
4 little different in how they worked.

5 And, basically, you'll hear testimony, Your
6 Honor, the reason that the new agreements were
7 requested of all of the physician employees was
8 because the practice, or at least some partners of
9 the practice, had invested or decided to build a
10 large building at the hospital to house their
11 practices. And in order to tie all of the
12 physicians to the building, if you will, tie them to
13 the practice so that the building could be supported
14 or to reduce the risk, that is why they came up with
15 this noncompetition provision and a new employment
16 agreement they requested all of the physician
17 employees who were shareholders to sign that
18 agreement and -- which brings us to the
19 noncompetition part, Your Honor.

20 And, basically, it works like this. And, Your
21 Honor, I'm going to go ahead, if you don't mind, if
22 it would be of help to you, and hand you up what's
23 going to be exhibit 1. And this is Dr. Barry
24 Feldman's employment agreement. But I've also blown
25 up some of the language on this chart.

1 And the key provision is on page ten and that's
2 where it defines what it means to compete in
3 violation of the agreement. And, basically, what it
4 says is that for 12 months following the termination
5 of employment within a 20 mile radius of where the
6 physician regularly practiced, you can't do the
7 following things:

8 You can't, A, organize or own any interest in a
9 business which engages in the business in the
10 territory, the territory's the 20 mile radius; you
11 can't, B, engage in the business in the territory,
12 so you can't be a cardiologist in the territory, you
13 can't own an interest in a cardiology practice; or,
14 C, and this is the most broad part of it, you can't
15 assist any person, and it gives some examples,
16 director, officer, employee, agent, consultant, as a
17 lender, as a lessor or otherwise, otherwise being
18 extremely broad language, to engage in the business
19 in the territory.

20 On page nine in section 5.1, and it's a little
21 -- not a little -- it's ambiguous we would say at
22 the definition of business, business following the
23 phrase in the field of cardiology. Now, Columbia
24 Heart Clinic wants to say, and we would assert it
25 really doesn't matter, that the business is defined

1 as the practice of medicine in the field of
2 cardiology.

3 We would assert it's ambiguous and the business
4 could just as easily be meant to modify field of
5 cardiology. It doesn't really matter because the
6 assist language, you can't assist, makes it very
7 broad and it precludes them from not just being
8 physicians, but it would preclude them from
9 assisting a cardiology practice as, say, a
10 consultant, as strictly a business manager, as
11 somebody who might sell services or loan money to a
12 cardiology practice. None of those things, Your
13 Honor, would be in competition with Columbia Heart
14 Clinic. And as we'll discuss later, that puts it
15 unreasonable under South Carolina law.

16 Now, Your Honor, what happens if they violate
17 the noncompete? The way the agreement works on that
18 is it goes in and sets up a penalty if you violate
19 the agreement. And the penalty works like this, it
20 basically has two parts: One is you pay the
21 equivalent of the average Columbia Heart Clinic's
22 physicians' prior year wages. And I think we're not
23 too far apart, that number is somewhere around
24 \$590,000 each.

25 But that's not all. You also forfeit any

1 rights you have to accounts receivable. And the
2 agreement has a sort of a proxy definition of
3 accounts receivable. Basically, you're supposed to
4 take the A/R on the date you leave, multiply it
5 times a collection percentage from the prior year
6 and then divide by the number of physicians and
7 that's what you would get unless you violate the
8 agreement.

9 Now, Your Honor, noncompetition agreements are
10 strictly construed under South Carolina law. And
11 the courts have even said things like they are
12 disfavored and they will be looked at with great
13 skepticism. They must be, one, necessary for the
14 protection of the legitimate interest of employer;
15 two, reasonably limited in operation with respect to
16 time and place; three, not unduly harsh and
17 oppressive in curtailing the legitimate efforts of
18 the employee to earn a livelihood; four, reasonable
19 from a standpoint of sound public policy; and, five,
20 supported by valuable consideration.

21 I'll take the last one first and that is this
22 agreement is not supported by consideration
23 whatsoever. There's a provision in here that talks
24 about what they think the consideration is and that
25 is \$60,000 paid out in 5,000 dollar increments, but

1 only if you obey the noncompete provisions.

2 So if you're a physician like Dr. Feldman and
3 Dr. Baugh, and even if you choose to pay the penalty
4 and forfeit the A/R and compete, you don't get --
5 you never get the consideration, I use the term
6 loosely, that's in the agreement. So it's an
7 illusion, Your Honor. The consideration would never
8 be paid to somebody like Dr. Feldman or Dr. Baugh
9 even if they paid the penalty and forfeited the A/R
10 and practiced in violation of the 20 mile radius in
11 any of the capacities that we discussed.

12 So, therefore, Your Honor, there's no
13 consideration for somebody like -- physicians in
14 their shoes and, therefore, clearly, it's not
15 enforceable as would be any contract that lacked
16 consideration. They just tried to pull a fast one.
17 They didn't want to pay the money up front and, you
18 know, they should reap the penalty for doing so.

19 Your Honor, the agreement is, we would assert,
20 is void because the restriction is vague. It's --
21 what it says is, when it talks about the 20 mile
22 radius, it says that it's 20 miles from any office
23 where the physician regularly practiced. Well, what
24 does that mean? It's not defined.

25 They not only practice in Lexington, but they

1 were in the Columbia offices and on a regular basis,
2 they were in a satellite office in Winnsboro and in
3 Newberry and Clinton. And so does the agreement
4 intend to have the satellite offices? We had
5 testimony that, yes, it did. That is vague. It
6 doesn't put the physician on notice of what the
7 restrictions are.

8 And, Your Honor, we cite in our brief, and
9 we'll cover it more in closing argument, a Georgia
10 case that holds a very similar provision was held to
11 violate -- or to void the entire noncompetition
12 provision because it was vague.

13 Your Honor, secondly, the geographic
14 restriction is unreasonable. And Dr. Baugh's going
15 to testify about this a little bit, but really the
16 contract speaks for itself.

17 We took the liberty of drawing a summary
18 exhibit, Your Honor, and drew 20 mile radius circles
19 around the practices or offices where Dr. Baugh and
20 Dr. Feldman regularly practiced being Columbia,
21 Lexington, Clinton, Newberry and Winnsboro. And as
22 you can see, takes up a good portion of the State.

23 You're going to hear testimony, Your Honor,
24 that most of the patients come from pretty close to
25 the main practice office of a physician. So this is

1 unnecessary for the protection of Columbia Heart.
2 But it really is bigger than this. And we cite an
3 Oklahoma case that says you've really got to look at
4 the practical effect.

5 These cardiologists are interventional
6 cardiologists. And you'll hear some testimony as to
7 what that means. But in summary, it means they have
8 to have close access to an interventional facility.
9 You'll probably note, Your Honor, that, for example,
10 Lexington at the moment is not such a facility, but
11 the nearby facilities in Columbia are interventional
12 facilities, but if they're excluded from these 20
13 mile zones, they can't just go to just outside the
14 zone, they have to go to the next nearest
15 interventional facilities, which we're talking about
16 Aiken, Rock Hill, Greenwood, Anderson, Spartanburg
17 and south of Beaufort and Charleston. You'll hear
18 testimony about all of this.

19 So, really, this restriction really goes all
20 the way to the dots that are on the map and it's
21 much broader than the already too broad 20 mile
22 circles. And we'll take about case law in closing
23 more, Your Honor, about how South Carolina courts
24 have viewed geographic restrictions and held that
25 they must be tightly limited to where the customers,

1 clients, in this case, patients where they come
2 from.

3 Your Honor, next, and I alluded to this
4 already, the type of jobs that are excluded is
5 overly broad. Under the Faces Boutique case, you
6 really can only limit the employee where it is
7 otherwise enforceable. You can't go beyond what the
8 employee was actually doing for you.

9 In this case, they're practicing medicine as
10 interventional cardiologists, but the agreement goes
11 far beyond that. It says, You can't assist, you
12 can't own, you can't participate in the organization
13 of such a medical practice, and that's far beyond
14 what they were doing for Columbia Heart and so,
15 therefore, we would assert the noncompetition
16 provisions fail for that reason as well.

17 Now, Your Honor, they want to avoid all of that
18 reasonableness review by saying that's not subject
19 to that, all these guys have to do is pay us the
20 penalty and they can go do whatever they want.

21 Well, the first problem with that, Your Honor,
22 is that's not all, they have to forfeit their A/R.
23 And we cite the Armors and the Wolf case in our
24 memorandum, which make very clear that forfeiture
25 upon competing in a noncompetition agreement or

1 cause and agreement are but two sides of the same
2 coin. And quoting from the Wolf case, Such clauses
3 are subject to the same requirements and strict
4 analysis as covenants not to compete. So, clearly,
5 the South Carolina courts push a forfeiture type
6 agreement, which this is in part, back to the
7 reasonableness review.

8 Now, they want to say this is just like a case
9 in North Carolina called W.H. Medical. And in that
10 case, yes, the courts did say -- and it was a
11 cardiologist case that contained a several county
12 restriction and the penalty was similar, didn't have
13 a forfeiture, but the penalty was similar. And the
14 court said, Well, this isn't really subject to
15 reasonableness review, but nevertheless we find it
16 reasonable because the physicians can't afford this
17 penalty. You'll find nothing like that in South
18 Carolina law.

19 Now, that case clearly cannot be applied in
20 South Carolina, one, because we have the Armors and
21 Wolf decisions line of cases that says, If there's a
22 forfeiture in there, it's subject to reasonableness
23 review. And, second, Your Honor, South Carolina
24 courts have not followed this reasoning in these
25 types of cases because -- and the main case is a

1 J.W. Hunt case, which is an accounting partnership
2 case. And in that case Mr. -- the employee that
3 left, he took clients with him. And the penalty in
4 that case, Your Honor, was that he had to pay back a
5 portion of the revenue that he got from those
6 clients.

7 So -- but one thing that the court made clear
8 was, we'll apply this rule in a partnership case.
9 Here, we have Columbia Heart Clinic is a corporation
10 and Kevin Baugh and Barry Feldman were employees,
11 that's the only thing a corporation can have is
12 employees. And the J.W. Hank (sic) case and the
13 Armor's case, which followed it which discussed J.W.
14 Hunt, make very clear that this does not -- that
15 reasoning does not apply in an employment type case.
16 And in an employment type case, you're subject to
17 reasonableness review.

18 But not only that, Your Honor, but the penalty
19 in this case bore no relationship to lost business.
20 They just pulled this number -- they just made a
21 number big enough that they thought it was a big
22 enough penalty or disincentive to keep physicians
23 tied to the practice.

24 In other cases in South Carolina that discuss
25 what is or what is not an unenforceable penalty, we

1 cite the Moser case. It's very clear that you've
2 got to tie your penalty, it's got to be at least a
3 reasonable estimate of damages. And, in this case,
4 it's going to be very clear from the testimony and
5 evidence, that they never intended this to be a
6 reasonable estimate of damages. Unlike the J.W.
7 Hunt case where you're tying it to customers that
8 the departing employee takes, that would be
9 enforceable not subject to reasonableness review.
10 In this case, they just said a penalty bearing no
11 relationship to any kind of damages and that is an
12 unenforceable penalty under South Carolina law.

13 Addressing the wage payment claim, Your Honor,
14 you'll hear testimony by my clients that they were
15 not paid their final wages that were due them. I
16 don't think that's contested. The reason that
17 Columbia Heart Clinic did not pay those final wages
18 was that they basically were saying, you owe us
19 other money, and this is for several reasons that
20 I'm not going to get into, we've got -- both sides
21 have experts that will talk about it, you owe us
22 more money than we owe you so we're not going to pay
23 you the final paycheck.

24 You'll hear testimony from CPA Donnie Burkett
25 that their calculation is not accurate, not based on

1 fact and that actually if you try to apply their
2 numbers or the appropriate numbers, that Columbia
3 Heart Clinic actually owed them more than that final
4 paycheck that was not paid.

5 In addition, Your Honor, we would assert that
6 the Court should invalidate the noncompetition
7 provision which only strikes that provision from the
8 contract and that, therefore, they would be entitled
9 to the accounts receivable under the contract, which
10 count as wages that are not paid. Thank you, Your
11 Honor.

12 **MR. BABCOCK:** May it please the Court.

13 **THE COURT:** Yes, sir.

14 **MR. BABCOCK:** Your Honor, I'm here today on
15 behalf of Columbia Heart Clinic. With me is Ariail
16 King and Pat McWright, my paralegal, along with
17 several doctors from the clinic, Dr. Ben Jones, Dr.
18 Robert Schulze and Dr. Wade Collins.

19 There are two issues before the Court. The
20 primary issue is the enforcement of the
21 noncompetition clause. And the secondary issue is
22 the wage claim. The remaining issues will be for
23 another day. They are all jury in nature.

24 But in looking at the covenant, it's important
25 to look at what the situation was at the time of

1 entering into these employment agreements. In 2004,
2 Columbia Heart Clinic had 12 shareholder physician
3 employees. And that's an important point, Your
4 Honor, because although they're structured like
5 a professional -- they are a professional
6 association and that has corporate side to it, in
7 fact, this is like a professional partnership. It
8 is a professional partnership that simply has a PA
9 umbrella. So when we look at it, when we get down
10 to looking at things like the Hunt case and the
11 accountants in Hunt, that same type of analysis we
12 should -- we submit applies.

13 This is not a hierarchal employee situation.
14 This is a small group of doctors who banded together
15 to work, at the time they entered into the
16 agreements, out of three offices. They had an
17 office in Lexington, an office at now Palmetto
18 Richland, I still think of it as Richland Memorial,
19 and one at Providence. Now, they had some other
20 clinics where they spent some small amount of time,
21 but those were their three offices and those were
22 where the physicians practiced.

23 In 2003 and 2004, the group, the entire group,
24 decided that they were going to build a new office
25 building on the Palmetto Richland campus to house

1 their office there. And it would be a large
2 undertaking.

3 Now, they formed a separate entity for the
4 medical office building. They called it MOB, I
5 think that was an LLC in terms of structure, but it
6 had the same shareholders as Columbia Heart.

7 So though we have two different entities, it's
8 the same people and it's the same effort to build
9 this new building to, in large part, house Columbia
10 Heart. And in undertaking this effort, there was
11 going to be substantial debt incurred both by the
12 medical office building group and the Columbia Heart
13 shareholders and, also, on the Columbia Heart side
14 because they were going to have to borrow money and
15 do a lot of upfitting, put in new equipment, new
16 furniture. So there were going to be substantial
17 costs on both sides, round figures 20 plus million
18 dollars that they were going to be assuming in new
19 debt between the two groups. So it's in that
20 context that Columbia Heart looks to strengthen
21 their existing employment agreements.

22 And this is very important. The 2004
23 agreements did not just spring forth out of the air,
24 there were existing employment agreements for the
25 doctors. In the case of Dr. Feldman, he entered

1 into his in 1997. Dr. Baugh entered into his in
2 1999. But those agreements were uniform, one small
3 clause different, but uniform throughout the group.
4 They all had this employment contract and they all
5 had a form of covenant not to compete in those
6 preexisting contracts.

7 Now, what did that address? Well, under those
8 contracts, if the physician departed, he was given
9 two things. He was given his unpaid but accrued
10 salary and he was also given a portion of accounts
11 receivable that was by formula.

12 Now, of course, the accounts receivable belong
13 to the entity. They don't belong to the doctor.
14 The group owns the accounts receivable. So by
15 contract, it was determined that if you left, you
16 would get the accounts receivable by formula.

17 However, the agreement also said that if you
18 leave and compete in the field of cardiology, we'll
19 talk about that in the 2004 contract in just a
20 minute, in either Richland or Lexington for a one
21 year period of time, if you do that, then you don't
22 get your account receivable formula and you don't
23 get your unpaid but accrued salary. So that was how
24 the noncompetition clause worked before these new
25 2004 agreements were entered into. I'll also add --

1 well, they proceeded forward with the new employment
2 agreements in the Summer of 2004.

3 David Summer from Parker Poe was the attorney
4 who helped prepare these agreements and he'll be
5 coming into court later to explain what he did, the
6 meetings he held and what was presented to the
7 doctors that they all signed. And, significantly,
8 they all had lots of time to read the documents, to
9 get their own counsel, if they wished, to make
10 whatever determination that they wanted with regard
11 to whether or not they wanted to sign or not sign.

12 And all of them signed. All of them signed
13 because they were about to go forward with this new
14 building. And it's an effort where everybody knew
15 with all of this debt, we want to know that we have
16 our group together to be able to handle this debt as
17 we go forward. So it's in that setting that the new
18 agreements were prepared, the 2004 employment
19 agreements.

20 Now, the first part of that that needs to be
21 addressed is the part concerning the accounts
22 receivable and the unpaid but accrued salary. That
23 section in the new agreements is almost identical to
24 the old agreements. Consequently, if you leave and
25 don't compete for one year period of time, then you

1 get your accounts receivable and you get the unpaid
2 but accrued salary.

3 Now, here the radius was different. The radius
4 instead of being Richland County and Lexington
5 County was reduced to this 20 mile radius from an
6 office where you routinely practiced in the year
7 before your departure, and that's important,
8 routinely practiced in the year before your
9 departure. So that's the provision concerning
10 accounts receivable.

11 But the agreement has something else. The
12 agreement has a provision in that section at section
13 4.6, which we're going to put on the screen, in the
14 agreement itself, there's an acknowledgment of
15 reasonableness. The physicians signed an agreement,
16 the employment agreement, that said they acknowledge
17 that the forfeiture described in 4.5(i), that's the
18 loss of accounts receivable and unpaid but accrued
19 salary, is intended as partial restitution for the
20 damages which Medical Group will suffer as a result
21 of competition by physician with Medical Group.

22 Physician further acknowledges that such
23 forfeiture together with the remedies set forth in
24 Article 5, which we'll talk about in a minute, is
25 fair and reasonably required for the protection of

1 the Medical Group.

2 Now, what's significant about all of the
3 different cases the plaintiffs want to talk about is
4 none of those agreements have language like this
5 where up front the person who later challenges the
6 agreement says it's reasonable and what's being lost
7 here is because there are damages which the group
8 will sustain. And we want to address that up front.

9 So as we go through the testimony, it's going
10 to be important to realize that this document has
11 some clauses that these other cases don't have
12 because what we've got in essence is people, when
13 they sign the agreement, saying everything's
14 reasonable and later on when it suits their purpose,
15 when they want to compete, coming into attack. Now,
16 that's one section of the agreement.

17 The other section, which is really the new
18 covenant not to compete, is in section five of the
19 agreement. Now, the case we cited, and it is, I
20 think, right on point in terms of what's being done
21 and how it's being enforced, is the Calhoun case
22 from North Carolina. But I don't think there's any
23 question that in South Carolina, you do have to be
24 reasonable in terms of time. Well, it's a one year
25 provision -- it's a one year provision for the

1 covenant and that's clearly an appropriate time and
2 I don't think there can be any dispute in terms of
3 that.

4 But the other two sections for what needs to be
5 reasonable under South Carolina law is what is being
6 prohibited, what is being protected. And the phrase
7 that counsel wanted to address during opening
8 argument is what the business is.

9 Well, Your Honor, if you look at 5.1 (a), which
10 we've got on the screen, the parties stipulate that
11 the Medical Group -- the Medical Group is engaged in
12 the practice of medicine in the field of cardiology,
13 the business. That's clearly the practice of
14 medicine in the field of card -- that's what the
15 Medical Group is engaged in. So there's no question
16 but that that's what's being addressed. So when we
17 look at the different things they can't do, well
18 they can't be doctors, they can't be assisting
19 practices that are in the field of cardiology in the
20 protected area.

21 And you've got to draw -- again, when we look
22 at covenants not to compete, the law is clear in
23 South Carolina, there is no prohibition against
24 covenants not to compete. They need to be
25 reasonably drawn and to narrowly protect and that's

1 what's being done here because you had to make sure
2 that these doctors didn't go out and become
3 employees or owners or participate in the field of
4 cardiology within the protected area. So the
5 language that was used for that is clearly defined
6 to protect that issue.

7 And the other issue is that -- the territory.
8 The territory, counsel would have you believe, is
9 really something much more than 20 miles, somehow
10 going way out in these other areas. Well, a couple
11 reasons why that's not right.

12 First off, the offices where you routinely
13 practiced -- the agreement says, Where you routinely
14 practiced in the year before departure. In this
15 case, Your Honor, that's 20 miles around Lexington,
16 20 miles around Richland because they're at the
17 Lexington office and they're practicing in Richland.
18 During that period of time, they weren't up in
19 Clinton or Newberry. And they only made a handful
20 of appearances in Winnsboro, plus those are clinics,
21 those aren't offices. So we're dealing with 20
22 miles around the Richland -- Lexington office and
23 the practicing they did in Richland.

24 Now, there are lots of places outside those
25 spheres where Doctors Baugh and Feldman could

1 practice cardiology. The only reason they'd have to
2 go any further distances is to practice all parts of
3 cardiology, including interventional cardiology, and
4 that's angioplasty and stents. And there are only
5 certain hospitals that allow that. But lots of
6 people practice cardiology without doing those
7 procedures and they had the ability to go lots of
8 places, Sumter, Camden, lots of places, Orangeburg,
9 and practice cardiology, but just not do the
10 particular -- those particular procedures.

11 So those are the three areas, term, activity
12 and location, that need to be carefully drafted to
13 protect, they were, and reasonable, they were.

14 And the amount, Your Honor, when you get into a
15 liquidated damage situation, it's typically because
16 you don't know exactly what the damages will be, you
17 don't know how much the impact will be. So you're
18 in a little bit of a blind area, but you've got to
19 try to figure it out in some logical way.

20 Well, the real logical way to approach this
21 would look at all of the money, all of the income
22 that the doctors produced from the practice in the
23 preceding year, because all of that money is coming
24 in and you don't have that money to deal with all of
25 these debt situations. You know you've got your

1 overhead, you know you've got your new debt, you've
2 got all of these things, so you don't have that
3 money.

4 But that wasn't how this document was drafted.
5 This document didn't look at the money brought into
6 Columbia Heart, it looked at what the doctors were
7 taking out, which definitionally is a much smaller
8 sum. And it looked to protect against the debt that
9 they were having, the loss of income they were going
10 to experience and the various other damages that
11 would be occurring with regard to -- with regard to
12 the departure of any doctors.

13 Now, once again, we didn't have just that
14 element in the contract, we had a separate
15 reasonableness clause. And if we go over to section
16 5.5, again concerning all of that, the physicians
17 each signed this document, this clause that said
18 they acknowledge -- acknowledgment of
19 reasonableness. They each said they carefully read
20 and considered the provisions of this agreement and
21 agrees that the restrictions set forth herein,
22 particularly those in sections 5.1, 5.2, 5.3 and
23 5.4, and those are the various things we've been
24 talking about, together with the remedy set forth in
25 Article 4, which is what we just looked at, are fair

1 and reasonably required for the protection of the
2 Medical Group.

3 They acknowledged the very reasonableness they
4 now want to attack. On all of these areas, they
5 said it was reasonable in July of 2004 when they
6 signed the agreement.

7 The clause also goes on to say that if any
8 court should decide that the scope, the activity,
9 the time period is too broad, the court has the
10 ability to redraw it. That's commonly called blue
11 pencilling and, normally, a court can't do that.
12 And there's case law that says, normally, a court
13 can't do that.

14 However, the parties in this case contracted
15 for the court to be able to do that. And that's the
16 big distinction between the cases here, Your Honor,
17 the parties said, look, if anything's considered too
18 broad, we, Columbia Heart and the individual
19 doctors, agree that the court can redraft it. So
20 that was a power given to the court if there was any
21 kind of issue concerning the reasonableness.

22 Now, consideration is a final issue. And I
23 think in this case there's a real question as to
24 whether additional consideration would have been
25 needed because this isn't the situation that the

1 cases address where an individual goes from having
2 no covenant not to compete at one point and then
3 having one. And in that situation, it's all right,
4 we need to do something here. That's not the case.
5 There was a covenant not to compete, which we've
6 already talked about. So that's the big distinction
7 factor.

8 But in an abundance of caution, there was
9 consideration included. The consideration was
10 \$5,000 a month for the 12 month period of time,
11 \$60,000. And, Your Honor, that's something that's
12 well known in the law, it's executory consideration
13 and you do get that if you don't compete. So it is
14 consideration. There's absolutely no case law that
15 says the consideration cannot be executor. There's
16 absolutely nothing wrong with that consideration
17 because that's what you would get if you stayed and
18 didn't compete, you would get it.

19 So we have these agreements signed in the
20 Summer of 2004. Going forward, the building starts
21 construction later in 2004 and then ends up being
22 constructed by the end of 2005, which is pretty
23 phenomenal, but they did it. And they were in a
24 position to move in and begin using that building in
25 late 2004, early 2005.

1 And this building, Your Honor, is located on
2 the campus at Palmetto Richland. There are a number
3 of office buildings right around it. The back of
4 the building looks to the helicopter pad for the
5 hospital itself. So it's kind of in a U around the
6 hospital itself.

7 They moved in. Before -- just before they
8 moved in in late November of 2005, there was a
9 meeting where the partnership considered a request
10 by Dr. Jennifer Feldman, Dr. Barry Feldman's wife,
11 to become a partner. They used the chain -- they
12 typically talked about partners and partnerships,
13 obviously it would be a shareholder, but that just
14 shows the partner-like status of the group. So she
15 wanted to be considered for that.

16 Now, up to this point in time, she had started
17 with Columbia Heart in 1993 or 1994. And she was a
18 cardiologist, but she was on a part-time basis by
19 her own choice. The reason she was on a part-time
20 basis was because she had young children and she
21 wanted to both practice cardiology and be able to be
22 involved as a mother with the kids and Columbia
23 Heart created the part-time position for her.
24 Significantly, the most significant thing is she
25 didn't have to take any call while she had a

1 part-time position, no call.

2 So, in November of 2005, the matter was
3 presented to Columbia Heart. And during the
4 discussion, some issues arose as to whether or not
5 there had been some complications in terms of some
6 of the procedures that she'd had previously and also
7 her productivity, so they did not offer her a
8 partnership at that time.

9 They did subsequently, after they looked at the
10 complication issue, offer her an opportunity to
11 become a partner with a two year track. The normal
12 track was a three year track. And they had some
13 benchmarks for productivity so that she would have
14 an opportunity to demonstrate that she could produce
15 on a partnership basis to become a full shareholder
16 at Columbia Heart.

17 However, it's pretty clear that after that
18 meeting in very short order by early December,
19 Jennifer Feldman had decided she was going to leave
20 the practice. Well, she was an employee, she didn't
21 have a covenant not to compete, she could go. So
22 there was nothing stopping her from going.

23 But Barry Feldman, her husband, decided he was
24 going to go, too. And Kevin Baugh, who shared the
25 office in Lexington, he decided he was going to go,

1 too. Well, those issues have nothing to do with the
2 contractual obligations between the parties. And
3 while Dr. Barry Feldman and Dr. Kevin Baugh had
4 every right to leave, what they didn't have a right
5 to do was to leave and compete unless they paid the
6 agreed upon sum.

7 And that is important here, Your Honor, because
8 this isn't a covenant in the traditional sense. The
9 contract itself anticipates that you can have the
10 option of competing if you provide us with this
11 money.

12 What the plaintiffs in this case have elected
13 to do is to leave the practice, and not just leave
14 the practice, leave the practice and take almost all
15 of the employees at the Lexington office with them
16 because all of those folks leave their resignation
17 letters where in January, 90 days effective, April
18 21st and all of those people leave and immediately
19 go to their new office so that when they begin work
20 on April 24th, which is when they started that
21 office for training purposes, started seeing
22 patients on May 1st, they had a fully staffed
23 office. So they basically siphoned off that whole
24 office.

25 And contrary to what counsel indicated, Dr. Ben

1 Jones, the third doctor out there, was not intending
2 to stop being at that office, that was his office,
3 too. Unfortunately, with all of the people who left
4 and with the business that was taken by Doctors
5 Baugh and Feldman, the Lexington office for Columbia
6 Heart could not continue. And although they tried
7 for a period of time, it ultimately closed. So you
8 have a situation where Columbia Heart not only lost
9 two doctors, they lost, really, the whole office.

10 And Marty Outz, an accountant, has looked at
11 the various losses sustained by Columbia Heart. Of
12 course, we don't get damages, but what we do get by
13 contract, if it is enforceable, is the average W-2
14 for the year before departure, which in this case is
15 about \$590,000. And he will show that given the
16 losses sustained, which are several million, looking
17 at the lost referrals, the costs and the debt the
18 doctors had at the time of leaving, all of those
19 things make the figure used in the contract, used in
20 the covenant very reasonable and very appropriate.
21 That is the primary part of the case, Your Honor.

22 The wage claim section does involve some unpaid
23 wages that Dr. Feldman and Dr. Baugh claim they're
24 entitled to. They were last paid by Columbia
25 Heart -- let me back up.

1 Again, their resignation letters were January
2 22nd, 90 day period of time, that ends up April
3 21st. During that time, Columbia Heart paid them
4 just like they paid everybody, twice a month. And
5 you got that payment when it came. And as checks
6 were given out to the other Columbia Heart doctors,
7 checks were given out to Doctors Baugh and Feldman.

8 The last check given out to anybody was April
9 the 15th and Doctors Baugh and Feldman got their
10 April 15th check. There were no checks given out
11 between April 15th and April 21st. The next checks
12 would have been at the end of the month or perhaps
13 May 1. So they're gone before the next check
14 occurred.

15 Now, the way they were paid, although they talk
16 in terms of salary, in fact, everybody agrees it was
17 really more akin to a draw, you've got a monthly --
18 or amount every two weeks in essence and -- but that
19 was marked against a formula for your production.
20 And every quarter they performed a true up to see
21 whether you were above or below the mark where
22 you're supposed to be. If you're below, you're
23 negative and you owe back. If you're above, you're
24 positive and you get a bonus. That's how they
25 operate.

1 Now, you could carry over your negatives from
2 month to month or from quarter to quarter, but the
3 end of time, you had to make up your negatives. And
4 when Doctors Baugh and Feldman left, they were in
5 negative positions on April 21st. Dr. Feldman,
6 approximately \$55,000. Dr. Baugh, a little less
7 than \$25,000.

8 The amount of pay that they would have gotten
9 during that six day period of time, I guess, from
10 the 15th to 21st, 27, amounts to a little over
11 \$8,000 for each of them, if they had gotten them.
12 That's what we're talking about.

13 Now, they weren't entitled to it and the wage
14 payment act doesn't apply because two reasons:
15 First of all, they're in a negative position.
16 Substantially for both of them, they're in a
17 negative. They were owing money back to the PA. So
18 there's no more money to be coming out to them.
19 They left on that day. Second, and significantly,
20 their employment agreement provided, we looked at
21 this a little bit earlier, but provided that, under
22 Article 4, if you left and didn't compete, you'd get
23 your unpaid but accrued salary, as well as the
24 portion of the accounts receivable.

25 However, this was the earlier noncompetition

1 that had been in place from the previous agreements,
2 if you left and you competed, you did not get those
3 moneys. So it's not just the A/Rs, but it's the
4 unpaid but accrued salary. So they're not entitled
5 to that money either by contract or by true up in
6 terms of where they were vis-a-vis the Columbia
7 Heart Clinic economically at that time.

8 So those are the two issues before the Court in
9 the phase of this case and then we will have, at
10 some later time, the jury issues before a judge and
11 jury. Thank you, Your Honor.

12 **THE COURT:** Call your first witness.

13 **MR. MALONE:** Your Honor, at this time, the
14 plaintiff calls Dr. Jennifer Feldman as plaintiff's
15 first witness.

16 **THE COURT:** All right. Come up to the clerk
17 please, ma'am.

18 JENNIFER ANN FELDMAN,
19 having been duly sworn, testified as follows:

20 **THE CLERK:** Have a seat around here and state
21 your full name for the record.

22 **THE WITNESS:** Jennifer Ann Feldman.

23 DIRECT EXAMINATION

24 BY MR. MALONE:

25 **Q** Good morning, Dr. Feldman. You have introduced

1 yourself. Would you identify your relationship to
2 one of the plaintiffs, Dr. Barry Feldman?

3 A Yes. I'm his wife.

4 Q What is your present occupation?

5 A I'm a cardiologist.

6 Q Are you any kind of special cardiologist?

7 A Yes. I'm a cardiac electrophysiologist.

8 Q What does that mean?

9 A I specialize in the diagnosis and treatment of
10 arrhythmias which includes performing electrical
11 studies, ablations, pacemakers and defibrillators.

12 Q Who is your current employer?

13 A Lexington Heart Clinic.

14 Q Before being employed by Lexington Heart
15 Clinic, who was your employer?

16 A Columbia Heart Clinic.

17 Q In two sentences or less -- let me rephrase
18 that. I just need a brief summary because I'm going
19 to ask you some follow-up questions, but in a
20 nutshell, why did you leave Columbia Heart Clinic,
21 briefly?

22 A I applied for a shareholder status and I was
23 denied that opportunity because I was erroneously
24 accused of having some unfortunate complications
25 with my procedures.

1 Q Was that true?

2 A No.

3 Q To help the Court understand the proper time
4 frames, I'm going to ask you some chronological
5 questions. When did you join Columbia Heart Clinic
6 or the predecessor to Columbia Heart Clinic?

7 A Late 1993 into '94.

8 Q And what was the entity that hired you at that
9 time?

10 A I think the old name was Columbia Cardiology
11 Clinic. Is that what you're asking me?

12 Q Was it Cardiovascular Clinic?

13 A Oh, Columbia Cardiovascular Clinic, yes.

14 Q And when did your husband join Columbia
15 Cardiovascular Clinic?

16 A In September of 1993.

17 Q And so you came on board when?

18 A About three months later.

19 Q End of '93, beginning of '94?

20 A Uh-huh.

21 Q When did your husband become a shareholder of
22 Columbia Heart Clinic, or it was possibly even
23 Columbia Cardiovascular Clinic at the time?

24 A It was three years from September '93, so it
25 was late 1996.

1 Q Was the entity still Columbia Cardiovascular
2 Clinic at that time?

3 A Yes.

4 Q And some merger of medical groups took place
5 shortly thereafter?

6 A Yes.

7 Q Why were you not a shareholder of Columbia
8 Heart Clinic?

9 A I chose to work part-time. And at the time,
10 the conditions -- the part-time were 32 hours a
11 week, but the conditions were stated that in order
12 to be a shareholder, I needed to work full-time and
13 to work call.

14 Q So from late 1993 until when you departed
15 Columbia Heart Clinic, how many years did you spend
16 practicing with this group of physicians? And I
17 know some came and some left, but, cumulatively, how
18 many years did you spend practicing with this
19 Medical Group?

20 A Thirteen years.

21 Q So from 1993 until -- you left --

22 A Until I left in March of 2006.

23 Q Was there ever a point -- let me rephrase that.
24 At some point you decided you wanted to be
25 considered as a shareholder?

1 **A** Yes. In about September of 2005, I approached
2 Dr. Steven Humphrey about applying to be placed on
3 shareholder track. I knew there would be a
4 so-called provisional period under which I would be
5 working on salary and I was ready to take more
6 responsibility, which include working full-time and
7 taking call at that stage.

8 **Q** Did you have any expectation that you would be
9 made a shareholder?

10 **A** Well, I had previously been told in an earlier
11 contract that the minute I wanted to take call, I
12 would be placed on shareholder track. I had been
13 told that at the beginning of my very first contract
14 in fact.

15 **Q** Why did you want to become a shareholder at
16 Columbia Heart Clinic?

17 **A** Well, I actually liked the group. I believed
18 in what their mission was and what they were trying
19 to accomplish. I thought I had a lot to contribute.
20 I had young children. And my youngest, my baby, was
21 about to start full-time school so I felt it was
22 about time that I stepped up to the plate and took
23 some more responsibility.

24 **Q** What steps did you take in attempting to become
25 a shareholder?

1 **A** I actually spoke to several of the senior
2 shareholders of the group and tried to solicit their
3 support obviously. I asked them if they would
4 support me if I made an application, and actually
5 nobody was negative at that time, no questions were
6 raised about my competency in particular.

7 **Q** Did you do anything formal in that regard?

8 **A** Dr. Humphrey had actually asked me to make a
9 written application which he would present to an
10 executive meeting of the group and then at a later
11 stage, I would be invited to speak for myself,
12 answer questions.

13 **Q** Do you recall when you made that written
14 application?

15 **A** It was actually about September 2005. It took
16 a long time to respond to it, but I was eventually
17 invited to a meeting on November 30th, 2005.

18 **Q** And how did Columbia Heart Clinic respond to
19 your request ultimately?

20 **A** Well, I attended the meeting. I answered some
21 questions. It was not a comfortable meeting. There
22 were some people who were noticeably hostile during
23 that meeting. And then I was asked to leave the
24 meeting with my husband and the next day asked to
25 come to Dr. Humphrey's office where --

1 Q Let me stop there. Who is Dr. Humphrey?

2 A Dr. Stephen Humphrey at the time was the
3 President of the group. And I was asked to come to
4 his office the next afternoon. And I was told that
5 there was going to be no offer and the reasoning was
6 that there were some concern about my complication
7 rate.

8 Q What was your reaction to that news?

9 A Well, I was devastated, shocked, angry. No one
10 had ever said anything to me before about any
11 complication rate and I had worked there 13 years
12 and done many procedures.

13 Q Did you have a conversation with your husband
14 about the news?

15 A Yes. I waited until the meeting was over and
16 then I called my husband.

17 Q What was Dr. Barry Feldman's response?

18 A He was stunned. He also could not believe what
19 he was hearing. He just couldn't believe it.

20 Q What happened next?

21 A Well, I actually -- at the time of the meeting
22 with Dr. Humphrey, I told him right away that he had
23 left me no choice but to leave the group. And he
24 really didn't encourage me to stay or leave at that
25 point. He just said, well, you know, you might just

1 want to go home and think about it. But there was
2 no offer at that point so I felt I was kind of --
3 that was it, you know. But I did ask him in that
4 meeting if it would be okay if I stayed on for a
5 couple of months because I was very concerned about
6 my patients and who would look after them and I also
7 needed to think about what else I could do for
8 myself.

9 Q And did you and your husband have any
10 discussions?

11 A We had discussions, of course, immediately.
12 And I told my husband that I had no choice, I was
13 going to have to leave. And he was obviously very
14 upset about that.

15 Q At some point, did you -- did Dr. Barry Feldman
16 discuss with you leaving the practice?

17 A Yes, he did. I mean within a day or two, he
18 started saying he would have to leave, too.

19 Q So was there some date or time frame in which
20 you said you were leaving and then Dr. Barry Feldman
21 tells you that he's leaving? Do you recall when
22 that was, month, year?

23 A When Barry told me he was going to leave?

24 Q Yes.

25 A I mean, the meeting took place on a Wednesday,

1 I think it was by the weekend probably after that
2 Wednesday. So it's going to be early December Barry
3 told me he felt he was going to have to leave.

4 Q Who did you and Dr. Barry Feldman tell about
5 your decision to leave?

6 A Well, we did discuss it with Dr. Baugh. Dr.
7 Baugh actually asked me not to make a rash decision,
8 but I told him I felt I didn't have a decision to
9 make, it was already made.

10 Q Did you know if your husband had a conversation
11 with anyone else?

12 A I'm sure that he -- I'm sure he must have
13 spoken to some other doctors in the group at the
14 time and told them that I was leaving. I don't know
15 what other conversations he had.

16 Q And Dr. Barry Feldman worked out of which
17 office?

18 A At the, predominantly, the Lexington office.

19 Q Please share your thoughts about the
20 complication rate justification that was provided to
21 you.

22 A Well, I thought it was an excuse actually to
23 not offer me a partnership track. I knew that my
24 record was good. I closely follow all of my own
25 complications. I knew my results were at least as

1 good, if not better than many other shareholder
2 members, so I knew that this was a ruse.

3 Q On what date did your husband submit his notice
4 of resignation to Columbia Heart Clinic?

5 A I believe it was late January 2006.

6 Q When did you submit your resignation to
7 Columbia Heart Clinic?

8 A March 1, 2006.

9 Q And you worked how long a notice?

10 A I gave 30 days notice.

11 Q And you worked out that notice?

12 A Yes, right to the end.

13 Q What about your husband, Dr. Barry Feldman,
14 what type of notice did he provide?

15 A Barry gave three months notice from January 21,
16 I believe.

17 Q And he worked out that notice?

18 A Yes.

19 Q Prior to submitting your written notice of
20 resignation on March 1, 2006, had you told others at
21 the practice that you, in fact, were leaving?

22 A Yes. I was up front about that from the
23 beginning. I told them that I was there to just
24 really take care of my practice while I was working
25 out my situation.

1 Q Did anyone from Columbia Heart Clinic come to
2 you and talk to you again about the complication
3 rate issue?

4 A Yes. In February of 2006, Dr. Humphrey and Dr.
5 Ben Jones asked me to come to a meeting. And at
6 that meeting, I was told they'd done some form of
7 investigation where they had retrospectively looked
8 at people's complications and that I was exonerated.
9 In fact, my complication rate was not any higher
10 than anyone else in the group.

11 Q Now, your testimony earlier was that Dr. Steven
12 Humphrey was the President of the practice. Dr. Ben
13 Jones, at any point, was he an officer in the
14 practice?

15 A He was the incumbent President of the group. I
16 don't know whether he had officially taken over at
17 that time, but the two doctors met with me
18 privately.

19 Q Whether Dr. Humphrey was the President or
20 immediate past President, Dr. Ben Jones, would he
21 have been the President elect?

22 A Yes.

23 Q If he were not already the President?

24 A Uh-huh.

25 Q Were you also -- during that meeting, was there

1 any type of communication regarding an opportunity
2 to become a shareholder?

3 A Yes. After the statements were made about my
4 complication rate, I was then offered an opportunity
5 to consider becoming -- joining as a shareholder --
6 on track to become shareholder over two years and
7 that the compensation will be productivity based,
8 which was something new for the group at that time.
9 All previous shareholder track people were placed on
10 salary, so I -- I didn't look at it very closely,
11 but that was the gist of the offer.

12 Q So are you saying a productivity component to
13 that agreement was different than what was offered
14 to other shareholders?

15 A Yes, prior to that time --

16 Q Or prospective shareholders?

17 A Yes.

18 Q How did you know that?

19 A Well, my husband has become a partner or a
20 shareholder, I knew the terms of his agreement. I
21 was aware of the terms of the agreements of other
22 doctors before and subsequently.

23 Q And in contrast to other individuals who were
24 pursuing shareholder status, how many years had you
25 worked at the practice?

1 **A** Well, I had worked 13 years and most other
2 prospective doctors had come straight from
3 fellowship programs.

4 **Q** You were a known commodity?

5 **A** Yes.

6 **Q** And what time frame are we talking about when
7 this conversation occurred when Dr. Jones and Dr.
8 Humphrey came to you and told you that there was no
9 problem with your complication rate and they
10 communicated an opportunity to pursue a shareholder
11 status, what type of time frame was that?

12 **A** Well, it was about two weeks after Barry had
13 offered his resignation and I had yet to put my own
14 resignation in at that point.

15 **Q** But had you told others in the group that you
16 were leaving?

17 **A** Yes.

18 **MR. MALONE:** No further questions at this time.

19 **THE COURT:** Cross?

20 **MR. BABCOCK:** May it please the Court.

21 **THE COURT:** Yes.

22 CROSS-EXAMINATION

23 **BY MR. BABCOCK:**

24 **Q** Dr. Feldman, you are currently a shareholder
25 and an employee at Lexington Heart Clinic; is that

1 right?

2 A That's correct.

3 Q And where is Lexington Heart Clinic located?

4 A We are located right behind the Lexington
5 Medical Center.

6 Q On the -- I think they still talk about that as
7 the Lexington Medical Center Campus?

8 A Yes, sir.

9 Q And that was the same area where Columbia, same
10 general area, where Columbia Heart Clinic had its
11 office when it was over there, wasn't it?

12 A On the same campus.

13 Q Right. Now, Lexington Heart Clinic opened on
14 May 1 of 2006; is that correct?

15 A Yes, I believe that was correct.

16 Q That's the date, I think, people have talked
17 about in this case. And you're still in the same
18 space where you originally located Lexington Heart;
19 is that correct?

20 A Yes.

21 Q Now, the structure for Lexington Heart is
22 you're an LLC?

23 A Yes.

24 Q And, originally, there were three owners of the
25 LLC, yourself, correct?

1 A Uh-huh.

2 Q Dr. Feldman, your husband, correct?

3 A Correct.

4 Q And Dr. Baugh, correct?

5 A Yes.

6 Q Now -- and it was just the three of you doctors
7 out there originally; is that correct?

8 A Yes.

9 Q Now how many doctors do you have?

10 A We have six.

11 Q And how many of them are shareholders?

12 A We have a total of four.

13 Q So over the last three years, we've added three
14 doctors, one of whom is now a shareholder; is that
15 correct?

16 A Yes.

17 Q When did you add the first doctor?

18 A He arrived in July of 2007.

19 Q When did you add the second doctor?

20 A The second and third doctors were added
21 approximately July of 2008.

22 Q Okay. Now, when you started at Columbia Heart,
23 it was in the late '93, '94 period as you testified
24 and you started as a part-time doctor; is that
25 correct?

1 A Yes.

2 Q I think you also had an apprentice year at some
3 point in time; is that correct?

4 A Yes.

5 Q And the reason you had an apprentice year was
6 because you did your training, original training,
7 abroad. And then when you moved to the United
8 States, you needed to do three years of apprentice
9 work before you could get licensed; is that right?

10 A Yes. The South Carolina Medical Board had some
11 unusual rules and I needed -- even though I had a
12 medical license in the State of Ohio and Minnesota,
13 I was requested to do an extra so-called training
14 year in the State of South Carolina.

15 Q And as I understood, from when we talked at
16 your deposition, you got credit for two years that
17 you'd done outside of South Carolina; is that right?

18 A Yes.

19 Q And they needed one more year. So the first
20 year you were here as an apprentice?

21 A Yes.

22 Q And you were the first apprentice that Columbia
23 Heart had had, as far as you know, correct?

24 A Yes.

25 Q And you also had the part-time status, which

1 was something new for Columbia Heart, wasn't it?

2 A Yes.

3 Q And as you testified, you had young children
4 and that was your reason for wanting to have less
5 than a full load, correct?

6 A Yes.

7 Q And one of the primary benefits of taking a
8 part-time status or part-time position is you didn't
9 have to worry about call, correct?

10 A Yes.

11 Q So you had specified hours during the day and
12 no worry about call, correct?

13 A Yes.

14 Q Whereas, full shareholders, like your husband
15 and like Dr. Baugh, like any other doctors, they had
16 to take call, correct?

17 A Yes.

18 Q And, in fact, they had to take call when
19 they're on the track to become a shareholder,
20 correct?

21 A Yes.

22 Q So your situation is one that was different and
23 created for you so that you could know that you
24 wouldn't have to worry about call in the evening so
25 you could take care of your kids, right?

1 A Yes.

2 Q Now, we had the period of time from '94 to
3 2005, which is about 11 years, where that situation
4 worked pretty well, right?

5 A Yes.

6 Q Worked well for you, you were able to be the
7 part time doctor and be mom. You could do that,
8 right?

9 A Yes.

10 Q And worked well for Columbia Heart because they
11 had the benefit of your professional services, at
12 least on a part-time basis?

13 A Yes.

14 Q So everything went fine until we get to the
15 meeting in November of 2005 because that's -- at
16 that point, you not only wanted to be at Columbia
17 Heart, you wanted to be a full shareholder, right?

18 A Yes.

19 Q You wanted to be an owner and be involved in
20 the decision making process so that you'd be a full
21 participant, right?

22 A Yes.

23 Q Now, when you started at Columbia Heart, you
24 and your husband both knew that there might be
25 difficulties that one or the other could have with

1 the group that might spill over to the other one; is
2 that fair?

3 A Yes.

4 Q Anytime we have a husband and wife, parent and
5 child, any familial relation, those situations can
6 occur; fair?

7 A Yes.

8 Q And one of the reasons that some businesses and
9 some professional groups have any nepotism policies
10 is to avoid that sort of thing; that's fair?

11 A I don't know if it's fair.

12 Q Well, the concept?

13 A Yes.

14 Q So there was not any nepotism policy at
15 Columbia Heart and they allowed you and your husband
16 to practice together there; fair?

17 A Yes.

18 Q All right. But, of course, everybody knew that
19 there might come a time, you never know how things
20 work, where there would be a problem with one of you
21 that the other might feel spilled over to him or her
22 on some level; fair?

23 A Yes.

24 Q Okay. Now, when you went to that November
25 meeting, I think you appeared for part of it, but

1 you weren't there for the whole meeting; is that
2 correct?

3 **A** That's correct.

4 **Q** At that point in time, the -- you had a
5 contract that had actually expired; is that fair?

6 **A** That's actually correct.

7 **Q** Pardon?

8 **A** Yes; it's correct.

9 (Defendant's Exhibit Number 1, Jennifer
10 Feldman's contract, was marked for identification
11 purposes.)

12 **Q** Let me hand you what we marked as Exhibit
13 Number 1. Is this the copy of the contract that --
14 the most recent contract when you finished at
15 Columbia Heart?

16 **A** Yes.

17 **MR. BABCOCK:** And for Your Honor's benefit,
18 before we started today, the attorneys for each side
19 shared the exhibits with the other side. And I
20 don't believe we've got any objections to any of the
21 exhibits, but we would offer Defendant's Exhibit 1
22 at this time.

23 **THE COURT:** Any objection?

24 **MR. THOMPSON:** We don't have an objection to
25 that exhibit, Your Honor.

1 **THE COURT:** Mark it in the record, please.

2 (Defendant's Exhibit Number 1, Jennifer
3 Feldman's contract, admitted into evidence.)

4 BY MR. BABCOCK:

5 **Q** Let's look at section 4.1 of that document.

6 The document on the front page is dated March 1,
7 2003; is that correct?

8 **A** That's correct.

9 **Q** And if we go over to the term in 4.1, it says,
10 The term of the agreement shall commence on March 1,
11 2003 and continues for a 20 month period expiring on
12 June 30, 2005 unless terminated sooner, correct?

13 **A** Correct.

14 **Q** And the end of June happened and nobody got a
15 new contract. You didn't come running, say, I need
16 a new contract. Columbia Heart didn't come to you
17 and say, We needed to do a new contract... You just
18 continued on as you had before?

19 **A** Yes, but not without me making some statements
20 to people that my contract was up and it was time to
21 renew.

22 **Q** And, of course, shortly after this, you were
23 raising the issue about becoming a shareholder,
24 correct?

25 **A** Correct.

1 Q And that would have required some kind of
2 new --

3 A New contract anyway, yes.

4 Q Sure. Now, this contract, if you go over to
5 section 6.8 on page ten.

6 A (Witness complies.)

7 Q That section has as its heading, No expectation
8 of shareholder status, correct?

9 A Yes.

10 Q And that is a one sentence section says,
11 Physician acknowledges that neither this agreement
12 nor physician's employment by Medical Group for all
13 or any portion of the term of this agreement
14 entitles physician to be a shareholder of Medical
15 Group and that any consideration for shareholder
16 status is in the sole discretion of the Medical
17 Group, correct?

18 A Yes.

19 Q And this is the document you signed after you
20 had been with Columbia Heart approximately ten
21 years, nine or ten years?

22 A Yes.

23 Q But, of course, you're still on a part-time
24 basis and not taking call and operating in that
25 scenario. Now, we go forward to the November 30, I

1 believe it was, 2005 meeting. You went to the
2 beginning of the meeting as you testified, correct?

3 A Correct.

4 Q You made a short presentation and then you were
5 asked to leave, correct?

6 A Correct.

7 Q And after you left, the doctors who were there
8 discussed your application. That's your
9 understanding, right?

10 A Yes.

11 Q All right. And it's your understanding that
12 one of the issues that was a question for the group
13 was whether the complication rate that you had was
14 greater than some of the other doctors. I believe
15 you were practicing at Providence at that time; is
16 that right?

17 A Yes.

18 Q So that was an issue. Now, I know that you
19 believe that you didn't have a problem with the
20 complications. And, ultimately, a study that was
21 performed indicated that that wasn't a problem. But
22 you would agree with me that if people had valid
23 concerns as to complication rate, that would be
24 something that would be worthy of looking at before
25 you made somebody a partner; is that fair?

1 A Yes.

2 Q Now, similarly, are you aware that productivity
3 was an issue that was being discussed at that
4 meeting?

5 A No, I was not aware of that.

6 Q Of course, you weren't at the meeting so you
7 wouldn't know all that was discussed. Are you aware
8 that Dr. Baugh had some issues that he presented
9 concerning your ability to do certain procedures?

10 A No.

11 Q Did you know that before this case, before we
12 took his deposition?

13 A No.

14 Q That was the first time you know that at that
15 meeting, Dr. Baugh was one of the doctors who said,
16 There's some issues about Dr. Jenny Feldman's
17 techniques, complications, whatever, that should be
18 looked at. You didn't know that before his
19 deposition, did you?

20 A No.

21 Q He didn't tell you that when y'all were looking
22 to start Lexington Heart, did he?

23 A No.

24 Q Now, you mentioned that you were a known
25 quantity or commodity, I think was your phrase?

1 A Yes.

2 Q And you were a known commodity in the sense
3 that you had worked on a part-time basis for a
4 number of years in the practice; fair?

5 A Yes.

6 Q What was not known about you at that point in
7 time was the level of production that would occur
8 when you were on a full-time basis; is that fair?

9 A Yes, but then they wouldn't know that about
10 anyone coming out of fellowship either.

11 Q Yeah, but they did know in your case what you
12 were able to make, what income you were able to
13 generate on a part-time basis. They knew that,
14 didn't they?

15 A Yes.

16 Q And they could take a look at that and
17 extrapolate out what they thought you might be able
18 to produce and have some amount of criteria to know
19 that there might be a question with productivity.
20 They could do that, couldn't they?

21 A Well, it's apples and oranges --

22 Q If you could answer that yes or no and then
23 explain.

24 A Yes, they can do whatever they like. However,
25 this is apples and oranges. I had a totally

1 different job description to what I would have as a
2 full-time person, totally different
3 responsibilities, different patient exposure. In
4 fact, as an employee, I was frequently given
5 nonproductive things to do and this is typical of
6 practices. And I'm sure you're aware in legal
7 practice that, you know, employees are given the
8 nonproductive things. And so, of course, it's very
9 hard to be maximally productive in that environment.

10 Q So, now you would have that opportunity and you
11 would have that opportunity to demonstrate to them
12 your productivity on a full-time basis, correct?

13 A Yes.

14 Q So what was ultimately offered to you after
15 they took a look at the complication issue and
16 decided that wasn't a problem, they ultimately
17 offered you not a three year track, which was
18 typical -- three year track was typical, wasn't it?

19 A Yes.

20 Q They offered you, again, a known commodity or
21 known quantity, a two year track with productivity
22 benchmarks. That's what you were offered, right?

23 A Yes.

24 Q Now, at that point in time, at that point in
25 time, you'd already decided you were going to leave;

1 is that right?

2 A Yes.

3 Q As I understand what happened, the meeting
4 occurred, you learned that you weren't being offered
5 a partnership and -- or a shareholder status at that
6 point in time and very quickly after that, you
7 decide you were going to leave?

8 A Yes.

9 Q And that was in the early December period of
10 2005 you'd made that decision and your husband had
11 made that decision, I think you said, just a few
12 days after that?

13 A Yes.

14 Q And it was shortly after that that Dr. Baugh
15 decided he was going to leave, too, correct?

16 A Yes.

17 Q All right. Now, your resignation was after the
18 offer was made to you, that's what you testified to?

19 A Yes.

20 Q So, obviously, until you actually resigned, you
21 could have continued and you could have taken them
22 up on the partnership that you were offered; is that
23 fair?

24 A Yes.

25 Q And it also was before your husband and Dr.

1 Baugh had actually left, wasn't it?

2 A Yes, although they had tendered their
3 resignation.

4 Q Sure. But what could have happened at that
5 point, is they could have gone back and said, look,
6 if she's going to be here on a partner basis, we'll
7 resend our resignations and continue on together,
8 they could have done that?

9 A Yes.

10 Q But they didn't do that and you didn't accept
11 the offer. So you sent your resignation in in early
12 March and it was effective at the end of March,
13 correct?

14 A Yes.

15 Q Now, after you left, I think you had a trip to
16 Australia that occurred shortly after that; is that
17 right?

18 A That's correct.

19 Q But you had a few days between the time you
20 finished and the time that you had to go on your
21 trip; is that fair?

22 A Yes.

23 Q Now, the practice to be, Lexington Heart, had
24 already contracted with a group called Resource One
25 to help you set up this office?

1 **A** Yes.

2 **Q** And Resource One, that's connected to Burkett,
3 Burkett and Burkett, the accounting firm, correct?

4 **A** Yes.

5 **Q** That's the same Burkett that's going to be
6 coming in and testifying later on in this case for
7 the plaintiffs, correct?

8 **A** Yes.

9 **Q** Now, in terms of setting up the office, you had
10 to do everything from getting space to getting
11 equipment to getting people, lots of things to do to
12 be able to set up the practice; fair?

13 **A** Yes.

14 **Q** And the idea was that when your husband and Dr.
15 Baugh actually left Columbia Heart in late April,
16 you wanted to hit the ground running so that, with a
17 minimal amount of training time, you'd be up and
18 operating, those doors would be open and patients
19 would be coming in. That's what y'all wanted,
20 right?

21 **A** Yes.

22 **Q** So to do that, we've got Burkett and Burkett --
23 I'm sorry -- Resource One doing certain things, but
24 the staffing issue, the hiring of staff, that's
25 something that your husband and Dr. Baugh delegated

1 to you to do, correct?

2 A I decided to hire the staff.

3 Q Okay. But you had discussions with them that
4 you were going to be the one doing that because, of
5 course, at this point, they're still working over at
6 Columbia Heart, aren't they?

7 A Right.

8 MR. THOMPSON: Your Honor, I'm going to object
9 to this. I really don't see the relevance of --
10 what difference does it make what steps they took to
11 prepare to open their new practice, that's not
12 really relevant to why we're here today, that is the
13 validity of the contract and the wage payment claim.

14 THE COURT: Do you wish to be heard?

15 MR. BABCOCK: Yes, sir. Your Honor, the
16 relevance here goes to the fact that the entire
17 staff is taken away, the whole office is lost and,
18 therefore, that goes to the negative impact on
19 Columbia Heart as a result of departure. I don't
20 have much more in this area, but I do want to go
21 through the people that were hired that were
22 Columbia Heart employees.

23 THE COURT: Anything else?

24 MR. THOMPSON: No.

25 THE COURT: Overruled.

1 Go ahead.

2 BY MR. BABCOCK:

3 Q Now, in terms of the operation at Lexington
4 Heart, again you open your doors on April 24th for
5 training purposes, so you'd have to hire people
6 before that time, correct?

7 A Yes.

8 Q And I think an ad ran in the paper on April 1.
9 And between April 1 and April 24, you got fully
10 staffed?

11 A We had --

12 Q Is that true?

13 A Yes.

14 Q All right. Now, a number of people that you
15 hired were Columbia Heart staff people, weren't
16 they?

17 A Yes.

18 Q Let's go through some of the people that you
19 hired. Andie Hoover, did you hire Andie Hoover?

20 A Yes.

21 Q All right. And what does she do at Lexington
22 Heart?

23 A She works in our business office.

24 Q And she was a Columbia Heart employee, wasn't
25 she?

- 1 A She had been.
- 2 Q How about Ashley Whitaker? What did she do?
- 3 A Ashley was, I believe, the front desk person.
- 4 Q She had been at Columbia Heart?
- 5 A She had been.
- 6 Q Cheryl Sandri, what did she do?
- 7 A She worked in the business office.
- 8 Q And she'd been at Columbia Heart?
- 9 A Yes..
- 10 Q How about David Smith? What does he do?
- 11 A He's an echo tech.
- 12 Q And he works at Lexington Heart?
- 13 A He works for me now, yes.
- 14 Q And he did work for Columbia Heart?
- 15 A Yes.
- 16 Q How about Debbie Watts?
- 17 A Debbie was given a job in the business office.
- 18 Q And she worked at Columbia Heart?
- 19 A Yes.
- 20 Q How about Dena Rauch?
- 21 A Dena was business office, also.
- 22 Q She actually serves as your office manager?
- 23 A She did.
- 24 Q That was her first position with you?
- 25 A Yes.

1 Q And she'd been at Columbia Heart?

2 A Yes.

3 Q How about Grace Kludo?

4 A Grace is a nurse practitioner with us.

5 Q And had she been at Columbia Heart?

6 A Previously, yes.

7 Q And how about Joanne Girou-Term?

8 A I think this is someone who didn't come in the
9 long run. That person -- that name is familiar, I
10 don't think they worked for us for any length of
11 time.

12 Q Okay. Johnnette Smith?

13 A Johnnette is working in filing, clerical area.

14 Q And she was from Columbia Heart?

15 A Yes.

16 Q And Lauren Vahjen?

17 A Yes. Lauren is an exercise physiologist.

18 Q She'd been at Columbia Heart?

19 A Yes.

20 Q Luisa Neal, what does she do?

21 A Luisa is a medical assistant.

22 Q And was she at Columbia Heart?

23 A Yes.

24 Q How about Melissa Strange?

25 A Melissa is a nuclear medicine technologist.

- 1 Q And she'd been at Columbia Heart?
- 2 A Yes.
- 3 Q How about Pam Knight?
- 4 A Pam is in Iran. She worked for us briefly.
- 5 Q And she was from Columbia Heart?
- 6 A Yes.
- 7 Q And Phyllis Williamson?
- 8 A Phyllis is a nurse practitioner.
- 9 Q She'd been at Columbia Heart?
- 10 A Yes.
- 11 Q And Staci Kingsmore, what does she do?
- 12 A Staci is a registered nurse. She works for me
- 13 now.
- 14 Q At Lexington Heart?
- 15 A Yes.
- 16 Q And she'd been at Columbia Heart?
- 17 A Previously.
- 18 Q And Stephanie Price, how about her?
- 19 A Stephanie no longer works for us. She was a
- 20 medical assistant.
- 21 Q So she was hired by Lexington Heart?
- 22 A Uh-huh.
- 23 Q That's a yes?
- 24 A Yes.
- 25 Q And she had been at Columbia Heart?

1 A Yes.

2 Q And Susan Grady, how about her? What does she
3 do?

4 A Susan is a secretary.

5 Q And she'd been at Columbia Heart?

6 A She had been.

7 Q And Thelma Haley?

8 A Thelma is a secretary.

9 Q And she had been at Columbia Heart?

10 A Yes.

11 Q So those are all people that were from Columbia
12 Heart that you hired and were staffing your
13 Lexington Heart office when you opened in late April
14 or early May of 2006, correct?

15 A Yes.

16 MR. BABCOCK: With the Court's indulgence.

17 THE COURT: Yes, sir.

18 (Pause.)

19 MR. BABCOCK: No further questions.

20 THE COURT: Redirect?

21 REDIRECT EXAMINATION

22 BY MR. MALONE:

23 Q Dr. Feldman, you were not at Dr. Baugh's
24 deposition, were you?

25 A No.

1 Q And you haven't read his deposition transcript,
2 have you?

3 A No.

4 Q So the question that Mr. Babcock asked of you,
5 you have no idea whether that's a true statement or
6 a false statement --

7 MR. BABCOCK: Your Honor, this is his witness
8 and he's leading her.

9 THE WITNESS: No, I don't --

10 THE COURT: Hold on just a moment please,
11 Doctor.

12 Don't lead. Rephrase your question.

13 BY MR. MALONE:

14 Q Do you know whether the question that
15 Mr. Babcock asked you about Dr. Baugh's statement,
16 do you know if that's true or not?

17 A I actually don't know if it's true.

18 Q Did you have a noncompetition agreement with
19 Columbia Heart Clinic.

20 A No.

21 Q So when you departed Columbia Heart Clinic,
22 what obligations or limitations did you have with
23 regard to starting a new practice?

24 A None.

25 Q How were -- strike that. With regard to

1 Lexington Heart Clinic; how were new employees
2 hired?

3 **A** Resource One put an ad in the newspaper and put
4 a fax number in for people to apply to various
5 positions that were advertised, medical assistants,
6 echo techs, nuclear medicine techs, et cetera. And
7 they independently, you know, collected all of those
8 faxes and then I visited their office early the
9 following week and went through the applications
10 with them. And we had applications from all over
11 the city. There was a huge number, any number of
12 people from many different practices.

13 **Q** When Dr. Feldman and Dr. Baugh submitted their
14 resignation, which was a written resignation, do you
15 recall whether Columbia Heart Clinic issued any kind
16 of statement? And if so, could you describe that
17 statement?

18 **A** I'm sorry, I don't know the circumstances of
19 the statements that were made. I believe there were
20 some letters sent out telling patients that they had
21 left the clinic, something of that order. I don't
22 know that there was any public announcement.

23 **Q** Were other employees at Lexington -- I mean, at
24 Columbia Heart Clinic, did they have any idea that
25 Doctors Baugh and Feldman were leaving?

1 **A** I think that when the announcement of
2 resignation was made, yes, they did know. They were
3 told that they were leaving, yes.

4 **Q** With regard to Dr. Ben Jones who, your
5 testimony earlier was that he was either President
6 of the practice or President elect of the practice,
7 was that going to affect in any way, and I want you
8 to explain how, that was going to affect his work
9 location?

10 **A** Yes. Dr. Jones would need to relocate to the
11 Richland office because his responsibilities would
12 be primarily there for administration reasons of the
13 practice.

14 **Q** So your testimony is that Dr. Ben Jones is
15 leaving to go to the Palmetto Richland campus and it
16 was announced that Doctors Baugh and Feldman were
17 also leaving the practice. In your opinion, did
18 that influence employees of Columbia Heart Clinic to
19 respond to that ad?

20 **MR. BABCOCK:** Objection, Your Honor. I don't
21 know how she could do that without speculating.

22 **THE COURT:** Do you wish to be heard?

23 **MR. MALONE:** Yes.

24 **THE COURT:** Let me hear from you.

25 **MR. MALONE:** I'm simply asking her opinion as

1 to why there was such a strong response to the
2 advertisement that was run in the paper.

3 THE COURT: It would be speculation. She can't
4 say what was in somebody else's head. You can
5 produce circumstantial evidence from which the Court
6 can draw conclusions, but you can't ask her what
7 somebody else was thinking.

8 BY MR. MALONE:

9 Q Your testimony was that there was an
10 overwhelming response to the advertisement?

11 A Yes.

12 Q Do you recall if the -- I guess breakdown
13 between -- can you give me a breakdown between the
14 percentage of Columbia Heart Clinic candidates and
15 the non-Columbia Heart Clinic candidates?

16 A Probably about 30 percent of the applications
17 were from Columbia Heart Clinic people and 60
18 percent from all over.

19 Q Thirty percent, 60 percent?

20 A Uh-huh.

21 Q Mr. Babcock raised issues about your
22 productivity. And I do not want you to name the
23 doctor's name out of respect for that doctor and the
24 dignity, but were you given a special assignment
25 with regard to a doctor at Columbia Heart Clinic who

1 had a drug problem?

2 A Yes.

3 Q Can you explain in summary fashion how that
4 impacted your practice?

5 A Yes. I had to uproot myself from my Richland
6 office and go down to the Providence office and I
7 had to take over that doctor's practice and see my
8 old patients as well and do some repair work.

9 Q Did that impact your productivity?

10 A I never measured my productivity. I mean, yes,
11 I worked extra hours, I suppose. I was working
12 longer hours to get through the excess work, yes.

13 Q So you were putting in more than the 32 hours?

14 A Yes.

15 Q When you made your request for shareholder
16 status, were you expecting automatic shareholder
17 status or some other option? Please explain your
18 answer.

19 A I was expecting to be given some kind of offer
20 to be on track to become a shareholder and it would
21 have been a period of two or three years, I thought,
22 just like other people in the practice.

23 Q When you met with Dr. Steve Humphrey the day
24 following the November 30th shareholder meeting
25 where your candidacy for shareholder status was

1 discussed, you testified earlier that you were told
2 that the issue was your complication rate.
3 Mr. Babcock raised the issue regarding your
4 productivity. I want to know what, if anything, Dr.
5 Humphrey told you about productivity during that
6 meeting or conversation?

7 A That was never mentioned.

8 MR. MALONE: Your Honor, I need one brief
9 moment.

10 THE COURT: Yes, sir.

11 (Pause.)

12 MR. MALONE: No further questions, Your Honor.

13 THE COURT: All right. Recross?

14 MR. BABCOCK: Very briefly, Your Honor.

15 RECROSS-EXAMINATION

16 BY MR. BABCOCK:

17 Q You testified that the applications you
18 reviewed were 30 percent Columbia Heart, 60 percent
19 or so other places?

20 A Yes.

21 Q So in the end, though, by far, the vast
22 majority of people you hired were Columbia Heart
23 people. No question on that, is it?

24 A No.

25 Q And you testified that you were expecting a two

1 to three year track; is that what you just said?

2 A Yes.

3 Q And, in fact, what was ultimately talked about
4 with you was a two year track, correct?

5 A Yes.

6 MR. BABCOCK: No further questions.

7 THE COURT: Anything further of the witness?

8 RE-REDIRECT EXAMINATION

9 BY MR. MALONE:

10 Q Very briefly. With regard to the candidates
11 who were submitting faxed résumés, was there a
12 difference between those you -- you said -- I
13 believe your testimony was 30 percent Columbia Heart
14 Clinic, the remainder non-Columbia Heart Clinic. So
15 there was a distinction between you knew some, you
16 didn't know some?

17 A Yes. Well, obviously, it's easier to hire
18 people you know whose work is good rather than the
19 unknown quantity, so, yes, I mean, there was a
20 tendency to hire people I knew personally.

21 MR. MALONE: No further questions.

22 THE COURT: Anything further of the witness?

23 MR. BABCOCK: Nothing further, Your Honor.

24 THE COURT: Thank you, Doctor. You may step
25 down.

1 **MR. MALONE:** Your Honor, I have one point
2 regarding the release of the witness. She is
3 leaving this afternoon for an out of town conference
4 that's going to run several days and we would want
5 to bring that to the attention of the Court and ask
6 the Court to release her and we shared that with
7 opposing counsel as well to communicate regarding
8 this issue.

9 **MR. BABCOCK:** No objection to that, Your Honor.

10 **THE COURT:** All right. Thank you, Doctor.
11 You're free to go.

12 We're going to take a ten minute break. During
13 this break, I want you all to look at this note my
14 law clerk just handed to me.

15 (Brief Recess.)

16 **THE COURT:** Call your next witness.

17 **MR. THOMPSON:** Dr. Barry Feldman.

18 BARRY J. FELDMAN,
19 having been duly sworn, testified as follows:

20 **THE CLERK:** If you'll have a seat and state
21 your name for the record.

22 **THE WITNESS:** Barry J. Feldman.

23 DIRECT EXAMINATION

24 BY MR. THOMPSON:

25 Q Did you give us your full name for the record,

1 please?

2 **A** Yes. Dr. Barry J. Feldman.

3 **Q** And what's your occupation, Dr. Feldman?

4 **A** I'm an interventional cardiologist.

5 **Q** Could you describe for the Court what an
6 interventional cardiologist is?

7 **A** Yes. An interventional cardiologist is someone
8 who has a subspecialty interest and training in
9 performing balloon, stent procedures where we open
10 up blocked arteries sometimes electively and
11 sometimes in situations where there are emergencies.

12 **Q** And those are surgical procedures?

13 **A** They are. We call them interventional
14 procedures. It's more than just doing a diagnostic
15 heart catheterization. It's one step further. We
16 actually have to go in and open up the blocked
17 artery with a balloon or a stent. Many times these
18 occur in patients who are having acute heart attacks
19 and that type of situation. And usually they have
20 to be in hospitals where there is a surgical backup
21 available to perform the procedure.

22 **Q** And we're going to cover this later, but does
23 Lexington Medical Center have such a surgical
24 procedure -- facility?

25 **A** Currently, no.

1 Q How long have you been an interventional
2 cardiologist?

3 A Approximately 23 years. I completed my
4 fellowship at the Mayo Clinic in 1986.

5 Q Okay. And can you sort of describe the
6 difference between an interventional cardiologist
7 and a cardiologist who doesn't have that
8 designation? Maybe you've already covered it,
9 but...

10 A An interventional cardiologist requires board
11 certification, a subspecialty training, requires
12 ongoing continued CME, also involves ongoing
13 continuing practice with certain numbers and
14 criteria each of which you need to meet, and also
15 requires recertification every ten years.

16 Q And could you do what you do now and, you know,
17 step outside whatever the geographical restriction
18 of the agreement is and just be a regular
19 cardiologist?

20 A No way.

21 Q Why is that a problem?

22 A Well, because the nature of what I do, first of
23 all, I need to practice in a hospital that has the
24 capacity to do open heart surgery so that I can do
25 the interventional procedures. Also, the nature of

1 these procedures often times they're emergent and it
2 requires coming in in the middle of the night. And,
3 really, you have to really be able to respond to one
4 of these within 20 minutes of the procedure.

5 Q But these surgical procedures are really just,
6 in terms of time, are a small part of what you do,
7 so why are they so important that you have this
8 capability?

9 A Well, I think that it's not really a small part
10 of what I do. Many times doing the actual procedure
11 may be a relatively small time, but the analysis and
12 the interpretation and the decision from the medical
13 point of view where this needs to be done is a large
14 part of what I do as well.

15 Q And where are you currently employed?

16 A At the Lexington Heart Clinic.

17 Q And when did you commence employment with
18 Lexington Heart Clinic?

19 A We opened the doors to practice May 1st, 2006.

20 Q And prior to being employed with Lexington
21 Heart Clinic, where were you employed?

22 A I was employed at the Columbia Heart Clinic
23 until January 21st, 2006, when I submitted my
24 resignation and then subsequently left fulfilling my
25 contract three months later.

1 Q So you worked 90 days beyond your resignation
2 date?

3 A According to my contract, yes.

4 Q Now, could you sort of briefly go through your
5 history with the entities that became Columbia Heart
6 and your employment through those entities?

7 A Yes. I initially left the Air Force in 1992
8 and came to Columbia and started practicing in the
9 -- actually, 1993 and started practicing with the
10 Columbia Cardiovascular Clinic at that time. That's
11 Columbia Cardiovascular Clinic, which was the entity
12 which preceded the Columbia Heart Clinic. And I
13 remained a shareholder employee -- I'm sorry -- a
14 nonshareholder employee for three years and then
15 became a shareholder employee in 1996. So I had --
16 my first shareholder employee contract was in 1996,
17 at that time that was the Columbia Cardiovascular
18 Clinic.

19 Then in 1994, the Columbia Heart Clinic was
20 formed with a mergence between the Columbia
21 Cardiovascular Clinic and I believe the Columbia
22 Cardiovascular Consultants in Columbia, which was a
23 predominantly Providence group. So they formed a
24 single group to form the Columbia Heart Clinic and
25 that was in 1997 and that's when we had our first

1 contract which Mr. Babcock was alluding to earlier.

2 Q And just briefly, can you explain why it is
3 that you decided to leave Columbia Heart Clinic?

4 A Well, first of all, my wife, who was here
5 earlier on the stand, was a cardiologist working at
6 the Columbia Heart Clinic for 12 years or 13 years
7 and she had an understanding that she could become a
8 shareholder after stop taking -- after started to
9 take call and working full-time within a one to two
10 year period, according to her original contract with
11 Dr. Schulze when we first joined. And she applied
12 for that status to become on a shareholder track
13 status. And when she did, unfortunately, I think
14 that there were some mis -- unfounded and erroneous
15 reasons given to her, which was very devastating to
16 her and certainly to me.

17 I was very stunned about the whole situation.
18 And I was very disappointed not only in the
19 decision, but also in the reasons given to her for
20 not offering her a shareholder status track.

21 As a result, we stopped and talked and thought
22 about it a lot because I'd given so much of my life
23 to the Columbia Heart Clinic and I was a very
24 dedicated employee and it was a very difficult thing
25 for me to do, but, really, I was in a situation

1 between a rock and a hard place. I had no option
2 but to leave with Jenny.

3 Q And what were the reasons given that you found
4 upsetting?

5 A I found them upsetting in that the reasons for
6 not offering her the shareholder status track option
7 were really unfounded. And they were, in some way,
8 concocted by -- I don't really want to speculate,
9 but they were really unfounded and I think they were
10 unfair.

11 Q Did anybody from Columbia Heart Clinic tell you
12 they were unfounded or what's your basis for
13 believing that?

14 A Well, I think that when Dr. Jones met with
15 Jenny, he virtually exonerated her from any issues
16 of complications. And I also had discussions with
17 Dr. Jones at times when he told me that in their
18 prospective studies, that there was no difference
19 between her and anybody else. In fact, some people
20 had actually had other issues we could relate to
21 infections which didn't relate to her.

22 Also, you know, I worked with her for 12, 13
23 years and I knew her performance track record. And
24 before that, we also worked in Dayton, Ohio together
25 so I knew her tactical ability, as well as her

1 competency quite well. Of course, I may be biased,
2 but aside from that, I knew that there was no major
3 complication issue or competency issues. None of it
4 had ever been raised over a period of 12 to 13 years
5 by any committees or any patients or any working
6 physicians with whom we've worked, so it was really
7 a shock.

8 Q And so what did you do after that happened?
9 What was the next thing you did?

10 A Well, I decided that I needed to talk to the
11 doctors with whom I worked with most closely and
12 they were Dr. Kevin Baugh and Dr. Ben Jones because
13 we worked at the Lexington office, you know, very
14 closely and whatever I did would certainly impact on
15 what they would be doing. And out of respect for
16 both of them, I felt that I'd need to tell them that
17 I decided that Jenny and I were going to leave.

18 Q Do you remember about how many employment
19 agreements you've had with Columbia Heart or any of
20 its predecessors?

21 A Yes. We've had a total of -- I've had a total
22 of four. My initial one in 1993, followed by the
23 second one when I became a shareholder in the
24 Columbia Cardiovascular Clinic, followed by a third
25 one with the Columbia Heart Clinic and, lastly, the

1 2004 agreement.

2 Q And do you recall if you took a length of time
3 to review these documents or have them reviewed by a
4 professional, an attorney?

5 A Unfortunately, being a physician, you know, we
6 always felt that the best contract is the one that's
7 left in the draw and that's sort of the philosophy
8 I've had through my life. And I really had none of
9 these ever reviewed. And I really had confidence in
10 the people that I worked with and I signed most of
11 them without any question.

12 Q Did you have any legal training or background
13 on employment contracts and the implications of
14 those contracts?

15 A No. I never went to law school. I'm not a
16 lawyer. I'm a cardiologist.

17 Q And why did you sign the last agreement. The
18 one that's at issue in this case?

19 A Well, there was a lot of rift in the group at
20 the time. There was a big split of seven doctors
21 who had migrated away from the practice. And Dr.
22 Humphrey, who I was fairly close with, was
23 pressuring me to sign the contract. I was so
24 reluctant. And he really told me that I needed to
25 be a team player and keep my eye on the ball and

1 sign the contract in order to keep the stability of
2 the group since they were concerned that there was a
3 faction of cardiologists who were from Providence
4 who potentially also may be leaving additionally and
5 I think they were trying to lock in everybody into
6 the group.

7 And so, at that point, you know, I was very
8 pleased with my practice. I thought it was, you
9 know, very -- I had a great professional experience
10 and I was very happy and I had no reasons to, at
11 this point, make a big issue over it. And he came
12 to me twice and then the third time Lynn Privett
13 actually brought the contract to my office, asked me
14 to sign it directly by Dr. Humphrey and I said okay.

15 Q Let me show you what we're going to mark as
16 Plaintiff's Exhibit 1.

17 (Plaintiff's Exhibit Number 1, Barry
18 Feldman's contract, was marked for identification
19 purposes.)

20 Q Let me ask you if you can identify this
21 document?

22 A Yes. This appears to be the last contract
23 which I signed. Let me see if this is signed. Yes.

24 MR. THOMPSON: At this time, we'd move that
25 Plaintiff's Exhibit 1 be admitted into evidence,

1 which is the employment agreement at the end of Dr.
2 Feldman's employment with Columbia Heart Clinic.

3 **THE COURT:** Any objection?

4 **MR. BABCOCK:** I think with the way it ended,
5 without objection, Your Honor.

6 **MR. THOMPSON:** And in my opening, Your Honor, I
7 handed you your copy of plaintiff's 1 already.

8 **THE COURT:** Okay. I've got it.

9 (Plaintiff's Exhibit Number 1, Barry
10 Feldman's contract, admitted into evidence.)

11 BY MR. THOMPSON:

12 **Q** Dr. Feldman, how much money, if any, were you
13 paid to sign this contract?

14 **A** Not a single penny and I haven't received
15 anything yet either.

16 **Q** And do you recall anything, as it relates to
17 the noncompetition parts, any differences between
18 this agreement and the one that was in effect
19 immediately prior to this agreement?

20 **A** Yes. There is a penalty placed of \$590,000,
21 which is a penalty provision which was not in the
22 previous contract, and also the area of restricted
23 practice was also different.

24 **Q** And why were you reluctant to sign the new
25 agreement? Why did it take three tries to get you

1 to sign the agreement?

2 A Well, I knew that it just wasn't fair, it
3 wasn't the right thing to do, but, on the other
4 hand, I just was pressured enough that I just felt
5 for the group's unity that I would just sign it.

6 Q And when you worked for Columbia Heart Clinic,
7 where did you routinely practice, what locations?

8 A I primarily practiced at the Lexington and
9 Richland campuses, but I also practiced at times in
10 Clinton and Newberry and Fairfield County.

11 Q And when you were employed by Columbia Heart
12 Clinic, where did most of your patients come from?

13 A Lexington County, but also quite a few from
14 Richland County since I had a long established
15 practice for many years in Richland as well.

16 Q And what's your understanding under this
17 agreement of Plaintiff's Exhibit 1 as to what
18 happens to you if you violate the noncompetition
19 provisions of the agreement?

20 A I would have to pay \$590,000. I would -- which
21 would be a penalty. I would also forfeit my
22 accounts receivable, which is \$161,000. And I would
23 also have to pay attorney's fees.

24 Q I meant to ask you this earlier: Do you have
25 any other board certifications? You mentioned

1 interventional cardiology.

2 **A** Yes. In order to be board certified in
3 interventional cardiology, you also need to be
4 certified in internal medicine, as well as
5 cardiology.

6 **Q** And what will be the implications for you
7 professionally if you stopped being an
8 interventional cardiologist?

9 **A** I think that would be a very serious problem
10 particularly because it's the importance of the
11 repetitive nature of what we do and the exposure.
12 In fact, I think that I would lose my credentialing
13 to perform the procedure if you don't do the
14 procedure for a year. So I think I would have to
15 report it to the staff. And, also, I think that the
16 ACC has stipulations on numbers of cases -- I'm
17 sorry -- ACC stands for American College of
18 Cardiology, has stipulations on the number of cases
19 they expect an interventional cardiologist to do.
20 And, certainly, if you stop doing procedures for a
21 year, you would lose your credentialing.

22 **Q** And how about in terms of your privileges at
23 the hospital, would they have an impact on those?

24 **A** It would affect my privileges in order to do
25 interventional cardiology, which is what I really

1 do. I could still practice general cardiology, but
2 I would lose my privilege to do interventional
3 cardiology, which is something that I spent a lot of
4 years of developing and training for.

5 Q And putting aside for a moment, if you will,
6 the broad restrictions on the types of things you
7 can do or can't do, rather, under the noncompete, if
8 you could not be a cardiologist, what other things
9 could you might do given your training and
10 background?

11 A I could do medical research in cardiology at
12 the university. I could teach at the university. I
13 could be a consultant for helping practices develop
14 cardiology programs. I could be a cardiology
15 administrator. I could work for a device company.
16 I could work for a pharmaceutical company as a
17 representative in sales or marketing. So those are
18 the sorts of things I could still do.

19 Q And in your understanding of how that
20 geographic restriction works and the things that are
21 restricted, could you do any of those things within
22 20 miles of any office you routinely practiced?

23 A The -- I'm not sure I quite understand your
24 question. Would you reword that?

25 Q Well, let's crash that. Let's move on to --

1 I'm going to ask you some questions about the
2 establishment of the Lexington office, or of
3 Columbia Heart Clinic. And before you left, how was
4 the Lexington office of Columbia Heart Clinic
5 staffed?

6 A We had three physicians, Dr. Kevin Baugh and
7 myself and Dr. Benjamin Jones, who virtually worked
8 the entire rotation, all three, of the office and we
9 also cover the hospital as well.

10 Q Okay. And could you describe what kinds of
11 things that were done at Lexington Heart, how you
12 treated patients and how you utilized the Lexington
13 Medical Center?

14 A Yes. In the office, we saw both new office
15 consultations, as well as follow-up office visits.
16 We also performed diagnostics testing. Any of those
17 patients that needed to have procedures such as
18 diagnostic heart catheterizations, we referred to
19 Lexington Medical Center or if they need other
20 diagnostic studies such as C.T. scans, x-rays, et
21 cetera, we would also send to Lexington Medical
22 Center. And any referrals that we would need to
23 send out to physicians for noncardiac issues, we
24 would also try to keep those in the Lexington
25 community.

1 So, basically, we also covered the hospital,
2 which was part of that rotation. So we had the
3 office and the hospital. So as you can imagine, it
4 was a very grueling job for all of us.

5 Q Can you describe sort of the activity level? I
6 mean, you mentioned grueling, why was it grueling?

7 A Well, I think that we have to see basically all
8 of the patients that were admitted from the night
9 before, cover all of those patients on rounds, as
10 well as do our office, as well as do procedures, as
11 well as bring interventional procedures downtown for
12 us to complete at one of the hospitals that had an
13 interventional cath lab, so it was a long day. I
14 mean, many times we worked till ten o'clock at night
15 on a routine basis.

16 Q And what's a heart catheterization?

17 A A heart catheterization is simply a test where
18 we place a catheter in the femoral artery or the
19 radial artery or brachial artery to get access to
20 the heart. And we take pictures of the arteries
21 that feed the heart to see if there are any
22 potential blockages. We can also look for other
23 problems such as blocked heart valves, holes in the
24 heart, leaky valves so we can do a lot of diagnostic
25 type procedures through a heart catheterization.

1 It's really a central feature of cardiology in this
2 day and age.

3 Q How does a catheterization lab relate to what
4 you just described?

5 A A catheterization lab is the place where these
6 procedures take place. So we would admit the
7 patient to the catheterization laboratory and we'd
8 do the heart catheterization there and then we would
9 make the diagnosis. Now, if there was a blocked
10 artery, generally if they were at Lexington and it
11 was a nonemergent case, we would transfer that
12 patient downtown to be taken care of mostly at the
13 Palmetto Richland Hospital, but also at the
14 Providence Hospital occasionally as well, but that
15 patient would require a blocked -- opening of a
16 blocked artery with a balloon and a stent. And
17 that's what an interventional cardiologist does.

18 Q And if it were nonemergent, or in layman's
19 terms perhaps, nonemergency, did you have to
20 transport them?

21 A No. Depends on how unstable the patient was.
22 If they were relatively stable and they weren't
23 having what we call angina, which is ongoing chest
24 pain from a blocked artery, we would keep them and
25 then transfer them, but if they didn't have those

1 issues, we would then send them downtown so they
2 could have an elective interventional procedure.

3 Q And do you have a feeling for about how many of
4 the heart catheterizations at Lexington Medical
5 Center were done by the Columbia Heart Clinic,
6 Lexington office?

7 A Yes. We did between approximately one half to
8 two-thirds of the procedures in the lab. I was the
9 director of the catheterization lab as well, or I
10 still am. And so that's, I would say, about the
11 right number. I'm not sure exactly, though.

12 Q Okay. When you say director, you're talking
13 about the Lexington Medical Center lab?

14 A Yes. I'm director of the cardiac
15 catheterization laboratory at the Lexington Medical
16 Center.

17 Q And have you been the director of that lab as
18 long as it's been in existence?

19 A Yes. For the last seven years, I've been the
20 director of the catheterization laboratory.

21 Q And were you involved in setting that up?

22 A Yes. I designed the lab, the outlay, the --
23 where the bathrooms are, where the call rooms are,
24 where the procedure room is. We purchased the
25 equipment. There's actually quite a bit that goes

1 into it as far as buying the radiological equipment
2 and all of the other issues involved. I was also
3 involved in training and staff development and that
4 sort of thing.

5 **Q** How did you get selected by Lexington Medical
6 Center to do that?

7 **A** I think they did a -- at that time, they did an
8 interviewing process where they interviewed
9 cardiologists from the entire city. And we actually
10 had a personality interview. And I went through a
11 fairly grueling procedure and process and they chose
12 me.

13 **Q** Were there some issues with getting support and
14 assistance from the Richland offices for the
15 activity that was going on at the Lexington office?

16 **A** Yes. I think that the doctors downtown were
17 very resistant and reluctant to come out to
18 Lexington probably because they had practices
19 downtown. It was a lot more work because we had
20 rounds at the hospital and the office and we had to
21 do our interventional procedures at two different
22 hospitals. It was a lot more work and a lot more
23 effort. So it was a great deal of reluctance and
24 resistance.

25 Dr. Jones had proposed before we had left

1 trying to get a nurse practitioner to help us in the
2 hospital to see these patients, but that was turned
3 down, but Dr. Jones I know was continuing to persist
4 in that area. But that's probably the reason that
5 was difficult to get people out there. But no one
6 really had a strong desire or interest in working in
7 Lexington probably because of the work loads and the
8 demands on your family, but also many of them just
9 -- it was just more effort.

10 Q Were there any nurse practitioners at the
11 Lexington office at Columbia Heart Clinic?

12 A Yes. We had an arrangement that two of the
13 employees that were mentioned by Mr. Babcock
14 earlier, Grace Kludo and Phyllis Williamson, Phyllis
15 has been my nurse practitioner for about eight to
16 ten years, but the arrangement was with Columbia
17 Heart Clinic that we would have to pay them fully
18 from our salary and it would be taken -- it would be
19 run through the practice. Although, in actuality,
20 we really paid for those nurse practitioners.

21 Q How did they do that? They deducted it from
22 your --

23 A They deducted it directly off of our salary and
24 that was both Grace Kludo, as well as Phyllis
25 Williamson.

1 Q When you decided to leave Columbia Heart
2 Clinic, who did you tell your decision?

3 A I think I first told Kevin and then I told Dr.
4 Ben Jones. And when I told Kevin, he was a little
5 surprised, but he thought maybe I should just
6 reconsider, you know, don't act emotionally, just
7 sit down, think about it, take your time. But I
8 knew right away the writing was on the wall when
9 that happened to Jenny and there was really no going
10 back. But I agreed with Kevin. I said, I'll take
11 my time, I'll reconsider, I'll think about it.

12 So I did and then I went back to Kevin a few
13 days later and said, Kevin, we're definitely going
14 to have to leave. It's the right thing for us to
15 do. And I told Ben as well. We had dinner one time
16 and we talked about it. And I also told Ben that I
17 had to leave as well because of the situation. And
18 I think Ben was very understanding because I asked
19 Ben actually if this happened to your wife, what
20 would you do? He said, I would do the same thing.
21 So I think, you know, I think we confided on that
22 issue and so -- and that's really the two people I
23 had told at that time.

24 And then I went back to Kevin. And when I went
25 back to Kevin, he said, you know, I know that Ben is

1 going to be moving downtown part-time. He's already
2 discussed that with us that he's going to be the
3 President elect of the group. He's not going to be
4 able to really be there full-time and you're going
5 to leave, I have to leave, too. And that's how
6 Kevin left as well.

7 Q - You used we a couple of times, like we told Ben
8 Jones. You're referring to you and Kevin or you and
9 Jennifer?

10 A Jennifer and myself.

11 Q Just to make that clear.

12 A Jenny and myself, yes.

13 Q Did you do anything with regard to your
14 contract before you left? Something -- did you do
15 anything in consideration of any concern that you
16 might have about the contract, the employment
17 agreement?

18 A Yes. Kevin and I, at that time, decided to
19 seek legal advice, maybe a little too late, I don't
20 know, but we decided to seek legal advice and see,
21 from experienced lawyers in the field of employment
22 law, what they thought about the noncompete
23 agreement. We spoke with a total of, I think, three
24 or four lawyers. Two definite -- three -- two
25 lawyers we actually formally received opinions from

1 and the third was a more casual one. And after
2 conferring with these lawyers, we felt that the
3 noncompete was not enforceable at that time.

4 Q And did you have any feeling or understanding
5 prior to that time as to whether or not it was
6 enforceable?

7 A I had a gist of the feeling that it wasn't
8 primarily because of what had transpired in the
9 development of the noncompete in that we were told
10 that we needed to be paid valuable consideration at
11 the time of the noncompete, which we never were.

12 Q Okay. Who said that?

13 A It was Mr. David Summers (sic), the lawyer who
14 had written this contract.

15 Q Did he say anything else about the
16 enforceability of the agreement?

17 A He also said that they're difficult to enforce.

18 Q Did you read, before signing, all of the
19 language in Plaintiff's Exhibit 1?

20 A Truthfully, since I'm under oath, no.

21 Q Do you recall looking at the, it was mentioned
22 in the opening, the reasonableness provisions of
23 that contract?

24 A Yes.

25 Q Do you have anything in your background or

1 education that would let you know whether the
2 agreement and the restrictions in the agreement were
3 reasonable as a matter of law?

4 A No.

5 Q And before signing the agreement, did you
6 consult with anybody on that point?

7 A No, I did not.

8 Q And by anybody, I mean a legal professional?

9 A No.

10 Q Prior to your departure, did you have any
11 discussions with Columbia Heart Clinic about
12 lessening the impact of the departure or how a
13 transition would be handled, those types of
14 discussions?

15 A Yes. We actually formally submitted to
16 Columbia Heart a proposition that we had volunteered
17 to basically assume the lease at Lexington Medical
18 Center, as well as purchase all of the furniture and
19 equipment. We did this primarily because we knew
20 that Ben had decided to become President and would
21 be there part time, Kevin was going to leave, I was
22 going to leave and there was very little interest in
23 a lot of the doctors in coming over to work in
24 Lexington. So we felt that in order to lessen the
25 impact on Columbia Heart, we offered to purchase

1 the, you know, the equipment and furniture, as well
2 as take over the lease.

3 Q Okay. And what was the response to the offer?

4 A They rejected the offer. In fact, Dr. Schulze
5 stated in his deposition --

6 MR. BABCOCK: Objection to that, Your Honor,
7 the testimony from another witness in a deposition
8 in this case.

9 MR. THOMPSON: I agree.

10 THE COURT: You can't say -- that's pitting a
11 witness. Go ahead, ask your next question.

12 BY MR. THOMPSON:

13 Q What ultimately happened to the Lexington
14 office of the Columbia Heart Clinic?

15 A They, as far as I know since I wasn't really
16 privy to all of the details, but I did see their
17 roster, which I had actually sent to me, of the
18 physicians and they basically had no -- they did not
19 assign any physician primarily to the office. They
20 just had patients who -- I'm sorry -- just had
21 physicians who would rotate through to see the
22 patients as they came in. And then I received a
23 letter from Dr. Jones, which is sent to the entire
24 medical community, stating that they were going to
25 close both the Providence office, as well as the

1 Lexington office on November 6th of that year that
2 we left.

3 Q Okay. Do you recall what the reasons given was
4 for closing the Providence and the Lexington
5 offices?

6 A They said that they were going to consolidate
7 their practice and move everything downtown, that
8 the patients would be able to receive the same
9 quality of care, but they would have to go to see
10 them at the, I believe, it's at 8 Medical Park
11 Office.

12 Q And are Columbia Heart Clinic physicians,
13 cardiologists still coming out to the Lexington
14 Medical Center?

15 A I see them -- I do see them occasionally, yes.

16 Q And so -- but how is their presence after
17 closing the office, how does the presence of the
18 physicians differ from how it was when they had an
19 open office where you and Dr. Baugh and Dr. Jones
20 were present?

21 A They don't seem to be involved in the -- for
22 example, I'm director of the catheterization lab so
23 I see what goes on with the, you know, the
24 procedures. It seems that most of the procedures
25 that -- patients they admit, they transfer downtown

1 for procedures to be done downtown rather than
2 keeping them at the Lexington cath lab.

3 Q Okay. And any other difference in sort of the
4 presence that Columbia Heart Clinic now has in
5 Lexington County?

6 A I think it's a bit of an afterthought for them
7 in some ways right now, yes.

8 Q And how about in terms of them being present,
9 speaking to referring physicians and being active in
10 the Lexington Medical Center community, those types
11 of things?

12 A No. They don't seem to be active. In fact,
13 they were invited to a staff meeting last week
14 regarding echocardiography and they declined to
15 attend.

16 MR. THOMPSON: If I may have a moment, Your
17 Honor?

18 THE COURT: Yes, sir.

19 (Pause.)

20 MR. THOMPSON: Just a couple more questions.

21 BY MR. THOMPSON:

22 Q Regarding the wage payment claim, what
23 compensation, at least according to you, were you
24 promised but did not receive?

25 A I did not receive the 161,000 dollar accounts

1 receivable. I did not receive my directorship fees
2 as director of the cardiac catheterization
3 laboratory at the Lexington Medical Center, which
4 was \$4,700. And I did not receive \$8,000 for my
5 final paycheck.

6 Q Regarding the directorship fees, do you know
7 how far back that goes?

8 A Yes. It goes over a period of two years, or
9 year and a half I would say.

10 Q And how would you normally be paid directorship
11 fees?

12 A They would pay it, I think, quarterly. I think
13 that's how it would be done.

14 Q You mentioned the final pay you felt you were
15 due. What time period would that be for?

16 A The final pay would be for the last several
17 days that I worked as an employee.

18 Q So you received pay twice a month, correct?

19 A Right. I didn't get the full paycheck for the
20 last seven to eight days.

21 Q And the first paycheck covers what time period,
22 the first paycheck of the month?

23 A The first paycheck would cover two weeks and
24 the second paycheck would cover the second two
25 weeks.

1 Q And you worked until the 21st?

2 A The 21st, correct. And I was paid until the
3 15th, I believe, or 14th.

4 MR. THOMPSON: No other questions.

5 THE COURT: Cross?

6 MR. BABCOCK: If it please the Court.

7 THE COURT: Yes, sir.

8 CROSS-EXAMINATION

9 BY MR. BABCOCK:

10 Q Doctor, just to clarify, your office is on the
11 Lexington Medical Center campus, correct?

12 A Correct.

13 Q But you don't live in Lexington, do you?

14 A I live in Richland County.

15 Q You live in, I think, Kings Grant?

16 A Yes.

17 Q As does Dr. Baugh?

18 A Correct.

19 Q So there's no problem with somebody living over
20 in Richland County and coming and working in
21 Lexington County is there?

22 A No, depends on where you live and the traffic
23 pattern.

24 Q You've been doing it for a number of years,
25 correct?

1 A Correct.

2 Q Now, as I understand it, you've got various
3 criticisms with the 2004 employment agreement you
4 signed. You criticized the 20 mile radius?

5 A I'm not criticizing anything, I'm sorry.

6 Q You're not criticizing or you're not -- let me
7 rephrase. You object to the 20 mile radius; is that
8 correct?

9 A Would you rephrase your question? Let me make
10 sure I understand.

11 Q Sure. We're here about the covenant and a
12 contract that you signed in 2004, which has been
13 marked, I believe, as Plaintiff's Exhibit 1. Do you
14 have it in front of you?

15 A Yes, I do.

16 Q And the issue before the Court involves the
17 covenant and certain restrictions in the covenant.
18 You understand that, right?

19 A Yes.

20 Q And one of the issues -- I want to make sure we
21 understand exactly what it is you're objecting to
22 within the restrictive covenant; fair enough?

23 A Certainly.

24 Q One of the issues in the restrictive covenant
25 is the area where you can't practice; you understand

1 that?

2 A Yes.

3 Q And that's the 20 mile radius?

4 A Correct.

5 Q And so are you objecting to that 20 mile

6 radius?

7 A That 20 mile radius is effectively, for what
8 the type of work I do, is maybe a 60, 70, 80 mile
9 radius.

10 Q All I want to know, Doctor, is whether you're
11 objecting to it --

12 A I'm objecting to it.

13 Q -- so the answer is yes?

14 A Yes, sir.

15 Q And are you objecting to the way the practice
16 of cardiology was defined? Are you objecting to
17 that?

18 A Yes.

19 Q Now, are you objecting to the one year time
20 period?

21 A No.

22 Q But you're objecting to the amount that you
23 would have to pay to compete; is that fair? You
24 don't think you should have to pay it, do you?

25 A Well, I think that if the contract is not

1 valid, I shouldn't have to pay it, yes.

2 Q If the contract were valid, do you think the
3 amount's a fair amount?

4 A No.

5 Q Why is that?

6 A It doesn't fairly reflect a true penalty.

7 Q What would truly reflect a true penalty?

8 A I'm not a lawyer.

9 Q All right. So you just object to it, but you
10 really don't know why, you just think it's too big?

11 A Yes.

12 Q Okay. And you object to not getting your
13 account's receivable; is that right?

14 A Correct.

15 Q And, finally, you weren't paid the \$5,000 a
16 month that you would have gotten if you hadn't
17 competed, so I guess you don't have a position one
18 way or another on that?

19 A I never received a penny and I never will.

20 Q All right. But you would have if you hadn't
21 competed, wouldn't you?

22 A I don't think I understand the question.

23 Q Sure. The question is simple. If you had left
24 Columbia Heart and had not gone into competition
25 within the area that we're talking about for a

1 period of one year, you would have gotten paid the
2 5,000 a month. That's what the contract says,
3 doesn't it?

4 A That's what it says, yes.

5 Q Okay. Fine. Now, let's look at your previous
6 agreement, I want to start not with the 2004, but
7 with the 1997 agreement that you signed. And as I
8 understand it, while you had two contracts with
9 previous groups, the 1997 contract was the first
10 that you had with Columbia Heart; is that right?

11 A With the Columbia Heart Clinic, yes.

12 Q Let me show you --

13 A It was the previous one with the Columbia
14 Cardiovascular one year before.

15 Q Right. I understand. I'm saying you had
16 previous contracts, I think, two with another group,
17 correct?

18 A Yes. We have a total of four.

19 Q I want to get beyond the first two and
20 concentrate on the last two; fair enough?

21 A Certainly.

22 Q Is that a copy of the contract that you signed
23 in 1997 with Columbia Heart?

24 A I haven't seen it in a while, but it looks like
25 it probably is. Let me see if it's a signed copy.

1 Yes, it is.

2 Q We had it at your deposition; you remember
3 that?

4 MR. BABCOCK: Your Honor, at this time, we
5 would offer the 1997 contract between Dr. Feldman
6 and Columbia Heart.

7 THE COURT: Any objection?

8 MR. THOMPSON: No objection.

9 THE COURT: Mark it in the record, please.

10 (Defendant's Exhibit Number 2, Barry
11 Feldman's 1997 contract, admitted into evidence.)

12 BY MR. BABCOCK:

13 Q Now, I want to talk about this contract briefly
14 because this was the contract that was enforced when
15 you signed -- or up to the time you signed the 2004
16 contract; agreed?

17 A Correct.

18 Q Now, the compensation is discussed on section
19 1.1, if you look at your copy --

20 A May I have a copy of it?

21 Q I'm sorry. You certainly should.

22 A Thank you. I'm sorry, what section?

23 Q One point one.

24 A Okay.

25 Q And I want you to -- do you have Plaintiff's

1 Exhibit 1 handy, also?

2 A Yes.

3 Q Just keep that handy in a minute. Look in your
4 1997 contract, the compensation that you would be
5 paid is reflected on exhibit A. And there's an
6 exhibit A attached, correct? Look at your 1997
7 contract.

8 A 1997?

9 Q 1997.

10 A Exhibit A?

11 Q Starts with a hand drawn chart.

12 A Okay. Yes.

13 Q We won't go through that specifically, but that
14 chart has a number of pages after it and there were
15 different ways to calculate your compensation with
16 different pots depending upon different procedures?

17 A Okay. Yes.

18 Q There was some things you get a hundred percent
19 for, some things would be split on different
20 percentages between you and the group. That was the
21 way you got your compensation, correct?

22 A It's been a long time, but correct.

23 Q All right. And this method of compensating the
24 doctors continued after you'd signed your 2004
25 contract, correct?

1 A I think there were some modifications possibly
2 in those ratios, but that's the similar idea, yes.

3 Q That's the general concept that was done
4 because if you look at the 2004 contract, that
5 didn't actually have the whole chart attached, did
6 it?

7 A No, it didn't.

8 Q All right. But you didn't get a new
9 compensation package in 2004. The way you did it
10 continued on after you signed your 2004 agreement?

11 A I'm not sure I understand your question.

12 Q All right. You had a formula for getting
13 compensation and that continued after you signed
14 your 2004 contract?

15 A Yes, it did.

16 Q All right. Now, let's look at on your 1997
17 contract at section 4.5(f).

18 A (Witness complies.)

19 Q And as you look -- Doctor, if you look at
20 Article 4 in general, it addresses different events
21 that can occur. One section, prior section, talks
22 about death, if you look about that, and one section
23 talks about resignation. And this section talks
24 about the other ways you can leave with cause or
25 without cause. Look at the top paragraph (f).

1 A (Witness reviewing document.)

2 Q If you want, take a second to look at all of
3 Article 4. I don't want you to feel like you're
4 being confused here.

5 A That's fine. It's very complicated for me as a
6 cardiologist, so I'll try my best.

7 Q Okay. Well, let's talk about that for a
8 minute. I realize you're not a lawyer, but you went
9 to undergraduate school, didn't you?

10 A Yes.

11 Q Where did you graduate?

12 A University of Massachusetts.

13 Q And when did you get your degree from UM?

14 A 1979.

15 Q And then you went to med school. When did you
16 graduate from med school?

17 A 1983.

18 Q And then you've had your residency and
19 internships and fellowships since then?

20 A Correct.

21 Q You're not coming in here telling us you're not
22 a well-educated individual, are you?

23 A I'm educated in certain areas, but not in this
24 area.

25 Q I know you're not a lawyer. I know you didn't

1 have a law school that you attended or you didn't
2 get a legal degree. I understand that.

3 A Good.

4 Q But you're a physician who's been board
5 certified in an area and you understand how to read
6 documents.

7 A I can read documents, but not understand the
8 full legal implications of them.

9 Q Didn't say that you were a lawyer, but you know
10 if you read a document that's got a legal question,
11 you can call a lawyer, you know that?

12 A Yes.

13 Q And you've done that on occasion, haven't you?

14 A Not till recently.

15 Q Well, you have, though?

16 A Just recently.

17 Q Okay. Now, looking at section four, it deals
18 with what you get if you leave with cause or without
19 cause. One thing you get is the salary earned or
20 accrued. Now, that says death and we're going to
21 talk about this with David Summer later. The death
22 section is actually earlier on, that's actually a
23 typographical error there, that's if you leave in
24 advance with cause or without cause. But you get
25 your salary that's earned or accrued under that

1 contract, correct?

2 A Yes.

3 Q And you also get a percentage of your accounts
4 receivable, correct?

5 A Yes.

6 Q Now. If you go to section 4.5(h), have you got
7 that section?..

8 A Yes, sir.

9 Q All right. That says that notwithstanding any
10 other provision in this agreement in the event
11 physician continues or commences the active practice
12 of medicine in the field of cardiology within
13 Richland or Lexington Counties, South Carolina, at
14 any time during the 12 month period immediately
15 following the termination, for any reason, with or
16 without cause, of this agreement, then physician
17 shall forfeit any moneys payable to physician
18 pursuant to section 4.5 following physician's
19 continuation or commencement of the practice of
20 medicine in violation of section 4.5(h). The
21 provisions of this section 4.5(h) will survive the
22 expiration or termination of this agreement for any
23 reason. That's what that says, doesn't it?

24 A Yes.

25 Q So that was the situation under your previous

1 agreement?

2 A Uh-huh.

3 Q If you left and competed within the one year
4 period in Richland or Lexington County, you lost
5 your A/Rs and you lost your unpaid but accrued
6 salary, correct?

7 A That's if this was enforceable.

8 Q That's the 1997 agreement?

9 A I don't know that it's enforceable.

10 Q Well, you didn't bring any action to attack
11 that agreement, did you?

12 A It wasn't an issue.

13 Q Pardon me?

14 A It wasn't an issue at the time.

15 Q All right. So it's only when things become an
16 issue that you would want to get information or find
17 things out; is that right?

18 A Well, I practice cardiology and I spend the
19 time seeing patients. I really don't study these
20 contracts every night and, you know, go over every
21 detail and every letter, which is probably, I agree,
22 not the right thing for an educated person to do.

23 Q And nobody's suggesting you do that every
24 night, but how about before you sign it? You want
25 to look and understand what you're signing, don't

1 you?

2 **A** I should have.

3 **Q** Because if you look at 4.6, and this is your
4 1997 agreement, what does 4.6 have to say? It says,
5 Acknowledgment of reasonableness. Physician
6 acknowledges that the forfeiture described in
7 section 4.5(h) is intended as restitution for the
8 damages which Medical Group will suffer as a result
9 of competition by physician with Medical Group.
10 Physician further acknowledges that such forfeiture
11 is fair and reasonably required for the protection
12 of Medical Group. Did I read that correctly?

13 **A** You read it correctly, but I never read it
14 before I signed it.

15 **Q** So is it your position that because you didn't
16 read it, you're not bound by the terms?

17 **A** No.

18 **Q** Okay. You recognize that when you signed that
19 document, you were bound by the terms?

20 **MR. THOMPSON:** Object, Your Honor.

21 **THE COURT:** Yes, sir. What's your objection?

22 **MR. THOMPSON:** It's calling for a legal
23 conclusion, that's why we're here. Of course, we're
24 talking about the '97 agreement not the one that's
25 supposed to be an issue in this case, but he's

1 basically asking the witness is it binding or not.

2 THE COURT: You can ask the question and he can
3 answer it any way he chooses.

4 THE WITNESS: I don't know.

5 BY MR. BABCOCK:

6 Q Okay. But you would agree with me that
7 normally when you sign a contract, you understand
8 that you're bound by that contract? You understand
9 that normally, don't you?

10 A I don't know.

11 Q You don't know that either?

12 A (Witness shook head.)

13 Q Okay:

14 A Because sometimes contracts may not be legal
15 when you sign them.

16 Q I said normally. You normally think the
17 contracts you sign are legal, don't you?

18 A Sometimes they aren't.

19 Q Normally?

20 A I haven't had that much experience.

21 Q Okay. Well, let's go over your 2004 agreement.
22 Just incidentally, on your 1997 agreement, did you
23 consult with an attorney for that?

24 A No, sir.

25 Q Now, on the 2004 agreement, which I believe was

1 marked as Plaintiff's Exhibit 1.

2 A The current contract?

3 Q Yes.

4 A Yes.

5 Q And that's got your signature on it, right?

6 A Correct.

7 Q Just like the 1997 did?

8 A Yes, I checked earlier.

9 Q Now, let's go over to Article 5 section 5.5?

10 A (Witness complies.)

11 Q Do you see that?

12 A Yes.

13 Q Now, that's acknowledgment of reasonableness.

14 That's the heading, isn't it?

15 A Yes.

16 Q And when you signed -- or what you signed in
17 this document said, Physician, that's you, has
18 carefully read and considered the provisions of this
19 agreement and agrees the restrictions set forth
20 herein, particularly those in sections 5.1, 5.2, 5.3
21 and 5.4 together with the remedy set forth in
22 Article 4, are fair and reasonably required for the
23 protection of Medical Group. That's what it says,
24 doesn't it?

25 A Yes, sir.

1 Q And that's what you signed, didn't you?

2 A Yes, sir.

3 Q And we're going to look at 5.1 and 5.2 five
4 point -- well, let's go ahead and do that now so you
5 can see what it is you were talking about. Let's
6 look at 5.1(a). This is a restrictive covenant
7 section. Have you got it, Doctor?

8 A Yes.

9 Q And what that says is the parties stipulate
10 that Medical Group is engaged in the practice of
11 medicine in the field of cardiology, the business,
12 in the territory as defined in section 5.2 below.
13 That's what it says, correct?

14 A Yes.

15 Q I want to understand some of your earlier
16 testimony. You were asked a question on direct
17 examination, if you weren't a cardiologist, what
18 other things you could do. Do you remember that?

19 A Yes, I do.

20 Q And one of the things you said was a
21 pharmaceutical rep?

22 A I didn't say rep. I said a salesperson
23 involved in marketing.

24 Q All right. So that's not the practice of
25 medicine in the field of cardiology, is it?

1 A No, but further on where it does mention it, it
2 does -- there's a conflict.

3 Q All right. Well, we're going to get that
4 further on, but I'm just looking at this start here.

5 A Okay.

6 Q And the practice of medicine in the field of
7 cardiology, that wouldn't stop you from doing
8 research, would it?

9 A No, sir.

10 Q Or it wouldn't stop you from teaching, would
11 it?

12 A No.

13 Q Or it wouldn't stop you from being an
14 administrator?

15 A No.

16 Q All right. Let's go over to 5.1(b) and that's
17 the 12 month period of time, but as I understand,
18 that's not an area that you are objecting to today;
19 is that correct?

20 A Correct.

21 Q So let's move on to 5.2 sub one.

22 A (Witness complies.)

23 Q Now, we had the practice of medicine in the
24 field of cardiology, that's the business. Now,
25 compete means directly or indirectly, on his own

1. behalf or on behalf of any other person, other than
2 at the direction of Medical Group and on behalf of
3 Medical Group: Organizing or owning any interest in
4 a business which engages in the business, practice
5 of medicine in the field of cardiology and the
6 territory; engaging in the business, the practice of
7 medicine in the field of cardiology and the
8 territory; or assisting any person as director,
9 officer, employee or agent, consultant, lender,
10 lessor or otherwise to engage in the business of
11 practice of medicine in the field of cardiology in
12 the territory.

13 Now, is this the other section you wanted to
14 talk about a minute ago?

15 **A** You ask me the questions, then I'll try to
16 answer your --

17 **Q** Okay. Well, we were just talking a minute ago
18 about where it defined practice of medicine in the
19 field of cardiology and I want to know how this
20 provision will stop you from being a pharmaceutical
21 salesperson?

22 **A** Because it would -- it basically says I can't
23 deal with anything that even related to nonpatient
24 care as it relates to the field of cardiology.

25 **Q** Well, it says, Organizing or owning any

1 interest in a business which engages in the
2 business, which is the practice of medicine in the
3 field of cardiology. That's not selling
4 pharmaceuticals, is it?

5 A Well, marketing is not necessarily selling
6 pharmaceuticals.

7 Q We're talking about selling pharmaceuticals
8 right now.

9 A Okay.

10 Q All right. And that has nothing to do with
11 organizing or owning any interest in a business
12 which engages in the field of medicine in the
13 practice of cardiology, does it?

14 A Well -- I couldn't be in practice -- I don't
15 see how I could be a manager of the cardiology
16 practice.

17 Q I didn't say that. We're talking about a
18 pharmaceutical rep. That's what you -- as I
19 understand it, you say you can't even be a
20 pharmaceutical rep under this agreement; is that
21 your position?

22 A I would like to look at it more carefully.

23 Q Sure. Take all your time.

24 A (Witness reviewing document.)

25 There are some drugs that are cardiovascular

1 . drugs that potentially would fall into that
2 category.

3 Q I want to understand your position. Is it your
4 position that if you were a pharmaceutical salesman
5 even with cardiology drugs, that would fit under
6 that category?

7 A I don't know.

8 Q Okay. And would the answer be the same for
9 doing research or teaching that you don't know?

10 A No. I think research would definitely be --
11 would definitely be restricted.

12 Q Well, show me where. A, B and C, let's take
13 them one by one.

14 MR. THOMPSON: I object, Your Honor. He's
15 trying to answer the question.

16 BY MR. BABCOCK:

17 Q Okay. Go ahead and answer the question.

18 A You know, many cardiology groups do do
19 research, clinical research, and I wouldn't be able
20 to conduct that.

21 Q Does Columbia Heart do research?

22 A Yes.

23 Q All right. And that's the practice of
24 medicine?

25 A Yes.

1 Q How about teaching at the university, is that
2 the practice of medicine?

3 A Yes. Columbia Heart teaches at the university.

4 Q I'm asking -- that's not what I'm asking. I'm
5 asking where teaching at the university is covered
6 under these categories?

7 A It is.

8 Q Where?

9 A I would say engaging in the business in the
10 territory.

11 Q Engaging in the business, and we already saw
12 business was the practice of medicine in the field
13 of cardiology.

14 All right. Doctor, this section, as we already
15 said, you found -- or when you signed the document
16 and said it was reasonable?

17 A I didn't read it.

18 Q But that's what it says, isn't it?

19 A That's what it says now, yes.

20 Q That's what it says then?

21 A That's what I see now.

22 Q Now, let's look at 5.2 sub three, Territory.
23 Have you got it, Doctor?

24 A Yes, sir.

25 Q Territory means the area within a 20 mile

1 radius of any Medical Group office at which
2 physician routinely provided service during the year
3 prior to the date of termination or expiration of
4 this agreement... Did I read it correctly?

5 A Correctly.

6 Q And you left Columbia Heart on April 21st, I
7 believe was your last day, 2006?

8 A Correct.

9 Q So this one year period will go from April 21,
10 2005 to April 21, 2006. And during that time, the
11 office -- Medical Group office at which you
12 routinely provided services was Lexington, wasn't
13 it?

14 A Yes. Although, occasionally, I would also go
15 to the Richland office and fill in at different
16 places.

17 Q But Lexington's the office where you routinely
18 practiced?

19 A Well, yes. Some of the other practice of
20 outlying areas didn't have offices, they actually
21 worked in hospitals.

22 Q Right, but those other areas had clinics not
23 offices?

24 A Clinics in the hospital.

25 Q And during the year immediately prior to this,

1 the only clinic you went to was Winnsboro; is that
2 correct?

3 A Occasionally, I don't remember, but I believe
4 I've been up to Clinton and I also -- I think
5 Clinton.

6 Q I'm not asking occasionally. I'm asking in the
7 year immediately before?

8 A I don't remember.

9 Q Winnsboro you did go to and you went two times
10 during that year before. Are you aware of that?

11 A No.

12 Q You wouldn't disagree with me, would you?

13 A Never.

14 Q Oh, good. Now, let's go over to 5.4.

15 A (Witness complies.)

16 Q That's the remedy section. And, if we look at
17 5.4(a), what that starts by saying is that in the
18 event that physician, at his or her option, desires
19 to practice in violation of the provisions.

20 So what we've got here is a situation where you
21 got a choice. You can leave and stay consistent
22 with the provisions and not have to pay this money,
23 or you had the choice to leave and stay with and be
24 in contravention of the terms of the agreement and
25 pay the money. That was your choice, correct?

1 A Correct.

2 Q And then it goes on to give the amount of money
3 that would have to be paid, correct?

4 A Correct.

5 Q And, again, under your acknowledgement of
6 reasonableness, what the words on the document that
7 you signed said was that you found that, in section
8 5.5, to be fair and reasonably required for the
9 protection of Medical Group. That's what the
10 document says?

11 A I signed the document.

12 Q Yes. That's what the words say, correct?

13 A I signed the document.

14 Q And that's what the words say, correct?

15 A Yes, uh-huh.

16 Q Now, the words are also in section 5.4(b).
17 Let's look at that.

18 A (Witness complies.)

19 Q Those words per sentence says that the parties
20 agree that a breach by a physician of any of the
21 provisions of section 5.3 of this agreement would
22 cause irreparable harm to the Medical Group --
23 irreparable damage, I'm sorry, to the Medical Group.
24 That's what the words say there, too?

25 A Yes.

1 Q Now, you had talked a little bit earlier about
2 the consideration section. Let's look at what the
3 words say there and that's 4.5(1).

4 A 4.5?

5 Q 4.5.

6 A Yes.

7 Q Now, what this says is that notwithstanding
8 anything to the contrary stated herein, in addition
9 to any other amounts payable upon termination, in
10 addition, physician should be paid \$5,000 per month
11 for each of the 12 months following termination so
12 long as the physician is not in violation of Article
13 5 of this agreement, correct?

14 A Correct.

15 Q All right. So what that said was if you left
16 and didn't compete for the period of one year, you'd
17 get \$5,000 a month, correct?

18 A Correct.

19 Q And if you -- and that's what the contract
20 says. Now, that provision was not in the previous
21 employment agreement, was it?

22 A Correct.

23 Q This was the new -- a new provision that was
24 added with this agreement?

25 A Yes.

1 Q Let's look over at 4.5(f).

2 A Yes.

3 Q We're going back now, Doctor, to the issue
4 concerning accounts receivable and salary or accrued
5 but unpaid -- salary earned or accrued but unpaid.

6 Now, this section of the document is a lot like the
7 section we looked at in your previous agreement?

8 A I'll have to look.

9 Q Sure. That's in your 1994 agreement over on
10 4.5(f).

11 A It looks like they're identical.

12 Q And, in fact, it's even got the same typo we
13 looked at earlier on the death issue that the other
14 one had, doesn't it?

15 A With the semicolon.

16 Q No. The word death, this section doesn't deal
17 with death. We talked about that earlier.

18 A Oh, I see, okay.

19 Q That's got the same word here.

20 A Okay.

21 Q Now, this section, like your previous
22 agreement, would have given you, if you left under
23 these sections, salary earned or accrued but unpaid
24 and the accounts receivable formula, correct?

25 A Correct.

1 Q But like the previous agreement, if you
2 competed, you wouldn't get it. Let's look over at
3 4.5(1).

4 A (Witness complies.)

5 Q In the event that physician violates Article 5,
6 no amount shall be paid pursuant to this section and
7 any amounts previously paid to physician pursuant to
8 this section shall be refunded to the Medical Group.

9 So what we've got is a similar section for your
10 accounts receivable but the noncompetition area,
11 which was Richland and Lexington, is now the 20 mile
12 radius, correct?

13 A In which section is that? I'm sorry. You said
14 (1), I don't see that there.

15 Q That's not there, that's in the -- we looked at
16 this earlier. The 20 mile radius is in the 2004
17 agreement; you remember that?

18 A Yes.

19 Q And the previous agreement had Richland and
20 Lexington County, didn't it?

21 A I'd have to look at it again, but I --

22 Q Do you want to look at it again?

23 A Sure, be happy to.

24 Q That's in section 4.5(h) of your 1997 document.

25 A Yes.

1 Q Okay. So we changed Richland and Lexington
2 County to 20 mile radius, like I said.

3 A Okay.

4 Q And, again, we won't go through this again, but
5 section 4.6 has the acknowledgment of reasonableness
6 that we talked about earlier, correct?

7 A I see that here as well, yes.

8 MR. BABCOCK: Your Honor, may we approach?

9 THE COURT: Sure.

10 (Whereupon, a bench conference was held off
11 the record.)

12 BY MR. BABCOCK:

13 Q Now, let's go back to July of 2004 and the
14 period immediately before signing that agreement.
15 And I think the date on the 2004 agreement is July
16 15, 2004?

17 A Yes, sir, that's correct.

18 Q Now, I think you said people asked you on a
19 couple of occasions about getting the agreement
20 signed. Did I understand your testimony correctly?

21 A Yes.

22 Q And that was part of a process. There were
23 various meetings where the doctors met and talked
24 about the concept of this new covenant, new
25 agreement; is that right?

1 A I don't remember a lot of meetings.

2 Q But you remember some?

3 A I just remember one meeting.

4 Q And that was a meeting where the lawyer,
5 Mr. Summer, came and talked to y'all?

6 A It wasn't -- I think it was some committee
7 meeting, but I happened to be in the Richland office
8 that day so I just popped down to hear what he had
9 to say.

10 Q And I think, as you told me in your deposition,
11 you were there for Mr. Summer's presentation?

12 A Yes. That's what he was presenting, I guess,
13 at that meeting, yes.

14 Q So you were there to be able to ask any
15 questions of him that you wanted to ask?

16 A Yeah.

17 Q And you had an opportunity, if you wanted, to
18 get a lawyer to review the document for you, didn't
19 you?

20 A Yes.

21 Q But for whatever reason, you chose not to; is
22 that right?

23 A It wasn't a conscious choice.

24 Q So you just didn't think about it one way or
25 another?

1 A I didn't think about.

2 Q But you did read the entire document, didn't
3 you?

4 A No.

5 Q It's your testimony that you did not read the
6 entire document?

7 A Yes.

8 (Pause.)

9 **THE COURT:** You may open it, Mr. Babcock.

10 BY MR. BABCOCK:

11 Q Doctor, I'm going to hand you the original of
12 your deposition, which was taken back in, if you
13 look at the front page, it was taken back on June 1,
14 2006. Do you see that?

15 A Yes, sir.

16 Q And I want to direct your attention, let's
17 start with page 98. If you look at line seven --
18 17, I'm sorry, the question I asked: And I'm
19 reading from the document, the employment agreement,
20 says, quote, Physician has carefully read and
21 considered the provisions of this agreement and
22 agrees that the restrictions set forth herein,
23 particularly those in sections 5.1, 5.2, 5.3 and 5.4
24 together with the remedy set forth in Article 4 are
25 fair and reasonably required for the protection of

1 the Medical Group; do you see that?

2 And your answer was what?

3 A Yes, I did see it.

4 Q And then I said: All right.

5 And you said what? Next page?

6 A I didn't study it. I didn't --

7 Q No, no. Go to the top of page 99. I said, All
8 right, on the end of 99, top of 99.

9 A What is your question?

10 Q And then I said: Was that sentence true when
11 you signed the agreement?

12 And what did you say?

13 A No, I didn't study it.

14 Q Read the whole answer.

15 A No, I didn't study it. I didn't read it in as
16 much detail as I should have.

17 Q Continue on.

18 A I didn't have it reviewed --

19 MR. THOMPSON: Your Honor, I object to this. I
20 don't see that this is a prior inconsistent
21 statement. I don't know why we're going back and
22 looking at consistent statements.

23 MR. BABCOCK: We're getting to the inconsistent
24 statement, but I thought in fairness to the witness,
25 we would let him see the situation.

1 **THE COURT:** Overruled. You may continue.

2 BY MR. BABCOCK:

3 **Q** And the answer you just said, I didn't read it
4 in as much detail as I should have, is that what
5 that said?

6 **A** Yes.

7 **Q** And then the question was: I didn't ask that.
8 Is that statement true or false?

9 And what did you say? What was your answer?

10 **A** Read that again where you want me to go again.

11 **Q** Sure. My question on line seven was: I didn't
12 ask that. Is that statement true or false?

13 And your answer on line nine?

14 **A** I didn't read it carefully.

15 **Q** My next question: So you're saying that
16 statement is false?

17 What was your answer?

18 **A** That I carefully read it.

19 **Q** And I said: Yes, sir.

20 And then your answer to that?

21 **A** I meant to say I didn't read it carefully.

22 **Q** Well, what you said was: I read it carefully,
23 but not to the point that I could be a lawyer to
24 interpret the fine details.

25 That's what you said, isn't it -- that's what

1 it says?

2 A Okay. But above it, it says, I didn't read it
3 carefully, so, you know, I don't know. I can't
4 remember. It's been a long time.

5 Q You don't know at this point whether you read
6 it or not, do you?

7 A I know I didn't read it.

8 Q You now say you didn't read it?

9 A I read it in a sort of cursory manner, but not
10 sit down and read every word of it.

11 Q But you knew it had a covenant not to
12 noncompete?

13 A I did know that.

14 Q Now, let's talk about the 20 mile radius.
15 Sumter's outside that 20 mile radius, isn't it?

16 A Yes, sir.

17 Q And Orangeburg is too, isn't it?

18 A Yes.

19 Q And Camden is too, isn't it?

20 A Yes.

21 Q Now, those hospitals, you can't perform the
22 balloons or stents; is that correct?

23 A Correct, you cannot do that.

24 Q Cannot. But what you can do is you can do a
25 heart cath at those hospitals, can't you?

1 A I don't know.

2 Q Did you check?

3 A No.

4 Q How about implanting pacemakers at those
5 hospitals; do you know about that?

6 A I don't really implant pacemakers very much so
7 I don't know.

8 Q How about conducting stress nuclear studies;
9 can you do that at those hospitals?

10 A Yes.

11 Q And how about performing electrocardiograms;
12 could you do that at those hospitals?

13 A EKGs, yes.

14 Q Now, the situation, to the best of your
15 knowledge, in places like Sumter and Camden and
16 Orangeburg in terms of what you can or can't do is
17 the same today as what it was in 2004, correct?

18 A Correct.

19 Q And the interventional cardiac locations that
20 are more than 20 miles, that's the same today as it
21 was in 2004; is that correct?

22 A As far as I know, yes.

23 Q Now, let's go back to the November 2005
24 meeting. That was the meeting on November 30th, I
25 think, where your wife, Dr. Jenny Feldman, wanted to

1 be considered for shareholder partnership status; is
2 that right?

3 A Yes, sir.

4 Q And you attended a part of that meeting; is
5 that correct?

6 A Yes.

7 Q So you were there for the start and for
8 whatever your wife had to say?

9 A Yes.

10 Q But then when it came time for the full
11 discussion by the various other shareholder
12 physicians, you and she left the room?

13 A I recused myself, yes.

14 Q So you weren't present for any of that
15 conversation?

16 A Correct.

17 Q And you don't have firsthand knowledge of
18 exactly what happened in there?

19 A Correct.

20 Q Did you later learn that some of the physicians
21 who were there had questions or issues concerning
22 complications or your wife's techniques?

23 A I heard that there were questions regarding
24 complications not techniques.

25 Q Did you here that Dr. Baugh made some comments

1 during that meeting?

2 A No.

3 Q You never heard that?

4 A No.

5 Q Did you -- did there come a point in time
6 before today that you knew that?

7 A The only time I heard it is in passing in the
8 hall that one of the physicians at the Columbia
9 Heart Clinic told me that he had said that.

10 Q Did you go and ask him what he had to say?

11 A No.

12 Q Did he ever come to you and say, you know at
13 the meeting on the 30th of November, I made some
14 comments? Did he ever say that to you?

15 A I never discussed it with him.

16 Q After the doctor told you in the hall, you
17 never went and said, by the way, Barry, what did you
18 have to say about Jenny?

19 A You mean Kevin?

20 Q I'm sorry, Kevin.

21 A No, I didn't.

22 Q You weren't curious?

23 A Well, it came from a source that I wasn't
24 certain would be reliable.

25 Q Okay. But the way you could have handled that

1 was by going and saying, Dr. Baugh, did you say
2 anything? You could have done that, couldn't you?

3 A I could have.

4 Q But you haven't in all this time done that,
5 have you?

6 A It didn't cross my mind.

7 Q Let me understand something. If -- and I know
8 you don't feel that your wife had any issues with
9 complications. And I know that in the end, that was
10 reviewed and she was ultimately told, hey, we took a
11 look at this and you don't have an abnormal
12 situation. That's your understanding, correct?

13 A Correct.

14 Q But you don't have any problem in general terms
15 with the concept of, if a question is raised about
16 technique or a complication, the practice looking at
17 that? You don't have a problem with that generally,
18 do you?

19 A Well, I think that -- if I may explain.

20 Q Well, I think you can answer that yes or no and
21 then give me your explanation.

22 A Yes and no, if I may.

23 Q Okay. Well, those are two answers. Go ahead
24 and explain both of them.

25 A I think that the issue of Jenny being

1 considered for an employee shareholder status had
2 been going on for many months. There had been
3 several committee meetings. It's not something that
4 was -- that had been percolating really through the
5 practice for quite a while and she had discussed
6 this with several of the partners. And, really, she
7 had gotten a positive review that things were going
8 to work out.

9 This happened in the very last second, I think,
10 in the meeting from what I can gather because it
11 didn't seem to be an issue about it prior to her
12 going to the meeting that evening. So I think that
13 if there was an issue, it should have been brought
14 up a lot earlier in the process than at the very
15 last minute where basically they rubber stamped the
16 decisions.

17 Q Let's go back to the question that I was
18 asking. Put aside your wife for a minute. I want
19 to talk generally. Generally, if an issue comes up
20 about a physician's complication rate or technique
21 and people have a question about it, do you have a
22 problem with that being studied, generally?

23 A Absolutely not.

24 Q Okay. And, again, you weren't at the meeting
25 as we've already established?

1 A Correct.

2 Q Now, I guess the situation involving your wife,
3 as you testified, was a situation where she felt
4 badly after the meeting and talked to you and then
5 she felt she had to go and then you felt you had to
6 go; is that true?

7 A She was devastated not just badly.

8 Q Okay. Devastated.

9 A It was devastating.

10 Q Okay. I understand that. And then she decided
11 she had to go and then you decided you had to go,
12 correct?

13 A Absolutely, yes.

14 Q Now, up till that point in time, your wife had
15 been a part-time physician with Columbia Heart,
16 correct?

17 A Yes.

18 Q That's something that the two of you mutually
19 wanted Columbia Heart to do so that she could be a
20 physician but also not have call, correct?

21 A Yes.

22 Q And that went on for a number of years,
23 correct?

24 A Yes. If I may expound a bit?

25 Q Sure.

1 A I think our original arrangement with Dr.
2 Schulze is that when we first joined, that I really
3 -- that she would be considered for a partnership
4 status track any time after the first three years
5 with a one year wait to partnership, or whatever
6 they call it in the original contract. And that was
7 her expectation for the entire 13 years that she was
8 there.

9 Q Now, you were here earlier today when we looked
10 at her contract?

11 A Uh-huh.

12 Q Yes, you were here?

13 A Yes.

14 Q The court reporter just has to have a yes or
15 no.

16 A Yes.

17 Q And you saw where, and you can take a look at
18 it, where that contract doesn't have any provision
19 concerning any kind of guaranteed partnership,
20 correct?

21 A Well, I'd like to make a comment if I may.

22 Q Do you remember that part of the contract
23 first?

24 A Yes.

25 Q Okay.

1 **A** The initial contract, which she signed, which
2 we can produce for you if you wish later, was her
3 original contract with Dr. Schulze's handwriting on
4 it where he actually stated that that would be an
5 understanding, and that's what the understanding
6 was. I think the implication of the second
7 contract, which you've shown today, or the third
8 one, was that there was no expectation that she
9 would be immediate shareholder at her request at any
10 time, but it didn't really comment on going into a
11 shareholder status.

12 **Q** Well, let's look at that just so -- you got her
13 contract in front of you?

14 **A** No, I don't.

15 **Q** It's our Exhibit 1. Looking over at Defense
16 Exhibit 1, 6.8.

17 **A** Yes.

18 **Q** And what that says is, No expectation of
19 shareholder status, correct?

20 **A** Yes.

21 **Q** And the sentence says, Physician acknowledges
22 that neither this agreement nor physician's
23 employment by Medical Group for all or any portion
24 of the term of this agreement entitles physician to
25 be a shareholder of Medical Group and that any

1 consideration for shareholder status is the sole
2 discretion of the Medical Group?

3 A Yes.

4 Q And that's what this says? That was her
5 contract?

6 A But this contract was expired also at the time
7 when she was seeking --

8 Q That's right. But this is the last one she
9 signed, isn't it?

10 A Yes. But the first one she signed, which is
11 the original one, and the intent, which was
12 maintained through the years that we worked at
13 Columbia Heart Clinic, was that she would be offered
14 a partnership track after one year after she worked
15 there for three years.

16 Q That document doesn't say that, does it?

17 A This document doesn't say it. The original
18 contract does.

19 Q But that document doesn't?

20 A No.

21 Q Now, a couple more questions and then we'll
22 take a break. You knew that having a spouse in the
23 practice always created the possibility that one or
24 the other of you might have some issues, correct?

25 A No.

1 Q When you started at the practice in 1993 and
2 '94, you didn't think about the fact that if there
3 was an issue with Jenny, you might have to deal with
4 it?

5 A Never crossed my mind.

6 Q All right. And you didn't think about the fact
7 if there was an issue with you, she might have to
8 deal with that?

9 A I never thought of that either.

10 Q You're familiar with the concept of any
11 nepotism policies, aren't you?

12 A No.

13 Q You never heard about groups or firms that say,
14 we don't want family members working here because
15 there might be problems, so if you're a spouse or
16 son or daughter, you can't work here? You've never
17 heard of something like that?

18 A I've heard of similar situations, yes.

19 Q But Columbia Heart didn't have that?

20 A No, they never did.

21 MR. BABCOCK: Your Honor, this is a good
22 breaking point.

23 THE COURT: All right. We're going to break
24 for lunch. I've got a status conference on a
25 different case at two o'clock and those usually take

1 15 to 20 minutes, so if you all would please be back
2 at 2:20 here.

3 Dr. Feldman, during your break, you're not
4 permitted to discuss your testimony with anybody,
5 all right? You can talk about other subjects, but
6 you can't talk about your testimony.

7 All right. We're in recess until 2:20. Thank
8 you.

9 (Court's Exhibit Number 1, Barry Feldman's
10 deposition, was marked for identification purposes.)

11 (Whereupon, there was a luncheon recess.)

12 **THE COURT:** All right. Doctor, back up here,
13 please.

14 We didn't have our status conference because
15 one of the lawyers didn't show up, so I gave them
16 some directives. I may have to stop. They're
17 trying to get that lawyer on the phone. I told them
18 what I could and couldn't do. And if they can't
19 work it out, they may have to interrupt me, but
20 other than that, we'll just keep going.

21 All right. We're still on cross.

22 **MR. BABCOCK:** Your Honor, before I continue
23 with my cross-examination, this does go to one of
24 the points in this case and there was a stipulation
25 that was signed by counsel for the plaintiffs, I'm

1 going to pass up at this point. And what this
2 stipulation goes to has got various things attached,
3 but it talks about the different -- the entry into
4 the agreements, the shareholder agreement. And
5 under paragraph five, the plaintiffs reserve any
6 right to contest the validity of section 5.4.

7 However, and the key paragraph is paragraph
8 six, the plaintiffs, J. Kevin Baugh, M.D. and Barry
9 J. Feldman, M.D., hereby stipulate that they will
10 not assert their inability or a lack of resources to
11 make payment of the amount set forth in section
12 5.4(a) of each of the shareholder physician
13 employment agreements, should section 5.4(a), the
14 shareholder physician employment agreements, be
15 upheld by the Court and they're able to make payment
16 to the defendant in the amount set forth in section
17 5.4(a) of the agreements.

18 So with that stipulation, obviously we won't
19 need to examine all of the various financial issues.

20 **THE COURT:** All right.

21 (Court's Exhibit Number 2, stipulation,
22 marked for identification purposes.)

23 BY MR. BABCOCK:

24 Q Now, before we broke for lunch recess, we had
25 talked a little bit about the meeting in late

1 November of 2005 involving your wife's request to be
2 considered for a shareholder physician at Columbia
3 Heart. Do you recall that discussion?

4 A Yes, sir.

5 Q And it was shortly after that, I think, that
6 she testified, that she decided to leave and a few
7 days after that, that you decided you would be
8 leaving Columbia Heart; is that right?

9 A Yes, sir.

10 Q And you mentioned that you had a conversation
11 with Dr. Jones telling him that you would be
12 leaving. And if I understood your testimony, he
13 said something along the lines of that he understood
14 and if he were in your position, he would do
15 likewise, or something to that effect?

16 A Yes.

17 Q Is that basically what he said to you?

18 A Uh-huh.

19 Q But he never told you that if you left or he
20 left under those circumstances, there wouldn't be
21 the need to abide by the covenant? He never said
22 that, did he?

23 A Correct.

24 Q And he never said that you wouldn't be
25 required, if you decided to compete, to pay the

1 money in agreement? He never said that, did he?

2 A Correct.

3 Q Now, your group, the new Lexington Heart group,
4 went forward and prepared its initial paperwork the
5 very beginning of January of 2006; is that right?

6 A I believe so, yes.

7 Q Let me hand you a document, which we marked as
8 -- well, we haven't marked yet, but it's the
9 unanimous written consent of the members of
10 Lexington Heart Clinic, LLC in lieu of
11 organizational meeting. Do you recognize that
12 document?

13 A I recognize the signatures, but -- yes.

14 MR. BABCOCK: We'd offer this as the next
15 exhibit for the defense, Your Honor.

16 THE COURT: Any objection?

17 MR. THOMPSON: No objection.

18 THE COURT: Mark it in the record please,
19 ma'am.

20 (Defendant's Exhibit Number 3, unanimous
21 written consent, admitted into evidence.)

22 BY MR. BABCOCK:

23 Q Let me hand you back Exhibit 3, Dr. Feldman.
24 And I think you recognize your signature on that
25 document?

1 A Yes, sir.

2 Q I think if we look at the date on that
3 document, it's January 3rd of 2006, correct?

4 A Yes, I see it, yes.

5 Q So that is the date?

6 A Correct.

7 Q Now, at about that same point in time, you're
8 doing several things to get Lexington Medical up and
9 operating. One of the things you're doing is
10 talking to Lexington Medical Center about leasing
11 some space from them?

12 A I'm not quite sure it's this early because we
13 were waiting still for a response back from Columbia
14 Heart Clinic.

15 Q Okay. But it was somewhere relatively early in
16 the process?

17 A Uh-huh.

18 Q And relatively early on in the process, you
19 also got going with your new electronic medical
20 records system, correct?

21 A Well, we -- yeah, were in the process of
22 shopping and trying to get one, yes.

23 Q Now, the conversation you had with Columbia
24 Heart about taking over their space --

25 A Yes.

1 Q -- I think you had offered, you said to, I
2 guess, assume their lease?

3 A Yes.

4 Q So that would enable you to continue on in that
5 very location?

6 A Yes.

7 Q But there was a proviso attached to taking over
8 the lease, wasn't it?

9 A I can't remember.

10 Q Well, didn't you tell Columbia Heart that you'd
11 take over their lease to the space provided they
12 didn't try to enforce the covenant?

13 A I don't recall. I suspect there might have
14 been, yeah.

15 Q So you don't deny that?

16 A No. We had that written by a lawyer, so,
17 again, yeah.

18 Q A lawyer at that point; is that right?

19 A Yes. I think Mr. Fred Crawford wrote that for
20 us.

21 Q Now, he's one of your previous lawyers in this
22 case?

23 A Yes.

24 Q Now, at about that same time that early time
25 period, you also hired Burkett and Burkett and

1 Resource One to help set your office up?

2 A Yes, we did.

3 Q Now, your resignation letter you submitted
4 later in January; is that correct?

5 A Yes, sir.

6 Q And is this a copy of your resignation letter?

7 A Yes.

8 MR. BABCOCK: Your Honor, we'd offer this as
9 the next defendant's exhibit.

10 THE COURT: Any objection?

11 MR. THOMPSON: No objection, Your Honor.

12 THE COURT: Thank you.

13 Mark it in evidence please, ma'am.

14 (Defendant's Exhibit 4, resignation letter,
15 admitted into evidence.)

16 BY MR. BABCOCK:

17 Q And with this exhibit it's dated January 22,
18 2006?

19 A Yes.

20 Q And what you're doing here is giving 90 days
21 notice in accordance with your employment agreement?

22 A Yes.

23 Q So you were trying to -- when you wrote this
24 letter, you were trying to abide by the employment
25 agreement; is that right?

1 A Yes.

2 Q And you're referencing section 4.4; is that
3 right?

4 A Yes. We also had assistance with a lawyer
5 helping write this as well.

6 Q But you signed it, right?

7 A Yes.

8 Q And, at this point in time, you've given them
9 90 days notice; is that right?

10 A As of this date, yes.

11 Q But in this letter, you don't tell them you're
12 contesting the covenant not to compete, do you?

13 A Correct.

14 Q And you don't tell them that you're looking at
15 opening an office in a geographical area that's
16 right close to their current office. You don't tell
17 them that, do you?

18 A Well, not in this letter, but I think
19 subsequently, very shortly, we offered to actually
20 take the office space that they were in.

21 Q And what you were intending to do at that point
22 in time was either take their office space or have
23 office space right in the same area?

24 A Yes.

25 Q So that if you were abiding by the agreement

1 and if you were being consistent with it, you would
2 have then had to pay them the \$590,000 each for the
3 ability to be operating at that spot?

4 A Well, I think there was a question about the
5 validity of the agreement, so I can't say --

6 Q I understand you're contesting the validity,
7 but you didn't say that in Exhibit 4?

8 A No, that wasn't part of our resignation letter.

9 Q I understand. As to the \$590,000, you never
10 did pay that, either one of you, to Columbia Heart,
11 did you?

12 A No, sir.

13 Q Now --

14 A Nor did they ever pay me the \$60,000.

15 Q They didn't pay you the \$60,000 because you're
16 operating too close?

17 A Correct.

18 Q You violated the agreement?

19 A Absolutely right.

20 Q Now, we talked about the start of your
21 operation. And I think everybody has agreed you
22 left Columbia Heart on April 21st, that was your
23 last day as you said in your resignation?

24 A Yes.

25 Q And then after that weekend, got your office

1 being trained April 24th?

2 A Uh-huh.

3 Q During the week of April 24th, you're working
4 with the employees training them away so you can
5 open up?

6 A More or less, yes.

7 Q And then open up on May 1st?

8 A Yes.

9 Q Now, during the time period from the time you
10 submitted your resignation of January 22nd till
11 April 21st, you were still working for Columbia
12 Heart, correct?

13 A Yes.

14 Q But you know that can't -- come April 22, you
15 were going to have another entity that you were
16 going to be working for?

17 A Yes.

18 Q During that time period, you wrote a letter to
19 different members of the General Assembly, didn't
20 you?

21 A Oh, yes.

22 Q Is this a copy of the letter that you sent?

23 A Yes.

24 Q What's the date on that?

25 A March 30th.

1 Q Which year?

2 A 2006.

3 MR. BABCOCK: Your Honor, we'd offer this as
4 the next exhibit for the defense.

5 THE COURT: Any objection to this?

6 MR. THOMPSON: No objection, Your Honor.

7 THE COURT: Thank you.

8 Mark it in evidence..

9 (Defendant's Exhibit Number 5, letter
10 3/30/06, admitted into evidence.)

11 BY MR. BABCOCK:

12 Q Now, this letter was written to various members
13 of the General Assembly and it involves an effort by
14 the Lexington Hospital, Lexington Medical Center, to
15 increase some of its services, right?

16 A Correct. Yes. It involves allowing them to
17 have access for open heart surgery, which I've been
18 a strong component for for many years.

19 Q I'm sorry?

20 A I've been a strong component of allowing
21 Lexington Medical Center to open heart surgery for
22 many years and this is a letter of support for that.

23 Q But you did it on Columbia Heart stationary?

24 A Yes.

25 Q And you knew that there was an issue within

1 Columbia Heart because y'all were practicing at
2 different hospitals and this was a different
3 political issue where Palmetto Richland wasn't
4 necessarily in the same boat as Lexington; you knew
5 that?

6 A No, I didn't because I had written editorials
7 and other things in support of this over the years
8 and this was nothing any different than I had done
9 previously.

10 Q That wasn't my question. My question to you
11 was you knew that at this point in time, the
12 hospitals in the area were fighting each other in
13 regard to whether a CON should be given or whether
14 legislation should be passed; you knew that?

15 A Yes.

16 Q And within the group, y'all practiced at
17 different hospitals and took different positions;
18 you knew that?

19 A Yes.

20 Q And, in fact, when there was an objection to
21 the fact that you wrote this on Columbia Heart
22 stationary --

23 A That's right.

24 Q -- you then sent a qualification letter saying
25 that this letter was only meant to be your opinion,

1 it didn't represent Columbia Heart's position?

2 A Yes. I didn't realize that some of the
3 physicians in other parts of the practice would
4 object to it, and I think, previously, they never
5 had. So, at their request, I submitted a second
6 letter, which you probably should have, basically
7 stating that it's my sole opinion and not the
8 representation of the group.

9 Q And Dr. Feldman wrote a similar letter, didn't
10 he?

11 A I'm Dr. Feldman.

12 Q I'm sorry. Dr. Baugh?

13 A Yes.

14 Q But he didn't send a letter clarifying or
15 qualifying, did he?

16 A I don't know.

17 Q We'll talk to him about that in a little bit.

18 A Also, I apologized to the other physician who
19 was slighted by it as well.

20 Q And who was that?

21 A Dr. David Bouknight.

22 Q Now, let's shift over to your salary and the
23 trueing up process. We talked a little bit about
24 this this morning, but the process that you had was
25 looking at your situation within the group on a

1 quarterly basis and if you were positive, you got a
2 bonus and if you were negative, you had to make that
3 up at some point. And that's true?

4 A I believe, yes.

5 Q And as long as you were in the group, that if
6 you had a negative, you'd carry over to give
7 yourself time to hopefully get caught up, correct?

8 A I never had a negative, so I'm not sure how it
9 would work.

10 Q Well, let's talk about that. You did have a
11 negative in the first quarter of 2006, didn't you?

12 A I don't know. I haven't studied the numbers.

13 Q You haven't looked at the numbers on that?

14 A No, sir.

15 Q And -- you haven't looked at the numbers on
16 that?

17 A No, sir.

18 Q You looked at the numbers that were on the true
19 up chart that Columbia Heart gave you?

20 A No.

21 Q Did you look at the numbers that Mr. Burkett,
22 your accountant, put together?

23 A No.

24 Q Did you look at the numbers that Mr. Ouzts, the
25 accountant for Columbia Heart, put together?

1 A No.

2 Q So somebody else will have to address that
3 issue?

4 A Yes, sir.

5 Q Now, let's talk about the new building, the new
6 building at Palmetto Richland. When that idea came
7 up, you didn't object to it, did you?

8 A No. I thought it was a very good idea.

9 Q So when the concept came up of the group having
10 a separate group to build that building, you were in
11 favor of that and participated in that, didn't you?

12 A Yes.

13 Q And, at that point in time, how much money did
14 you pay in to be part of that group for that
15 building?

16 A I don't recollect, but we had to sign notes for
17 one point two million dollars, but I think it was
18 maybe 20,000 or \$10,000.

19 Q Ten thousand dollars?

20 A Uh-huh.

21 Q And that would have been in some time in 2004?

22 A Yes.

23 Q Now, ultimately, in the Fall of 2006, you sold
24 your interest back to the group, didn't you?

25 A Well, there was a noncompete clause in the

1 building contract as well which stated that if you
2 practiced within a hundred miles of the building,
3 you have to offer your share back to the practice
4 and they have the first option to buy it back.

5 Q And that's what you did with that noncompete,
6 you offered it back?

7 A Yes.

8 Q And you were paid money for the shares that you
9 returned?

10 A Yes.

11 Q All right. In fact, you were paid \$200,000 for
12 your interest in the building, weren't you?

13 A Because the value of the building had gone up
14 in value.

15 Q I understand. The answer to my question is you
16 were paid \$200,000; you were, weren't you?

17 A Yes.

18 Q Now, Dr. Feldman, when you left Columbia Heart,
19 you and Dr. Baugh thought you could do better
20 financially if you were on your own, didn't you?

21 A No, that had nothing to do with my decision.

22 Q That wasn't my question. My question was you
23 thought you could do better if you were on your own
24 and operating in Lexington with just the Lexington
25 overhead, just being responsible for that operation?

1 A No, the thought never crossed my mind.

2 Q All right. You're going to deny having talked
3 with Dr. Baugh at any time before you actually left
4 Columbia Heart about being -- about the
5 profitability of this venture you were going to
6 embark on?

7 A I think we talked about profitability from a
8 business venture, according to you, but I never -- I
9 never compared that to what I was doing. I was very
10 happy where I was at Columbia Heart and I was happy
11 with my salary and my income, that was not an issue
12 for me.

13 Q I want to talk about the profitability, that is
14 something you looked at?

15 A Well, I think we looked at it from an
16 accountant's point of view where they did an
17 analysis of, you know, cost, expense ratios and that
18 sort of thing, which is fairly technical and I
19 really didn't have a lot to --

20 Q Sure, that was something that Mr. Burkett did
21 for you?

22 A Yes.

23 Q And that was so that you could figure out how
24 to go about operating your new venture?

25 A Right, per business point of view.

1 Q And when you got up and operating, you made
2 more in 2007 at Lexington Heart than you made at
3 Columbia Heart when you were there, didn't you?

4 A I don't remember, but I think there are a lot
5 of factors, that we had large loans to pay and also,
6 we also had several months not getting any income at
7 all.

8 Q All right. I'm asking not about 2006 when you
9 started. You started in April?

10 A Right.

11 Q So by the following year 2007, that's just a
12 couple years ago, that was your first full year of
13 operation, would have finished 2007 and done the tax
14 returns about a year ago.

15 A Uh-huh.

16 Q I'm asking at that point in time, if you didn't
17 do better in 2007 than your last full year at
18 Columbia Heart?

19 A I'd have to look at the numbers.

20 Q You don't know?

21 A I think I did do better, but, again, it's not a
22 focus of what I'm interested in.

23 Q But you would agree you think you did better?

24 A Yes.

25 MR. BABCOCK: Court's indulgence.

1 THE COURT: Yes, sir.

2 MR. BABCOCK: No further questions.

3 THE COURT: All right. Redirect?

4 MR. THOMPSON: Yes, Your Honor.

5 REDIRECT EXAMINATION

6 BY MR. THOMPSON:

7 Q Dr. Feldman, I want to draw your attention, I
8 don't know if you can see this, to page nine of your
9 agreement, which is Plaintiff's Exhibit 1, 5.1
10 section (a) on page nine. Do you know -- or
11 actually is it anywhere in the agreement that you
12 know of where practice of medicine is defined?

13 A No, sir.

14 Q Do you know if practice of medicine just means
15 treating patients or could it mean other things?

16 A Well, I guess I'm --

17 Q Or do you know?

18 A No. To me, practice of medicine is take care
19 of patients.

20 Q If you're teaching in a teaching hospital, is
21 that practice of medicine?

22 A It is, that involves educational experiences
23 for the residents, would also -- giving lectures.
24 So there are -- that is part of what cardiologists
25 do do, yes. In fact, at one time, I was director of

1 the cardiology fellowship program at USC.

2 Q And how about, say, if you were employed by the
3 V.A. Hospital, would that be the practice of
4 medicine?

5 A Absolutely, yes.

6 Q And is the V.A. Hospital at all in competition
7 with Columbia Heart Clinic or Lexington Heart
8 Clinic?

9 A Not that I'm aware because they generally have
10 a separate population of patients who are veterans
11 and have different veterans' benefits and they
12 usually keep those patients in really the same
13 system.

14 Q Let me draw your attention back to the
15 definition of compete. It has three parts, doesn't
16 it, Dr. Feldman?

17 A Yes.

18 Q I'm looking at page ten, 5.2(i)?

19 A Yes.

20 Q What are those three parts?

21 A 5.2, page ten, (i).

22 Q It's not just treating patients, what is it?
23 What are the three different types of categories of
24 things you can't do in the practice of medicine in
25 the field of cardiology?

1 A Well, it says that you can't organize and own
2 any business interest, you can't assist any person.

3 Q Okay. Let's take the first one, organizing or
4 owning an interest in a business which engages in
5 the business in the territory. Does that have
6 anything to do with actually practicing medicine?

7 A No.

8 Q Now, B admittedly would. How about C,
9 assisting any person to engage in the person, is
10 that the practice of medicine?

11 A No.

12 Q So it's not just about the practice of
13 medicine, is it?

14 A No. It's the restriction of doing nonpatient
15 care activities as well.

16 Q Okay. And you were asked about selling
17 pharmaceuticals. If you were selling
18 pharmaceuticals to a cardiology practice, would that
19 be violating section C?

20 A Yes. Also, I think it states also, under
21 person, under governmental unit, I think that
22 applies to any V.A. Hospital or where there -- V.A.
23 or Air Force, teaching hospital, whatever other
24 hospital would be also restricted from this as well.

25 Q And you were asked about where a physician

1 routinely provided services. I'm looking at page
2 nine now. Is where you routinely provide, is that
3 defined somewhere?

4 A No. There is no definition as what routine
5 means.

6 Q And was this restriction, the way it's worded
7 with the three part, was that in your 1997
8 agreement?

9 A I don't know. I'd have to check.

10 Q And how about the 590,000 dollar penalty, is
11 that in your 1997 agreement?

12 A Absolutely not.

13 Q Is that 590,000 dollar penalty significant to
14 you? Is that a significant change?

15 A Yes.

16 Q Did any other doctors tell you anything about
17 whether they thought you made the right decision or
18 not in leaving?

19 A Yes.

20 Q Who did? What did they say?

21 A Dr. Hendricks stopped me one day shortly after
22 and he told me that I did absolutely the right
23 thing. And he felt very strongly I did the right
24 thing to leave and he would have done the absolute
25 same thing himself. And Dr. Schulze also told me at

1 one time that his wife had told him that I did the
2 right thing.

3 MR. BABCOCK: Objection to whatever wife --
4 well, what somebody other than the doctor at
5 Columbia Heart who would be a party would say, Your
6 Honor.

7 THE COURT: You said Dr. Schulze? Is that what
8 you said?

9 THE WITNESS: Yes, Dr. Schulze is what -- Dr.
10 Schulze told me that his wife told him.

11 THE COURT: Robert A. Schulze, Jr.?

12 THE WITNESS: Yes.

13 THE COURT: You're saying what Dr. Schulze's
14 wife told Dr. Schulze?

15 THE WITNESS: No. Dr. Schulze told me what his
16 wife --

17 THE COURT: Sustained.

18 BY MR. THOMPSON:

19 Q Before you submitted your resignation, did
20 other physicians in Columbia Heart Clinic support
21 the heart surgery center at Lexington Medical
22 Center?

23 A I believe Dr. Jones did to -- a mix -- I think
24 he had conflicting issues partly because he was at
25 Lexington, but, also, he was also downtown involved

1 with the practice. So generally speaking, certainly
2 I've been one of strongest proponents.

3 Q How about after you sent your letter supporting
4 the heart surgery center, did any other physician
5 weigh in on that topic?

6 A Yes. In fact, Dr. Alexander wrote an editorial
7 in the State newspaper openly opposing it and that
8 editorial was actually circulated in the hospital,
9 which had very negative impact on the Columbia Heart
10 Clinic, unfortunately.

11 Q Now, some mention's been made of the MOB,
12 that's the entity that owns the building, correct?

13 A Yes.

14 Q Did they have to buy your shares back?

15 A No. I had signed a note basically backing the
16 -- taking the risk when we first invested and, also,
17 they had the option to buy the shares back, but they
18 didn't have to. And I'd been very happy to
19 continue, of course, if they'd allowed me.

20 Q And I think you mentioned you had signed on a
21 personal guarantee for the debt?

22 A Yes.

23 Q Were you released from that guarantee?

24 A Yes, they did.

25 Q Did they have to release you from the guarantee

1 if they didn't purchase the shares?

2 A (No response.)

3 Q Let me put it this way. If you hadn't sold
4 your shares, would you still be on the hook for
5 that?

6 A Yes, I'd still be on the hook, yes.

7 Q Now, did you receive some income, actually
8 receive some income out of the building?

9 A I think a small amount of \$30,000 perhaps in
10 that order.

11 Q Did they even bargain or try to negotiate a
12 lower amount when you made an offer to sell your
13 shares?

14 A Yes. In fact, when we negotiated, we had a
15 meeting with Dr. Schulze who told us that we
16 actually owed them money because we're minority
17 shareholders.

18 Q I'm talking about the MOB?

19 A The MOB, yes. They wanted us to pay to get our
20 shares out of the building until we had a
21 negotiation with Mr. Harvey Rosen and Mr. Gotley
22 (ph) who were the -- and they worked out an
23 arrangement.

24 Q And as a result of that, you were paid your
25 shares?

1 **A** They reassessed the situation and found that in
2 actuality, they did owe us money rather than us
3 owing them money.

4 **Q** Do you know what happened to your shares after
5 the MOB bought them back?

6 **A** Yes. They were sold to two other partners that
7 were coming in. I believe Dr. Bill Phillips --

8 **MR. BABCOCK:** Your Honor, objection to the
9 relevance of whatever happened to the shares after
10 he got out. I don't see how that would have
11 anything to do with --

12 **MR. THOMPSON:** That got made a big point out of
13 trying to make -- basically establish the point that
14 they profited off the sell of their shares. I don't
15 know why he made that point, but having made it, I
16 think I'm entitled to show that they bought the
17 shares back voluntarily, and not only that, they
18 resold them at a profit.

19 **MR. BABCOCK:** And the resale is what I'm going
20 to, Your Honor, that's the issue that doesn't have
21 any relevance to this proceeding.

22 **THE COURT:** The objection is overruled. I
23 don't think it's going to have much to do with my
24 decision, but it's overruled.

25 Go ahead.

1 BY MR. THOMPSON:

2 Q Do you know what happened to your shares?

3 A One share was sold, I think, for about an
4 80,000 dollar profit to one partner and the other
5 was sold for maybe another 30 to 40,000 dollar
6 profit to the other partner.

7 MR. THOMPSON: No other questions, Your Honor.

8 THE COURT: Anything else, Mr. Babcock?

9 MR. BABCOCK: Very briefly, Your Honor.

10 RECROSS-EXAMINATION

11 BY MR. BABCOCK:

12 Q The information you just talked about, you
13 weren't involved in any of that transaction, the
14 selling again of your shares, were you?

15 A No.

16 Q Now, the MOB document you were just asked some
17 questions about, whether somebody had to do
18 something in terms of rebuying your shares, how that
19 all worked, did you review the MOB document before
20 you came in here?

21 A No.

22 Q You just remember those things?

23 A Well, it's a very contentious issue as well
24 regarding the MOB documents, so I do remember some
25 aspects of it.

1 Q You'd also agree that it's pretty contentious
2 on this covenant not to compete, wouldn't you?

3 A I would like it not to be.

4 Q But we're here in court?

5 A We're here in court.

6 Q Now, insofar as the language in this section
7 which talks about competing, 5.2 number one, we
8 talked about this before and I'm not going to go
9 through this at any great length, but I just want to
10 be clear on a couple points. Subsection (a) talks
11 about organizing or owning any interest in a
12 business. Now, when you were at Columbia Heart, you
13 owned a part of that business, correct?

14 A I was a shareholder.

15 Q Yeah, that means you owned part of that
16 business, doesn't it?

17 A Yes.

18 Q And what you did with Lexington Heart, you
19 organized another entity and became an owner of that
20 other entity in the field of cardiology, correct?

21 A Yes.

22 Q Now, engaging in the business, you were
23 practicing medicine in the field of cardiology while
24 you were at Columbia Heart, correct?

25 A Word that again, please.

1 Q Going to 5.1(a) of the agreement, when you were
2 at Columbia Heart, you were a physician engaged in
3 the practice of medicine in the field of cardiology,
4 correct?

5 A Yes.

6 Q And that's what you -- you did that at Columbia
7 Heart and you're doing that at Lexington Heart now,
8 correct?

9 A Yes.

10 Q Is that right?

11 A Yes.

12 Q And then the final, C, talks about assisting
13 persons and it lists director, officer, employee,
14 agent, various things. While you were at Columbia
15 Heart, you were an employee of Columbia Heart, a
16 shareholder, physician, employee, weren't you?

17 A Yes.

18 Q Now, you mentioned, and just so I want to be
19 clear, it's your contention that this paragraph will
20 stop you from selling pharmaceuticals in the 20 mile
21 radius area; is that right?

22 A If I were selling them to cardiology groups.

23 Q That's your position, you think that means
24 that?

25 A Well, yes, but...

1 Q I just want to know, do you think that means
2 that, that you would be prohibited from selling
3 pharmaceuticals?

4 A If it is in the business of cardiology, yes.

5 Q Let me just be clear. You think that you would
6 violate that paragraph if you sold pharmaceuticals
7 in the protected area? It's a yes or a no, do you
8 think that or not?

9 A I don't know.

10 Q You don't know. Now, let's very briefly, you
11 mentioned Dr. Hendricks said something to you about
12 leaving, about you've done the right thing?

13 A Yes.

14 Q But Dr. Hendricks never said, But if you decide
15 to compete, you don't have to pay us the agreed upon
16 sum. He never said that to you?

17 A He never said that.

18 Q And, finally, you referenced Dr. Alexander's
19 piece or editorial in the newspaper. Is this a copy
20 of that editorial that you were referencing?

21 A Yes, it is.

22 MR. BABCOCK: We'd offer this as the next
23 exhibit, Your Honor.

24 THE COURT: Any objection?

25 MR. THOMPSON: No objection, Your Honor.

1 **THE COURT:** Mark that in evidence please,
2 ma'am.

3 (Defendant's Exhibit 6, newspaper article,
4 admitted into evidence.)

5 BY MR. BABCOCK:

6 **Q** The date on that editorial is May 9, 2006,
7 isn't it?

8 **A** Yes.

9 **Q** And that's after you had already left Columbia
10 Heart?

11 **A** Yes.

12 **Q** And that's after you had started Lexington
13 Heart?

14 **A** Yes.

15 **MR. BABCOCK:** No further questions.

16 **THE COURT:** Anything else of this witness?

17 **MR. THOMPSON:** Nothing further, Your Honor.

18 **THE COURT:** Dr. Feldman, I want to make sure I
19 understand. An interventional cardiologist, the
20 distinction between an interventional cardiologist
21 and regular cardiologist is what?

22 **THE WITNESS:** An interventional cardiologist is
23 a subspecialty of cardiology which specializes in
24 the interventional work where you open up blocked
25 arteries with balloons and stents. In order to

1 perform that procedure, you need to be at a hospital
2 that could offer open heart surgery capability
3 because if there's a problem with the artery
4 blocking off during the procedure, you need to have
5 the ability to rescue the patient.

6 **THE COURT:** Can you do that at Lexington?

7 **THE WITNESS:** Well, that's just what this issue
8 is about that we are -- they were just approved as
9 of last week to do emergency angioplasties and
10 stents without surgical backup, but the ultimate
11 goal is that at Lexington, we were trying to have
12 open heart surgery available so that we can open up
13 all of the cardiology to this area for percutaneous
14 interventions.

15 **THE COURT:** All right. Any questions of the
16 witness in light of the Court's questions from the
17 plaintiffs?

18 **MR. THOMPSON:** Not from the plaintiff.

19 **MR. BABCOCK:** Not from the defendant, Your
20 Honor.

21 **THE COURT:** Thank you, Doctor. You may step
22 down.

23 Let's take five minutes and then we'll call
24 your next witness.

25 (Brief recess.)

1 **THE COURT:** Call your next witness.

2 **MR. THOMPSON:** Mr. Tod Augsburger.

3 TOD AUGSBURGER,

4 having been duly sworn, testified as follows:

5 **THE CLERK:** State your name for the record.

6 **THE WITNESS:** I'm Tod Augsburger.

7 **COURT REPORTER:** Can you spell your last name?

8 **THE WITNESS:** Sure. Augsburger,

9 A-U-G-S-B-U-R-G-E-R. And that's Tod with one D.

10 DIRECT EXAMINATION

11 BY MR. THOMPSON:

12 **Q** Mr. Augsburger, could you give us your present
13 occupation, place of employment?

14 **A** Sure. I'm the Chief Operating Officer of
15 Lexington Medical Center.

16 **Q** And how long have you been employed in that
17 capacity?

18 **A** Since November of 1999.

19 **Q** And just to give the Court a little bit of
20 background, could you maybe briefly describe your
21 education and what types of professional jobs you
22 had before coming to Lexington Medical Center?

23 **A** Sure. My undergraduate degree is from Michigan
24 State University and a business degree in finance,
25 actually. And my masters degree is in health

1 services administration in Michigan, which was
2 received in 1985. And then I've worked in differing
3 administrative capacities for several hospitals, the
4 majority of which were in Columbus, Ohio. I worked
5 in Columbus, Ohio for ten years prior to coming to
6 Lexington in 1999 in hospitals from a hundred beds
7 to a thousand beds and many combinations within,
8 within pretty much the same system in Columbus.

9 Q And can you give us a general description of
10 what the CEO -- COO, excuse me, of Lexington Medical
11 Center does?

12 A Sure. At the broadest level, I'm responsible
13 for the operations of the main hospital, the
14 Lexington Medical Center. Our system is a little
15 unique. We have not only a significant hospital,
16 but we also own a large nursing home in downtown
17 Lexington that I do not have responsibility for. We
18 have six community medical centers located around
19 Lexington County that provide urgent care, as well
20 as other diagnostic services. I do not have
21 responsibility for those. They report to our senior
22 vice president CFO.

23 And then we also employ approximately 160
24 physicians in an employment model that provide
25 services throughout the county and I don't have

1 direct responsibility for any of those except those
2 that work inside the hospital, the emergency
3 department, for example, radiation, oncology and a
4 few others.

5 Other than that, if it happens within the
6 hospital providing care, I'm directly responsible,
7 but I've got a lot of great people that do the real
8 work.

9 Q And who do you report to?

10 A The chief executive officer of the district is
11 Michael B. Deer.

12 Q And what level is above him, the board of
13 directors?

14 A Yeah. We have a board of directors that are
15 appointed by Lexington County Council.

16 Q And what involvement, if any, do you have in
17 physician staffing and the physician use of LMC, the
18 Lexington Medical Center?

19 A All sorts of differing involvement varying from
20 physician recruitment to get physicians to want to
21 help work at Lexington Medical Center to providing
22 the tools, staff, equipment that they need to do
23 their job to treat patients. If there's conflict
24 resolution or issues or things we can do better, I
25 work with physicians to provide those enhancements.

1 We do, as I said, employ some physicians, so I work
2 on an employment model for those that provide
3 service in the hospital. So it's sort of a varied
4 involvement from all aspects that are required in a
5 hospital.

6 Q How about in terms of, like, foreseeing medical
7 needs for the community and physician needs for the
8 community, is that something you're involved in?

9 A We do a great deal of strategic planning and
10 have a lot of methods for that planning process. A
11 significant portion of strategic planning in the
12 hospital is gauging and assessing current as well as
13 future demand for services, demand for patient care.
14 Lexington Medical Center is quite -- very, very busy
15 and very, very rapidly growing due in great part to
16 its location in Lexington County, as well as the
17 great physicians and staff we have so we're
18 continually looking forward to predict what services
19 will we need in the future, what population will use
20 them and then what physician compliment will we need
21 to help provide that care.

22 Q And as part of that process, do you keep in
23 contact with the existing physicians and keep
24 abreast of what they're doing and what their future
25 needs are going to be; that kind of thing?

1 **A** As best as one can recognizing that we have
2 separate businesses. I'm obviously not involved in
3 the day-to-day business aspects of a private group
4 of physicians, but we do our best to talk with all
5 of the attending physicians that routinely admit at
6 the hospital to gauge how well we're doing with the
7 services we offer today and if there's things we can
8 do better and to collaborate on those predictions
9 for the future. So part of my role, a significant
10 portion of my role, is physician surveillance and
11 relationships.

12 **Q** And can you describe for us briefly what
13 cardiologists and heart surgeons currently can and
14 cannot do at Lexington Medical Center?

15 **A** Do we have a few hours?

16 **Q** I did use the word briefly.

17 **A** Okay. Cut me off if I talk too much.

18 Cardiology and heart services are tremendously
19 important to Lexington Medical Center and I'm quite
20 passionate about that topic. We are in an ongoing
21 struggle to expand the amount of services and types
22 of services that we can offer our community, the
23 folks that we're here to take care of.

24 Today, I say -- let's back up -- two weeks ago,
25 we were legally only able to offer diagnostic

1 catheretization in our cath lab. We offer other
2 cardiology services, noninvasive cardiology service
3 from nuclear stress to echos to cardiac rehab to
4 inpatient care, but on the catheretization side, all
5 we've legally been able to do is to offer diagnostic
6 services, the insertion of a catheter that
7 measure -- I'll let the cardiologists talk about
8 that -- but the measuring of the heart and its
9 function.

10 In 2002, we opened our first diagnostic lab,
11 the only one we have today, and it's dramatically
12 been successful. It's the fastest growing and, we
13 believe, busiest diagnostic lab, single diagnostic
14 lab in the state or further.

15 Lexington Medical Center also has the unique
16 privilege in that we probably have the busiest E.R.
17 in the State of South Carolina. I say probably,
18 Spartanburg may be slightly busier. We saw almost
19 87,000 visits in our E.R. last year. We're the only
20 hospital in seven states around us that treat 80,000
21 E.R. visits and cannot perform emergency angioplasty
22 legally.

23 In 2004, we began a CON process that we believe
24 we met the criteria through the state and DHEC to
25 expand into invasive cardiology using stents to open

1 those vessels. And the state requires, if you want
2 to open vessels with angioplasty, you need to be
3 able to provide open heart surgery on the campus.
4 We are not allowed to do that because we don't yet
5 have a CON from DHEC to do so.

6 So, technically, we can provide diagnostic
7 cardiology, diagnostic catheterization. This last
8 week we were approved for a CON that we submitted a
9 few months ago and asked to add a second diagnostic
10 lab and we're approved to perform emergency
11 angioplasty under very strict criteria when, in the
12 physician's opinion, it was in a life or death case
13 to save the life of the patient, we're allowed to
14 now perform angioplasty. Although we really haven't
15 begun that program yet because it was just approved
16 last week. We've got a lot of work to do with our
17 cardiologists to establish protocols and practices
18 to -- under which we'll do invasive cardiology, but
19 again only under strict emergency criteria.

20 Q And why is it important for, in your view, for
21 Lexington Medical Center to have greater capability
22 to perform interventional procedures at LMC?

23 A As I said, we treat not only 80,000 plus visits
24 in our emergency department, we have another 150,000
25 patients that come through our community medical

1 centers for urgent care, many of which require
2 cardiac services. We have tremendous amount of data
3 showing the volume of patients who come to Lexington
4 needing emergent or urgent or even elective cardiac
5 services and we believe we could significantly
6 improve the quality of their care and the quality of
7 their life if those services were to be offered at
8 Lexington.

9 My personal opinion, I think the law is
10 terribly antiquated in that the very same physicians
11 in many cases who are performing those procedures
12 today at a downtown hospital are standing in the
13 Lexington cath lab with a catheter in the patient's
14 vessel and seeing the blockage and saying, I have to
15 stop, I can't fix this, I've got to stop, transport
16 you downtown, start over again and then open that
17 vessel, when we have the same technology or better,
18 same staff or better, same equipment or better. I
19 believe the law's antiquated and it's no longer
20 protecting patient care as much as it's protecting
21 financial interest, but that's a personal opinion.

22 Q I'm going to get you to focus a little bit on
23 Columbia Heart. Can you describe for me what their
24 current presence is like at the LMC campus versus
25 what it was like back in late 2005?

1 **A** Yes. Generally speaking, when we began seeking
2 privileges for our open heart surgery and
3 angioplasty program, we had a great partnership with
4 the Columbia Heart group, who I believe was really
5 interested in helping bring interventional services
6 to Lexington Medical Center. In 2002, we had, I
7 think, six members of that group on our active
8 medical staff admitting patients. In 2003, that was
9 14, I think, or 16. In 2004, it was 16. We saw a
10 tremendous number of physicians who wanted to
11 practice at Lexington and provide care for their
12 patients which we were very appreciative of.
13 They're a great group. They've got a great
14 reputation. They provide great care. We were
15 ecstatic to have that partnership.

16 As the cath lab volume grew and the admissions
17 to the hospital grew, that group became even more --
18 had a stronger presence on the campus. They had
19 owned a building on our campus but outside the main
20 hospital, a small building on the left side of the
21 campus, I think, since 1998. In 2004, the group
22 requested to lease approximately 10,000 square feet
23 in an attached medical building to the hospital,
24 which we were ecstatic. I mean, that would be
25 great, that demonstrated their commitment in their

1 presence on the campus.

2 In 2006, post the reason we're here today, I
3 guess, this relationship issue in the group,
4 Columbia Heart made the decision, I think,
5 financially to help reduce some of their overhead, I
6 think, to close those -- that office suite on the
7 Lexington Medical Center campus and go back to their
8 main office downtown at the Richland campus.

9 So significant up -- in sort of a significant
10 decline, we still have a tremendous number of the
11 physicians on our active staff. They still admit
12 patients. They no longer use our catheretization
13 lab unfortunately. I'm going to convince them to
14 change their mind here before long again, but we're
15 trying to. But they still use the services but not
16 as strongly as they did during the 2004, 2006
17 period. And we don't see -- without an office on
18 campus, we don't see those physicians nearly as much
19 as we used to.

20 **Q** And can you say why cardiologists, or for that
21 matter, any other doctor that uses the LMC services,
22 why would they want to have a physical presence
23 there near the hospital? How is that an advantage?

24 **A** Well, there's several advantages, obviously
25 convenience for those physicians who are treating

1 patients within the hospital, they don't have to
2 drive back and forth, they can walk between their
3 office, they can see patients and go back and forth
4 at odd hours to provide care for those patients so I
5 think that's a convenience, as well as there's a
6 relationship developed when physicians spend time
7 together in the doctor's lounge or on the floors or
8 referring and consulting on patients. And I think
9 there's an opportunity for that -- for business to
10 grow and referral relationships to be enhanced the
11 more people see each other and work together, but,
12 again, a lot of it is efficiency and convenience for
13 physicians to be on the campus.

14 Q And so you talked about the lease. How did
15 they approach you about the lease and getting out of
16 the lease for the office space?

17 A Dr. Jones was my primary contact with Columbia
18 Heart regarding business matters at that time. I
19 think he might have been president of the group, I'm
20 not sure exactly the term, but he might have been
21 the official president of the group and he had his
22 office over on the Lexington campus.

23 Columbia Heart leased two suites from us
24 totaling 10,000 square feet which made it a little
25 easier when they wanted to down size. Ben

1 approached us and asked if we would take back,
2 change the lease on one of those offices for them so
3 again they could reduce their overhead. And we had
4 never done such a thing before with any of our
5 leased tenants, but their logic made sense and we
6 were hoping to find a way to keep them on the campus
7 for the long term so we wanted to see if we could
8 find a way to help. So we, I think it was in the
9 Fall of '06, September, October, some time around
10 there of '06, we modified our lease to remove one of
11 the two suites.

12 And then later in early 2007, again Ben
13 approached me, I think, and said they couldn't keep
14 that office either and they were going to go back to
15 Richland, but he wasn't asking at that time to get
16 out of the lease, he knew they had the obligation
17 and we appreciated that. And I was hoping, and as I
18 told him, I hoped that he would change his mind and
19 be able to bring physicians back out there.

20 And then it was later in '07, probably late
21 Summer of '07, that finally I think he did either
22 come see me or send me a letter, can't remember
23 which, saying they would like to get out of that
24 lease financially, would we consider doing so. We
25 had other tenants who had an interest in expanding

1 into that space so it wasn't a real financial
2 hardship for us if we were to do that, so we
3 terminated their lease.

4 Q Why did you want to keep them on campus, have a
5 presence on campus?

6 A They are a successful, large, reputable group
7 and we believed if we could keep all of the
8 cardiology groups in the midlands on our campuses
9 using our services, that we'd meet the greatest
10 patient need. Again, there's a tremendous number of
11 patients who need services in Lexington County and
12 if we could make our hospital again attractive and
13 support their patient care and benefit the needs of
14 our patients. So the idea that one of the largest
15 groups in town would leave Lexington Medical
16 Center's campus and go downtown and diminish the
17 services they provided to our patients was not
18 attractive.

19 Q Was there a time when Columbia Heart Clinic was
20 supportive of the LMC getting the heart surgery
21 center?

22 A Oh, yes, I'd like to think that there are
23 several of them that still are. During our -- as I
24 said, when we applied for the open heart suite and
25 emergency -- or elective angioplasty the first time

1 in 2004, we asked for letters of support from the
2 physicians around the community. I think there were
3 140 approximate physicians who wrote letters of
4 support demonstrating Lexington's need for this
5 service. At that time, not one letter of opposition
6 was actually written by a physician to DHEC prior to
7 our ruling. In that list of 140, I think there were
8 12 to 15, I don't recall the exact number, of
9 Columbia Heart physicians who wrote letters of
10 support to DHEC encouraging them to approve our
11 application, which we appreciated.

12 Q And so that went beyond --

13 A Oh, yes.

14 Q -- Kevin Baugh and Barry Feldman writing
15 letters. So those were other physicians as well?

16 A Again, we felt a great deal of support from the
17 group, which was appreciated. Again, they cared for
18 a tremendous amount of Lexington patients and
19 believed, I believe, that those patients received
20 great care at our hospital.

21 Q How much does the Columbia Heart Clinic use the
22 cath lab now compared to back in 2005 and before?

23 A Very, very little. During our fiscal 2008
24 year, which ended September 30th of 2008, or October
25 1st actually, a little before that, the Columbia

1 Heart group only performed six catheterization
2 procedures in our laboratory and we performed
3 approximately 1200 cath. And none of those six
4 were outpatients, it was a few inpatients. The
5 majority of which of their patients had been
6 transferred downtown for services, which was a
7 dramatic drop from where it was in its prime days in
8 2004, 2005.

9 Q And is that because they're taking patients
10 elsewhere or is that because their presence is
11 lowered or do you know?

12 MR. BABCOCK: Objection, Your Honor. I don't
13 know how he would know individually on that.

14 THE COURT: Do you want to be heard?

15 MR. THOMPSON: He tracks these kinds of things.
16 He's the COO of -- if he doesn't know, I guess he
17 can say he doesn't know.

18 MR. BABCOCK: He can testify as to numbers but
19 not to cause, that's the problem.

20 THE COURT: You can ask the question, if he
21 answers it the way...

22 BY MR. THOMPSON:

23 Q Do you have any direct knowledge of why they
24 are using the Lexington Medical Center cath lab less
25 now than they were in 2005, early 2005?

1 **A** I cannot speak to the clinical needs of each of
2 those patients, but I find it very hard to believe
3 that all of a sudden the patients that are admitted
4 to Lexington Medical Center no longer need the
5 services that they were getting prior to the split.

6 **Q** Are Columbia Heart Clinic physicians still
7 admitting patients to the Lexington Medical Center?

8 **A** Yes, quite a bit.

9 **Q** Are those patients still receiving the same
10 types of services at Lexington Medical Center as
11 they were back in 2005?

12 **A** With the exception of catheterization which
13 they don't receive at Lexington Medical Center
14 anymore.

15 **Q** Let me show you what's been previously marked
16 as Defendant's Exhibit 6 and ask you if you
17 recognize this document?

18 **A** Yes, I recognize it.

19 **Q** And what is that?

20 **A** That's an editorial that was published in the
21 State newspaper by Dr. Don Alexander after the
22 governor vetoed our bill.

23 **Q** And you mentioned that previously Columbia
24 Heart Clinic physicians had been in support of the
25 heart surgery center -- well, let me back up. When

1 did you first become aware of this letter and how
2 did you become aware of this letter?

3 A We had lots and lots of editorials printed in
4 the State newspaper against our open heart
5 application, so I have a routine of looking at the
6 paper everyday to see if I'm in it. So the morning
7 of this editorial, I saw the editorial in there and
8 was disappointed.

9 Q Did that come as a surprise to you?

10 A Yes, it came as a surprise. We never received
11 any formal correspondence or discussions with Dr.
12 Alexander that said he'd changed his opinion of the
13 Lexington Medical Center project prior to receiving
14 that, but then I didn't expect that he would call me
15 and tell me that, but I was taken aback that he felt
16 that way.

17 Q Did you receive any support from Columbia Heart
18 Clinic physicians after Spring of 2005 after Kevin
19 and Barry left, any support for the heart surgery
20 center certificate of need?

21 A There were less opportunities for support --
22 let me think how to answer that -- I felt that there
23 were many members of the Columbia Heart group who I
24 believe still would like to see Lexington Medical
25 Center be able to provide these needed services

1 including Dr. Jones, but there weren't, again,
2 opportunities for public support, which was fine.
3 We never again asked for either -- after our
4 application either. I was disappointed to see any
5 public opposition from one individual, but, again, I
6 was pleased that I didn't see 18 other names from
7 Columbia Heart sign on the bottom of that line.

8 Q Did that letter get circulated around Lexington
9 Medical Center?

10 A Particularly the doctor's lounge at Lexington
11 Medical Center, it was posted in our lounge by one
12 of our physicians or two of our physicians, I'm not
13 sure whom, with big circles around Dr. Alexander's
14 picture and arrows pointing to him and other
15 comments.

16 Q So there were discussions about it that you
17 knew of?

18 MR. BABCOCK: Your Honor, object to the
19 substance of any conversations.

20 MR. THOMPSON: I'm not going to get into the
21 substance of the conversations. I'm just asking if
22 discussions occurred.

23 THE WITNESS: There was plenty of comments --

24 THE COURT: The objection is overruled. You
25 may answer it.

1 Go ahead and ask your next question.

2 BY MR. THOMPSON:

3 Q Did this letter -- can you say if this letter
4 harmed Columbia Heart Clinic's reputation and the
5 Lexington Medical Center, the medical community --

6 MR. BABCOCK: Your Honor, I would object to
7 that. He's giving an opinion about something the
8 Lexington County medical community had -- he's not
9 being offered as an expert, he'd have to be dealing
10 with hearsay and there's no way he could possibly
11 answer that question of his own knowledge.

12 THE COURT: Do you want to be heard?

13 MR. THOMPSON: I'll ask some other questions,
14 withdraw that question, Your Honor.

15 THE COURT: All right. Your question's
16 withdrawn. Go ahead.

17 BY MR. THOMPSON:

18 Q Mr. Augsburger, do you know, from your
19 experiences as COO of Lexington Medical Center, how
20 doctors in general and cardiologists, if you will in
21 particular, obtain referrals of patients? How does
22 that -- where do they typically get referrals of
23 patients?

24 A There's all sorts of processes that different
25 physicians use and different colleagues use,

1 providing great patient care to the patients that
2 the physicians share is the number one, in my
3 opinion, driver of referrals. Physicians appreciate
4 great service and great care for their patients or
5 they wouldn't be sending those patients to them. So
6 follow-up -- excellent care and then good follow-up
7 and communication seems to be, through our practice,
8 a tremendous driver of continued business and
9 referral relationships.

10 And then, again, there's a social aspect to
11 referrals as well. You work with people that you
12 know and trust and you like, so there's a
13 relationship piece as well. And then often
14 availability is significantly important to
15 physicians. If the person they want to refer to is
16 available, can take that patient quickly, can give
17 them an answer quickly. Or, conversely, if they see
18 someone, again, in the hall or nearby and think to
19 follow up quickly on a patient, they'll do that
20 informally.

21 So it's a combination of factors, trust,
22 experience and professionalism and follow-up is what
23 I've seen has been the most effective.

24 Q And would it affect referrals if you were a
25 physician who had a higher presence, were involved

1 in operations at LMC and went to staff meetings and
2 supported the heart surgery center, those types of
3 things, would that be something that would be
4 helpful to develop a reputation among referring
5 docs?

6 **MR. BABCOCK:** Your Honor, again, he's not a
7 referring doctor and we've gone beyond just the
8 general methodology of obtaining referrals and
9 asking this individual who doesn't do referrals or
10 doesn't instruct people on referrals or how
11 referrals occur. So this witness is not competent
12 to testify on that subject and that question.

13 **THE COURT:** Do you want to be heard?

14 **MR. THOMPSON:** Yes, Your Honor. Mr. Augsburger
15 is the COO of the hospital. The hospital owns a lot
16 of doctor practices, particularly the ones that are
17 based on the campus. And I think he's established
18 that he's in pretty close contact with those
19 physicians and is familiar with the referral process
20 and how that works.

21 I think he can offer some helpfulness to the
22 Court as to whether or not if you reduce your
23 profile, leave the campus and say bad things about
24 the heart surgery center, that's going to affect
25 your expected referrals. In other words, it's going

1 to damage you if you do those things.

2 **THE COURT:** But how is that relevant to any
3 inquiry I've got to make when the editorial came out
4 in 2006?

5 **MR. THOMPSON:** Your Honor, part of what they
6 need to establish, at least in our view, is that
7 that penalty bears some sort of reasonable
8 relationship to damages. They're going to put up an
9 expert that says, here's our damages. And one of
10 the things they're going to claim for damages is,
11 and they use the word not me, referrals. So I think
12 I'm entitled to introduce some evidence that it's
13 not that Kevin and Barry left, it's that you came
14 out in public opposition to the heart surgery
15 center, you reduced your visibility at the hospital
16 voluntarily and left the campus, that cut your
17 throat in the Lexington medical community. That's
18 what I'm trying to establish. That's the relevance.

19 **MR. BABCOCK:** And, Your Honor, first off in all
20 candor with the Court, there's no question that
21 diminution in referrals in Lexington is part of the
22 methodology that Mr. Ouzts used to show the
23 financial impact on Columbia Heart Clinic. That's
24 not the issue with regard to this witness. This
25 witness --

1 **THE COURT:** Your objection was not as to
2 relevance, I brought that up, but you explained that
3 to me now. Go ahead.

4 **MR. BABCOCK:** Now, what this witness said in
5 his deposition was that although Lexington Medical
6 Center has doctors on staff, they're not involved
7 with the referral process from his standpoint. He
8 doesn't make referrals, he doesn't tell groups who
9 to refer to. Referrals by individual doctors in
10 Lexington is outside this individual's area of
11 expertise. He doesn't do it and he's not involved
12 in that process.

13 **THE COURT:** Okay. It goes to weight not
14 admissibility. Go ahead. Your objection is
15 overruled.

16 BY MR. THOMPSON:

17 **Q** Mr. Augsburg, I have to rephrase my question
18 because I don't remember what it was unless you do.

19 **A** No, thank you. Go ahead.

20 **Q** Based on your experience as COO and your
21 involvement at the Lexington Medical Center, would
22 the actions of Columbia Heart Clinic that you have
23 described in reducing their profile and
24 Mr. Alexander's letter, would that, do you think,
25 have affected their likelihood of getting referrals

1 from Lexington -- the doctors in the Lexington
2 medical community?

3 A Yes --

4 MR. BABCOCK: Your Honor, just so I don't waive
5 it, same objection.

6 THE COURT: All right. The objection is noted
7 and overruled.

8 You may answer the question, sir.

9 THE WITNESS: Yes.

10 BY MR. THOMPSON:

11 Q Did you try to talk Dr. Jones out of leaving
12 the campus?

13 A Yes.

14 Q Did he blame Dr. Feldman or Dr. Baugh for their
15 decision to leave the campus?

16 A No.

17 Q Did he offer an explanation?

18 A It was a -- as I recall, it was a financial
19 decision and their desire to reduce the overhead of
20 their practice.

21 Q Had they added -- do you know if they've added
22 cardiologists since Dr. Baugh and Dr. Feldman left
23 to their practice?

24 A Yes. I believe there have been two or three
25 additions, but I've not followed specifically their

1 individual practices very closely. I don't get to
2 see them very often so I'm not sure how many.

3 Q Is there any cardiologists from the Columbia
4 Heart Clinic practice who has taken a higher profile
5 position at Lexington Medical Center, has gone out
6 of his way to try to be involved with you or anybody
7 else since Dr. Baugh and Dr. Feldman have left?

8 A No. Again, Dr. Jones has always been
9 supportive and encouraging and I don't see him
10 nearly as much as we used to, but when I do, it's
11 been pleasant. And, again, I believe some day in
12 the future, we'll get him back, but that hasn't
13 happened yet.

14 Q Is it correct that Columbia Heart Clinic asked
15 to reduce their lease some time in the Fall of 2006?

16 A I think it was September of 2006.

17 Q And when they asked, you allowed them to do
18 that?

19 A We had to talk it over, may have actually
20 required a board action, I cannot recall, but it
21 took about a month or so, maybe two months, to work
22 through that process.

23 Q And then they later asked to be let out of the
24 lease entirely?

25 A Yes, almost a year later. Again, they emptied

1 the building and moved downtown, then asked six,
2 seven, eight months later to stop paying the rent.

3 Q When you say they emptied the building, what
4 does that mean?

5 A They relocated. They moved their whole
6 practice out of the building back downtown and left
7 the space vacant.

8 Q Was the equipment that they had vacated as
9 well?

10 A I did not go through the office to look, but I
11 believe they took everything that was theirs.

12 Q Do you know what would have been the answer if
13 they had asked earlier to reduce their lease or to
14 get out of the lease?

15 MR. BABCOCK: Your Honor, I object. He'd be
16 speculating there.

17 THE COURT: You've got to lay a foundation.

18 BY MR. THOMPSON:

19 Q Was there anybody looking for space on campus
20 before the Fall of 2006?

21 A Not for a suite, not for the Columbia Heart
22 size suite in its location, no.

23 Q And how about between the time they asked to
24 reduce the lease and the time they asked to
25 eliminate the lease, was there anybody looking for

1 space then?

2 A Yes. We'd added a few other practices who
3 needed space in that building, so there was an
4 increased demand.

5 Q So during that time period, would it have been
6 possible if they had asked to get out of the lease,
7 that that would have been fine with Lexington
8 Medical Center?

9 A I really can't say whether, at the time,
10 whether it would have been or not. It depended on
11 the circumstances.

12 I was continuing to encourage Dr. Jones to not
13 give up the space, that his group would see the need
14 to be on the Lexington Medical campus for the long
15 term and if they changed their mind and come back.
16 So I was hoping we could hang on to that lease for a
17 while so that they would come back.

18 MR. THOMPSON: If I may have a moment, Your
19 Honor.

20 THE COURT: Yes, sir.

21 (Pause.)

22 BY MR. THOMPSON:

23 Q Perhaps just one other question, Mr.
24 Augsburger. Did Dr. Jones or anybody else with
25 Columbia Heart Clinic mention, as a reason for

1 leaving the Lexington Medical Center campus, that
2 they had a relationship with Palmetto Richland, that
3 they had to concentrate their physicians there
4 because of that contractual relationship?

5 MR. BABCOCK: Objection, Your Honor, that's a
6 leading question.

7 MR. THOMPSON: I can ask it a different way.

8 THE COURT: All right.

9 BY MR. THOMPSON:

10 Q Other than the sort of general unspecific
11 financial reasons, did Dr. Jones or anybody else at
12 Columbia Heart Clinic give any other reason for
13 leaving the Lexington Medical Center campus?

14 A No.

15 MR. THOMPSON: No other questions, Your Honor.

16 THE COURT: Cross?

17 MR. BABCOCK: Please the Court.

18 THE COURT: Yes, sir.

19 CROSS-EXAMINATION.

20 BY MR. BABCOCK:

21 Q Mr. Augsburger, as I understand it, Lexington
22 Medical Center is not involved with referrals
23 itself; is that right?

24 A Well, we have employed physicians who make
25 referrals to other doctors everyday.

1 Q Right. You have employed physicians who do it,
2 but you as an entity don't do it?

3 A No. As an administrator, I can't make a
4 referral for a patient.

5 Q So you don't make referrals, correct?

6 A Correct.

7 Q And you also don't tell other groups who to
8 refer to?

9 A Correct.

10 Q That's the individual doctor's determination?

11 A Correct.

12 Q Now, in 2006, I think you told me at your
13 deposition, you had about 40 cardiologists on staff
14 at Lexington?

15 A Between 40 and 50. I think today we have 55.

16 Q And going back to 2006, again, before Doctors
17 Baugh and Feldman left, as I understand your
18 testimony, they had -- Columbia Heart had a very
19 active presence and a very active participation at
20 Lexington Medical Center; is that right?

21 A Correct.

22 Q And it was after that they left and started
23 Lexington Heart in late April and May, that was
24 after that that the presence of Columbia Heart
25 decreased?

1 **A** It was after they moved away from the leased
2 space on our campus, which was after the group split
3 up, yes.

4 **Q** And it was after they had staffed their
5 operation and were up and going in May, correct?

6 **A** The time again was late fall and early the
7 following year, yes.

8 **Q** And, of course, you don't know where they --
9 where they hired their staff from? You wouldn't
10 have an independent knowledge of that?

11 **A** Who's they? I'm sorry.

12 **Q** Lexington Heart?

13 **A** No, I have no idea.

14 **Q** But in relatively short order in the Fall of
15 '06, Dr. Jones came to you about giving up some of
16 their space because they just didn't have the same
17 level of activity at Lexington at that point in
18 time?

19 **A** He didn't -- he came to ask to be let out of
20 the space. He didn't talk about the level of
21 activity. He talked about the overhead and cost.

22 **Q** Right. And their activity was decreasing
23 during that period, wasn't it, or do you know?

24 **A** I don't believe so. I don't recall seeing a
25 dramatic drop in the Summer of '06.

1 Q But after that point in time, it certainly
2 dropped?

3 A Yes.

4 Q You would agree with that?

5 A Yes.

6 Q And, ultimately, they eventually closed their
7 whole operation in '07?

8 A Yes.

9 Q On the Lexington campus.

10 MR. BABCOCK: I don't have anything further.

11 THE COURT: Redirect?

12 REDIRECT EXAMINATION

13 BY MR. THOMPSON:

14 Q Was there a change in admissions of Columbia
15 Heart Clinic physicians, and maybe you don't know
16 this, immediately after Dr. Baugh and Dr. Feldman
17 left? Or, can you say how that may have changed
18 their admissions, number of admissions?

19 A Cardiology admissions have grown dramatically
20 over the last several years by all doctors in the
21 community, generally speaking, at Lexington,
22 including Columbia Heart and Lexington Heart. 2002,
23 for example, there were 250 admissions roughly by
24 Columbia Heart as a group, maybe a little bit more
25 than that. In fiscal '07, both Lexington Heart and

1 Columbia Heart combined had 850 admissions. So
2 we've had a dramatic increase in volumes.

3 Columbia Heart, I think, still in 2007 at least
4 admitted 400 plus patients as did Lexington Heart
5 during that same period of time. I haven't checked
6 2008. I do think Columbia Heart's admission volume
7 fell down in '07 from '06, but I can't speak to the
8 magnitude of that drop.

9 Q How about '05 to '06?

10 A No, it increased.

11 Q And Dr. Baugh and Dr. Feldman left in '05?

12 A It would have been our fiscal '06 probably --

13 Q Early '06?

14 A Yeah.

15 Q So from '05 to '06 there was no drop off in
16 Columbia --

17 A Oh, there's an increase from everyone. Again,
18 we've had a dramatic increase in volumes.

19 MR. THOMPSON: That's all. Thank you, Your
20 Honor.

21 THE COURT: Recross?

22 MR. BABCOCK: No questions, Your Honor.

23 THE COURT: Mr. Augsburger, I try not to inject
24 myself into the case, particularly when I have
25 excellent lawyers like I have here in this case, but

1 I want to make sure I'm understanding.

2 I've been on the opposite end of that scalpel.

3 **THE WITNESS:** I'm sorry.

4 **THE COURT:** I'd been on the opposite side of
5 the grass if I hadn't been on the opposite side of
6 the scalpel.

7 What are you calling an admission?

8 **THE WITNESS:** When somebody -- when a patient
9 is admitted to the hospital overnight for care.
10 Typically, we count the admissions at midnight. If
11 you were in a bed at midnight and aren't under
12 observation status, which is a government
13 nomenclature for a very short stay of less than 24
14 hours, you're admitted to the hospital.

15 **THE COURT:** All right. Can't do stent --
16 before this week, can't do stents?

17 **THE WITNESS:** No, sir.

18 **THE COURT:** Can't do open heart surgery?

19 **THE WITNESS:** No, sir, unfortunately.

20 **THE COURT:** Is it part of your business to know
21 what your competition can do?

22 **THE WITNESS:** Oh, yes, sir.

23 **THE COURT:** What other hospitals are there in
24 South Carolina, off the top of your head, that are
25 in a similar situation to you as far as being unable

1 to do -- what is it?

2 **THE WITNESS:** Invasive cardiology or
3 angioplasty --

4 **THE COURT:** Put in stents?

5 **THE WITNESS:** There are many small hospitals in
6 South Carolina that cannot perform angioplasty or
7 put in stents.

8 **THE COURT:** But just the ones that can do the
9 angioplasty, but cannot do the stents?

10 **THE WITNESS:** Angioplasty and stents I'll use
11 as one word, sir. I may be incorrect as the
12 cardiology -- but I will use that as one term.
13 Using a balloon to open a vessel and then putting a
14 stent in.

15 **THE COURT:** You're right. I'm sorry.

16 **THE WITNESS:** But I'll defer to the
17 cardiologists on that. Most hospitals in the State
18 of South Carolina can't do that unless they're very
19 large hospitals. So in Columbia, sir --

20 **THE COURT:** What is it that they do at
21 Lexington? I'm trying to figure it out.

22 **THE WITNESS:** Again, it would be a cardiologist
23 who could explain it better, but in my layman's
24 term, they put a tube in your vessel up near your
25 heart that measure the pressure and helps send

1 images to a big x-ray machine that shows you whether
2 there's a blockage or not. So they get the tube up
3 there close, they'd see the blockage and normally
4 what they would want to do, depending on the
5 clinical needs, and I'm not a cardiologist, is to
6 open that vessel as quickly as they could to get the
7 blood flow back through if you're having a heart
8 attack, for example, or if you're just at risk.
9 They'd want to open that with a balloon, sometimes
10 putting a stent in there to keep it open.

11 At Lexington, by state law, they allow us to go
12 in and look but not fix, which is terribly
13 antiquated. They set the threshold by saying if you
14 did 1200 diagnostic caths a year, and then someone
15 argued it didn't affect other hospitals, we'll
16 debate that, then you should apply for angioplasty
17 or interventional --

18 **THE COURT:** I was trying...

19 **THE WITNESS:** We do the 1200, we meet that
20 criteria, but the other hospitals believed it would
21 hurt them financially if we were allowed to take
22 care of those patients.

23 **THE COURT:** I understand the dispute.
24 Catheretization was the word I was trying to think
25 of while ago when I said angioplasty. So they can

1 do the cath.

2 THE WITNESS: Yes, sir.

3 THE COURT: They can't do angioplasty and they
4 can't implant stents.

5 THE WITNESS: Correct. That said, sir, on 40,
6 little less than 40 occasions in the last five
7 years, we have had cardiologists who have inserted
8 stents when a patient was dying on our table. And
9 we encourage that, what matters is the patient. So
10 technically we --

11 THE COURT: And now you can do that --

12 THE WITNESS: Now, we can open that vessel in
13 emergencies, which is ironic in that you don't let
14 your staff get trained routinely on less critical
15 patients. You don't practice, arguably, on routine
16 patients. You only do the most serious at the worst
17 time. We don't believe that's right in our state
18 law, but we're moving forward with that process, so,
19 hopefully, we'll be able to do the whole program in
20 the not too distant future. And, again, we've had
21 great support from the cardiologists in many cases
22 to help do that.

23 THE COURT: So they do the catheterization.
24 They go up there, they find a blockage --

25 THE WITNESS: Uh-huh. Sorry, catch you

1 tomorrow.

2 **THE COURT:** What about transporting them to a
3 different hospital?

4 **THE WITNESS:** You can. Many of them do
5 transport either immediately or will say, this isn't
6 critical, we can do this scheduled another day. But
7 the patient has at least two procedures, two bills,
8 a transport, a worry. And if it were me on the
9 table, as our cardiologists have said during the
10 last trial, it's the same doctor with the same
11 equipment with the same -- fix it while you can.
12 That's my editorial, sir.

13 **THE COURT:** All right. Any questions in light
14 of the court's questions, from the plaintiffs?

15 REDIRECT EXAMINATION

16 BY MR. THOMPSON:

17 **Q** So you mentioned in '06, that admissions were
18 the same -- well, you said they were increased
19 actually.

20 **A** Uh-huh.

21 **Q** And I believe you testified earlier that the
22 Columbia Heart Clinic physicians weren't utilizing
23 -- the admissions may have been there, but they
24 weren't utilizing other services. And the other
25 services are the cath?

1 **A** Correct. They stopped using our cath lab.

2 **Q** So do you know what they're using? You just
3 know they're not using yours anymore?

4 **A** I can say they're not using ours. I believe
5 they're using the Richland labs, but I can't speak
6 to the specific patients.

7 **MR. THOMPSON:** No other questions.

8 **MR. BABCOCK:** None from the defendant, Your
9 Honor.

10 **THE COURT:** Thank you, sir. You may step down.
11 How many more witnesses do you have?

12 **MR. THOMPSON:** I'm not sure how long you want
13 to go today, Judge. We have a short witness next.
14 And after that; the next witness probably after him
15 will take some time.

16 **THE COURT:** Well, let's just take a very short
17 recess about five minutes and then we'll start and
18 see how it goes.

19 (Brief Recess.)

20 **THE COURT:** Call your next witness.

21 **MR. THOMPSON:** Dr. Charles Parker.

22 **THE COURT:** Come around please, sir, to the
23 clerk.

24 *****

25 *****

1 CHARLES PARKER,
2 having been duly sworn, testified as follows:

3 THE CLERK: State your name for the record.

4 THE WITNESS: My name is Charles Parker.

5 DIRECT EXAMINATION

6 BY MR. THOMPSON:

7 Q Dr. Parker, can you tell us what your
8 occupation is and your current employer?

9 A I'm a physician internist at Internal Medicine
10 Associates. We're owned by Lexington Medical
11 Center.

12 Q And where is your office physically located?

13 A Medical Park 2 adjacent, across the street from
14 the hospital, from Lexington Hospital.

15 Q What kind of medicine do you practice?

16 A I'm an internist.

17 Q And do you from time to time see patients who
18 have heart conditions?

19 A Sure.

20 Q And can you describe a patient -- who -- type
21 of patient or what patient -- what type of symptoms
22 would they have that you might refer them to a
23 cardiologist? I know that was awkward, but --

24 A That's a very large question. Everybody has a
25 heart, anybody at some point could need to be

1 referred. I tend to do a lot of my cardiology work
2 myself in terms of pulmonary workup. So, generally,
3 it's going to be people who need procedures,
4 interventions, further evaluation treatment that I
5 couldn't provide, so electrical problems, rhythm
6 problems, decreased blood flow, which is circulation
7 problems, perhaps in some cases structural or
8 autoimmune problems as well. Probably, I'll get a
9 little bit too far if I go beyond that.

10 Q Okay. And an internist, can you kind of
11 describe what an internist's practice is like?

12 A We're doctors for adults, so we take care of
13 both sick and well adults.

14 Q So you would take in a very wide range of
15 patients that had a wide range of problems, if you
16 will?

17 A Sure.

18 Q And so it's not unusual for you to refer
19 patients to a specialist if that's what they need in
20 your opinion?

21 A Correct.

22 Q Are you familiar with the Columbia Heart Clinic
23 and the Lexington Heart Clinic?

24 A I am.

25 Q And they're a cardiology practice, correct?

1 A Yes, both.

2 Q Can you describe what your relationship was to
3 Columbia Heart Clinic, say, in early 2006 before Dr.
4 Baugh and Dr. Feldman left that practice?

5 A I mean, I referred, we're going to get to
6 referrals eventually I think, I referred patients to
7 all the cardiology groups, probably the majority
8 went to Columbia Heart with Columbia Car -- what is
9 now known as Columbia Cardiology as a second in the
10 years prior to the whole debate about the
11 certificate of need at Lexington Medical Center.
12 And the dates on that, I'll let everybody drag out
13 the dates on, but that's the relationship that I had
14 at that time.

15 Q And I'm backtracking somewhat, but do you know
16 what other types of doctors refer cardiac patients
17 to cardiologists?

18 A The way things work now anybody can refer a
19 patient to a cardiologist. They can come from
20 surgeons. Pulmonologists and cardiologists seem to
21 like to refer to each other, and family practice
22 doctors and internists will do a bulk of that as
23 well.

24 Q And the patients that you refer to a
25 cardiologist, your patients, do you know typically

1 where they get treated; is it Lexington Medical
2 Center or downtown Columbia?

3 **A** Well, that -- it depends on what kind of
4 treatment you're talking about and that's the debate
5 it's all up in the air about. So my patients get
6 shoveled around to various places depending on
7 whether they need interventions or not.

8 **Q** And what types of -- what types of things can
9 Lexington -- cannot be done at Lexington Medical
10 Center for a cardiac patient?

11 **A** Interventional cardiology, angioplasty, stent,
12 as well as cardiothoracic surgery related to the
13 heart.

14 **Q** And have you been involved in, I'll call it the
15 debate, the back and forth, if you will, having to
16 do with Lexington Medical Center getting the heart
17 surgery center?

18 **A** I have been.

19 **Q** And is that an issue -- can you describe the
20 importance of that issue to you?

21 **A** Sure. My patients generally come from West
22 Columbia, Lexington area. When they need to be
23 hospitalized, I only practice at Lexington Medical
24 Center and I would tend to admit them there. They
25 tend to come to that emergency room. So to me, it's

1 a moral, ethical issue that we'd be able to do
2 interventional cardiology at Lexington because
3 people die.

4 If you come from Gilbert and you make it to
5 Lexington, you have -- you're having a heart attack
6 that has certain EKG pattern on it, you need to be
7 intervened, the arteries need to be opened up and
8 you're losing muscle, you're losing your ability to
9 pump and you can die in transport. And all of the
10 delays that go into bundling that person up and
11 transporting them can contribute to morbidity, which
12 is not being able to function in life, and
13 mortality, which is dying. So I advocated in front
14 of the state senate committees and DHEC committees
15 and other places to give testimony to the need for a
16 hospital with our E.R. volume to have interventional
17 cardiology in place.

18 What came to be at the forefront of that was a
19 certificate of need for cardiothoracic surgery. And
20 the reason that that is sort of a leading wedge of
21 the thing is up to this point, most hospitals have
22 said that you need cardiothoracic surgery backup to
23 do these interventions in case you have
24 complications.

25 So I also read EKGs at Lexington Medical Center

1 and see these kinds of heart attacks that may come
2 through on a daily basis knowing that those people
3 are having to be bundled up and transported instead
4 of being treated there. So, yes, I've been a big
5 advocate for us to have those capabilities.

6 Q And do you have a general rule for who you
7 refer cardiac patients to now and who would that be?

8 A I don't have a rule.

9 Q Or a practice that you could describe --

10 A I would say that most of my patients are
11 referred to Lexington Heart at this point.

12 Q Do you refer much, if any, to Columbia Heart
13 Clinic at this point?

14 A If patients have a preference, if they already
15 have an established relationship with one of the
16 doctors over there, they go back and forth between
17 there, but new referrals I'll tend to send to
18 Lexington Heart at this point.

19 Q And your tendency to send to Lexington Heart is
20 that different from what your practice was in
21 referrals before, say, in early 2006 and before
22 that?

23 A 2006 -- well, you can use 2006 as the date if
24 you want. Like I said earlier, some time in the
25 early 2000's, my referral pattern would probably be

1 to Columbia Heart Clinic and then I had
2 relationships with people -- with Columbia
3 Cardiology whenever those two weren't the same
4 thing. I can't keep score on who went where at this
5 point. And when it became clear that certain
6 cardiology groups were not supporting, either
7 supporting interventional cardiology at Lexington by
8 doing diagnostic caths and things at the other
9 hospitals or whatnot, I began to preferentially move
10 my patients to support the hospital and to support
11 the moral and ethical position that we should have
12 that capability. So however that all panned out,
13 most of my referrals at this point go to Lexington
14 Heart.

15 Q And is Columbia Heart Clinic who you're
16 referring to when you say, I forget how you
17 described it, but other groups that weren't
18 supporting, however you described it?

19 A Well, Columbia Heart Clinic and Columbia
20 Cardiology saw referrals from me decline as things
21 panned out about who was or wasn't supporting our
22 ability to do interventions at Lexington Medical
23 Center.

24 Q Okay. Did you mention you were aware that they
25 stopped using the cath lab, that -- they being the

1 Columbia Heart Clinic?

2 A Well, I would not phrase it the way that you
3 just did. My observation is that people were
4 preferentially taken to the hospitals over across
5 the river for interventions. Sometimes that was
6 appropriate for a high risk patient so they don't
7 have to get stuck twice, but there were other -- the
8 editorial that was written made it clear. And my
9 understanding is that there were relationships
10 between Columbia Cardiology and Providence that were
11 there and I was looking for cardiology people who
12 were going to support Lexington Medical Center to be
13 able to do what was right for the patients that were
14 under my care.

15 Q And that was not Columbia Heart Clinic?

16 A Correct.

17 Q I think right at your left elbow there, there's
18 an exhibit. Let me ask you if you recognize that?

19 A I do.

20 Q What is that?

21 A It's Dr. Alexander's editorial from May of '06.

22 Q And were you -- did you -- when did you become
23 aware of that letter?

24 A I can't give you the exact date, but I believe
25 it was posted in the doctor's lounge soon after it

1 was published.

2 Q And what was your reaction to seeing that
3 letter?

4 A Indignant, disappointed, I think those are fair
5 words.

6 Q And was that letter a subject of discussion
7 among doctors at Lexington Medical Center?

8 A Sure. And I think that was the general
9 reaction. In fact, my partner, if I'm correct, from
10 what he told me today, wrote an editorial to that --

11 MR. BABCOCK: Your Honor, I object, again, to
12 what somebody else told him, that's hearsay.

13 THE COURT: Do you wish to be heard?

14 MR. THOMPSON: No, Your Honor.

15 THE COURT: You might can get it in a different
16 way, but you can't say it the way you said it.

17 THE WITNESS: Which part? Everything's a
18 blur --

19 THE COURT: What your partner told you, you
20 can't get that in.

21 THE WITNESS: Okay. It's my understanding that
22 Dr. Black wrote an editorial in response to
23 Dr. Alexander's editorial, so he felt that strongly
24 about it.

25 BY MR. THOMPSON:

1 Q Who is Dr. Black?

2 A He's one of my partners.

3 Q Were there any other sort of public or private
4 responses in opposition to Don Alexander's letter
5 that you're aware of?

6 A Passing conversation was simply being
7 indignant.

8 Q I won't ask you about those since they're
9 hearsay. In terms of -- has there been a change in
10 the presence of Columbia Heart Clinic physicians at
11 the Lexington Medical Center campus comparing now
12 to, say, back in early 2005?

13 A Again, I can't say the dates, but you don't see
14 the physicians that you used to see there as readily
15 now as you did then.

16 Q And from your perspective, does that perhaps
17 affect your willingness to refer patients to doctors
18 if they have a lower presence?

19 A I think the predominant thing is the referral
20 patterns were set up along the lines of this
21 conflict over certificate of need for surgery. The
22 issue of presence or not really has to do more with
23 my patients, most of my patients are old and most of
24 them don't want to go downtown to be treated.
25 Driving into Columbia is a big deal for my patients.

1 Q Okay. And so let me ask a follow-up question,
2 that is if the Columbia -- since the Columbia Heart
3 Clinic physicians don't have a physical office on
4 the Lexington Medical Center campus or nearby, does
5 that affect your willingness to refer patients to
6 them?

7 A I think it affects the willingness of my
8 patients to go to a particular cardiologist. Again,
9 I think my referral patterns have been set up prior
10 by some of these other conflicts and concerns.

11 MR. THOMPSON: That's all of the questions from
12 this witness.

13 THE COURT: Cross?

14 MR. BABCOCK: Just a few.

15 CROSS-EXAMINATION

16 BY MR. BABCOCK:

17 Q Dr. Parker, you're here today to talk about
18 your own referral patterns; is that right?

19 A Correct.

20 Q And your group does not have any kind of
21 policy, your group has individual referrals based
22 upon the individual doctor's preference; is that
23 right?

24 A Correct.

25 Q Last year how many referrals did you have to

1 cardiac physicians?

2 A I have no idea.

3 Q When using end of April '06 as our divider
4 line, and for your benefit, you weren't here
5 earlier, that was the time period after Doctors
6 Baugh and Feldman left Columbia Heart Clinic and
7 started Lexington Heart, I think they actually
8 opened the doors on May 1st, we're using that as a
9 dividing line, before that point in time, you were
10 giving referrals to Doctors Baugh and Feldman,
11 correct?

12 A Sure.

13 Q And once they moved to Lexington Heart, you
14 continued to refer to them, but, of course, they
15 were at Lexington Heart?

16 A That's true.

17 MR. BABCOCK: No further questions.

18 THE COURT: Redirect?

19 MR. THOMPSON: Nothing further, Your Honor.

20 THE COURT: Thank you, Dr. Parker. You may
21 step down.

22 Is he free to go?

23 MR. BABCOCK: Without objection, Your Honor.

24 THE COURT: You're free to go, Doctor. Thank
25 you very much.

1 Is your other witness still here?

2 **MR. THOMPSON:** Well, we have a number of
3 options, Your Honor. I don't know if you want to
4 talk about what your schedule is for the rest of the
5 day. There's probably a 30 to 45 minute witness who
6 is here. Dr. Jones, I'm going to call, may take,
7 between direct and cross, an hour, I'm -- just a
8 guess. Dr. Baugh is going to take more than that.
9 And then we have the CPA expert and he's going to
10 take significantly more than that.

11 **THE COURT:** They're all here?

12 **MR. THOMPSON:** The CPA is not here. Dr.
13 Baugh's here and the other two witnesses of shorter
14 duration are here.

15 **THE COURT:** Let's take your 45 minute witness,
16 if that doesn't mess up your pattern.

17 **MR. THOMPSON:** That's fine, Your Honor. I
18 don't think the order matters.

19 We would call then Dr. Robert Schulze.

20 **THE COURT:** Dr. Schulze, would you come up
21 please and be sworn by the clerk.

22 ROBERT SCHULZE,
23 having been duly sworn, testified as follows:

24 **THE CLERK:** State your name.

25 **THE WITNESS:** My name is Robert Schulze.

1 DIRECT EXAMINATION

2 BY MR. THOMPSON:

3 Q Dr. Schulze, my name is Charles Thompson. I
4 believe we've met before.

5 A We have.

6 Q And I expect your examination, at least for my
7 purposes, to be fairly short, but nevertheless
8 important. Can you describe for the Court please,
9 Dr. Schulze, the link between the new agreements in
10 2004 and the new building? What was the
11 relationship between those two?

12 A Well, as you've heard somewhat from other
13 witnesses, Dr. Humphrey, who was the President of
14 the practice at that time, in conjunction with the
15 other officers of the practice and David Summer
16 developed this addition to our contract that covered
17 the approximately 25 million dollar expense that we
18 were undertaking to build this hundred thousand
19 square foot building and staff it and buy the
20 equipment that was appropriate to it.

21 This was, you know, quite a bit of money for
22 us. And we were taking the risk of building the
23 building and the substantial increase in overhead,
24 for example, our rent was going to go up more than a
25 hundred percent and we needed some protection, some

1 financial protection, to the practice and the
2 shareholders of the practice. And Dr. Humphrey
3 developed this process whereby there was a penalty
4 for people who left the practice and then went into
5 competition with us with the result in loss of
6 revenue that would occur, some increase in overhead
7 and, of course, basically walking away from the
8 debts that had been occurred -- incurred.

9 Q There's no question that the new building was
10 the impotence, if you will, for the 2004 agreements?

11 A I think that's correct. Although, certainly if
12 anybody left the practice, we were going to have
13 substantial shortfalls in revenue because patients
14 tend to follow their doctors.

15 Q Would you agree that, at least for the typical
16 Columbia Heart Clinic physician, that most of his or
17 her patients are going to come from, say, the county
18 within which their main office or their main
19 practice is located?

20 A Well, in general, that's true. Obviously, we
21 get referrals from all over the state, but I think
22 if you're working in the Lexington community, you're
23 going to have a lot of Lexington referrals. If
24 you're working in Richland County, you're going to
25 have a lot of Richland referrals.

1 Q Would it be fair to say that the majority,
2 probably, of your patients are going to come from
3 within that area?

4 A Probably.

5 Q Is it true you agreed or told Dr. Barry Feldman
6 that he had done the right thing or words to that
7 effect in leaving the practice based on how his wife
8 was treated?

9 A I think I did say that, but certainly my
10 expectation was that Barry was going to live up to
11 his contract. I mean, we'd all made this major
12 financial commitment and I didn't think he was going
13 to personally put me at risk for his share of the
14 costs of the plan we'd undertaken, especially since
15 we were good friends.

16 Q Now, y'all chose to let him out of the building
17 ownership, correct?

18 A We were -- I don't know whether we were
19 contractually bound to let him out, I'm not exactly
20 familiar with the details there, but I know that --
21 he had an opportunity to stay in the building, but
22 it was sort of a -- if it wasn't a written
23 obligation, it was an unwritten obligation that a
24 negotiation should take place and generally he
25 should not benefit financially from the building in

1 the future if he wasn't going to be a member of the
2 practice. The shareholders of the practice were the
3 building owners even though they were two separate
4 entities.

5 Q Certainly, the shareholders of the building
6 didn't let Kevin and Barry out of the contract out
7 of that building out of some altruistic motive, it
8 was a financial one. Is that what you testified to?

9 A Long-term financial one. I mean, short term,
10 they invested \$10,000 and about a year later, we
11 paid them each \$200,000.

12 Q Now, their shares were resold to other incoming
13 physicians, correct?

14 A On down the line, yes, but they were sold to
15 other incoming physicians based on a strict
16 appraisal policy that was undertaken. Appraisals
17 were obtained by the building owners and by the
18 junior partners who were -- partners who were --
19 wanted to buy into the building and then, as I
20 recall, we met in the middle somewhere.

21 Q Do you know if they were sold for more or less
22 than what the owners paid for --

23 A They were sold for more. And the numbers
24 weren't quite as high as Barry Feldman mentioned,
25 but they were in the 30 to 50,000 dollar range each.

1 **Q** You're an interventional cardiologist; is that
2 correct?

3 **A** Among other things.

4 **Q** And what types of hospital facilities does an
5 interventional cardiologist need nearby in order to
6 do what he does?

7 **A** I believe you're asking me what kind of
8 hospital facilities does an interventional
9 cardiologist need within the hospital to do what he
10 does?

11 **Q** Yes, to take advantage of this specialty?

12 **A** Yeah, we need open heart surgery and, of
13 course, catheterization labs and trained personnel.

14 **Q** And isn't it true that in order for you or
15 Kevin or Barry to continue to be interventional
16 cardiologists, if they have to move outside of the
17 20 mile radiuses that are in the agreements, they're
18 going to have to go to another or at least near
19 another facility that has these interventional
20 capabilities and approval, correct?

21 **A** That is correct. However, they chose to leave
22 the practice. Whatever their reasons were, they
23 were contractually bound not to practice within that
24 20 mile radius where there would be certain
25 penalties involved.

1 Q I understand.

2 A And I think it's important to remember that
3 there was a contract here, we all agreed to it and I
4 expected them to live up to it. I was shocked.

5 Q And would it be correct that the next nearest
6 facilities that I described that have the
7 interventional capability approval would be
8 Greenwood, Aiken and Rock Hill?

9 A That's probably right, but I think you need to
10 recognize that although I'm an interventional
11 cardiologist, Dr. Jones is an interventional
12 cardiologist, Dr. Baugh is an interventional
13 cardiologist, Dr. Feldman is an interventional
14 cardiologist, we practice in the general sphere of
15 cardiology. None of us spends more than five
16 percent of our time doing interventional cardiology.
17 We do consultative cardiology. We treat people in
18 the hospital. We do diagnostic catheterization,
19 echocardiography, nuclear cardiology, we regulate
20 the cardiograms, we spend hours on-call basically
21 answering the phone or attending to patients in the
22 emergency room. The interventional part of our
23 practice, and it's nice to call ourselves
24 interventional cardiologists, that's only a small
25 amount of our income, probably three or four percent

1 at the most.

2 Q I understand that, but --

3 A Being a cardiologist is what we do.

4 Q Doesn't that differentiate you, though, from a
5 cardiologist who does not have that specialty?

6 A Certainly. Just like an electrophysiologist
7 does different things, noninvasive cardiologists do
8 essentially everything except work in the
9 catheterization laboratory.

10 Q And isn't it correct that that was no small
11 amount of effort on your part to obtain that
12 certification? It's not an easy thing to get, is
13 it?

14 A No, you have to train to do it.

15 Q And it has some value to it, does it not?

16 A Yes, it does.

17 Q And if you weren't going to do it for a time,
18 is it your understanding that you would lose those
19 privileges or perhaps lose the certification?

20 A It would be almost impossible to lose your
21 privileges. It's almost like riding a bicycle. You
22 know, once you know how to do it, you can do it.
23 You may be a little rusty the first couple of
24 procedures, but, you know, it sounds like an
25 incredibly complex sophisticated technique, but, you

1 know, we do it everyday or we do it one day a week,
2 actually that's pretty much what we do, we do it one
3 day a week. And, of course, we're doing many other
4 things other than the interventional stuff that day
5 when we're working in the cath lab. So, no, no
6 one's going to lose their privileges to -- or
7 nobody's going to lose their ability to do
8 interventional cardiology because they don't do it
9 for a year. I mean --

10 Q Okay --

11 A Let me finish, please.

12 Q Well, I don't want to interrupt you, that
13 really wasn't my question. My question was --

14 MR. BABCOCK: Your Honor.

15 THE COURT: Yes, sir.

16 THE WITNESS: I think I answered your question.

17 THE COURT: Wait a second, Doctor. Let me hear
18 from them, okay.

19 MR. BABCOCK: He's interrupting the witness.

20 The witness is in the middle of his answer of the
21 question he asked. He's talking exactly about what
22 he asked about, the certification or whatnot.

23 MR. THOMPSON: No, Your Honor, it's not
24 responsive.

25 THE COURT: What's your position, Mr. Thompson?

1 **MR. THOMPSON:** I asked him was it his
2 understanding, or words to this effect, that if you
3 don't practice for a while, you lose your
4 privileges. I meant that as a sort of a legal
5 ability to do it under the way interventional
6 cardiologists are certificated and approved by the
7 state. Maybe he can't answer that part of it, I
8 don't know.

9 **THE WITNESS:** I can't answer it.

10 **THE COURT:** Hold on just a moment. The
11 question was, If you weren't going to do it for a
12 time, is it your understanding that you would lose
13 your privilege or perhaps lose your certificate?
14 He's responding to the question. You may continue.
15 Have you finished your answer?

16 **THE WITNESS:** The answer is you would not lose
17 your privileges. You may have to reapply for
18 privileges, but you certainly would still meet, at
19 least in this community, the criteria to be able to
20 do those procedures. Dr. Feldman was incorrect when
21 he answered the question, the similar question, that
22 you asked him.

23 **BY MR. THOMPSON:**

24 **Q** And I may have made a mistake. Are you board
25 certified in interventional cardiology?

1 **A** No, I'm not. I've been doing interventional
2 cardiology since 1981. No one in this community has
3 done more interventional procedures than I have. No
4 one has been doing interventional procedures as long
5 as I have and I would guess nobody has the track
6 record I have. I've had one death in 28 years of
7 doing interventional cardiology. I don't believe
8 anybody would consider that I was not qualified to
9 do interventional cardiology or speak about it.

10 **Q** And I apologize if you think I was casting
11 aspersions on you. That was not my intention.

12 **A** It sounded like it. The board in
13 interventional cardiology was developed
14 approximately eight or nine years ago and some
15 people chose to take the board, some people were
16 grandfathered in. And I felt like board
17 certification was not necessary for me, I've been
18 doing it so long. And I'm sure there are many
19 people like me in the country.

20 **Q** And you're aware, of course, that Kevin and
21 Barry offered to assume the staff and the lease over
22 at -- on the Lexington Medical Center campus when
23 they left?

24 **A** Yes. They made us an offer we could refuse.

25 **Q** And is the reason it was refused in your

1 opinion because y'all wanted to make it as difficult
2 as possible on them?

3 A That's not the entire reason. Of course, they
4 were going to go into competition with us and we
5 would be foolish to make their life easy for them,
6 but the request they made was almost absurd. They
7 basically offered to take over the rent of the
8 office space from us and in return we would give
9 them a ready made place to work. We'd spent
10 hundreds of thousands of dollars upfitting that
11 office and staffing it, we still had debt related to
12 that upfitting that we owed and they basically
13 wanted to have a turnkey arrangement where they
14 would walk in, everything would be there waiting for
15 them. They'd already taken all of our staff and for
16 that they were going to assume our lease. It really
17 was not very hard to turn that deal down.

18 Q Dr. Schulze, do you recall giving a deposition
19 in this matter?

20 A Yes.

21 Q And do you remember telling me in that
22 deposition when I asked you that same question, that
23 the reason you gave was to make it as difficult as
24 possible on them?

25 A I believe my answer -- part of my answer was

1 there was at least that element of it, and I don't
2 think that should be surprising to you. We would
3 not be going out of our way to help them compete
4 with us. We were planning to stay at the Lexington
5 Medical Center, continue to have an office there.
6 Dr. Jones had been just as instrumental in our
7 Lexington practice as Dr. Barry Feldman and Dr.
8 Baugh and I know he was planning to stay there and
9 work. And we brought other cardiologists in our
10 group out there to work. We needed a place to work
11 as well.

12 Q And do you remember if you offered those other
13 reasons at the deposition or not?

14 A I don't think I gave as complete an answer. I
15 think in a deposition, your lawyer tells you to say
16 as little as possible. And I think when I'm
17 answering your questions, I feel like I should
18 answer them directly, but I think I also have the
19 right to expound on my answer.

20 Q But in the deposition, you didn't expound in
21 the same manner, did you?

22 A No. I was trying to minimize my answers to any
23 question you asked me at the deposition.

24 MR. THOMPSON: No other questions.

25 THE COURT: Any questions of the witness at

1 this time?

2 MR. BABCOCK: Yes, sir.

3 CROSS-EXAMINATION

4 BY MR. BABCOCK:

5 Q And, Dr. Schulze, I think you've got some
6 commitments later in this week; is that right?

7 A I do.

8 Q So we're going to go ahead and do your
9 examination at this time. We didn't get any of your
10 background. How old are you, sir?

11 A Sixty-three.

12 Q And where do you live?

13 A I live on Congaree Avenue in Columbia near --
14 in the Wells Gardens area near Five Points.

15 Q And I think it's pretty well understood, but
16 you currently practice with Columbia Heart?

17 A I do.

18 Q And how long have you been with them?

19 A Well, I founded the group that eventually
20 became Columbia Heart in 1978. We became the
21 Columbia Cardiovascular Clinic in 1980. We merged
22 with Columbia Cardiology Associates to form the
23 Columbia Heart Clinic in 1998. So you can do the
24 math, 31 years.

25 Q And if you would, sir, briefly give us your

1 education and training starting with med school and
2 moving forward.

3 A Okay. I graduated from the Columbia University
4 College of Physicians and Surgeons in New York in
5 1971. I subsequently trained in internal medicine
6 at the Columbia Presbyterian Medical Center for the
7 next three years and then I did my cardiology
8 training at Johns Hopkins subsequent to that.
9 Following that, I was a cardiologist in the U.S.
10 Army at Fort Jackson for two years and then started
11 my practice in Columbia.

12 Q And, Dr. Schulze, we've had -- you've been in
13 the courtroom this morning; is that right?

14 A Yes.

15 Q And we talked a little earlier today about the
16 July 2004 employment agreements. I think we got
17 that marked --

18 A We did -- or I heard you talking about it.

19 Q I think we've got that marked as Plaintiff's
20 Exhibit 1.. Let me hand that to you, please. And is
21 that representative of the employment agreements
22 that the doctors in Columbia Heart signed in July of
23 2004?

24 A Yes, sir, it appears to be.

25 Q Tell me what led up to the signing of those

1 documents in terms of what discussions the group
2 had, what meetings the group had?

3 A I wasn't privy to developing this document. I
4 was no longer the President of the practice, but as
5 I understand it, Steve Humphrey, who was the
6 President at the time, and perhaps some of the other
7 officers were involved in developing this new
8 contract. They developed it in conjunction with
9 David Summer who was a well-known, excellent health
10 care attorney who we had used previously. And the
11 document evolved to the point that it is.

12 We had meetings with David Summer and I think
13 we had a board meeting or perhaps a special meeting
14 of the members of the practice, possibly just the
15 shareholders of the practice, I'm not certain about
16 that, where Dr. Humphrey presided and reviewed all
17 of these documents after we'd already met with
18 Mr. Summer. And I think he was available at that
19 second meeting as well to answer questions and help
20 with the legal issues involved.

21 Q So the discussions went on for a period of
22 time?

23 A They did.

24 Q And did all of the doctors have the ability to
25 read the document?

- 1 A As far as I know.
- 2 Q Did you read the document?
- 3 A I did.
- 4 Q And did the doctors have the ability to consult
5 with their own attorney if they chose?
- 6 A We had plenty of time to discuss all of this
7 among ourselves, consult with attorneys and, of
8 course, be certain of what we were signing.
- 9 Q Do you recall any objections being raised
10 during the discussion process concerning the
11 covenant?
- 12 A I don't, but I'm a little fuzzy. At the time,
13 there may have been some, but I'm not aware of any.
- 14 Q In the end, all of the doctors signed; is that
15 right?
- 16 A That's correct.
- 17 Q Now, let's go forward to November of 2005 and
18 the meeting concerning Jenny Feldman's application
19 to be included as a shareholder. Did you attend
20 that meeting?
- 21 A I did.
- 22 Q What -- before the meeting, was there any
23 discussion concerning that application coming up at
24 the meeting or did you wait to have it presented?
- 25 A I had discussions with Jenny about it. As she

1 testified, she was originally supposed to be on the
2 agenda in September. And for whatever reason, the
3 board meeting ran over or there was some problem
4 that -- which she had no control over and I really
5 don't think the shareholders of the practice had any
6 control over it earlier and she really didn't get on
7 the agenda.

8 We have one board meeting a month of the
9 shareholders of the practice. It's at 6:00 a.m. to
10 8:00 a.m. on the last Wednesday of the month. It's
11 the only time we can get everybody together that
12 early in the morning. And, really, when eight
13 o'clock comes, you sort of have to stop because
14 we've got to go to work, if you want to call it
15 work.

16 But, anyway, I'd had discussions with Jenny.
17 And Jenny and I were very close professionally and
18 we were friends personally. I referred her all of
19 my electrophysiology work and -- well, to the great
20 extent, my electrophysiology work and I was
21 supportive of her desire to become a shareholder.

22 Q Did you tell her that?

23 A Yes.

24 Q Now, let's go forward to the meeting itself.

25 Tell me what you remember that occurred at the

1 meeting in -- on November 30th, 2005.

2 A Well, the meeting was shocking in many ways.

3 The meeting took place -- and I'm going to
4 concentrate on the part related to Jenny becoming a
5 shareholder.

6 Q Y'all discussed other things at the meeting
7 before that?

8 A I believe we had a regular, sort of a mini
9 board meeting before that. We had a few issues we
10 had to clear up. It was December and getting near
11 the end of the year, sometimes we don't have a board
12 meeting the last Wednesday of December, but for some
13 reason, we had some business to do and then the rest
14 of the evening, this was an evening meeting, the
15 rest of the evening was related to Jenny's
16 application. And she addressed the group and
17 explained what had happened in her practice and why
18 she desired at this time to become a shareholder of
19 the practice and requested that we look upon her
20 application in a positive way.

21 The one thing I remember from the meeting that
22 really, really surprised me and was something I
23 could never agree with was that she did request, and
24 I wasn't aware she was going to request this, she
25 requested that she have a one year, so-called,

1 junior partnership where she would take night call,
2 work on weekends, do all the things the regular
3 shareholder partners and junior partners do in the
4 practice or on partnership track. She wanted to do
5 that for one year and then she requested an
6 unequivocal guarantee that she would be made a
7 shareholder at that time.

8 Q That was done at the meeting?

9 A Yes. And she said that's what she wanted. But
10 she -- that's what she told us. And, you know, that
11 particular point, even though she was my friend and
12 my colleague, professional colleague, and I liked
13 her very much, that was a point that I could
14 personally never agree with.

15 Q Why is that?

16 A It's just not a long enough period to -- for us
17 to determine whether she was going to have the
18 ability to hold up her end of the deal. And,
19 certainly, no one is going to guarantee you a job
20 until you prove that you can do the work.

21 Q She'd been working with you for a period of
22 time as a part-time physician, hadn't she?

23 A This is a totally different thing. This is
24 stress beyond belief. You know, we work 80, 90
25 hours a week in most cases. And there's a joke

1 among cardiologists, and I'm sure Dr. Feldman and
2 Dr. Baugh have heard it, it's harder to be a partner
3 in a cardiology practice than to be married.
4 There's more stress involved. You're sleep
5 deprived. You're up all night and you have to work
6 the next day. You work the weekends and you work
7 the next week. So it's -- you're tested under fire
8 and that's what we ask of anybody who wants to
9 become a partner, we have to see how they perform
10 under these stresses because sometimes it can be a
11 very difficult thing.

12 Q What's the normal length of a partnership track
13 at Columbia Heart?

14 A At that time, it was three years. Now it's two
15 years.

16 Q All right. So we'll go back to the meeting
17 itself.

18 MR. THOMPSON: Your Honor, I need to maybe get
19 a clarification here. Are we examining this witness
20 as part of your case now? Because obviously this is
21 beyond the scope of my direct.

22 MR. BABCOCK: Well, we're in state court, I
23 can.

24 THE COURT: He's not limited by any rules I
25 know anything about.

1 **MR. BABCOCK:** Federal court's different.

2 **MR. THOMPSON:** Well, but I still need to know,
3 Your Honor, is this now his witness because --

4 **MR. MALONE:** Can't lead, he's been leading
5 repeatedly.

6 **MR. BABCOCK:** Well, first off, one lawyer on
7 the other side objecting. And if they want to
8 object, they can object.

9 **THE COURT:** I understand. Have you finished?

10 **MR. THOMPSON:** Well, he said something about,
11 okay, because Dr. Schulze is not going to be
12 available later on, so I just want a clarification
13 of is he just having a broad examination or are we
14 actually using this witness as part of his case and
15 we're just going to do it out of order, which is
16 okay. I just want to know what the posture of this
17 witness is right now or maybe it doesn't matter.
18 You can tell me it doesn't matter and I'll sit down.

19 **THE COURT:** I can tell you what happens
20 everyday in court and it is if they decide whether
21 they're going to call him in their own case or
22 whether they're just going to go ahead and put it
23 all up at one time and not call a witness twice. I
24 don't know what they do in federal court. I haven't
25 practiced much in federal court.

1 **MR. THOMPSON:** Well, there was no objection,
2 Your Honor. I was just trying to get a
3 clarification.

4 **THE COURT:** That's fine.

5 **MR. BABCOCK:** And for everybody's benefit, I'm
6 only intending to examine Dr. Schulze today. I'm
7 not going to be recalling --

8 **THE COURT:** Either one of you can call him
9 again if he's still under subpoena. I don't want to
10 interfere with his plans or whatever his commitments
11 are.

12 BY MR. BABCOCK:

13 **Q** Let's go back to the meeting that you were
14 talking about. If you could continue forward, was
15 there anything else of significance from what Dr.
16 Jennifer Feldman presented?

17 **A** No, that was what I remember. And then I
18 remember that she left the meeting and Barry recused
19 himself or was asked to leave appropriately because
20 we were going to discuss his wife's situation. And
21 then we were basically, I guess you could call it,
22 executive session. I don't know whether it was
23 formally that, but -- and then we -- there were
24 various comments made by the various partners there.
25 Incidentally, we had some junior partners also who

1 were at the initial meeting who had left as well, so
2 it was just the shareholders.

3 Jenny had been working at the Providence
4 hospital for, approximately, the previous year.
5 Prior to that time, she was working at Richland
6 Memorial closely with Dr. Collins, Dr. Jones, myself
7 and the other doctors who tended to work at
8 Richland. And she'd been asked, because of our
9 partner who had had a problem had to leave the
10 practice of medicine, to go and become the
11 electrophysiologist at Providence. So she had
12 worked there in conjunction with our Providence
13 doctors for approximately a year or so and I'd seen
14 very little of her.

15 And the thing that was terrible at this meeting
16 was that the reaction of the Providence doctors who
17 basically spoke up, not all of them, but Dr.
18 Rhinehart and Dr. Bouknight, Daniel Bouknight, were
19 very critical of her. They were critical of her
20 surgical abilities and they were critical of her in
21 terms of, at least one case and perhaps others,
22 where she had abandoned patients who'd had
23 complications to the point that the cardiac surgeons
24 at Providence, and specifically Dr. Allen and Dr.
25 Sutten had spoken to our other Providence doctors,

1 and I don't know whether it was Dr. Humphrey or Dr.
2 Bouknight or Dr. Rhinehart, were extremely upset
3 because they had felt like on occasion, they had
4 been called in to deal with a complication she had
5 without her being present or without her making any
6 effort to handle the complication herself. I don't
7 know firsthand about this, but this was what was
8 said at the meeting and I was, you know, very
9 surprised.

10 There was always some subtle background concern
11 about Jenny's technical abilities, but that did not
12 keep people in our practice from referring her
13 devices to put in including myself, although I'd put
14 all these devices in myself, sometimes I couldn't.
15 So I don't think, uh, there was concern about the
16 device complication, but there was also concern
17 about her ability to deal with the device
18 complications. It's a tradition in medicine that if
19 you create a problem, you do everything you can to
20 fix it. You don't pass it off on somebody else.
21 And I think this was the ethical dilemma that we
22 were in to some extent there.

23 There were also questions raised about her
24 productivity and whether or not she would become a
25 financial burden on the other partners in the

1 practice. At that time, we had an incentive
2 practice, but basically about 80 to 85 percent of
3 your income related to income that was generated by
4 all the partners and split equally. So if we had a
5 partner who was not holding up their share
6 financially, they would be taking money away from
7 the other partners, at least to this 85 percent
8 extent. And it was obvious from reviewing her
9 productivity while she'd been at Providence within
10 the last year, that she was not going to be able to
11 produce the kind of revenue that the shareholders in
12 the practice were expected to produce.

13 Q Why do you say that?

14 A We looked at the numbers and she had -- there's
15 some controversy about how hard she was working at
16 that time, but she was working a minimum of 32 hours
17 a week and by her statement, as much as 50 to 55
18 hours a week. So she was -- and she had all
19 these -- she had all this business at Providence
20 that she had to deal with, the departed physician
21 who'd been at practice in Columbia for many years
22 had a huge practice which she was seeing all those
23 patients, plus her patients, plus doing all the
24 electrophysiology referrals that she got at
25 Providence Hospital which included cardiologists

1 other than in our immediate practice, although we
2 had five cardiologists working there. And despite
3 that, the numbers looked pretty bad.

4 And we expected that her -- if she took call
5 and worked weekends and did things like this, her
6 charges and income, revenue generated would go up
7 substantially, but probably, to be perfectly honest,
8 the expected increase might be 50 percent. And if
9 she doubled her productivity at that time, she was
10 still going to be, in terms of charges, a million
11 dollars below the average shareholder in the
12 practice. So there was a big concern there as well.

13 And I understand some of this generated into
14 concern about complications, but that's not all it
15 was. It was a business situation and it was a
16 situation where there was this abandonment issue
17 regarding surgical complications which had extended
18 beyond our practice. She really had a -- the
19 cardiac surgery doctors at Providence were extremely
20 unhappy with her. And, also, in the background,
21 there was some sort of investigation of
22 complications going on. This was not anything that
23 was generated for her, apparently this was the
24 practice at Providence where if there were
25 complications related to implanted devices, they

1 were being monitored by nurses over there. And
2 apparently there was some concern in that regard.
3 So all these --

4 **Q** Was that ongoing at the time of the meeting?

5 **A** Yes. And these were all of the concerns that
6 were raised at the meeting. And as a result of
7 that, there was -- there was a lot of controversy.
8 There were a lot of doctors there, such as myself,
9 who still supported Jennifer's ability to become a
10 partner, but certainly we had to investigate certain
11 issues. She was my friend, but, you know, business
12 is business and patient care is patient care. And I
13 think all this had to be sorted out and we
14 developed, and as it turned out, the process went
15 on.

16 Unfortunately, per her testimony she was
17 devastated. She made, in Dr. Baugh's words, a rash
18 judgment. She just basically was mad at us and said
19 that's it, I'm threw.

20 **Q** Let's stay with the meeting for just one
21 minute. What comments, if any, were made by Dr.
22 Baugh at that meeting?

23 **A** Dr. Baugh spoke against Jennifer's
24 application --

25 **MR. THOMPSON:** Your Honor, I want to object --

1 I'm sorry, Your Honor. I withdraw the objection.

2 **THE COURT:** Okay. You can complete your
3 answer.

4 **THE WITNESS:** Dr. Baugh spoke against
5 Jennifer's application and he spoke very strongly
6 against it. I think he was under some influence by
7 one of the Providence doctors. I don't think he had
8 any firsthand experience, but there were several
9 negative comments.

10 Additionally, the thing that really got me was
11 sort of toward the end of the discussion a comment
12 was made from one of the Richland doctors, and I
13 don't know which. They specifically asked Dr.
14 Humphrey if he was using Jennifer to do any of his
15 device implantations. And he was a very
16 well-respected member of our practice. He was the
17 President, but he was also someone we all knew to be
18 an extremely honest, straightforward person and he
19 basically just shook his head and said no. So that
20 was -- that virtually ended the meeting.

21 BY MR. BABCOCK:

22 **Q** At any point after the meeting, did you have
23 any conversations with Dr. Jennifer Feldman
24 concerning a partnership or the shareholder issue at
25 the practice?

1 **A** Well, I had conversations with her. She was
2 very upset and I was unhappy about all this, but --
3 and I tried to -- she told me she was leaving and I
4 tried to convince her not to leave. And I suggested
5 to her that, you know, maybe she needed to get out
6 of the Providence situation and get back to the
7 Richland office. And if there really was a problem
8 with the devices, maybe she should just do
9 diagnostic electrophysiology and consultative
10 cardiology.

11 And she had a nice referral practice. She was
12 a very pleasant person. She was an excellent
13 cardiologist. And she had a connection with -- a
14 special connection with a lot of the female doctors
15 in the community and also certain, you know, male
16 cardiologists as well, but she had really developed
17 a nice practice and I just hated for her to have to,
18 you know, I never considered that she would stay
19 around, although I guess she could have done that
20 contractually, but I just hated to see her leave. I
21 mean, she was a real positive person in our
22 practice. And I was trying to find anything I could
23 do to convince her to stay.

24 **Q** Doctor, the 2004 employment agreement that we
25 talked about earlier, when that was signed by you

1 and the others at that point in time, did you think
2 that was a fair document?

3 A Yes, absolutely. I mean, we had to protect
4 ourselves financially. We were taking a huge risk
5 here. I mean, we could have had cost overruns in
6 the building. I mean, we were taking on a major
7 financial risk to do this.

8 Now, obviously, we thought it was going to be a
9 good deal or we wouldn't have done it, but it was a
10 big unknown. And, you know, you're talking about
11 borrowing 23, 24 million dollars, I mean we had --
12 we maybe had been on the line for a couple million
13 before that maximally, I don't know exactly what the
14 number was, but it certainly was far less than five
15 million.

16 Q And as you sit here today, do you still think
17 it's fair?

18 A Yes, I think it's very fair.

19 MR. BABCOCK: With the Court's indulgence.

20 THE COURT: Yes, sir.

21 (Pause.)

22 MR. BABCOCK: Answer any further questions
23 counsel may have.

24 THE COURT: Any other questions of the witness?

25 MR. THOMPSON: Yes, Your Honor.

1 REDIRECT EXAMINATION

2 BY MR. THOMPSON:

3 Q Dr. Schulze, I take it you were -- when I asked
4 you about whether or not you were board certified,
5 that got a little bit of a reaction for you. That's
6 not what I was looking for, but you took that as
7 somewhat offensive, correct?

8 A I did.

9 Q Okay. So can you understand Dr. Jennifer
10 Feldman, after learning she'd been accused of
11 abandoning patients, having poor surgical ability
12 and failing to handle complications, can you
13 understand her being upset and deciding to leave the
14 practice?

15 A I can absolutely understand her being upset and
16 I can understand her deciding to leave the practice.
17 It was the abruptness of her decision that I regret
18 because I think if she'd just been willing to talk
19 to some of us, she had a lot of close friends in the
20 practice, I don't think, you know, I'm sure she
21 discussed this with her husband, but she was -- I
22 mean, she just made a quick decision. She was
23 adamant and nobody was going to change her mind. I
24 did everything I could to change her mind. And I
25 think if anybody could have changed it other than

1 Barry, it would have been me.

2 Q In your history of being involved with Columbia
3 Heart Clinic, have you heard such strong accusations
4 against other physicians?

5 A Um...

6 Q I mean, is this something that typically
7 happens or was this unusual?

8 A No, I was shocked.

9 Q After Barry and Kevin left, say, in the next 12
10 months, did Columbia Heart Clinic hire any new
11 cardiologists?

12 A Yeah. We've hired five cardiologists since
13 they left.

14 Q Were any of those -- when the Lexington office
15 was still open -- well, I'll open it more than that.
16 After they left, were any physicians assigned to be
17 based at the Lexington office?

18 A I want to correct my last answer. My last
19 answer wasn't correct. We had five junior people
20 who were hired around the time that Barry and Kevin
21 were leaving, some became shareholders in 2006, that
22 sort of thing. I apologize for that. I was
23 incorrect there. Would you ask your question again?

24 Q My next question then was were any physicians
25 assigned to the Lexington office as their primary

1 office after Kevin and Barry left?

2 A No. When Kevin and Barry left, the plan was
3 for Ben Jones to work out there on a regular basis,
4 not everyday as he was the -- he'd become the
5 President of the practice, but we had a rotating
6 group that would rotate out there one week at a time
7 and I was a member of that group. There were five
8 or six of us. So we had two -- we had two doctors
9 in the office at all times.

10 Q Is it correct that, I think you alluded to
11 this, Ben Jones was going to have to spend more time
12 at the Columbia office, correct?

13 A That's correct because of his responsibilities,
14 but he would still -- the plan was still for him to
15 be half-time at Lexington, that subsequently
16 evolved, but that was the plan.

17 Q You mentioned that Jennifer Feldman had made a
18 request to be, I forget the exact terms, basically a
19 junior shareholder. What did you mean by junior
20 shareholder, junior partner?

21 A We refer to people on partnership track who
22 were not shareholders as junior partners, that's
23 essentially what she would have become on -- as she
24 would work along her partnership -- to her full
25 partnership.

1 Q I'm going to use the more accurate term. A
2 shareholder track, y'all are shareholders, right,
3 not partners?

4 A Yeah, but we refer to ourselves as partners.

5 Q Be that as it may, I'll use the more accurate
6 term. Shareholder track is the norm, so what was
7 unusual about her request? I didn't really
8 understand your testimony.

9 A What was unusual about her request to my mind
10 was she wanted a one year call arrangement and then
11 guaranteed shareholder status.

12 Q That was your understanding?

13 A Absolutely.

14 Q Now, is it correct that about that time that
15 Dr. Jennifer Feldman was addressing a difficult
16 situation that was left by a physician over at the
17 Providence practice?

18 A She'd been doing that for a year, approximately
19 a year.

20 Q I don't want to get into that physician's
21 personal problems, but he did have personal problems
22 that spilled over into his practice and there were
23 some deficiencies in how he was treating patients?

24 A It's already been alluded here that he had drug
25 and alcohol problems and he was asked to leave the

1 practice and seek treatment. And he'd been keeping
2 very poor records and he was basically one of our
3 electrophysiologists at Providence and so it was
4 normal for her to sort of pick up a lot of his
5 patients. I don't think she picked them all up, but
6 she picked up a lot of them, especially the ones
7 with electrical problems.

8 Q And she was also fixing some problems that he
9 left, particularly with regard to recordkeeping and
10 things like that, right?

11 A Yeah, the recordkeeping was a problem. The
12 recordkeeping had been a problem for years and we
13 were unaware of why. I mean, I had discussions with
14 him five years before that about his inadequate
15 recordkeeping.

16 Q And wouldn't it be correct that that would
17 affect your productivity that she was having to --

18 A No. I would think it would -- personally, I
19 would think it would increase her productivity. She
20 basically had more to do than she would have
21 otherwise. I mean, every one of these patients she
22 was seeing was essentially a new patient referral
23 and she had evaluations that had to be done, tests
24 that had to be run. If anything, it would have been
25 -- resulted in a fairly substantial increase in her

1 productivity in my opinion. It certainly would have
2 increased my productivity.

3 Q Didn't she have to go back and redo some things
4 she couldn't charge for because there was no record
5 that they were done?

6 A I don't think that would be correct. Though,
7 you know, I'm not her, basically the way I would
8 handle it is if I saw a patient who came in who had
9 inadequate records, I would start with a complete
10 new patient evaluation, which is the most productive
11 thing that we do.

12 Q And, at that time, she was not taking call,
13 correct?

14 A That's correct.

15 Q And that would affect her patient base, would
16 it not? If you're not taking call, that's going to
17 lower your productivity?

18 A Not taking call would lower -- well, you can
19 look at this a number of ways. Productivity refers
20 to --

21 Q Well, how about this. Can you answer my
22 question yes or no? You're free to explain
23 afterwards.

24 A I did.

25 Q No, I don't think you did.

1 **A** I said no. I said basically you --
2 productivity is revenue based on time spent. And
3 she probably had no free time. I mean, she had all
4 these patients she had to deal with, so probably she
5 was -- she should have been as productive as she
6 could be. She had all these new patients to
7 evaluate and she had -- there's going to be no
8 openings in her schedule, I'm sure. I'm sure she
9 had people waiting for weeks to see her.

10 **Q** If she had these problems that the Providence
11 physicians were accusing her of, why didn't somebody
12 bring these to her attention before the meeting to
13 consider her request to become a shareholder?

14 **A** I don't understand that. As I said, I was not
15 aware that there was this problem going on, but, you
16 know, we're working in one hospital and she and the
17 other four doctors are working in another hospital
18 and another office. At that time, we had a separate
19 office at Providence where the Providence doctors
20 worked.

21 **Q** You mentioned the study of implant problems.
22 Isn't it correct that ultimately there was no
23 evidence that she had issues with implants beyond
24 the norm?

25 **A** There was a decision made that she had no

1 excessive complications or difficulties with her
2 implants, whether or not that was a scientific study
3 is something for another time.

4 MR. THOMPSON: No other questions.

5 MR. BABCOCK: Just very briefly, Your Honor.

6 RECROSS-EXAMINATION

7 BY MR. BABCOCK:

8 Q I wanted to clarify. You were asked a question
9 concerning the hiring of new physicians. I want to
10 ask you, so we can be clear on your answer, how many
11 new physicians, not looking at shareholders, but new
12 physicians have been hired at Columbia Heart Clinic
13 since Doctors Baugh and Feldman left in April of
14 2006?

15 A I think three.

16 MR. BABCOCK: No further questions.

17 MR. THOMPSON: Nothing further.

18 THE COURT: All right. Dr. Schulze, I have
19 some more of these stupid questions.

20 THE WITNESS: Yes, sir. Yes, Your Honor.

21 THE COURT: Devices and implants to which
22 you've been referring, the lawyers referred,
23 pacemakers; is that correct?

24 THE WITNESS: Yes, sir. Pacemakers and
25 internal cardioverter defibrillators, defibrillators

1 and pacemakers.

2 **THE COURT:** Like Vice President Cheney had the
3 defibrillator in his --

4 **THE WITNESS:** Yes, sir.

5 **THE COURT:** Can they do those at Lexington?

6 **THE WITNESS:** I know they can do pacemakers at
7 Lexington because I've done some there. I would
8 assume you can do a defibrillator at Lexington. I
9 don't see any reason why you couldn't.

10 **THE COURT:** She would not have been a
11 shareholder, and I understand the distinction there.
12 When you say on-call, you have three different
13 hospitals that your group was operating in at that
14 time?

15 **THE WITNESS:** Yes, that's correct.

16 **THE COURT:** You have a physician on-call for
17 each hospital?

18 **THE WITNESS:** No. We have two physicians
19 on-call each night and two of them work till ten
20 o'clock and then one is on-call after ten o'clock
21 for all three hospitals. The hospitals are split up
22 before ten o'clock.

23 **THE COURT:** All right. So they're not
24 physically at the hospital necessarily?

25 **THE WITNESS:** No. Although, generally, they're

1 there till -- I would say more than half the time
2 they're in the hospital until -- at least one of
3 them is in the hospital until ten o'clock and then
4 you come in for emergencies. And, of course, there
5 are weekends, too, which are worse than being
6 on-call at night in terms of your time commitment.

7 **THE COURT:** All right. So she's a specialist.
8 She's a cardiologist. And she's a specialist in the
9 electric activity of the heart?

10 **THE WITNESS:** That's correct. She would do
11 consultative cardiology, take care of patients with
12 all kinds of cardiac problems.

13 **THE COURT:** Is she an interventional
14 cardiologist?

15 **THE WITNESS:** No, sir. She would do all the
16 general things that I do, but her specialty was the
17 diagnosis of the electrical system of the heart,
18 that's what an electrophysiologist does. And most
19 electrophysiologists implant these devices. I am
20 not an electrophysiologist, but I do implant the
21 devices because where I trained, the cardiologists
22 did all of the implanting. The surgeons didn't do
23 any of them.

24 **THE COURT:** If she's on-call and someone comes
25 in with a hundred percent occlusion like me --

1 **THE WITNESS:** We have backup interventionalists
2 if there's a cardiologist on-call who does not do
3 interventional cardiology. So, for example, last
4 night I was on-call with one of our
5 electrophysiologists, so for the period of time he
6 was on-call, I was also on-call for his emergencies
7 that had to go to the cath lab.

8 **THE COURT:** Can you tell me what these initials
9 stand for on the letterhead, FACC?

10 **THE WITNESS:** Fellow of the American College of
11 Cardiology.

12 **THE COURT:** FRACP?

13 **THE WITNESS:** I think that's -- FRACP, Fellow
14 of the Royal Australian College of Physicians. Is
15 that right, Barry.

16 **MR. FELDMAN:** That's correct.

17 **THE COURT:** And FACP?

18 **THE WITNESS:** I'm not sure what that is.

19 **THE COURT:** I'll ask Dr. Feldman.

20 Do you have any questions in light of the
21 Court's questions?

22 **MR. THOMPSON:** No, Your Honor.

23 **THE COURT:** Any questions?

24 **MR. BABCOCK:** Not for the defendant.

25 **THE COURT:** Thank you very much.

1 Thank you, Doctor. You may step down.

2 MR. BABCOCK: Your Honor, if the witness may be
3 excused?

4 MR. THOMPSON: No objection.

5 THE COURT: Doctor, you're welcome to stay as
6 much as you would like to stay. You're free to go
7 any time you wish to go.

8 THE WITNESS: Thank you, Your Honor.

9 THE COURT: All right. Is 9:30 okay to start
10 in the morning?

11 MR. BABCOCK: Yes, Your Honor.

12 THE COURT: Is that okay with the plaintiffs?

13 MR. THOMPSON: Yes, Your Honor.

14 THE COURT: All right. Court's in recess until
15 9:30 in the morning. Thank you.

16 (Whereupon, the proceedings were concluded
17 for May 12, 2009.)

18 (The following proceedings were held on May
19 13, 2009.)

20 THE COURT: Call your next witness.

21 MR. THOMPSON: Dr. Benjamin Jones.

22 BENJAMIN R. JONES,

23 having been duly sworn, testified as follows:

24 THE WITNESS: My name is Dr. Benjamin R. Jones.

25 *****

1 DIRECT EXAMINATION

2 BY MR. THOMPSON:

3 Q Good morning, Dr. Jones. I'm Charles Thompson.
4 We've met several times during the course of this
5 case. Could you, for the Court's benefit, describe
6 your occupation and where you are currently
7 employed?

8 A Yes. I'm a cardiologist employed by Columbia
9 Heart Clinic.

10 Q And what is your -- do you have a position,
11 officer position within Columbia Heart Clinic?

12 A Yes. I am President of the practice.

13 Q When did you become President the first time?

14 A January 1st, 2006.

15 Q And you were previously based at the Lexington
16 office at the Columbia Heart Clinic?

17 A The most recent period of time before I became
18 President, I was based there. Although, for most of
19 my practice, I was based at Richland.

20 Q Right. And was your -- when you became
21 President, how did your time, if you could quantify
22 it or percentage quantify it, how did your time
23 split between the Columbia offices and the Lexington
24 offices?

25 A My patient practice remained based at

1 Lexington. I often went to our Richland facility
2 for meetings and so forth, but my patient practice
3 was -- remained based at Lexington.

4 **Q** Okay. And could you say how much time after
5 you became President, you were spending in Columbia
6 versus at the Lexington office?

7 **A** Most of my time administratively was early in
8 the morning or later in the afternoon. I would say
9 that probably on an average day, I might have spent
10 two hours or so in administrative duties based at
11 Richland, but typically that would either be before
12 I started or after I finished my day of patient
13 care.

14 **Q** And at some point, you closed the Lexington
15 office. I say you, I mean, Columbia Heart Clinic
16 closed the Lexington office; is that correct?

17 **A** Yes, sir.

18 **Q** And when was that?

19 **A** That was around September of 2006.

20 **Q** And at that time, you were -- after that time
21 you were based in the Columbia offices?

22 **A** Yes. I moved my patient practice to our new
23 Richland office.

24 **Q** And after -- let's start with the time period
25 immediately after Kevin and Barry left in April of

1 2006. Besides you, were there any other Columbia
2 Heart Clinic physicians based in Lexington?

3 **A** No others were based there.

4 **Q** And from the time until -- from that time that
5 they left until closure of that office, besides you,
6 were there any other physicians that were based
7 there?

8 **A** No physicians were based there. We did rotate
9 doctors in virtually everyday in addition to myself,
10 but no one was based there.

11 **Q** Is it not true that the other physicians at
12 Columbia Heart Clinic were not really interested in
13 coming out to Lexington to be based there?

14 **A** Well, I can't speculate how other people feel
15 about this. We did certainly have doctors rotate
16 out. Doctors took call at Lexington. So I don't
17 know if that's strictly speaking correct. Other
18 doctors' offices were based primarily at Richland so
19 coming to Lexington was inconvenient, but certainly
20 not something that they rejected or didn't do.

21 **Q** Okay. So you say you can't speculate, so you
22 don't know if anybody would have based their --
23 moved their practice over there or not?

24 **A** I don't know that. I think it's possible, had
25 we been able to maintain the Lexington office, other

1 doctors would have chosen to move their practice
2 completely over there, but that did not occur
3 because we needed to close the office for financial
4 reasons.

5 Q So between April and September of 2006, no --
6 to your knowledge, no inquiry was made of the
7 doctors in Columbia as to whether or not they would
8 move their practice out to Lexington?

9 A Discussions were carried out with all of the
10 physicians, but nobody individually made that
11 commitment at that time.

12 Q Well, I'm not sure I understand your answer.
13 You said you couldn't speculate as to whether or not
14 anybody would move out there and then you just now
15 testified that inquiries were made. I don't
16 understand.

17 A Well, I'll try and inform you then. This issue
18 was discussed many times at many meetings about how
19 to staff the office. The problem is that once
20 patients became used to coming to one facility or
21 the other, so moving your base of operations isn't
22 just a question of moving your secretary and your
23 medical assistants, it's a question of re-educating
24 one's patients.

25 So, for example, if I were to see patients at

1 the Richland office, which I occasionally did over
2 the years before we closed that office, sometimes
3 patients would come to the Lexington office thinking
4 I was there instead. So a commitment to move
5 patients is more than a doctor's commitment, it
6 involves an educational process, which is a very big
7 step.

8 Many of the doctors talked about this, but
9 between the time that Doctors Feldman and Baugh left
10 and then we closed the office, nobody actually did
11 move their practice over.

12 Q Was anybody specifically asked to move their
13 practices over to Lexington?

14 A Nobody was asked specifically, although many
15 doctors considered it.

16 Q And at some point, you moved your practice over
17 to Lexington, right?

18 A I did. I had been going to Lexington since at
19 least 1990. We had four separate Lexington offices.
20 So the physical moving of my office over there was a
21 natural outgrowth of the practice I'd been
22 cultivating there for many years.

23 Q And Dr. Baugh and Dr. Feldman at some point
24 moved their practices over to Lexington, correct?

25 A Yes.

1 Q And do I have the testimony correct? I mean,
2 would you agree that the primary motivation for the
3 new agreements in 2004 was because of the new
4 building, that was the primary motivation for
5 requiring those?

6 A I think that was part of the motivation. We
7 had also been through a previous exodus from the
8 group that was very disruptive just a few years
9 before that. I think that was all on our minds. In
10 addition to the fact we are incurring tremendous new
11 debt. So for both of those reasons.

12 Q You mentioned a previous exodus, that was Dr.
13 Juk and his group?

14 A A number of other doctors with Dr. Juk, yes,
15 but not the entire group that had joined us, some of
16 those doctors remained.

17 Q How many doctors was that?

18 A Well, at the peak of our group, there are
19 approximately 25 doctors. When Dr. Juk left, I
20 would estimate six or seven doctors in total left.
21 I don't recall exactly.

22 Q There's been some testimony and it's been --
23 predecessor agreements have been introduced into
24 evidence. Were Dr. Juk and the other physicians
25 that left covered by those predecessor agreements?

1 **A** Well, they would have been covered by, I would
2 imagine, the agreement that we had previously,
3 although I don't recall exactly, but -- since I
4 haven't reviewed that, I wasn't involved in
5 management of the group at that time, but I would
6 assume they would have signed those contracts.

7 **Q** Was there ever any litigation against them to
8 try to enforce their noncompetes?

9 **A** Not that I'm aware of.

10 **Q** Do you know why?

11 **A** Well, I don't think they had the same
12 noncompete structure that we have currently. As I
13 recall, they forfeited their accounts receivable,
14 which would have been present in the oral contract
15 that Doctors Baugh, Feldman and myself were under as
16 well.

17 **Q** And it's already been introduced and you were
18 here in the courtroom for various witnesses talking
19 about Don Alexander's letter to the State newspaper.
20 And you would acknowledge, wouldn't you, that this
21 letter likely did not please the physicians in the
22 Lexington Medical Center community?

23 **A** I think we've heard testimony to that fact
24 already.

25 **Q** But I'm asking you. Wouldn't you acknowledge

1 that?

2 A I can't really speculate about how other
3 doctors feel. You know, there's always multiple
4 points of view even within a community like
5 Lexington, but probably many of the doctors,
6 certainly those who posted the letter in the
7 doctor's lounge, felt strongly.

8 Q And you were aware of that?

9 A I was aware of that.

10 Q And would you also agree that not having
11 physicians based in Lexington would tend to have a
12 negative impact on referrals from Lexington doctors?

13 A To the degree that those individuals aren't in
14 front of other doctors, sure, because many consults
15 are hallway consults or consults of convenience. So
16 to that extent, yes.

17 Q And would it be correct that, at least in your
18 experience, the great majority of your patients came
19 from -- when you were based in Lexington, they came
20 from Lexington County?

21 A Both Lexington and Richland Counties. I had --
22 since I practiced previously for many years in
23 Richland, I have a practice that encompasses both
24 counties.

25 MR. THOMPSON: If I can have a moment, Your

1 Honor.

2 THE COURT: Yes, sir.

3 (Pause.)

4 MR. THOMPSON: No more questions.

5 THE COURT: Cross?

6 MR. BABCOCK: Your Honor, we reserve our
7 cross-examination of Dr. Jones until our case in
8 chief.

9 THE COURT: All right. Thank you, Doctor. You
10 may step down.

11 Call your next witness, please.

12 MR. THOMPSON: Dr. Kevin Baugh.

13 THE COURT: Come around please, sir.

14 JOHN KEVIN BAUGH,
15 having been duly sworn, testified as follows:

16 THE CLERK: Have a seat. State your full name
17 for the record.

18 THE WITNESS: Dr. John Kevin Baugh.

19 DIRECT EXAMINATION

20 BY MR. THOMPSON:

21 Q Dr. Baugh, can you describe to the Court your
22 occupation and where you are currently employed?

23 A I'm an interventional cardiologist with
24 Lexington Heart Clinic.

25 Q At the beginning of the testimony, I'm going to

1 ask you to address an issue that came up and maybe
2 there were some, I think some invitation for you to
3 perhaps explain the difference between
4 catheterizations and interventional procedures?

5 A Certainly. Diagnostic cardiac catheterization
6 or a cath procedure is indeed a diagnostic study
7 where we pass little plastic tubes up through the
8 arteries to the heart injecting contrast into the
9 arteries while we're taking x-ray film. It allows
10 us to see if the patients have blockages in the
11 arteries and if so, where they are, how bad they are
12 and that sort of thing.

13 An interventional procedure, similar approach,
14 through the artery using a larger port catheter.
15 Though, with these, we actually open the artery with
16 a balloon and/or a stent or some combination
17 thereof. And there are some other more exotic
18 devices we use in that procedure as well.

19 There are a lot of cardiologists who do general
20 cardiology who see patients, read EKGs, echos, some
21 who do invasive, which is diagnostic cardiac
22 catheterization, and then some who do invasive
23 diagnostic studies, as well as interventional
24 procedures with the balloons and stents. I'm in the
25 latter group.

1 **Q** Okay. And is that a -- can you describe the
2 certifications that an interventional cardiologist
3 has versus just a cardiologist without those
4 certifications?

5 **A** Certainly. Well, to do -- to practice
6 cardiology certainly in most areas and in this area,
7 you have to be board certified in general
8 cardiology, which requires that previously you'd be
9 board certified in internal medicine.

10 Now, currently, folks who are leaving practice
11 and entering into the field of interventional
12 cardiology have to be board certified. Now, those
13 who had been practicing for many years as Dr.
14 Schulze mentioned yesterday are kind of
15 grandfathered in to a degree and the -- but the
16 board certification in interventional cardiology, it
17 is a relatively new designation. It -- of course,
18 board certifications speak to competence as best as
19 it can be done and to present to the public some
20 information about competence and experience and that
21 sort of thing. You have to pass a test and you have
22 to demonstrate -- provide evidence you've done so
23 many procedures; I believe, it's 150 in the two
24 years prior to your board application.

25 **Q** And there's been some testimony to the effect

1 of, well, that's -- interventional is a small part
2 of what interventional cardiologists does and you
3 can go out and just be a regular cardiologist and
4 it's not that big a deal, I think, is the
5 insinuation. Would you comment on that?

6 **MR. BABCOCK:** Your Honor, we object to the
7 leading. And I'm trying to not object more than
8 what I need, but when we start getting into
9 insinuations and whatnot, we're getting into
10 editorializations.

11 **MR. THOMPSON:** I'll be happy to rephrase the
12 question.

13 **THE COURT:** All right.

14 BY MR. THOMPSON:

15 **Q** Can you describe for the Court the importance
16 of being an interventional cardiologist as opposed
17 to not having that specialty?

18 **A** Certainly. And it is certainly true that doing
19 interventional procedures time-wise is a fairly
20 small part of what I do; however, it is critical to
21 doing what I do. The analogy that comes to mind,
22 pilots landing a plane only land a plane for a very
23 brief period of time, but it's an important part of
24 being a pilot, but the -- if you cannot do
25 interventional procedures from a group perspective,

1 you cannot provide full service cardiology. And
2 while it is a relatively small part of the time I
3 spend practicing, it is a critical part both for me
4 professionally and more importantly for my patients.

5 **Q** And do you have any -- are there any facts
6 figures about number of procedures that you could
7 share with the Court about how often it is that you
8 do interventional procedures?

9 **A** Well, I reviewed some of the numbers recently
10 and I did about 80 of interventions per year and
11 about -- at Richland, did around 230, 240 heart
12 diagnostic cath. The American College of
13 Cardiology guidelines are that to do interventions,
14 you should maintain a number of 75 per year. It's
15 advised. It's not a requirement, but it is
16 recommended.

17 Columbia is a little unusual environment
18 compared to the national trends in that in Columbia,
19 a lot of the cardiologists do intervention certainly
20 in our group at Lexington Heart and my former group,
21 Columbia Heart Clinic. A number of doctors do
22 interventions where in other groups, nationally, the
23 more typical scenario is you have one or two
24 interventionalists who that is pretty much all they
25 do all day in the cath lab. They do very little

1 else. Whereas, in Columbia, the trend has been for
2 interventional cardiologists also practice general
3 cardiology and do diagnostic cases as well.

4 **Q** And there's been some testimony about the
5 catheretization lab at the Lexington Medical Center
6 and I don't know that we ever got a good explanation
7 of what a catheterization lab is, what it's like.
8 For the Court's benefit, can you describe that?

9 **A** Certainly. A cath lab is basically a
10 diagnostic x-ray suite of sorts where we have the
11 ability to perform heart catheretizations, to
12 perform interventional procedures. At Lexington, it
13 is predominantly a diagnostic lab. As was testified
14 yesterday, recently, they've gotten approval from
15 DHEC for a certificate of need to do emergent
16 interventions.

17 Now, as Mr. Augsberger mentioned yesterday, we
18 have, over the years, done emergent interventions
19 when the life of the patient is at risk. We have a
20 number of cases in our practice where patients
21 showed up with an acute infarction. One patient
22 comes to mind that basically he was having recurrent
23 cardiac arrest and -- due to an acute heart attack.
24 I defibrillated him about 75 times in the process of
25 getting him from the emergency room to the cath lab

1 until we got the artery open and his arrest was
2 halted. He still sees me five or six years later.

3 Q Could you describe your employment history?

4 And let's just start with any predecessors of
5 Columbia Heart Clinic and describe how that
6 progressed.

7 A Okay. I finished my cardiology fellowship in
8 1996. And this was -- at that time, there was a
9 fellowship program at what is now Palmetto Health
10 Heart Hospital. I was recruited and joined Columbia
11 Cardiovascular Clinic the next week. I finished my
12 fellowship on a Friday and started the group on
13 Monday. Columbia-Cardiovascular Clinic ultimately
14 merged with another group to form the Columbia Heart
15 Clinic and I was with Columbia Heart Clinic until
16 leaving in April of 2006.

17 Q I'm going to show you what we're going to mark
18 for identification as Plaintiff's Exhibit 2.

19 (Plaintiff's Exhibit Number 2, Kevin Baugh's
20 2004 contract, was marked for identification
21 purposes.)

22 Ask you if you can identify this document?

23 A It's a shareholders agreement, shareholder
24 physician employment agreement dated July of '04.

25 Q And was that agreement in effect from the time

1 you departed from Columbia Heart?

2 **A** It was..

3 **Q** Before we get into that, and I know this has
4 been covered, so maybe we don't need to cover it in
5 great detail, but can you tell me how it came about
6 that you departed Columbia Heart Clinic?

7 **A** As was discussed some length yesterday, in
8 November of 2005, there was a meeting of the group
9 in which Jennifer Feldman applied for partnership
10 track status or shareholder status. And at that
11 meeting, there was some concern raised predominantly
12 by the physicians on the Providence side of the
13 practice about clinical competence and complication
14 rates and procedures. And to a large degree, the
15 discussion also focused both in that meeting and
16 around the time of the meeting on productivity
17 issues. And due to that, as was discussed at some
18 length yesterday, Dr. Barry Feldman and Dr. Jennifer
19 Feldman felt that they had no choice but to leave
20 Columbia Heart Clinic.

21 To give a little background, as has been
22 mentioned, Dr. Ben Jones, Dr. Barry Feldman and I
23 have been the primary doctors at the Lexington
24 office of Columbia Heart Clinic for a number of
25 years before this turn of events. And we had

1 reached the point, frankly, we were getting
2 overwhelmed by the work load.

3 I mean, Dr. Barry Feldman, Ben Jones and myself
4 had each individually hired nurse practitioners out
5 of our own pocket to help us meet that work load.
6 And we had asked the group for some other physician
7 support and in lieu of that, for a nurse
8 practitioner provided by the group to help us handle
9 the hospital business. And we were turned down on
10 pretty much all -- in all cases. And we were at the
11 point where we were just working more hours than any
12 of us should or could continue, eight, nine ten
13 o'clock often in the evening because of the amount
14 of work to be done was so great.

15 And so immediately prior to the meeting in
16 November of '05, Ben Jones had been elected
17 President of the practice and it was anticipated
18 that he was certainly going to be spending less time
19 at Lexington. And we had not yet actually come to
20 terms with what we were going to do to replace Ben's
21 lost time because, frankly, we were getting killed
22 by the work load already.

23 And when Barry felt compelled to leave, it
24 would have left me in a completely untenable
25 position. I'd have been the only doctor there full

1 time with a long track record of little support from
2 the practice in meeting the work load. So I felt,
3 frankly, I had little choice but to leave at that
4 point or move back to Richland, which would have
5 been very unattractive and costly to my patients.
6 Most of my practice had for some time at that point
7 been established in the Lexington community.

8 Q And you mentioned the November meeting where
9 Dr. Jennifer Feldman's application was discussed.
10 And we've already covered in great detail, but I do
11 want you to address, you've heard testimony about
12 your comments, and I want you to address what your
13 comments actually were and how they should be
14 characterized?

15 A Absolutely. I think the flavor of my comments
16 was somewhat misrepresented. In that meeting when
17 the issue of clinical competence came up, Dr.
18 Humphrey, who was presiding over the meeting,
19 basically went around to each physician present
20 wanting us all to give a comment, weigh in on this
21 matter. And I commented that when Jennifer had
22 started doing pacemakers again after having not done
23 them for a while, and this had been six to eight
24 years before that point, I was called a number of
25 times to come and help her gain access.

1 This was not a complication, just one of those
2 things she had not done the procedure in a while and
3 was a little rusty. And so I'd come in to help her
4 just like I've come in to help others and I've asked
5 others to come in and help me at times. So I did
6 not mean that to particularly be critical, it was
7 just an inexperience matter at that time, but that
8 had been six or seven years before and had not
9 happened in recent years. So to characterize that
10 as being critical, I think is probably -- gives an
11 untrue flavor to my comments.

12 I mean, as a practical matter, I shortly
13 thereafter chose to become part of a group where she
14 was one-third of the practice. And Jennifer takes
15 care of my mother now so I have absolute confidence
16 in her skills and always have.

17 Q When was your last date of employment with
18 Columbia Heart Clinic?

19 A April 21st of 2006.

20 Q And do you recall about how many employment
21 agreements you had during the course of your
22 employment with Columbia Heart or its predecessors?

23 A I believe I had four. My initial contract was
24 when I -- my first year out of fellowship, I believe
25 that was a one year contract. At the end of the one

1 year, I signed a two year contract for my, quote,
2 junior shareholder status for three years. And then
3 I was, I believe, the first physician to join as a
4 shareholder the newly created Columbia Heart Clinic.
5 So in 1999, I signed that contract. And then the
6 contract before me in 2004 is the fourth one.

7 Q And you were already a shareholder when you
8 signed the 2004 agreement, correct?

9 A Correct.

10 Q Did you have anybody -- did you have an
11 attorney review any of these agreements?

12 A I did not.

13 Q And do you, yourself, have any training or
14 background in interpretation of legal documents?

15 A None at all. And, you know, did I look over a
16 contract, yes. Frankly, as a layman in the legal
17 world, much of this makes little sense. And, you
18 know, even the fact that terms like the business
19 require paragraphs to define, you know, a lot of the
20 legal documents are not written in English that uses
21 common usage of terms.

22 And I'll tell you, as a practical matter at the
23 time, it was presented to us, sign this or, you
24 know, if you want to stay in this group. And I
25 certainly was not prepared at the time nor did I

1 have any desire at that time to leave. And it
2 really seemed very -- there are few options. I
3 didn't see an option to -- even if I got an
4 attorney, what was I going to do? I mean, I was not
5 prepared to leave at the time, didn't want to leave
6 at the time. I was very supportive with the group,
7 very -- and confident that I was going to finish my
8 career with Columbia Heart Clinic.

9 Q To your knowledge, did the compensation scheme
10 that was used before and after the 2004 agreement,
11 for you, did that change?

12 A The compensation scheme?

13 Q How you were compensated, did that change from
14 before and after the agreement?

15 A I don't believe so. I mean, it was a
16 predominantly -- there was a -- part of our
17 compensation schedule was based on productivity, but
18 it was a relatively limited part, 10 to 15 percent
19 as I recall.

20 Q Who is David Summers? Do you know who that is?

21 A He was the attorney for Columbia Heart before
22 and during the time of this contract and he was the
23 one who presented the contract. I assume he wrote
24 it, I don't know that for a fact, but he presented
25 the contract. If there were several meetings, I

1 only recall one where he presented the contract and
2 basically talked about the noncompetition clause.
3 that -- because I recall some of this because he --
4 it was the first time I'd heard the word
5 consideration used in apparently what is a legal
6 sense of compensation. And I remember him telling
7 us that for -- when you change a contract making it
8 more restrictive for current employees, that there
9 must be valid consideration. And he also commented
10 that noncompete clauses are notoriously difficult to
11 enforce.

12 But that's -- I believe I had met him at a time
13 or two before -- I actually was behind -- I was
14 behind him in line at Kroger one time. We chatted
15 just socially for a few minutes, but I didn't have a
16 lot of contact with him.

17 Q And other than that one meeting, did you meet
18 with him on any other occasions for the purpose of
19 discussing this agreement?

20 A I don't believe I did. I don't recall meeting
21 him another time.

22 Q And have you ever used David as your personal
23 attorney?

24 A No.

25 Q And what were you paid in return for signing

1 this agreement?

2 A We have received nothing, any payment nor will
3 we.

4 Q And did -- does the agreement differ from your
5 prior agreement?

6 A Absolutely.

7 Q What are the big differences that you knew?

8 A Well, the 590,000 dollar penalty is the glaring
9 difference of competition. Now, of course, they
10 also redefined the geographic territory compared to
11 the prior noncompete of 20 miles around any office
12 where we had previously done business. And I will
13 tell you when we were considering leaving and
14 looking at the contract and the noncompete issues,
15 you know, I didn't know office versus satellite
16 versus, you know, to me, any place where I'd
17 practiced for Columbia Heart, I considered to be an
18 office of Columbia Heart.

19 Q Okay. Drawing your attention to section 5.2
20 little i.

21 A You don't have the page number by chance, do
22 you?

23 Q Page ten, should be, the definition of compete.

24 A Yes.

25 Q And it basically has three parts, correct?

1 A Correct.

2 Q Now, do you recall in the meeting with David,
3 did he explain three parts and how he thought they
4 would work?

5 A I don't recall any discussion about the term
6 compete.

7 Q And this is not the same definition that was in
8 your '97 agreement, is it?

9 A No, it's not.

10 Q And as you -- as you would understand it, what
11 are the three parts of the restriction on competing?

12 A That competing would be owning or engaging in
13 -- organizing any business which engages in, quote,
14 the business, engaging in the business in the
15 territory or assisting any person through virtually
16 any means as a director, officer, employee, agent,
17 consultant, lender, lesser or otherwise to engage in
18 the business. And the business is defined somewhat
19 on another page.

20 Q And the definition, flip back to page nine of
21 business -- well, the term business in quotes is on
22 page nine, correct?

23 A Correct.

24 Q And it follows the phrase, The practice of
25 medicine, and then the phrase, In the field of

1 cardiology, right?

2 A Correct.

3 Q Now, there is a definition section, correct?

4 A Yes.

5 Q Can you find that for me?

6 A That may take a moment. I haven't looked at
7 this in a bit.

8 Q How about page ten?

9 A Page ten? Oh, I see.

10 Q Is business defined there?

11 A No, it's not.

12 Q If you could not be an interventional
13 cardiologist, are there other types of jobs that you
14 could do?

15 A Well, certainly I could teach. I could do
16 clinical research both at the -- teach, the obvious
17 choice would be the University of South Carolina
18 School of Medicine. I could teach at the V.A.
19 Hospital in Columbia. V.A., of course, being kind
20 of a separate patient population. It would not be
21 in competition with Columbia Heart in any way. But
22 as I understand it, I could not, based on this
23 contract.

24 Q And any of the things that you listed, would
25 that be in competition with Columbia Heart Clinic?

1 A Well, it would be based on the way the term is
2 described, compete --

3 Q I mean --

4 A -- but not in the real sense of the word
5 compete, no. It would not be taking patients that
6 they would otherwise be seeing. It would be a
7 segregated patient population?

8 Q Where do you feel you routinely practiced as a
9 cardiologist, interventional cardiologist, in the
10 year prior to your departure from Columbia Heart?

11 A I was predominantly at the Lexington office of
12 Columbia Heart. I did some work at the Richland
13 office. I certainly did a lot of my cath lab work
14 at Richland. Occasionally, I went to Providence.
15 I'm not sure how to define occasionally. I
16 certainly did cases at Providence Hospital and I
17 routinely went to Winnsboro as well for the clinic
18 in the Winnsboro office.

19 Q And that --

20 A Well, let me clarify. There was a point at
21 which I was taken off the Winnsboro rotation. I
22 don't recall what that date was. It was in part
23 because the work load in Lexington got so much that
24 it became progressively difficult to move me to
25 Winnsboro.

1 Q And how would you describe the geographic
2 restriction that's in the agreement? How does that
3 work in your understanding?

4 A Well, my understanding was, you know, 20 miles
5 radius around any office of Columbia Heart where we
6 routinely provided services. I don't know how
7 routinely is defined nor do I know how office is
8 defined in -- somewhat ambiguous in my mind.

9 Q Do you know if those terms are defined in the
10 definition section or anywhere else in the
11 agreement?

12 A I don't see them defined.

13 Q We talked about an interventional cardiologist
14 and what that means. To be an interventional
15 cardiologist, can you explain to the Court your need
16 to have access to facilities that allow
17 interventional procedures?

18 A Absolutely. To practice interventional
19 cardiology, you have to be able to respond to an
20 emergency within a very brief time period. Most
21 hospitals will actually define that as a 30 minute
22 drive time to be at the hospital, some will say 40.
23 But if I get a call in the middle of the night,
24 which happens fairly frequently, that a patient's in
25 the E.R. with an acute infarction, I need to come in

1 and take them to the cath lab, then I need to be
2 there quickly.

3 And typically the time is -- I don't want my
4 being able to get there to be the limiting factor.
5 Usually, it's the time -- the limiting factor in
6 time is getting the cath lab up and ready to go.
7 So, certainly, you've got to practice within a
8 fairly close place to your home, 20, 30 minutes
9 would be, I think, the limited, which I would be
10 comfortable.

11 Q Okay. And if you couldn't practice in the 20
12 mile circles, and let's just use the 20 mile circles
13 for purposes of this question around the Columbia
14 and Lexington offices, where would you have to go?

15 A Well, as I read it, the closest place would be
16 Aiken or perhaps Greenwood. I mean, the -- Rock
17 Hill is in the neighborhood. Florence is a little
18 bit further to my eye looking at the map, but
19 certainly the closest place would be Greenwood or
20 Aiken.

21 Q But you couldn't go just outside the 20 mile
22 circle, could you?

23 A Not and practice interventional cardiology.
24 Now, I will say, I know it's been brought that, you
25 know, taking a year off from interventional

1. cardiology is not a big deal in skills. I
2. absolutely disagree with that. The American College
3. of Cardiology clearly states you should do 75 a year
4. ideally and you should practice in the facility that
5. does so many more per year with a -- and I know when
6. I -- if I've been off on a two week vacation, come
7. back, I feel, you know, a little rusty in the cath
8. lab. There's -- a lot of this is muscle memory,
9. hand/eye coordination issues to do this well and if
10. you're not doing it on a regular basis, you do lose
11. your skills.

12. Q And when you were employed with Columbia Heart
13. Clinic, where did the vast majority of your patients
14. come from?

15. A Oh, certainly from Richland and Lexington
16. County, predominantly Lexington County I'm sure as
17. I've been based in Lexington for a number of years
18. at that point.

19. Q As you understand it, what would happen under
20. the agreement if you violated the competition
21. restrictions?

22. A Well --

23. Q What would be the effect -- if the agreement
24. were upheld, what would be the effect?

25. A I'm sorry, could you restate that question,

1 please?

2 Q Under the agreement as it is worded, based on
3 your understanding, if you practiced within 20 miles
4 of any office where you routinely practiced with
5 Columbia Heart Clinic, what kicks in in the
6 agreement; what obligation do you incur?

7 A I see. Well, I would be penalized \$590,000,
8 lose all of my accounts receivables, which is a
9 formulaic number, not my real -- truly what I had
10 earned but not received, and I would lose the
11 final -- any earned but unpaid income.

12 Q And do you have an understanding approximately
13 how much the formulaic accounts receivables would be
14 that you would lose?

15 A I understand it's around \$161,000.

16 Q You mentioned your personal receipts. What do
17 you mean there?. What are those?

18 A Well, the formula used to calculate that
19 account receivables is the average accounts
20 receivables of all of the physicians basically
21 taking the total accounts receivables for the
22 practice, applying to that the collection of
23 percentage, which I believe is around 42 percent,
24 and then dividing it by the number of shareholders,
25 which at the time was 12. So it would be 1/12th of

1 the expected accounts receivables.

2 Now, I was one of the -- among the higher
3 producers in the practice at the time I left, so my
4 personal accounts receivable were more than that.

5 Q After your resignation but before you left, did
6 you have any discussions with anybody at Columbia
7 Heart Clinic about your departure, lessening the
8 impact of that, things like that?

9 A Well, the day we met with Dr. Jones, who is the
10 current President of the practice, and gave him our
11 resignation letters, we also gave him a letter and
12 spoke to him directly about an offer to assume the
13 practice's lease and equipment at the Lexington
14 office to try to -- we wanted to minimize the
15 financial impact on Columbia Heart. And we really
16 hoped to avoid some of the personal animosity that
17 unfortunately has kind of come through all this.
18 Because speaking for myself, I was not leaving
19 because I was mad at anybody, it was just a matter
20 of trying to have a little more reasonable quality
21 of life and be able to practice, keep doing what I
22 enjoyed doing. So we wanted to minimize the impact
23 financially and we'd hoped to get beyond this
24 separation back to the point where we could at least
25 restore some cooperation.

1 We talked to the group about, you know,
2 continuing interaction. I mean, at the time and
3 even after we left, despite the ongoing legal
4 conflicts, for some time I sent patients to Columbia
5 Heart and actually still do for some procedures that
6 they do that we don't do. C.T. angiogram of the
7 chest is one thing that they do in their office and
8 they have a physician at the practice who is
9 excellent at reading them. So I still send patients
10 to Columbia Heart because I think they provide the
11 best service in that realm.

12 **Q** And for the time period after you submitted
13 your resignation until you left, did Columbia Heart
14 Clinic assign any other physicians to the Lexington
15 office to your knowledge?

16 **A** To my knowledge, not on a regular basis. I
17 understand they rotated physicians out there, but
18 not anyone who is committed to the office or to the
19 community.

20 **Q** If you could, describe for the Court any
21 compensation you claim that you are owed that you
22 were not paid and how you come about those numbers.

23 **A** Well, certainly the accounts receivables is
24 money that I earned through my work for the practice
25 and never received. They did not pay me my final

1 paycheck of, I believe, around \$8,000, but the
2 accounts receivables was the larger sum.

3 **Q** And do you have an understanding of why they
4 haven't paid you, in particular the \$8,000 in
5 compensation?

6 **A** Well, I saw some calculations that they had
7 done on the, quote, true up at the end of the first
8 quarter of 2006, which actually had me in a negative
9 balance which I found very surprising because during
10 that quarter, I was still among the top producers in
11 the practice even though I was leaving and it was
12 the first time, to my knowledge in my career with
13 Columbia Heart, that I was ever in a negative
14 balance at the end of a quarter. I'm not stating
15 that categorically, but I certainly don't recall
16 another time being negative.

17 **Q** So you don't recall any other time where you've
18 been asked to pay money back because you were in a
19 negative position?

20 **A** There's never been a time that I was asked to
21 pay money back.

22 **Q** Are you aware of how often these true ups are
23 done?

24 **A** Well, at the time, they were being done
25 quarterly. And -- but if you were in a negative

1 balance, basically you waited until -- people could
2 carry a negative balance until the end of the
3 calendar year.

4 Q So to your knowledge, was anybody ever asked to
5 pay money back because of a negative balance?

6 A I believe they have been. And, certainly, I've
7 heard of one physician who reduced his salary toward
8 the end of the year so he wouldn't have to write a
9 check toward the end, so -- I shouldn't say salary,
10 his draw that contributes to part of the true up
11 process.

12 Q Okay. And could you give the Court, if you
13 understand how it works, sort of a summary of how
14 the compensation system works with Columbia Heart?

15 A Well, this will be in very broad strokes
16 because it is a very complicated system. The gist
17 of it is that we separated different jobs that we do
18 into various pots and some pots were you've got full
19 productivity. For instance, a typical example of
20 that is seeing a patient in the office, a new
21 consultation or an office follow-up patient, that
22 was considered a hundred percent personal
23 productivity.

24 Now, that's a fairly low reimbursement
25 activity, but it is also the activity that kind of

1 drives the practice, that's where new patients come
2 from, that's how you bill patients in the future,
3 versus things like any procedures in the cath lab.
4 They were ten percent productivity as I recall. And
5 90 percent of the revenue from that went into the
6 quota we called the splits pot or the even pot that
7 would be divided among all of the partners evenly.
8 And there were some other permutations of that, some
9 were 80/20, some were 10/90. Honestly, I don't
10 recall which is which, but, the idea was to
11 incentivize us to do the things that frankly, you
12 know, are not as glamorous or not as fun to do
13 sometimes, being in the office all day versus doing
14 some of the procedures we do in the cath lab.

15 Q All right. Now, turning to the new building,
16 can you describe what the new building was, where it
17 was and why the practice came about -- how the
18 position came about that they thought it was a good
19 idea to have a new building?

20 A Well, we'd been in discussion for years
21 regarding what to do about business space. When we
22 merged Columbia Cardiovascular Clinic with Columbia
23 Cardiology Associates to create Columbia Heart, one
24 of the things we kind of soon came to note is there
25 was a difference in cultures between the two

1 practices and that keeping everybody separate, you
2 know, the Providence based physicians generally
3 stayed at Providence, the Richland based physicians
4 generally stayed at Richland and those of us at
5 Lexington were at Lexington predominantly, it made
6 it very difficult for us to kind of be of a like
7 mind on where we're going to have a mutual goal for
8 the practice to much less a mutual agreement on how
9 to achieve those goals. So the idea ultimately came
10 to build a single building and we looked at options
11 of building a building downtown Columbia.

12 We looked at the, what used to be the Hampton
13 Buick building on Elmwood Avenue. We looked at some
14 other places. But then ultimately through long
15 negotiation with Palmetto Health, looked at leasing
16 land from Richland on the Richland campus and
17 building a building there that would serve as the
18 building for Columbia Heart.

19 There was still debate on whether or not we
20 would keep the Lexington practice open because we
21 had all long since accepted the fact that Lexington
22 physicians are very interested in using people who
23 were there, who are physically present. So those of
24 us at Lexington argued that we should keep the
25 Lexington office even if we don't have any others.

1 other than the Richland. And so, ultimately,
2 through negotiations with Palmetto Health, that
3 agreement was both a land lease agreement to lease
4 the land on which the building was ultimately built
5 and a management services agreement with Palmetto
6 Health under which Columbia Heart would comanage the
7 heart hospital at Palmetto Health.

8 Q Comanage, what do you mean by that? What would
9 be the hospital's input into the building?

10 A Well, no, this is not the medical office
11 building. We're talking about the heart hospital
12 that was currently being built by Palmetto Health,
13 which is opening and running and has been for a
14 little over three years now. And that was pretty
15 much part of the deal that Columbia Heart was going
16 to build a medical office building adjacent to and
17 attached to the heart and vascular hospital that
18 Palmetto Health was building. And part of the
19 negotiation was that if Columbia Heart would enter
20 into this obligation to stay on the Richland campus
21 and to devote resources there, Columbia Heart would
22 have basically half of the management board seats
23 for the heart and vascular hospital, which it's my
24 understanding they still do.

25 Q And why is that an advantage to Columbia Heart?

1 **A** Well, it gives them some control over the
2 future of the heart hospital. And that management
3 services agreement also included a number of
4 payments to Columbia Heart for various tasks, being
5 director of the cath lab, teaching, I think there's
6 an executive medical director of the heart hospital,
7 a number of different functions that include
8 payment, I believe, a total of around \$300,000 per
9 year.

10 **Q** And you owned shares in the new office
11 building, correct?

12 **A** I'm sorry?

13 **Q** You owned shares in the -- you, yourself, owned
14 shares in the new office building?

15 **A** I did. Each of the shareholders at the time
16 took on a personal note obligation for, I believe,
17 it was around one point two million dollars in terms
18 of the loan to build the medical office building.
19 And, of course, when we left, we were obligated to
20 offer those shares for sale to Columbia Heart. We
21 were perfectly willing to keep those shares. We
22 felt it was and continues to be a good investment.

23 **Q** Okay. And just so the record is clear, what is
24 the entity, the name of the entity that owns the
25 office building?

1 **A** Oh, boy. I believe it's Palmetto Health MOB,
2 LLC. I believe that's true. The building is
3 actually owned somewhat jointly between Columbia
4 Heart and Carolina Cardiac Surgical Group, but
5 Columbia Heart, I believe, owns 94 percent or
6 somewhere in that neighborhood, and the surgeons own
7 a smaller percentage.

8 **Q** And do you know does Columbia Heart Clinic, the
9 corporation, own any part?

10 **A** No. No. Columbia Heart Clinic, P.A., I
11 believe they are, does not own it, but the
12 shareholders of Columbia Heart have another LLC that
13 owns part of Palmetto Health MOB. It's fairly
14 convoluted.

15 **Q** Do you know if the same shareholders of
16 Columbia Heart Clinic, that there was a complete
17 match of the shareholders and the shareholders who
18 own parts of the building -- I'm sorry -- who own
19 parts of the MOB?

20 **A** Yes. I believe it's -- it certainly was when
21 it started. And I believe to be a shareholder of
22 the MOB, LLC, you have to be a shareholder for
23 Columbia Heart Clinic.

24 **Q** While you were an owner of the MOB, did you
25 receive any income from that investment?

1 **A** Yeah. We received one payment. It was 30 or
2 \$40,000 for lease payments to the LLC.

3 **Q** Did you also have some sort of -- what was your
4 relationship to the debt that was incurred? What
5 was your obligation on the debt as you understood
6 it?

7 **A** It was absolute until released, which was part
8 of the negotiation when Columbia Heart bought our
9 shares of the building.

10 **Q** And did you want to offer your shares back?

11 **A** No. My understanding, we were obligated to
12 offer the shares for sale to Columbia Heart. And
13 there was a formula by which you would derive at a
14 price. If we agreed on the appraisal, that would be
15 it, but if not, they would get an appraisal, we
16 would get an appraisal and there would be some way
17 to come to a meeting between the two. I don't
18 recall the details of that. But, no, to answer your
19 question, no. I would have loved to have maintained
20 my ownership of that building. I thought it was and
21 is a good investment.

22 **Q** Do you own the building where you're currently
23 located?

24 **A** We do not. We lease the building from
25 Lexington Medical Center.

1 **MR. THOMPSON:** If I may have a moment, Your
2 Honor.

3 **THE COURT:** Yes, sir.

4 (Pause.)

5 BY MR. THOMPSON:

6 **Q** Going back to the agreement, we talked about
7 the definition of business that's on page nine. Are
8 you aware of any definition of either practice of
9 medicine or field of cardiology or those phrases put
10 together? Is there any definition of those in the
11 agreement?

12 **A** Not that I'm aware of, no.

13 **MR. THOMPSON:** No other questions, Your Honor.

14 **THE COURT:** Cross?

15 **MR. BABCOCK:** May it please the Court?

16 **THE COURT:** Yes.

17 CROSS-EXAMINATION

18 BY MR. BABCOCK:

19 **Q** Dr. Baugh, as I understand your testimony, for
20 you to do all of the things that you currently do,
21 including the interventional aspect of cardiology,
22 you could move to Rock Hill and do that, correct?

23 **A** Yes, I could.

24 **Q** And while you might not be able to commute from
25 Columbia, you could actually move up there and

1 practice everything you want to do right up there,
2 correct?

3 A Correct.

4 Q And I think you also gave Aiken as another
5 place where you could move and do all of the things
6 that an interventional cardiologist does, correct?

7 A Correct.

8 Q And Florence also fits in that category where
9 you could move and do all of the things that you
10 want to do as an interventional cardiologist?

11 A Correct.

12 Q Now, it's also fair, and I know you don't want
13 to do this, but you could go to Camden and do all of
14 the other things that you do as a cardiologist, such
15 as the diagnostic procedures and the pacemakers and
16 the defibrillators, all those other things except
17 for the interventional aspect. You could go to
18 Camden and do that, correct?

19 A Correct.

20 Q And, similarly, you could go to Sumter and do
21 those sorts of things, correct?

22 A Correct.

23 Q And you could go to Orangeburg and do those
24 sorts of things, correct?

25 A Correct.

1 Q Now, let's shift gears. You talked a little
2 bit about accounts receivable. Let's look at -- you
3 got your 2004 agreement in front of you, sir?

4 A I do.

5 Q Let's shift over to section 3.1.

6 A Can you give me the page number?

7 Q Sure. Page four and five.

8 A Okay.

9 Q Are you there?

10 A Yes, I am.

11 Q For the start of that at the bottom part of
12 page four, it says, 3.1, Fees, collections and
13 billings. Medical Group, and that's of course
14 Columbia Heart, correct?

15 A Correct.

16 Q Shall establish and modify from time to time
17 all professional fees for services rendered by
18 physician or any other physician.

19 Let's go to the next page. And we just had
20 physician employee of Medical Group, and physician
21 agrees to cooperate on all billing matters and
22 assist in collection efforts as necessary.

23 It then goes on to say, Medical Group shall own
24 and control all collections and billings arising
25 pursuant to the rendering of medical services by

1 physician or any other employee. Do you see that?

2 A I do.

3 Q And it finishes up by saying, All fees and
4 compensation received or realized by Medical Group
5 as a result of the rendering of services by
6 physician and other employees shall belong, be paid
7 and be delivered to Medical Group. Do you see that?

8 A I do.

9 Q So you understood with regard to the accounts
10 receivable that all of the accounts receivable were
11 the property of the Medical Group, correct?

12 A Correct.

13 Q And while you talked about your personal
14 accounts receivable, those were efforts you made by
15 providing services for moneys that went to the
16 Medical Group, correct?

17 A Correct.

18 Q And those moneys were owned by the Medical
19 Group, correct?

20 A Correct.

21 Q Now, Doctor, you talked a little bit about this
22 contract. Let's just look at the main part of the
23 contract. And it's -- with your signature on page
24 15, it's only 15 pages long, isn't it?

25 A Correct.

1 Q And it's got some attachments, but the main
2 part is 15 pages and that is your signature, isn't
3 it, Doctor?

4 A It is.

5 Q Now, when this contract was presented to you,
6 you had the opportunity to read it, didn't you?

7 A I did.

8 Q And you did read it, didn't you?

9 A I read over it, yes.

10 Q And you understood from the conversations that
11 were held at the various meetings, that one of the
12 big differences with this contract was the covenant
13 not to compete. You understood that, right?

14 A I did.

15 Q All right. And you had -- if you didn't feel
16 that you were comfortable understanding this
17 document, you had the opportunity to go and talk
18 with a lawyer and have that lawyer explain to you
19 anything you didn't understand. You had that
20 chance, didn't you?

21 A I did.

22 Q But you didn't avail yourself of that
23 opportunity?

24 A I did not.

25 Q Now, if you had done that, that lawyer would

1 have had the opportunity to talk to David Summers if
2 there were any points that y'all wanted changed and
3 discuss it, correct?

4 A I presume so.

5 Q But that didn't occur, did it?

6 A It did not.

7 Q Had you met David Summer before the
8 presentation that he made to the group?

9 A I had met him.

10 Q And you understood that he was the attorney for
11 the group?

12 A I did.

13 Q You had not used him as your own attorney at
14 any time, had you?

15 A No, I had not.

16 Q Have you used attorneys for other matters such
17 as real estate matters and things like that, haven't
18 you?

19 A I have.

20 Q I think there are a fair number of lawyers who
21 just live in the same subdivision, the Kings Grant
22 subdivision, that you live in, correct?

23 A There are a few.

24 Q And so you know them at least on a social
25 basis?

1 **A** I do.

2 **Q** Now, let's talk a little bit about the clinics
3 that Columbia Heart had. The clinics that you had
4 in various locations were at hospitals, weren't
5 they?

6 **A** Correct.

7 **Q** And those are situations where there wasn't --
8 or there weren't any Columbia Heart employees there
9 on a regular basis, were there?

10 **A** Well, I can't speak to the ones I didn't go to,
11 but certainly not in Winnsboro.

12 **Q** And Winnsboro's where you primarily went when
13 you went?

14 **A** Correct.

15 **Q** So you would bring along, if you needed staff,
16 an assistant of any nature, you would bring that
17 person with you when you went to Winnsboro?

18 **A** Well, the hospital actually provided some
19 staffing at Winnsboro.

20 **Q** If you needed a nurse practitioner, you would
21 bring your own nurse practitioner, right?

22 **A** I don't think I ever did, but, yes, if I had, I
23 would have brought my own, yes.

24 **Q** Okay. And during the year immediate -- the
25 immediate year before you departed, from April 21,

1 2005 to April 21, 2006, you wouldn't dispute that
2 you were only in Winnsboro on three occasions, would
3 you?

4 A I wouldn't dispute it, no.

5 Q And those dates from the records are April 26
6 2005, May 24, 2005 and June 21, 2005. You wouldn't
7 dispute those dates?

8 A No.

9 Q Now, you testified a little earlier about the
10 situation in Lexington where you were working a lot
11 of hours and spending a lot of time. And that one
12 of the reasons that you left was from -- want to
13 have a better quality of life, I think was your
14 phrase; is that right?

15 A Yes.

16 Q So we had a situation where, from a time
17 standpoint, the meeting occurred with Jennifer
18 Feldman coming up for shareholder or partnership
19 consideration on November 30, 2005. And you
20 testified a little bit about that earlier?

21 A Correct.

22 Q We're going to talk about that meeting in a
23 minute. But prior to that meeting, before that
24 meeting, you had not gone to the -- anybody at
25 Columbia Heart and said, listen, I'm having to work

1 so much, if I don't get more help out here, I've got
2 to leave. You never said that, did you?

3 **A** I did not.

4 **Q** So then we had the meeting, again we'll talk
5 about that in a minute. And the aftermath of the
6 meeting was Jennifer Feldman, we've heard testimony,
7 felt that she needed to leave, her husband, Dr.
8 Barry Feldman, felt he needed to leave. And at that
9 point in time, as I understood your testimony, you
10 felt the situation was such that you had to go
11 because there was just going to be too much work in
12 Lexington. Is that what you said?

13 **A** Well, that was -- that was what made it a
14 crisis point at that time.

15 **Q** Okay. And as I understood, you testified that
16 was the reason you left?

17 **A** Well, that was the reason I left at that
18 moment, yes.

19 **Q** Okay. But what you didn't do was at that point
20 go to Columbia Heart and say, listen, with Dr.
21 Feldman leaving and Dr. Jones having more work
22 administratively when he becomes President, there's
23 going to be too much here and I can't do it and if
24 you don't get more help out here, I'm going to have
25 to leave. You never had that conversation with him,

1 did you?

2 A I did not threaten to leave, that's true.

3 Q Well, you didn't even give them the opportunity
4 to try and figure out what could be done to try and
5 get enough staffing so that you'd be able to leave.
6 You didn't talk to them at all?

7 A Well, we talked to them for a year before
8 trying to get more help and the answers have
9 routinely been no.

10 Q I understood that, but what had changed from
11 the year before was Dr. Jennifer Feldman was going
12 to go, Dr. Barry Feldman was going to go. And what
13 you could have done was to go and say, listen, if
14 this doesn't change, I've got no choice, I'm going
15 to have to go. You never had that conversation?

16 A I didn't.

17 Q Now, let's look at your previous employment
18 agreement with Columbia Heart. Let me show you a
19 document, see if you can identify it?

20 A This is the shareholder physician employment
21 agreement, July 1999.

22 Q And does your signature appear on that document
23 over on page 13?

24 A It does.

25 Q And this would have been the employment

1 agreement that would have been in effect immediately
2 prior to the July 2004 agreement, correct?

3 **A** Correct.

4 **MR. BABCOCK:** We'd offer this as the next
5 exhibit for the defendants, Your Honor.

6 **THE COURT:** Any objection?

7 **MR. THOMPSON:** No objection.

8 **THE COURT:** Mark it in evidence please, ma'am.

9 (Defendant's Exhibit Number 7, Kevin Baugh's
10 '99 contract, admitted into evidence.)

11 BY MR. BABCOCK:

12 **Q** Now, what I'd like to do, Doctor, is direct
13 your attention to article four which begins over on
14 the bottom of page five. And that section, if you
15 go to the next few pages, deals with different
16 situations concerning termination. Over on page
17 seven, you can have a situation where you're dealing
18 with a death situation. And on page eight at the
19 top of the page, you're dealing with retirement
20 situation. And then if you look down at section
21 4.5(f), you're dealing with a situation where you as
22 a physician would be leaving for other reasons with
23 cause, without cause, that sort of thing, correct?

24 **A** 4.5(f)?

25 **Q** 4.5(f) on page eight.

1 A Okay. I got it.

2 Q Are you with me?

3 A Yes, I am.

4 Q And this, again, we're looking at your 1999
5 agreement, the previous one to your 2004 agreement.
6 And what we've got in this section is in the event
7 of termination for cause, no cause, whatever, two
8 things that you would receive, one being the salary
9 earned or accrued but unpaid as the date of
10 physician's death, and we saw yesterday that's a
11 typographical area, that's leaving for cause,
12 without cause, so that's one thing you've got. And
13 then the second thing under your previous agreement
14 that you would get is a formula based determination
15 of a percentage of accounts receivable, correct?

16 A Correct.

17 Q Those would be things that you would get if you
18 left under your old agreement. However, there was a
19 situation where you would lose those. You remember
20 that, don't you?

21 A Correct.

22 Q If you look over on section 4.5(i). Do you see
23 that section?

24 A I do.

25 Q And under that section, if you are active in

1 the practice of medicine in the field of cardiology,
2 see that phrase?

3 A I do.

4 Q That's the same phrase that we saw over on your
5 2004 agreement when we looked at the definition of
6 business, isn't it?

7 A Yes.

8 Q Now, if you were active in the field in the --
9 active practice of medicine in the field of
10 cardiology within Richland or Lexington County at
11 any time during the 12 month period immediately
12 following the termination for any reason whether
13 with or without cause of this agreement, then
14 physician shall forfeit any moneys payable to the
15 physician pursuant to this section. So with your
16 1999 -- and did I read that part correctly?

17 A You did.

18 Q Now, in your 1999 agreement, you understood
19 that if you were to practice in Richland or
20 Lexington Counties in the -- practicing medicine in
21 the field of cardiology within 12 months of leaving
22 Columbia Heart, you would lose your unpaid but
23 accrued salary; you understood that?

24 A Correct.

25 Q And you would also lose the formula or any

1 moneys calculated under the accounts receivable
2 formula; you understood that?

3 A Correct.

4 Q So that was a situation when you got together
5 and considered the new 2004 agreement. Of course,
6 the 1999 agreement had one other section of
7 pertinence here, section 4.6. You see that section,
8 Doctor?

9 A I do.

10 Q And under that section, it says, Acknowledgment
11 of Reasonableness. Physician acknowledges that the
12 forfeiture described in 4.5(i) -- that was what we
13 just read, right?

14 A Correct.

15 Q Is intended as restitution for the damages
16 which Medical Group will suffer as a result of
17 competition by physician with Medical Group.
18 Physician further acknowledges that such forfeiture
19 is fair and reasonably required for the protection
20 of Medical Group. Did I read that correctly?

21 A You did.

22 Q And that was all in your 1999 agreement. Now,
23 let's go forward and if you would, Doctor, take a
24 look at your 2004 agreement, which is Plaintiff's
25 Exhibit 2, I think.

1 **A** (Witness complies.)

2 **Q** Now, this agreement obviously was the one that
3 was in effect when you departed from Columbia Heart
4 in 2006, correct?

5 **A** Correct.

6 **Q** Let's look first at section 5.5.

7 **A** (Witness complies.)

8 **Q** And we'll look at some of these other
9 subsections in a minute, but section 5.5 in this
10 document that you signed says, Acknowledgment of
11 Reasonableness. It says, Physician has carefully
12 read and considered the provisions of this agreement
13 and agrees that the restrictions set forth herein,
14 particularly those in sections 5.1, 5.2, 5.3 and
15 5.4, together with the remedy set forth in article
16 four are fair and reasonably required for the
17 protection of Medical Group. Did I read that
18 correctly?

19 **A** You did.

20 **Q** So this was something that was in your 15 page
21 agreement that you signed in July of 2004?

22 **A** Correct.

23 **Q** Now, you understood what that said, didn't you?

24 **A** Well, I can't tell you I even read that in any
25 detail, but I do understand what it says.

1 Q You at least saw the heading saying
2 acknowledgment of reasonableness?

3 A Probably. I have no clear recollection of
4 that, but I don't dispute that.

5 Q Right now I think it's fair to say you think
6 you read the agreement, but you don't remember
7 exactly how carefully you might have read it; is
8 that fair?

9 A Oh, I'm sure I didn't read it very carefully,
10 but --

11 Q You did not?

12 A I would think I didn't.

13 Q Even though this was the agreement for your
14 employment to continue on with Columbia Heart, a 15
15 page agreement, and you're saying you didn't read it
16 carefully and you didn't go talk to a lawyer; is
17 that your testimony?

18 A It is my testimony because frankly I had little
19 alternative at the time.

20 Q Well, Doctor, you left in 2006, didn't you?

21 A I did.

22 Q If you had wanted to, you could have left in
23 2004?

24 A It's possible, but as a practical matter, I --
25 when this was presented, it was this is it. If you

1 want to stay in the practice, you sign this
2 agreement. And I was certainly not prepared nor
3 interested in leaving at the time.

4 Q Well, let's look at that for a minute. You
5 were pretty busy in 2004, weren't you?

6 A I was.

7 Q And at that point in time, you could have said,
8 look, I don't want to sign a noncompete. You could
9 have said that?

10 A I could have and should have.

11 Q But you didn't?

12 A Correct.

13 Q And you had the opportunity if you said,
14 listen, I think this is -- because this is something
15 new, we haven't had this kind of restriction before,
16 that's not something I want and I think I'll have to
17 leave if we do that. You never said that, did you?

18 A I did not.

19 Q Now, let's look over at section 5.1(a).

20 A (Witness complies.)

21 Q Just so we're clear on what the document says,
22 the document says, The parties stipulate that the
23 Medical Group is engaged in the practice of medicine
24 in the field of cardiology, parentheses, the, quote,
25 business, end quote, end parentheses, in the

1 territory, parentheses, as defined in section 5.2
2 below. And that's the same phrase about engaged in
3 the practice of medicine in the field of cardiology
4 that we saw in the 1999 agreement, isn't it?

5 A Correct.

6 Q Let's go over to 5.1(b).

7 A (Witness complies.)

8 Q You see that section?

9 A I do.

10 Q And that section says, Physician in the event
11 of termination or expiration of this agreement for
12 any reason, during the 12 month period -- 12 month
13 period immediately following the date of termination
14 or expiration, shall not compete, defined in section
15 5.2 below, with Medical Group. So that establishes
16 a one year period, correct?

17 A Correct.

18 Q And you don't have any problem with that one
19 year period, do you?

20 A No, I don't.

21 Q Now, let's go over to 5.2(i). And it says
22 here, Compete means directly or indirectly, on his
23 own behalf or on behalf of any other person, other
24 than at the direction of Medical Group and on behalf
25 of Medical Group: A, organizing or owning any

1 interest in a business which engages in the business
2 in the territory; B, engaging in the business in the
3 territory; and, C, assisting any person as a
4 director, officer, employee, agent, consultant,
5 lender, lesser or otherwise to engage in the
6 business in the territory. Did I read that
7 correctly?

8 A You did.

9 Q Now, at the time that you left Columbia Heart,
10 you had owned an interest in Columbia Heart, hadn't
11 you?

12 A I did.

13 Q That was what you did at Columbia Heart as a
14 shareholder physician. And when you started
15 Lexington Heart, you were one-third owner of that
16 entity, correct?

17 A Correct.

18 Q And then engaged -- B, engaging in the business
19 of the territory, you were practicing medicine in
20 the field of cardiology when you were at Columbia
21 Heart, weren't you?

22 A Yes.

23 Q And when you went to Lexington Heart, you were
24 engaged in the practice of medicine in the field of
25 cardiology at Lexington Heart, correct?

1 **A** Correct.

2 **Q** And you are today?

3 **A** Correct.

4 **Q** And, finally, C, assisting a person as
5 director, officer, employee, agent, consultant, and
6 it goes on to engage in the business in the
7 territory. In fact, you also did that at Columbia
8 Heart because you were an employee physician,
9 weren't you?

10 **A** Yes.

11 **Q** And as such -- and your new entity, I guess is
12 set up a little differently. Are you considered an
13 employee of Lexington Heart?

14 **A** Well, it is an LLC. I'm a member and employee.

15 **Q** So you've got -- so it's the same situation,
16 okay. And, again, this was one of the sections that
17 when you signed the agreement in 2004, you
18 acknowledge was reasonable, correct?

19 **A** Correct.

20 **Q** Let's go over to 5.2(iii). Now, this defines
21 territory as the following, Territory means the area
22 within a 20 mile radius of any Medical Group office
23 at which physician routinely provided services
24 during the year prior to the date of termination or
25 expiration of this agreement..

1 Now, when we looked at your 1999 agreement, in
2 that restrictive provision section, that talked
3 about Richland and Lexington Counties, didn't it?

4 A It did.

5 Q And now it's a smaller situation. It's a 20
6 mile radius of any Medical Group office at which
7 physician routinely provided service during the year
8 prior to the date of termination or expiration of
9 this agreement. And in your case that would have
10 been the Lexington office along with the Richland
11 office, correct?

12 A I don't know that it's smaller, but it's
13 defined differently.

14 Q You don't think that's smaller than Richland --
15 all of Richland and Lexington Counties?

16 A I just don't know. I'm not disputing it. From
17 glancing at the map, geography is not my strong
18 suit. But I don't know how big Lexington and
19 Richland Counties are.

20 Q You don't know that?

21 A No.

22 Q Let's look at section 5.4.

23 A (Witness complies.)

24 Q And this is the remedy section of your
25 contract. And let's look at 5.4(a). And without

1 going through this word for word, but basically what
2 this section says is that if the physician, at his
3 or her option, desires to compete in violation of
4 the provisions in section 5.1, you're to pay a sum
5 that's established by averaging the W-2 compensation
6 of the physician shareholders for the previous
7 calendar year, correct?

8 A Correct.

9 Q So it gives you the option to either pay that
10 amount to be able to compete or not compete and not
11 pay that amount. Those were the two options,
12 correct?

13 A Correct.

14 Q And you have not paid Columbia Heart the amount
15 defined there, have you?

16 A No, I have not.

17 Q And you are competing in violation of this
18 agreement where you're practicing at Lexington
19 Heart, correct?

20 A Correct.

21 Q Now, this section two was another section that
22 when you signed the agreement, you acknowledge the
23 reasonableness to this section, too, didn't you?

24 A Correct.

25 Q And if we go over to section 5.4(b) and we look

1 at the start of that section, the start of that
2 section says that the parties agree that a breach by
3 a physician of any of the provisions of section 5.3
4 of this agreement would cause irreparable damage to
5 Medical Group. And it goes on from there. Did I
6 read that correctly?

7 A You did.

8 Q So that again was part of the agreement that
9 you signed in 2004. Let's jump over to section
10 4.5(1). Now, this provision was a new provision to
11 the 2004 contract, wasn't it?

12 A Yes.

13 Q And let's look first at what it says. It says,
14 Notwithstanding anything to the contrary stated
15 herein, in addition to any other amounts payable
16 upon termination, physician shall be paid \$5,000 per
17 month for each of the 12 months following
18 termination so long as the physician is not in
19 violation of article five of this agreement. In the
20 event that the physician violates article five, no
21 amount shall be payable pursuant to this section
22 4.5(1), and any amounts previously paid to physician
23 pursuant to this section shall be refunded to
24 Medical Group. Of course, you have not gotten any
25 payments under this section, correct?

1 A Correct.

2 Q But you understood that this was, and I think
3 you said the first time that you had heard the word
4 consideration in a legal sense was when David Summer
5 was presenting to the group; is that correct?

6 A That is correct.

7 Q And he explained to you and to the rest of the
8 group that this section was consideration money that
9 was additional money for this particular agreement
10 whereby if you did not compete for the 12 month
11 period, you would get an additional \$60,000,
12 correct?

13 A I don't recall how well he described things,
14 but I do understand that to be the case.

15 Q And he, generally, talked about how that would
16 work, I mean, not in the same words as me, but in
17 general?

18 A Right.

19 Q Now, let's look over at section 4.5 of your
20 2004 agreement.

21 A 4.5 you said?

22 Q 4.5, yes.

23 A Okay. I thought that was where we were.

24 Q Well, we were in part of 4.5. I'm going to go
25 to the top of 4.5, okay. And 4.5 starts at the

1 bottom of that page and says, Effect of Expiration
2 or Termination. And if we go over and look at --

3 A I'm sorry. I have not caught up with you yet.

4 Q If you look at the bottom of page six.

5 A Okay.

6 Q Very last line on page six.

7 A Okay. I'm there.

8 Q And the heading for this section says, Effect
9 of termination or expiration. Do you see it?

10 A I do.

11 Q And this is similar section to what you had in
12 the 1999 agreement, isn't it?

13 A I'll accept your word.

14 Q Okay. Well, let's look over at subsection (f).
15 While she's working with the computer, let's do it
16 the old way where we look at the document. And if
17 we look at the document itself at 4.5(f), it's
18 similar to the section we looked at previously where
19 we're looking at physician leaving with or without
20 cause and the two types of moneys that would be
21 paid. Subsection one talks about all salary earned
22 or accrued but unpaid as the date of physician's
23 death, and again we've got the same typo we had
24 before.

25 A Correct.

1 Q And then we've got the second part being
2 physician's pro rata share of the current year's
3 accounts receivable. And that again has the formula
4 which we looked at before for getting a portion of
5 accounts receivable pursuant to the formula spread
6 out over a period of time, correct?

7 A Correct.

8 Q But, again, if we look at subsection (i), again
9 we've got a provision whereby if you do end up
10 commencing the active practice of medicine in the
11 field of cardiology, that's the same phrase we've
12 seen before?

13 A I'm sorry, which subsection (i) of which --

14 Q 4.5, if you'd go to page nine.

15 A Okay. I'm sorry.

16 Q That's okay.

17 A I'm there now.

18 Q And what that says is that notwithstanding any
19 other provision in the agreement if, and I'm going
20 to paraphrase here, during the 12 month period of
21 time following the expiration or termination of this
22 agreement, physician continues or commences the
23 active practice of medicine in the field of
24 cardiology within a 20 mile radius of any Medical
25 Group office at which physician routinely provided

1 services during the year prior to the date of
2 expiration or termination of this agreement, then
3 physician shall forfeit any moneys payable to
4 physician pursuant to section 4.5. Do you see that?

5 A I do.

6 Q So, again, like the previous agreement, if you
7 end up in a competitive situation during that one
8 year period, you forfeit the unpaid but accrued
9 salary, correct?

10 A Correct.

11 Q As well as the accounts receivable defined by
12 that formula, correct?

13 A Correct.

14 Q And for this section, also there was an
15 agreement of reasonableness, which is found at 4.6.
16 And if you look at that, it says, Acknowledgment of
17 Reasonableness. Physician acknowledges the
18 forfeiture described in section 4.5 (i), which is
19 what we just read, correct?

20 A Correct.

21 Q Is intended as partial restitution for the
22 damages which Medical Group will suffer as a result
23 of the competition by physician with Medical Group.
24 Physician further acknowledges that such forfeiture
25 together with the remedies set forth in article five

1 below is fair and reasonably required for the
2 protection of Medical Group. Do you see that?

3 A I do.

4 Q And that was also part of the agreement that
5 you signed in 2004, correct?

6 A Correct.

7 MR. BABCOCK: Your Honor, may we approach.

8 THE COURT: Yes, sir.

9 (Whereupon, a bench conference was held off
10 the record.)

11 THE COURT: All right. Ladies and gentlemen,
12 we'll take a ten minute break.

13 Dr. Baugh, during the break, you're not
14 permitted to discuss your testimony with anyone.

15 THE WITNESS: Yes, Your Honor.

16 THE COURT: Thank you very much. We're at ease
17 for ten minutes.

18 (Brief Recess.)

19 THE COURT: All right. Mr. Babcock.

20 BY MR. BABCOCK:

21 Q Doctor, we now want to turn our attention to
22 the November 30, 2005, meeting at Columbia Heart and
23 the discussion concerning Jenny Feldman, Dr. Jenny
24 Feldman, becoming a shareholder partner at Columbia
25 Heart and you talked a little bit about that on your

1 direct examination. And as I understand, there was
2 consideration of that meeting on a couple areas
3 concerning Dr. Jennifer Feldman, one of which was
4 technique or complications; is that fair?

5 A Yes.

6 Q And another subject was productivity, correct?

7 A Correct.

8 Q And before that meeting, you had had a
9 conversation with Dr. Rhinehart concerning Dr.
10 Feldman's desire to be a shareholder with Columbia
11 Heart, didn't you?

12 A I did.

13 Q In fact, I think you had that conversation
14 maybe by mobile telephone on the way to the meeting
15 itself; is that right?

16 A Correct.

17 Q And Dr. Rhinehart, was he one of the physicians
18 that was at Providence?

19 A He was.

20 Q And a Columbia Heart shareholder physician,
21 also?

22 A Yes.

23 Q So he was going to be attending the Columbia
24 Heart meeting. So the two of you discussed Jennifer
25 Feldman's desire to be a shareholder, correct?

1 A He told me about the concern about technical
2 complications.

3 Q Right. And he told you of the concerns
4 concerning the technical complications. And after
5 you heard that from him, you told him that if people
6 had concerns, it was something that should be looked
7 into?

8 A I did.

9 Q So it was in that context that you came to the
10 meeting and were you the first person who spoke?

11 A No.

12 Q Other people had spoken before you?

13 A As I recall, Dr. Humphrey went around the room
14 wanting each of the shareholders to weigh in on this
15 since it was such an important issue.

16 Q Sure. And I would assume he's looking for
17 positive and negative feedback at that time?

18 A I would presume so.

19 Q And what you told him and the group was that
20 several years prior, you had had to assist Dr.
21 Jennifer Feldman with defibrillator or pacemaker
22 installation, correct?

23 A In gaining vascular access. During the time,
24 Dr. Feldman had not done them in a while. It was
25 not a complication per se, but it was getting into

1 the supplanting of the vein, which is part of that
2 procedure.

3 Q So it was something that she was having
4 difficulty with that you needed to help her with?

5 A Correct, six or seven years before this.

6 Q Sure. But that was something you shared with
7 the group concerning her technical abilities?

8 A I believe I prefaced it with the only issue I
9 have is six or seven years ago. I've had nothing in
10 recent years.

11 Q So in fairness, that's not a positive thing
12 you're saying, it's something that showed that there
13 were some issues a few years ago, but you don't know
14 what the situation is today?

15 A Correct.

16 Q And at that meeting, I think you felt that if
17 people had concerns, as you told Dr. Rhinehart, it
18 was something that should be looked into?

19 A Well, I felt that in the procedurally based
20 specialty, if there's a concern about procedural
21 abilities, obviously it's an important issue. Now,
22 I did not know at the time, frankly, that this had
23 already been discussed prior to this meet -- Dr.
24 Feldman's application for shareholder status had
25 been discussed in other settings. I wasn't aware of

1 that.

2 Q But you felt it was something to be looked into
3 and, in fact, it was looked into, correct?

4 A Correct.

5 Q So that was done. And from your standpoint,
6 you felt the meeting was a fair meeting, didn't you?

7 A I did at the time, yes.

8 Q And what you found was that if people had valid
9 concerns about technical competence, that was
10 something that was to be addressed?

11 A I did.

12 Q And that, I guess, productivity would also be a
13 fair subject for discussion when you're looking to
14 make somebody a partner, too, wouldn't it?

15 A Correct.

16 Q And the meeting itself was one that was chaired
17 by Dr. Humphrey, who was the President of the group?

18 A Correct.

19 Q And I think you described him as being a very
20 fair individual?

21 A That was Dr. Schulze, but I agree with that
22 assessment.

23 Q That's what you told me in your deposition.

24 A Oh, okay. Yeah, I certainly agree with that,
25 yes.

1 Q And from the standpoint of the meeting itself,
2 it was something that really was difficult, not
3 pleasant for the entire group?

4 A That's very fair. I think it was a painful
5 time because all of us did and still do, I think,
6 like Jenny personally.

7 Q So after the meeting, you told Barry and
8 Jennifer Feldman what you had said at the meeting,
9 didn't you?

10 A I did.

11 Q And --

12 A Not immediately after -- I'm sorry -- I don't
13 want to imply immediately after, within the next
14 week or so.

15 Q That's right. Within a few days, you told them
16 both what you had said?

17 A I did.

18 Q And after that, as we know, a couple things
19 occurred, the complication rate was examined by
20 Columbia Heart, correct?

21 A Correct.

22 Q And, subsequently, a offer was made to Dr.
23 Jennifer Feldman for a two year track to become a
24 shareholder with certain productivity benchmarks,
25 correct?

1 A Correct.

2 Q Of course, she didn't take that because she and
3 her husband and you formed Lexington Heart?

4 A Correct.

5 Q And Lexington Heart, we saw yesterday with the
6 original paperwork, believed -- the formal paperwork
7 was signed on, some of the formal paperwork, was
8 signed on January 3rd of 2006. Let me show you
9 Defendant's Exhibit 3.

10 A It says, Effective as of the 3rd day of
11 January. I don't know that that's the day we signed
12 it.

13 Q It's effective that day and that's when
14 effectively you're up and operating?

15 A Correct. Well, not operating, we were creating
16 the entity.

17 Q Let me rephrase that. The LLC is operational.
18 The practice itself took time to actually become
19 operational, correct?

20 A Correct.

21 Q And you had to do things like getting space,
22 which you just told us a little bit earlier today,
23 you leased from Lexington Medical Center, correct?

24 A Correct.

25 Q And you had to get all of your equipment and

1 everything you needed to actually operate the
2 practice, correct?

3 A Correct.

4 Q And, obviously, you also needed staff to
5 operate the clinic and -- or the practice rather.
6 And you're aware that a large portion of your staff
7 came from Columbia Heart; you knew that?

8 A I do.

9 Q And you also realize that, at the time, that
10 the loss of that staff would hurt Columbia Heart?

11 A To a degree. I think also the -- ultimately,
12 they ended up closing the Lexington office, that
13 staff was frankly going to be losing their jobs
14 anyhow.

15 Q Well, let's look at the timing on it, Doctor.
16 The timing was that the staff was hired by Lexington
17 Heart and began training on April 24th; you remember
18 that?

19 A I do.

20 Q And began seeing patients on May 1st; you
21 remember that?

22 A I do.

23 Q And it wasn't until the Fall of 2006 that
24 Columbia Heart closed its Lexington office, correct?

25 A Correct.

1 Q You had a resignation letter which you
2 submitted to Columbia Heart, correct?

3 A Correct.

4 Q And I'm going to hand you a document and can
5 you identify that for me, please?

6 A I can. This is our resignation letter as of
7 January 22nd, 2006.

8 Q And it's got your signature at the bottom?

9 A It does.

10 MR. BABCOCK: We would offer this as the next
11 exhibit for the defendants, Your Honor.

12 THE COURT: Any objection?

13 MR. THOMPSON: No objection.

14 (Defendant's Exhibit Number 8, resignation
15 letter, admitted into evidence.)

16 BY MR. BABCOCK:

17 Q I'm going to hand you Defendant's Exhibit 8.
18 And this is your resignation letter dated January
19 22, 2006, correct?

20 A Correct.

21 Q And in this letter, you provided 90 days notice
22 as you were required to do under the 2004 agreement?

23 A Yes.

24 Q So you were abiding by the 2004 agreement to
25 that effect, weren't you?

1 A I was.

2 Q And you gave the 90 days notice, which ended up
3 being April 21st. But in this letter, you didn't
4 indicate anywhere that you were going to contest the
5 covenant not to compete, did you?

6 A No.

7 Q And you didn't say, we're not going to pay --
8 we're going to open an office in Lexington, but
9 we're not going to pay the sum we agreed upon in the
10 agreement, did you?

11 A I did not.

12 Q And the Lexington Heart operation has now grown
13 from the original three doctors to six doctors; is
14 that correct?

15 A It is.

16 Q Now, after you submitted your letter of
17 resignation, but before you actually started
18 Lexington Heart, you talked to various other doctors
19 and told them you were leaving the practice,
20 correct?

21 A I did.

22 Q You talked to people such as Dr. Martha Parker
23 Hester; is that right?

24 A That's correct.

25 Q And Dr. Mark Hester; is that right?

- 1 A Martin Hester.
- 2 Q Martin, I'm sorry. And Dr. David Lyle?
- 3 A Yes.
- 4 Q And you talked to people at South Hampton
- 5 practice?
- 6 A That is the Hesters.
- 7 Q And Lexington Family Practice?
- 8 A Yes.
- 9 Q And, also, you went to Sumter to see people
- 10 such as Doctors Clay Lowder and David Whaley; is
- 11 that right?
- 12 A Correct.
- 13 Q And you were telling them you were leaving and
- 14 going to be practicing in Lexington, but you didn't
- 15 know exactly where at that point in time?
- 16 A Correct.
- 17 Q And, of course, that was important for you to
- 18 let people know other -- to have other doctors know
- 19 where you were so that they could send you referrals
- 20 in the future, correct?
- 21 A Well, I think as a professional courtesy, even
- 22 if I was leaving the state, I would let people know
- 23 I was leaving. But, at that point, I had sought
- 24 legal advice and I was scrupulously careful not to
- 25 let them know I want your business when I go, I was

1 just letting them know I was leaving.

2 Q But you went and made personal contact to let
3 them know you were leaving?

4 A I did, some of the physicians I've worked with.

5 Q These were people you've had referrals from in
6 the past?

7 A Correct.

8 Q Because referrals you recognize is an important
9 part of your practice, correct?

10 A Of course.

11 Q An important part of Columbia Heart Clinic's
12 practice or, for that matter, any cardiologist
13 practice?

14 A Correct.

15 Q I think in March of 2006, you sent a letter to
16 various representatives at the State House weighing
17 in on the issue concerning additional heart
18 operations at Lexington Medical Center, correct?

19 A I did.

20 Q And is that a copy of the letter that you sent?

21 A Yes, it is.

22 MR. BABCOCK: We'd offer this as the next
23 defendant's exhibit, Your Honor.

24 THE COURT: Any objection?

25 MR. THOMPSON: No objection, Your Honor.

1 **THE COURT:** Mark it in the record.

2 (Defendant's Exhibit Number 9, letter,
3 admitted into evidence.)

4 **BY MR. BABCOCK:**

5 **Q** And this letter is dated March 31, 2006?

6 **A** Yes.

7 **Q** And it is on Columbia Heart stationary; is that
8 right?

9 **A** It is.

10 **Q** And it was written to, we said, various members
11 of the General Assembly concerning Lexington Heart's
12 desire to have additional heart related capability
13 at Lexington Medical Center?

14 **A** Correct.

15 **Q** Now, after you sent this letter, you had a
16 request made by Columbia Heart or an objection that
17 it be sent on Columbia Heart stationary, correct?

18 **A** Not to me. Dr. Feldman apparently was
19 contacted by Dr. Bouknight, but I did not hear until
20 after --

21 **Q** So you -- I'm sorry?

22 **A** Dr. Bouknight never spoke with me about that,
23 but he did speak to Dr. Feldman.

24 **Q** And Dr. Feldman spoke with you?

25 **A** Correct.

1 Q So you know how Columbia Heart felt. Dr.
2 Feldman sent a clarification letter out, but you did
3 not?

4 A Well, we know how Dr. Bouknight felt. I don't
5 know that it was an official statement of the
6 practice. And I did not send a clarification letter
7 out.

8 Q And you didn't call Ben Jones, Dr. Ben Jones,
9 to ask him how the practice felt beyond that one
10 doctor, did you?

11 A I did not. I was speaking for myself and I was
12 a shareholder of Columbia Heart at the time.

13 Q In fairness, at that point in time, y'all are
14 still sharing the Lexington office, aren't you?

15 A Correct.

16 Q Dr. Jones is there, Dr. Feldman is there and
17 you're there. And after finding out that Dr.
18 Feldman had had that phone call, you could have just
19 gone over to Dr. Jones' office and said, is this a
20 problem? I've already given my letter of
21 resignation. I'm about to leave in about three
22 weeks and I've sent this letter on Columbia Heart
23 stationary, is that a problem? You didn't do that,
24 did you?

25 A I didn't.

1 Q Let's talk briefly about the true up situation.
2 As you testified earlier, the situation at Columbia
3 Heart is one where on a quarterly basis, the
4 shareholders were reviewed in terms of whether they
5 were positive or negative, correct?

6 A Correct.

7 Q And if they were positive, they'd get a bonus,
8 correct?

9 A Correct.

10 Q But if you're negative, it's something that
11 needed to be made up at some point in time?

12 A Correct.

13 Q And when we shift gears to the period of time
14 of the first quarter of 2006, there were a whole lot
15 of additional costs and expenses associated with
16 operating Columbia Heart during that first quarter
17 of 2006 that had been true previously, weren't
18 there?

19 A That had not been true previously?

20 Q Let me rephrase it.

21 A Okay.

22 Q There were additional costs and expenses or
23 increased costs and expenses that were present in
24 the first quarter of 2006 than had been present
25 before?

1 A Had not been present before, yes.

2 Q All right. Things -- you'd just moved in to
3 the new Richland building, correct?

4 A Correct.

5 Q And so really for the practice, you're in a new
6 time period in terms of analyzing how much it's
7 costing to do business; fair enough?

8 A Yes.

9 Q So even though you had regularly been in a
10 positive position in terms of production previously
11 at Columbia Heart, you're not in a position to
12 dispute that you were -- that you were in a negative
13 position for that first quarter of 2006, are you?

14 A I'm not in a position to dispute it, no.

15 Q And you would agree that if you were in a
16 negative position, that would be something that
17 under the Columbia Heart methodology would need to
18 be made up?

19 A Correct. I'm not certain I understand the
20 legal issues in terms of I was going to be gone
21 during the time or it would routinely be made up
22 even though the money I'd earned would be coming in,
23 so I --

24 Q You don't know when, but you know it needed to
25 be made up at some point?

1 A Correct.

2 Q Fair enough. Finally, Doctor, just so we're
3 clear. You were in favor of the new building at
4 Richland -- Palmetto Richland, correct?

5 A I was.

6 Q And you paid, I believe, \$10,000 to enter that
7 separate LLC that had the ownership in the building,
8 correct?

9 A Correct.

10 Q And that all occurred in the 2004 time period,
11 correct?

12 A I believe so, yes.

13 Q And then in the Fall of 2006, you were paid
14 \$200,000 for your interest in the building, correct?

15 A Correct.

16 MR. BABCOCK: With the Court's indulgence.

17 THE COURT: Yes, sir.

18 (Pause.)

19 MR. BABCOCK: No further questions.

20 THE COURT: Redirect?

21 REDIRECT EXAMINATION

22 BY MR. THOMPSON:

23 Q Dr. Baugh, let me show you what we're going to
24 mark as our next exhibit.

25 (Plaintiff's Exhibit Number 3, minutes of

1 November 30, 2005, was marked for identification
2 purposes.)

3 It's been marked as Plaintiff's Exhibit 3 and
4 ask if you recognize this document?

5 A I do.

6 Q Can you describe the document for the Court?

7 A It's the minutes of executive session of the
8 meeting November 30, 2005, of the Columbia Heart
9 Clinic Board of Directors?

10 Q And is that the same meeting that we've been
11 talking about over the past couple of days at which
12 Dr. Jennifer Feldman's request for consideration of
13 shareholder status was discussed?

14 A It is.

15 Q And there are some handwritten notes on the
16 minutes or there appear to be changes; is that
17 correct?

18 A Correct.

19 Q And do you know if the -- how this was
20 apparently originally typed up, is that the accurate
21 description of the meeting or do the changes reflect
22 a more accurate description of the meeting?

23 A Quite honestly, I'm having trouble reading some
24 of the handwritten changes. (Pause) I mean, I
25 certainly feel like the typed form is accurate.

1 Q Is there any mention of a discussion of
2 productivity, Dr. Jennifer Feldman's productivity,
3 in the minutes?

4 A No.

5 Q But that was discussed?

6 A It was.

7 Q Now, there was some testimony on
8 cross-examination that, and correct me if I'm
9 mischaracterizing it, that the subjects brought up
10 in the meeting were fair for discussion?

11 A Correct. I believe it fair to consider
12 procedural skills in a procedurally based specialty.

13 Q Was there any hostility from the Providence
14 doctors regarding Dr. Jennifer Feldman?

15 A There was. And I was frankly surprised by
16 that. Even though I had spoken to Dr. Rhinehart en
17 route to the hospital, there was a little hostility
18 from him and particularly Dr. Bouknight that I was
19 surprised at, but I don't think the general mood of
20 the group was hostile. I felt that most of the
21 physicians were supportive and, you know, friendly
22 with Dr. Feldman, and there was some hostility.

23 Q You mentioned the Winnsboro visits that you had
24 to that facility. What sort of things were you
25 doing in Winnsboro when you went there?

1 **A** Well, if there were any inpatient consults to
2 see, patients in the hospital at Winnsboro who
3 needed to be seen for cardiology, I would see them.
4 And then I would have scheduled office hours --
5 well, clinic hours perhaps where patients would be
6 scheduled for follow-up or new patient, outpatient
7 consultations.

8 **Q** And so you went up there pursuant, was there
9 some sort of obligation or agreement between
10 Winnsboro and Columbia Heart Clinic?

11 **A** Correct. For years that had been going on, I
12 believe, even when I joined the group. And for
13 years, I was routinely, I think there were four of
14 us, and I went every fourth Tuesday, or there may
15 have been five, I don't recall. Toward the end of
16 my time with Columbia Heart, I was taken out of that
17 rotation just because of the responsibilities at
18 Lexington were becoming so great.

19 **Q** But Columbia Heart Clinic physicians
20 appearances in Winnsboro were not ad hoc or
21 emergency basis, this was part of a regular
22 arrangement?

23 **A** It was every Tuesday I know and then often went
24 on Thursdays as well.

25 **Q** Did you ask the Columbia based physicians for

1 help in your being able to adequately take care of
2 patients in Lexington?

3 **A** On a number of occasions.

4 **Q** And what was the types of help that you
5 requested?

6 **A** Well, we wanted another physician who would be
7 dedicated to the Lexington office. And when that
8 was declined, we asked for a nurse practitioner to
9 be hired by the practice to help us with the
10 hospital work. As I mentioned earlier, each of us,
11 the three of us, Dr. Jones, Feldman and myself, had
12 hired nurse practitioners on our own to help with
13 work load, but we needed some -- even that was not
14 allowing us to keep up with the work demands to
15 include the hospital work.

16 **Q** Did you request additional nurse practitioners?

17 **A** We did. The request was for a nurse
18 practitioner hired by the practice to help with the
19 hospital part of the Lexington rounds, follow-up
20 care and new consults in the hospital.

21 **Q** At the time you left or shortly before, were
22 there plans to hire additional cardiologists?

23 **A** Well, they had hired two that come to mind, off
24 the top of my head, were hired, but came shortly
25 after we left, Dr. McCotter and Dr. Isbell, the two

1 who were hired.

2 Q Were there any plans to base them in Lexington
3 to help out?

4 A Not that I'm aware of. Dr. McCotter is an
5 electrophysiologist and Dr. Isbell is an imaging
6 specialist, who, I think, both of them were pretty
7 much committed to being at Richland because of the
8 focus of their work.

9 Q We've used this as sort of a summary exhibit
10 and I'm going to hand it to you because I understand
11 it might be a little bit difficult to see. And did
12 you have any role in preparing that?

13 A I did.

14 Q How did you do it?

15 A Well, basically, we had a map, I used the 20
16 mile scale and a compass and drew the circles and
17 colored them in.

18 Q Okay. Let's disregard everything except the
19 circles around the Lexington office and the Columbia
20 office. And what counties do those circles
21 encompass?

22 A Virtually all of Lexington County, almost all
23 of Richland County, maybe three quarters --
24 two-thirds of Fairfield County, part of Calhoun
25 County, Orangeburg County, a piece of Aiken County,

1 Sumter County, Kershaw County. So it's -- oh, and
2 Newberry and Saluda.

3 Q And just to refresh the Court's memory, your
4 prior agreement, prior to the 2004 agreement, what
5 counties did that restrict you in?

6 A Lexington and Richland only.

7 Q What's your understanding of -- if you had paid
8 the 590,000 dollar penalty, what's your
9 understanding -- that doesn't mean you get the
10 60,000 or does it?

11 A I would think not. I believe, if you compete
12 in any --

13 Q I'm sorry. Assuming that you did practice
14 within the 20 mile --

15 A Correct. If I competed, I would lose the
16 60,000 whether I paid the penalty or not.

17 Q And there was mention of a subsequent offer to
18 Dr. Jennifer Feldman after the November meeting.
19 Was that before or after she and you and Barry
20 resigned?

21 A My recollection is it was after, but I can't
22 speak with certainty on that.

23 Q And there was a productivity requirement. Do
24 you know what that was?

25 A I don't know specifically what the productivity

1 numbers were, but I understand it didn't include a
2 productivity requirement on her behalf.

3 Q When you -- did you do the two year track to
4 the shareholder status?

5 A Three year.

6 Q Three, okay. Did you have productivity
7 requirements on yours?

8 A I did not..

9 Q And as other physicians were considered for
10 shareholder status, are you aware of any of them
11 that were required to have a productivity
12 requirement during their two year track?

13 A Up until just recently, it was a three year
14 track, but I'm not aware of any, no.

15 Q It was introduced into evidence, a letter you
16 wrote in support of the Lexington Medical Center
17 certificate of need application. Before you sent
18 that letter, did anybody with Columbia Heart Clinic
19 tell you it was the official position of Columbia
20 Heart Clinic to oppose or stay neutral with regard
21 to the LMC's application?

22 A There had been some discussion perhaps a year
23 or more before that, particularly from the
24 Providence based physicians, they did not want any
25 support of Lexington. I can't recall it being an

1 official position, but I can't speak to that
2 specifically.

3 Q Did you receive any instruction from the
4 President or executive committee or any entity like
5 that that you were not to send letters or not to
6 express support for the certificate of need before
7 you sent that letter?

8 A Not that I recall. I can't speak to that
9 specifically.

10 MR. THOMPSON: No other questions.

11 THE COURT: Recross?

12 RECROSS-EXAMINATION

13 BY MR. BABCOCK:

14 Q Doctor, you said you weren't very good with
15 geography a few minutes ago; is that right?

16 A Uh-huh.

17 Q But you were able to take a compass and draw
18 the circles around the Columbia office and the
19 Lexington office in connection with this court case,
20 weren't you?

21 A Well, I do wood working as a hobby, so I'm used
22 to using compasses.

23 Q Sure. And when you saw the 20 mile radius
24 reference in the 2004 agreement, just as you made
25 this document, you could have taken your compass and

1 drawn the 20 mile radius at that point in time and
2 known exactly what it encompassed, couldn't you?

3 **A** Sure.

4 **Q** But you didn't do that?

5 **A** I didn't.

6 **Q** What you did do, as we saw earlier, was say
7 that that provision and other provisions were
8 reasonable. That's what you did do, correct?

9 **MR. THOMPSON:** Object, that's a
10 mischaracterization of testimony, Your Honor.

11 **THE COURT:** Your objection is a
12 mischaracterization?

13 **MR. THOMPSON:** Yes, Your Honor.

14 **THE COURT:** Overruled. I'm not saying it is or
15 it isn't, but you can ask the question.

16 **THE WITNESS:** Can I say it's a
17 mischaracterization?

18 **THE COURT:** You can answer the question any way
19 you want to.

20 **THE WITNESS:** Could you repeat the question,
21 please?

22 BY MR. BABCOCK:

23 **Q** Sure. Let's make it real simple. We saw
24 earlier an acknowledgment of reasonableness in the
25 2004 agreement, didn't we?

1 A We did.

2 Q And you signed that agreement, didn't you?

3 A Correct.

4 Q In that paragraph, we can go back and look at
5 it if you like, talked about the fact that various
6 sections were fair and reasonably designed to
7 protect the interest of Columbia Heart. That's what
8 it said, correct?

9 A Correct.

10 Q And you signed that?

11 A I did sign that.

12 Q And the efforts that were made to get
13 additional -- or I think you said an additional
14 nurse practitioner at the hospital, that was
15 something that would have occurred while you and Dr.
16 Feldman and Dr. Jones were all at the Lexington
17 office, correct?

18 A That is something that would have --

19 Q That did occur?

20 A Yes, it did.

21 Q And, in fact, that was something Dr. Jones
22 wanted, correct?

23 A Correct.

24 Q All three of you wanted?

25 A Right.

1 Q But the group as a whole didn't see fit to go
2 along?

3 A Correct.

4 Q Dr. Jones didn't leave Columbia Heart, did he?

5 A He didn't.

6 Q In fact, he's the President now, isn't he?

7 A He is.

8 MR. BABCOCK: No further questions.

9 THE COURT: Anything further of the witness?

10 MR. MALONE: One moment, please.

11 THE COURT: Sure.

12 (Pause.)

13 RE-REDIRECT EXAMINATION

14 BY MR. THOMPSON:

15 Q Just one other question, Dr. Baugh. Do you
16 have any idea if this reasonableness provision that
17 you've gotten questions on would legally control
18 whether or not this agreement is enforceable or not?

19 A I would have no idea --

20 MR. BABCOCK: Objection, Your Honor. I mean,
21 he's asking for a legal conclusion from the witness.

22 THE COURT: He said he didn't have any idea and
23 I'm afraid that's a decision I'm going to have to
24 make.

25 MR. THOMPSON: No other questions, Your Honor.

1 **THE COURT:** Do you have anything else, Mr.
2 Babcock?

3 **MR. BABCOCK:** Nothing further, Your Honor.

4 **THE COURT:** All right. I'm not clear if this
5 was ever entered in the record.

6 **MR. THOMPSON:** I do move that it be admitted as
7 Plaintiff's Exhibit.

8 **MR. BABCOCK:** Without objection.

9 **THE COURT:** What about number 2?

10 **MR. THOMPSON:** I thought I did move to admit
11 number 2.

12 **THE COURT:** I thought 2 was in, but the court
13 reporter is the one who decides whether it's in or
14 not.

15 **MR. THOMPSON:** To clean it up, I move that
16 Plaintiff's Exhibit 2 be admitted.

17 **MR. BABCOCK:** I have no objection.

18 **THE COURT:** Mark 2 and 3 in the record. I did
19 not tell you to mark 2 in the record, that's my
20 fault.

21 (Plaintiff's Exhibit Number 2, Kevin Baugh's
22 2004 Contract, and Plaintiff's Exhibit Number 3,
23 minutes of 11/30/05, were admitted into evidence.)

24 **THE COURT:** Dr. Baugh, my attempts to ask
25 questions have not -- I guess, just to explain a

1 little bit from my perspective, if this were a jury
2 trial, I'd keep my mouth shut. I'd never ask any of
3 those questions because I'd have a jury sitting over
4 there and that's it. They would be the fact
5 finders. In a nonjury setting, it's a little bit
6 more relaxed and I can ask some questions. I think
7 I'm just going to direct my questions to the
8 attorneys rather than continue to try to ask them.

9 I did misstate yesterday when I meant to say
10 catheterization, I was talking about angioplasty.
11 My concern is with the practice and what happens.
12 And I'm trying to evaluate the argument that was
13 made to me that an interventional cardiologist has
14 to practice at a certain facility.

15 **THE WITNESS:** Yes, sir.

16 **THE COURT:** That part I understand very
17 clearly. I told you all which side of the scalpel I
18 had been on. I'm familiar with the testing and the
19 other 95 percent of the things that you all do that
20 Dr. Schulze talked about, but I don't pretend to be
21 a doctor or an expert in your field.

22 I admire what all of you do very, very much.
23 Like I said, if it weren't for folks like you, I'd
24 be on the other side of the grass right now. But I
25 think I'll just quit asking questions of the doctors

1 and I'll just address my questions to the attorneys
2 at the end.

3 What I was trying to get to is you're at
4 Lexington, which is a facility that is not allowing
5 interventional radio -- interventional cardiology.
6 I keep saying interventional radiology because I had
7 a medical malpractice case not too long ago that
8 dealt with radiologists. I'm sorry, it's just a
9 slip of the tongue. But the argument's being made
10 that you have to be at that facility. I'm assuming
11 that you all have privileges at the other facilities
12 which is where you do that, but I hadn't heard that.

13 **THE WITNESS:** Yes, sir, that is true. We all
14 go to Richland and Prov -- we're on staff at
15 Providence, but I did 80 or so interventions at
16 Richland last year and we all go to Richland right
17 now.

18 **THE COURT:** I just hate making assumptions
19 because you all know the adage about assumptions.

20 **THE WITNESS:** Yes, sir.

21 **THE COURT:** All right. Thank you very much,
22 Doctor.

23 Call your next witness.

24 **MR. THOMPSON:** Judge, the next witness is
25 probably going to take a good bit of time.