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STATE OF SOUTH CAROLINA COUNTY OF KERSHAW JAMIE CURLEY, Plaintiff, v. SCENT LAND HOLDINGS, LLC, AMY PUCHALSKI AND ROBERT PUCHALSKI, Defendants.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT CIVIL ACTION NO. 2010-CP-28-00322
STATE OF SOUTH CAROLINA COUNTY OF KERSHAW DR. ORVILLE DYCE, Plaintiff, v. SOUTH CAROLINA ENT, ALLERGY & SLEEP MEDICINE, P.A., AMY PUCHALSKI AND ROBERT PUCHALSKI, Defendants.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT CIVIL ACTION NO. 2010-CP-28-00323

Judge: **The Honorable Diane Schafer Goodstein**

Attorneys for Plaintiffs: **Morris A. Ellison, Esquire, William C. Cleveland, III, Esquire, and Jana B. Baker, Esquire**

Attorneys for Defendants: **Vincent A. Sheheen, Esquire, and Michael D. Wright, Esquire**

This matter came before the Court for a bench trial on the following dates: November 19, 2013 – November 26, 2013; March 31, 2014 – April 2, 2014 and November 24, 2014 -

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November 25, 2014 (the "**Trial**").[1] Morris A. Ellison, Esquire, William C. Cleveland, III, Esquire, and Jana B. Baker, Esquire, appeared on behalf of Plaintiffs Dr. Orville Dyce ("**Dr. Dyce**") and his wife Jamie Curley ("**Ms. Curley**") (collectively, the "**Plaintiffs**"). Vincent A. Sheheen, Esquire and Michael D. Wright, Esquire, appeared on behalf of Defendants Dr. Robert Puchalski ("**Dr. Puchalski**"), his wife Dr. Amy Puchalski ("**Dr. Amy Puchalski**"), South Carolina ENT Allergy & Sleep Medicine, P.A. ("**SCENT**") and SCENT Land Holdings, LLC ("**SCENT Land**") (collectively, the "**Defendants**"). Dr. Dyce's lawsuit against SCENT, Dr. Robert Puchalski and Dr. Amy Puchalski, Civil Action No. 2010-CP-28-00323, was consolidated for trial with Ms. Curley's lawsuit against SCENT Land, Dr. Robert Puchalski and Dr. Amy Puchalski, Civil Action No. 2010-CP-28-00322.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Findings of Fact

1. At all times relevant to this dispute, SCENT was a Subchapter S corporation.

Dr. Puchalski formed SCENT in 2004[2] and elected for SCENT to be a Subchapter S corporation. Pursuant to its initial articles of incorporation dated October 28, 2004, SCENT was only authorized to issue a single class of shares.[3] SCENT's amended articles of incorporation filed June 12, 2008, similarly prohibited SCENT from authorizing any securities which would cause the corporation to have classes of stock that vary other than by voting rights.[4]

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[1] The Court would like to take this opportunity to acknowledge Professors McWilliams and Freeman's testimony in this case. Although both are excellent expert witnesses and both outstanding members of the South Carolina legal community the opinions regarding corporate governance are opinions regarding questions of law that the court must decide. Based upon the objections of counsel that this testimony is improper expert testimony this objection is sustained. *See* Dawkins v. Fields, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003).

[2] SCENT was originally known as Kershaw Ear Nose and Throat.

[3] Plaintiffs' Exhibit 261, ¶4.

[4] Plaintiffs' Exhibit 108, ¶10(a)(1).

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2. **Dr. Dyce became a fifty percent (50%) shareholder in SCENT on February 1, 2008.**

In 2005, Dr. Dyce joined SCENT as an employee physician. Beginning in 2007 there was a series of documents executed between SCENT, Dr. Dyce, and Dr. Puchalski. The final agreements executed by the parties were the July 16, 2008 Stock Purchase Agreement[5] and the July 16, 2008 Shareholder Agreement[6].

In March 2007, Drs. Puchalski and Dyce agreed Dr. Dyce had become a shareholder and would pay for his shares by having his profit distributions paid to Dr. Puchalski until Dr. Dyce's buy-in was complete.[7] Dr. Puchalski's staff, under Dr. Puchalski's supervision, created a spreadsheet that kept a record of the distributions that would have been paid to Dr. Dyce as an equal shareholder, but which were instead paid to Dr. Puchalski (and/or Dr. Amy Puchalski) pursuant to the March 2007 agreement between Drs. Dyce and Puchalski, to fund Dr. Dyce's buy-in (the "**Dyce Buy-In Spreadsheet**").[8] The amounts paid to Dr. Puchalski under this process consisted of (i) $21,000 profit distributions (or sweeps) approximately every two (2) weeks totaling $604,000 beginning in March 2007 through January 2008; (ii) additional profit distributions in July, August, September, October, November and December 2007 totaling $586,000; and (iii) an additional profit distribution of $178,216 in January 2008. The Dyce Buy-In Spreadsheet's file name is "DyceBuyinandupdates.xls."[9]

In recognition that Dr. Dyce had become a shareholder in March 2007, SCENT's internal bookkeepers established a K-1 distribution account in SCENT's books in March 2007 to record distributions credited to Dr. Dyce but being paid to Dr. Puchalski pursuant to the March 2007

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[5] Plaintiff's Exhibit Number 9
[6] Plaintiff's Exhibit Number 7
[7] March 31, 2014 – April 2, Tr. 8:11 – 10:7.
[8] November 26, 2013 Tr. 297: 12 – 287: 3.
[9] Plaintiffs' Exhibit 5.

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agreement between Drs. Dyce and Puchalski.[10] Importantly, only shareholders receive K-1 distributions in a Subchapter S corporation such as SCENT.[11]

On or about August 31, 2007, Drs. Dyce and Puchalski executed (i) the August 31, 2007 Shareholders' Agreement[12]; (ii) a Stock Purchase Agreement[13]; and (iii) a Bill of Sale.[14] The Bill of Sale provides, in part, that Dr. Puchalski "hereby transfers and conveys unto Orville Dyce, M.D. .... 50,000 shares of the capital stock in SCENT for $50,000."

Throughout the rest of 2007 and during January of 2008, SCENT continued to distribute profits to Drs. Robert and Amy Puchalski that were due to Dr. Dyce as an equal shareholder and which payments were recorded on the Dyce Buy-In Spreadsheet and credited to Dr. Dyce as K-1 distributions.

At some point near the end of 2007 or the beginning of 2008, SCENT's outside accountant, Austin Sheheen, advised Dr. Puchalski that the mechanism by which Dr. Dyce was paying for his shareholder interest violated rules applicable to Subchapter S corporations.[15] Those rules required that shareholders receive distributions exactly equal to their proportionate share of ownership in the corporation.[16]

As a result, Drs. Puchalski and Dyce orally agreed to undo their prior agreements and to postpone Dr. Dyce's admission as a shareholder until Dr. Dyce completed his buy-in.[17] Consistent with that approach, the monies recorded in Dr. Dyce's K-1 distribution account in 2007 were zeroed out and the distributions paid to Dr. Dyce in 2007 were reported to the IRS as

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[10]Plaintiffs' Exhibit 124.
[11]March 31, 2014 – April 2, Tr. 410: 9-12.
[12]Plaintiffs' Exhibit 3.
[13]Plaintiffs' Exhibit 4.
[14]Plaintiffs' Exhibit 6.
[15]March 31, 2014 – April 2, Tr. 414:17-417:16
[16]March 31, 2014 – April 2, Tr. 402:16-403:7
[17]Dr. Puchalski testified that this alternate buy-in mechanism for Dr. Dyce was never written down. November 25-26, 2013 Tr. 227:18 – 229:12.

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employee income using a Form 1099.

The actions and testimony of SCENT's outside accountant, Austin Sheheen, confirm that Dr. Dyce had completed his buy-in and became a SCENT shareholder as of February 1, 2008. SCENT and Dr. Puchalski took the position that Dr. Dyce was not yet a shareholder in 2007, therefore Mr. Sheheen directed that Dr. Dyce's 2007 SCENT K-1 distribution account be zeroed out and that his 2007 compensation be reported using a Form 1099.[18] Under the accounting strategy recommended by Mr. Sheheen and implemented by SCENT, these actions recognized that Dr. Dyce had not yet completed his buy-in by year end 2007 and was not yet, under the parties' new oral agreement, a shareholder. Subsequently, Mr. Sheheen became aware that SCENT established a K-1 distribution account for Dr. Dyce commencing February 1, 2008. Unlike as he had done in 2007, Mr. Sheheen took no steps to alter the account established in February 2008 which showed Dr. Dyce's receiving SCENT K-1 distributions commencing in February 2008.[19] Mr. Sheheen testified that it would not have been proper for Dr. Dyce to receive K-1 distributions beginning in February 2008 unless he was a shareholder in SCENT at that time.[20]

Commencing February 1, 2008, SCENT began paying Dr. Dyce bi-weekly profit distributions of $21,000. Dr. Dyce also began receiving additional profit sweeps in the same amount as those that were paid to Dr. Puchalski and/or Dr. Amy Puchalski.

Contrary to Dr. Puchalski's claim that the February-July 2008 distributions to Dr. Dyce were not reported to the IRS as shareholder K-1 distributions, SCENT's tax records establish that SCENT reported the profit distributions it paid to Dr. Dyce beginning February 1, 2008 as

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[18]March 31 – April 2, 2014 Tr. 442:7 – 443: 10. See note 23, *supra*, and accompanying text.

[19] Mr. Sheheen indicated in his testimony that he explained to both Drs. Dyce and Puchaslski many times that if Dr. Dyce was not a shareholder the proper tax treatment would be to pay Dr. Dyce W-2 wages and withhold to appropriate taxes rather than issue K-1 distributions.

[20]March 31 – April 2, 2014 Tr. 443:11 – 446:11.

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shareholder K-1 distributions, not employee wages.

In 2008, SCENT issued Dr. Dyce a Form W-2 reflecting that Dr. Dyce received wages from SCENT in the amount of $300,500. A review of SCENT's payroll records reflect that all of these monies were paid to Dr. Dyce as salary. In the first twenty-six (26) weeks of 2008, he received $10,000 every two weeks, totaling $130,000. In the second twenty-six (26) weeks of 2008, he received $13,000 every two weeks, totaling $169,000. Finally, at the end of 2008, he received a $1,500 payment.[21] The sum of these three (3) series of payments equal $300,500.

Contrary to Dr. Puchalski's contention that the payments SCENT started paying to Dr. Dyce in February 2008, and which SCENT labelled K-1 distributions, were actually reported as W-2 wages, none of the compensation reported to have been paid to Dr. Dyce as W-2 employee wages included the profit distributions paid to him commencing February 1, 2008. Dr. Puchalski testified repeatedly that SCENT reported the monies paid to Dr. Dyce between February 1, 2008 and July 16, 2008 as W-2 employee wages.[22] As noted above, SCENT's records establish conclusively this testimony was incorrect.

3. **Dr. Puchalski and Dr. Amy Puchalski took substantially more in distributions from SCENT than did Dr. Dyce after Dr. Dyce became an equal shareholder on February 1, 2008.**

SCENT'S general ledger reflects that between February 1, 2008 and December 31, 2008 SCENT distributed $872,992.16 more to Drs. Robert and Amy Puchalski[23] than it distributed to Dr. Dyce. The items comprising the $872,992.16 are revealed by comparing Drs. Puchalski's and Dyce's K-1 distribution accounts maintained by SCENT, under the monthly supervision of SCENT's outside accountant, Mr. Sheheen, who testified:

[21]Plaintiffs' Exhibit 304.052.
[22]November 25-26, 2013 Tr. 204:21 – 205:2; March 31 – April 2, 2014 Tr. 22:14-22.
[23]Although Dr. Amy Puchalski received some distributions she was at no time a member of SCENT. Dr. Robert Puchalski testified that any distributions made to Dr. Amy Puchalski were for his benefit.

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Q. Under the assumptions that I've asked you to make [that Dr. Dyce became an equal shareholder on February 1, 2008] Dr. Dyce was entitled to receive the same amount of distributions as Dr. Puchalski during this period of time, was he not?

A. Yes.

Q. And if that's the case, would you agree that he has been shortchanged by the tune of $872,992?

A. Yes, without any other circumstances.[24]

Between January 1, 2009 and December 31, 2009, Drs. Robert and Amy Puchalski received $98,542.06 more than Dr. Dyce received. This difference resulted primarily, but not exclusively, from the fact that in the summer of 2009, Dr. Dyce endorse to Dr. Puchalski a June 2009 SCENT distribution check in the amount of $50,000.[25] Dr. Puchalski claims that he was entitled to receive the distribution as additional compensation from Dr. Dyce for his shares.[26] It is clear that Dr. Puchalski was not entitled to these additional funds under the agreement of the parties. However, the decision to endorse this check to Dr. Puchalski was completely within the control of Dr. Dyce. It is undisputed that Dr. Dyce freely and voluntarily endorsed the check and there is no cause of action alleged which would entitle Dr. Dyce to recoup this excess distribution from Dr. Puchalski. Therefore, the court finds that between January 1, 2009 and December 31, 2009, Dr. Pulaski received excess distribution from SCENT in the amount of $48,542.06 (98,543.06 – 50,000.00). Therefore, Dr. Puchalski received a total of $921,534.22 in excess distributions.

4. <u>Dr. Dyce was terminated without cause effective May 9, 2010.</u>

In March 2010, Dr. Puchalski terminated Dr. Dyce's employment with SCENT with the termination to become effective sixty (60) days later, on May 9, 2010. The termination followed

[24]March 31 – April 2, 2014 Tr. 408:12-18.
[25]November 19 – 22, 2013 Tr. 252:22-253:19.
[26] Dr. Puchalski asserted that he was entitled to this additional amount in order to cover taxes that Dr. Puchalski was required to pay as a result of the sale of the stock in SCENT

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approximately seven (7) months of escalating tension between the doctors in the practice over a number of issues.

In September 2008, Dr. Puchalski formed SCENT Land.[27] However, Drs. Puchalski and Dyce who negotiated on behalf of their wives did not agree on the terms of an operating agreement for SCENT Land until September 2009 when Drs. Robert and Amy Puchalski and Ms. Curley executed the Operating Agreement of SCENT Land Holdings, LLC. (the "**2009 SCENT Land Operating Agreement**").[28] In 2009, SCENT began constructing a medical office building in Lugoff, South Carolina. During this time, Dr. Puchalski was working with the Nelson Mullins law firm to create a new shareholders agreement for SCENT that consolidated much of the decision making authority for SCENT in Dr. Puchalski.[29] Dr. Puchalski testified that consolidating power in him was in SCENT's best interest. However, he conceded that Dr. Dyce did not share this view and preferred a more open and participatory decision making process. In February and early March 2010, Dr. Dyce submitted a number of requests for financial and other information to SCENT personnel.[30] In response Dr. Puchalski placed various conditions upon allowing Dr. Dyce to take possession of copies of SCENT's records. During this time period, mistrust between Drs. Dyce and Puchalski grew exponentially.

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[27]Plaintiffs' Exhibit 17.

[28]Plaintiffs' Exhibit 16.

[29]On January 13, 2010, Ed White, an attorney with the Nelson Mullins law firm, emailed Dr. Dyce's attorney, Bruce Arman, a draft of a new shareholder's agreement (the "**January 2010 Shareholders' Agreement**") (Plaintiffs' Exhibit 12). The draft January 2010 Shareholders' Agreement contained a number of significant changes in SCENT's governance. The changes included: creation of a Board of Directors (¶3.2.1) with Dr. Puchalski as CEO and Chairman (Plaintiffs' Exhibit 12.036) empowering the Chairman with a substantial severance package (Plaintiffs' Exhibit 12.036), allocating to the Chairman the right to set other shareholders' compensation (¶3.4.3), and the right to determine vacation schedules. The footer on the document indicates it is version 35. [The footer on the July 16, 2008 Shareholders' Agreement bears the same document number, but shows it as version 10].) (Plaintiffs' Exhibit 7.001). Upon receipt of the draft January 2010 Shareholders' Agreement, Dr. Dyce was shocked and asked to see the prior versions. He was never provided the other versions. (November 19-22, 2013 Tr. 261: 11-263:4.) Dr. Dyce also requested these drafts in discovery. They were never provided.

[30]Defendants' Exhibit 40.

In early 2010, Dr. Puchalski wanted to have SCENT Land borrow the construction funding for the Lugoff building. Dr. Puchalski negotiated with First Palmetto Bank and obtained its agreement in February 2010 for SCENT Land to receive the loan without requiring Dr. Dyce to guarantee its repayment.[31] The bank's approval of the construction loan to SCENT Land without requiring Dr. Dyce to personally guarantee the loan remained in effect until the loan was eventually closed in May 2010.[32] Despite First Palmetto Bank having agreed to this request on February 17, 2010 in exchange for Dr. Puchalski's pledging additional collateral for the loan; on March 1, 2010 Dr. Puchalski's staff forwarded to Dr. Dyce copies of loan documents that were represented to be necessary for the loan closing.[33] The forwarded documents included a personal guaranty from Dr. Dyce even though First Palmetto Bank had agreed that Dr. Dyce did not need to guarantee the loan.[34] Dr. Puchalski followed up on March 2, 2010 with his email to Ms. Curley representing to her that a mechanic's lien had been filed against the project and that it was critical that she and Dr. Dyce sign the documents.[35]

When Dr. Dyce received the draft loan documents, he emailed Dr. Puchalski reiterating his request for financial and other information, including, among other documents, a copy of a budget for the project and a proposed closing statement.[36] In his email, Dr. Dyce stated,

> You apparently forgot to tell me in all of your email correspondence that the Bank wants my personal guaranty. I am not prepared to provide it at the present time.

Dr. Puchalski responded,

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[31]Defendants' Exhibit 37.
[32]March 31 – April 2, 2014 Tr. 137:10-144:17-18.
[33]Plaintiffs' Exhibit 301. The records subpoenaed from First Palmetto Bank contained only one loan approval memo for the loan. The loan approval memo stated First Palmetto was not requiring Dr. Dyce's guaranty.
[34] Dr. Puchalski included this personal guarantee in order to avoid providing additional collateral for the loan. Although First Palmetto did not require Dr. Dyce's personal guarantee they did require additional collateral from Dr. Puchalski.
[35]Defendants' Exhibit 43. The loan was not closed until approximately sixty (60) days later though Dr. Puchalski represented that the closing was critical.
[36]Plaintiffs' Exhibit 18.

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> I did indeed discuss this with you. This is just like the Hartsville deal. It is my understanding that you have personal guarantees on the Hartsville property and the Columbia land currently. If you recall, this is why the bank requested your personal tax returns.

Dr. Puchalski's representation that a mechanic's lien had been filed against the project was incorrect. Dr. Puchalski's representation that Dr. Dyce needed to sign the personal guaranty was also false. When Dr. Dyce did not attend a loan closing which Dr. Puchalski had scheduled for March 3, 2010, Dr. Puchalski prepared the March 3 "consent" terminating Dr. Dyce without cause.[37] However, Dr. Puchalski did not immediately make Dr. Dyce aware that this March 3 "consent" had been prepared.

On March 5, 2010, Dr. Dyce forwarded Dr. Puchalski an email listing the SCENT documents that he had requested, but which had not been provided.[38] On March 10, 2010, Dr. Puchalski delivered the March 3 "consent" to Dr. Dyce, and declared Dr. Dyce's employment had been terminated without cause to be effective in sixty (60) days.

On March 30, 2010, Dr. Puchalski issued a "management directive" that included a demand that Dr. Dyce "comply with [his] obligations under this directive as well as the provisions of the [July 16, 2008] Shareholders' Agreement and [the June 1, 2008] Employment Agreement."[39] The "management directive" ordered Dr. Dyce to cooperate in recruiting a new physician, not to disparage the Group, to refrain from soliciting patients and requested that Dr. Dyce advise where he intended to practice after May 9. Dr. Puchalski did not submit the "management directive" for a vote to SCENT's shareholders.

On May 8, 2010, the day before Dr. Dyce's last day as a SCENT employee under the March 3 "consent" terminating Dr. Dyce ***without cause***, Dr. Puchalski issued the May 8

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[37] This "Consent" was never consented to by Dr. Dyce. This was a mechanism in the operating agreement of SCENT that allowed the members of the corporation to act without holding a formal meeting.
[38]Defendants' Exhibit 40.
[39]Plaintiffs' Exhibit 22.

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"consent" purporting to terminate Dr. Dyce ***for cause***, citing as the sole reason, "Dr. Dyce shared numerous pieces of information regarding a proposed contract to other non-shareholder physicians of SCENT to further his own personal position." Dr. Puchalski did not submit the May 8 "consent" to a vote of SCENT's shareholders. All of these allegations revolved around the alleged communications between Dr. Dyce and Dr. Gunnlauggson which Dr. Puchalski alleges were held to conspire to the detriment of SCENT.

Dr. Dyce did not participate in Dr. Gunnlauggson's setting up or conducting of Dr. Gunnlauggson's medical practice upon his departure from his employment with SCENT.

Dr. Dyce did not practice medicine from the date he left SCENT on May 9, 2010 until October 18, 2010. There is no evidence Dr. Dyce solicited any patients prior to October 18, 2010. There is no evidence that Dr. Dyce maintained malpractice insurance during this time. There is no evidence Dr. Dyce disparaged SCENT at any time. Having not received payment for his stock in SCENT, on October 18, 2010, Dr. Dyce began working for Carolina Pines where he works today. [40]

Under Section 4.6.1 of the July 16, 2008 Shareholder Agreement, SCENT was obligated to commence purchasing Dr. Dyce's shares within sixty (60) days of the effective date of Dr. Dyce's termination, July 8, 2010. At no time has SCENT offered Dr. Dyce anything for his SCENT shares.

I find that there were a total of two shareholders in SCENT at the time of the end of Dr. Dyce's employment with SCENT. I further find that Dr. Dyce was terminated without cause on May 9, 2010. As a result of that termination, SCENT or the remaining shareholder(s) were

[40]Plaintiffs' Exhibit 0080.001

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required to purchase Dr. Dyce's shares according to the formula set out in the Shareholder's Agreement section 4.5[41] and 4.6.1[42]

CONCLUSIONS OF LAW

DR. DYCE ALLEGES THAT SCENT AND DR. PUCHALSKI BREACHED ITS AGREEMENT WITH HIM BY FAILING TO COMPENSATE HIM APPROPRIATELY IN 2008 AND 2009 WHEN HE WAS A 50% SHAREHOLDER OF SCENT. DR. DYCE FURTHER ALLEGES THAT SCENT AND DR. PUCHALSKI BREACHED AGREEMENTS WITH HIM FOR FAILING TO COMPENSATE HIM FOR HIS SHARES IN SCENT FOLLOWING HIS TERMINATION WITHOUT CAUSE. THE COURT FINDS THAT DR. DYCE HAS SUSTAINED HIS BURDEN OF PROOF.

In order to prove a breach of contract claim, one must prove: (1) a binding agreement entered into by the parties, (2) the defendant's failure to perform in accordance with the agreement, and (3) damage suffered by the plaintiff as a direct and proximate result of the defendant's breach. *Fuller v. Eastern Fire Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602, 609 (1962).

Dr. Dyce became a fifty (50%) percent shareholder in SCENT on February 1, 2008. As a shareholder, he was entitled to receive distributions in proportion to his stock ownership. At all times relevant to this dispute, SCENT was a Subchapter S corporation.[43] As a Subchapter S corporation, SCENT may have only one class of shares of stock. 26 U.S. Code § 1361(b)(1)(D).

Defendants SCENT and Dr. Puchalski materially breached their obligations to Dr. Dyce by failing to make equal distributions to him in 2008 and 2009. Dr. Dyce was entitled to receive fifty (50%) percent of SCENT's distributions commencing February 1, 2008 when he became an equal shareholder. Yet Drs. Robert and Amy Puchalski received $872,992.16 more than Dr. Dyce received in 2008, and Dr. Puchalski caused himself and his wife to be paid $48,542.06

[41]Plaintiffs' Exhibit 0007.016
[42]Plaintiffs' exhibit 0007.017
[43]For example, SCENT's tax returns, of which Plaintiffs' Exhibit 253, state that SCENT is a Subchapter S Corporation.

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more in distributions than Dr. Dyce received in 2009.[44] Dr. Dyce is entitled to recover from Dr. Puchalski and SCENT one-half (1/2) of the difference in what was distributed in 2008, which is $436,496.08, and one-half (1/2) of the difference in what was distributed in 2009, which is $24,271.03.

Dr. Dyce is thus entitled to judgment against Dr. Robert Puchalski and SCENT, jointly and severally, in the amount of $460,767.11, which represents the sum of $436,496.08 and $24,271.03 together with prejudgment interest, because of the failure by Dr. Puchalski and SCENT to make equal distributions in 2008 and 2009. Dr. Amy Puchalski's receipt of some of these distributions results in her being jointly and severally liable for a portion of the above amount as set out below.[45]

Plaintiffs have requested prejudgment interest. The law allows prejudgment interest on obligations to pay money from the time when either by agreement of the parties or operation of law, the payment is demandable. Babb v. Rothrock, 310 SC 350, 352, 426 SE2d 798,791 (1993). The agreement of the parties required that both Dr. Puchalski and Dr. Dyce receive equal distributions each year. Therefore, the amounts due as stated above were demandable at the end of 2008 and 2009 respectively.

1. SCENT and Dr. Puchalski breached their obligation to pay Dr. Dyce for his shares in SCENT.

The July 16, 2008 Shareholders' Agreement is a binding agreement. The evidence established that Defendants SCENT and Dr. Puchalski breached its terms by failing to redeem Dr. Dyce's shares after he had been terminated without cause. As a direct and proximate result of the breach, Dr. Dyce suffered damages.

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[44]These numbers are distinguished from the $986, that Dr. Dyce paid for his shares through the buy-in procedure that was in place between March 2007 and February 1, 2008.

[45]The causes of action that support Dr. Amy Puchalski's liability are set forth below.

Section 4.5 of the July 18, 2008 Shareholders' Agreement states, in pertinent part, the following:

> Purchase Price. The Corporation or the Remaining Shareholders, as the case may be, shall pay the Departing Shareholder a purchase price ("Purchase Price") for the Shares in an amount equal to (a) one-fourth of the total collected revenue of the group for the 12 whole calendar months preceding the Departure Event divided by the number of Shareholders of the Corporation including the Departing Shareholder plus (b) one-third of the sum of the accounts receivable of the Corporation, booked in accordance with Corporation's normal accounting methods, and the cash (to include cash equivalents and marketable securities) of the Corporation divided by the number of Shareholders of the Corporation including the Departing Shareholder, and minus (c) any amount, if any, owed by the Departing Shareholder as of the effective date of the Termination of Employment under Section 4.6.4 of this Agreement. The Departing Shareholder also agrees that he shall sell his interest in SCENT Land Holdings, LLC at the price specified in that company's Operating Agreement at the same time the Shareholder's Shares are redeemed pursuant to this Agreement. Provided, however, the Purchase Price shall be reduced by fifty percent (50%) if (i) the term of Physician's employment did not consist of at least thirty-six (36) whole calendar months (ii) Physician elects to terminate the Employment Agreement without cause pursuant to Section 2.3(d) of the Employment Agreement and Physician fails to give the Group the twelve (12) whole calendar months written notice requested by that provision, or (iii) Physician is terminated pursuant to Sections 2.2(c)-(h) or Section 2.3(a). For clarity, any termination pursuant to Section 2.2(a) (death), Section 2.2(b) (disability), Section 2.2(i) (change in law), Section 2.3(a) ((i) material breach by the Corporation), Section 2.3(b) (mutual agreement), or Section 2.3(c) (by the group without cause) or Section 2.3(d) (by Physician without cause with 12 months' notice) shall be subject to payment for Physician's Shares at the Purchase Price. The Corporation and the Departing Shareholder may agree that such payments may be made in cash or as a distribution of corporate assets in kind to satisfy the Corporation's obligations. Notwithstanding anything in this Agreement to the contrary, a Departing Shareholder shall not be entitled to any distribution from the Corporation nor be entitled to vote the Shares subsequent to the Event of Departure.

(Emphasis added).

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Section 4.6.1 of the July 16, 2008 Shareholders' Agreement requires that SCENT shall commence payment of the Purchase Price set forth in Section 4.5 within sixty (60) days following the effective date of the termination date. It further provides that to the extent permitted by applicable law, the Purchase Price shall be paid in sixty (60) equal monthly installments as evidenced by a promissory note. There was no evidence presented that a promissory note was ever issued by Dr. Puchalski or SCENT to Dr. Dyce.

The valuation of the component elements of "accounts receivable" was hotly contested. In summary, SCENT and Dr. Puchalski maintained at trial that based upon the definition contained in paragraph 4.5 of the July 18th, 2008 shareholders agreement the value is zero. Dr. Dyce maintained he is entitled to one third of the Accounts receivable as recorded by SCENT, also citing the dictates of paragraph 4.5 of the same agreement.

SCENT and Dr. Puchalski presented the testimony of accounting expert Marc Quigley in support of their position. Mr. Quigley opined that the word "booked" as used in paragraph 4.5 of the July 16th, 2008 shareholders' agreement meant to record in the practice's general ledger. It is uncontroverted that SCENT does not record its accounts receivable in its general ledger because SCENT maintains its books on a cash basis rather than an accrual basis. Mr. Quigley opined that because SCENT's accounts receivable are not recorded in its general ledger zero ($0) should be used as the amount of accounts receivable for the buyout formula in paragraph 4.5.

Mr. Quigley, however, was unable to offer any authority for his opinion that "booked" meant to record in the general ledger. Mr. Quigley testified further that he knew of no authority supporting his opinion and acknowledging he had looked for none.[46]

There was a secondary dispute regarding accounts receivable. SCENT and Dr. Puchalski maintained that even if the Court was to consider an amount of accounts receivable it must only

[46] November 24, 2014 Tr. 199: 23 – 200: 17.

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consider those amounts actually collected in the buyout formula. Mr. Quigley propounded these calculations on behalf of SCENT and Dr. Puchalski. However, a fundamental problem with Mr. Quigley's analysis is that he tracks the accounts receivable and utilizes only those that were in fact paid during the time period he examined. This type of "look-back" could have been utilized by the parties as the accounts receivable element of the buyout formula, but did not. These parties made allowance for the prospect that some of the accounts receivable may not ultimately be paid by providing in the July 16, 2008 Shareholders' Agreement that only one-third (1/3) of the accounts receivable would be included as an element in the buy-out formula for Dr. Dyce's shares. One could certainly reasonably infer that problems of collectability were built into a buyout formula to be used by equal partners when one-third (1/3) of the stated value of SCENT's accounts receivable would be included in the buy-out formula for a departing shareholder.

It is uncontested that SCENT kept meticulous track of its accounts receivable in its books, although not maintained as part of its general ledger.

Kim Koumas, SCENT's business office director, supervised SCENT's billing department. In that capacity, she regularly ran accounts aging reports on SCENT's practice management computer system. Ms. Koumas testified at length regarding the reports generated and was able to identify those reports as being the foundation of Plaintiff's exhibit 250. The Court finds that the accounts receivable reports generated by SCENT under the supervision of Ms. Koumas were summarized in Plaintiff's exhibit 250. Ms. Koumas testified that Plaintiff's exhibit 250 contained the best records of SCENT's accounts receivable.

Further, the amounts in SCENT's answers to Plaintiff's interrogatories asserted that the accounts receivable "booked" in accordance with SCENT's normal accounting methods yielded the amounts which became Plaintiff's exhibit 250.

Dr. Puchalski, in asserting that any amount considered should be those amounts collected, offered a "60 day accounts receivable report," which is Defendants' exhibit 214. Dr. Puchalski's position was corroborated by Mr. Quigley, who opined that many of the accounts receivables in Plaintiff's exhibit 250 were not ultimately collected and therefore should not be included. Mr. Quigley testified concerning standards that relate to how accounts receivable are kept when a company keeps its books according the generally accepted accounting principles (GAAP). However, it must be noted that SCENT keeps its books on a cash basis which is not GAAP. Further, there is no requirement under the July 16, 2008 Shareholders' agreement that the accounting methods be GAAP.

When examined on direct Mr. Sheehen adopted the premise that the 60 day report Defendants' exhibit 214 should be utilized as the accounts receivable component of the buy-out formula; but on cross examination when confronted with a number of discrepancies in the "60 day report" he conceded that Plaintiff's exhibit 250 was a more reliable report from which to determine SCENT's accounts receivable.[47]

Based upon the Court's review of the evidence and the credibility of the witnesses' testimony regarding the basis of the inclusion of accounts receivable and the appropriate sum to be considered this Court concludes as follows:

Paragraph 4.5 of the July 16, 2007 shareholders' agreement is clear and unambiguous that an amount for SCENT's accounts receivable should be used in the buyout formula. It would be nonsensical for the formula to include a value for accounts receivable if the very definition of

[47] Q. My question is don't you, based on what you've seen today, believe that Exhibit 250 is a more reliable document by which to determine the way in which the company booked its accounts receivables on a normal basis than Defendant's Exhibit 214?
A. Yes.
March 31 – April 2, 2014 Tr. 470:25-471:1-4.

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accounts receivable would dictate a value of zero. In formulating a buyout formula as part of the July 16, 2008 Shareholders' Agreement, the parties were free to agree on whatever buy-out formula they chose and to specify whatever level of accuracy they felt appropriate with respect to the components of that formula. For instance, the parties could have required that SCENT's books be audited as part of the valuation process. The parties could have provided for a future adjustment of the purchase price depending on what actually occurred with SCENT's accounts receivable. Rather than include any such provisions, the parties agreed the buy-out formula should utilize only one-third (1/3) of SCENT's accounts receivable, implicitly recognizing that not all of the accounts receivables on SCENT's books would be collected.

Unfortunately, the practice management software utilized by SCENT is unable to extract accounts receivable retroactively and there was no contemporaneous determination of accounts receivable on May 9, 2010, so the Court will consider the accounts receivable information closest to the date which is April 30, 2010 (9 days earlier). Utilizing the records of account receivables closest to the operative date of May 9, 2010, the accounts receivable for SCENT on that date is $1,868,707 (One Million Eight Hundred Sixty Eight Thousand Seven Hundred and Seven Dollars).

The parties agreed that the cash in the practice amounted to $472,227.00.

The parties disagree as to whether the cash value of "key man" insurance maintained by SCENT and a note payable from SCENT Land to SCENT are 'cash equivalents' that should be included in the buy-out formula. The cash value of the life insurance was $33,000. Austin Sheheen testified on direct examination that because there was a penalty associated with converting the life insurance to cash, he would not consider the surrender value of the insurance to be a cash equivalent. The buy-out formula in the July 16, 2008 Shareholders' Agreement does

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not require the cash equivalents be converted to cash, but simply that the value of the cash equivalents be included in the redemption formula.[48] I find that the $33,000 of life insurance is a cash equivalent that should be included in the redemption formula used to calculate the price owed Dr. Dyce for his shares. If the court had been provided with the amount of penalty to cash in the policy the court may have taken that into account, however, no evidence of the penalty was provided and is not considered. Therefore, the $33,000.00 for life insurance shall be included in the redemption formula.

I further find that the $726,000 note from SCENT Land to SCENT constitutes a cash equivalent that should be included in the redemption formula. As explained by Mr. Sheheen, the issue is whether SCENT had a reasonable expectation of receiving that money within a reasonable period of time from the relevant termination date of March 2010. With this standard as a guide the Court considers that: (1)SCENT's receivable from SCENT Land was from an entity owned by the wife of the owner of SCENT; (2) the manager of SCENT Land was Dr. Puchalski; (3) the receivable was going to be repaid from the proceeds of a previously approved construction loan from First Palmetto Bank. (Although this loan was approved in February 2010 before Dr. Dyce was terminated, the loan was not closed until May 5, 2010, four days before the valuation date.) It is clear to the Court that SCENT Land had readily available proceeds from the loan as of the May 9, 2010 valuation date and in fact repaid the loan to SCENT within four (4) days after the valuation date. Based upon reasoning provided by the experts, to include Mr. Sheheen, the court finds that the note from SCENT Land was a cash equivalent.[49] Therefore I

[48]Mr. Sheheen testified that if the redemption price formula calls for the value of cash equivalents to be used, rather than requiring that the cash equivalents actually be converted to cash, then his opinion as to the appropriateness of including the cash surrender of the life insurance is different than he testified on direct. March 31 – April 2, 2014 Tr. 475: 2-21.

[49]March 31 – April 2, 2014 Tr. 474: 21-23.

find that the $726,000 (Seven Hundred Twenty Six Thousand Dollar) note payable should be included in the redemption formula.

Based upon the evidence presented I find that the total collected revenue of SCENT for the twelve (12) whole calendar months preceding the end of Dr. Dyce's employment with SCENT was $10,340,061 (Ten Million Three Hundred Forty thousand Sixty One Dollars).

I further find that the purchase price that SCENT owed Dr. Dyce for his shares, as prescribed by Section 4.5 of the July 16, 2008 Shareholders' Agreement, is $1,809,472 (One Million Eight Hundred Nine Thousand Four hundred Seventy Two Dollars). This redemption formula is set out in Plaintiffs' Exhibit 292.2.

		Dyce
Purchase Price Calculation:		
(A) Total Collected Revenue for Group	$	10,340,061
Divide by Four		4
Subtotal		2,585,015
Divided by Number of Shareholders		2
Subtotal (A)		1,292,508
(B) Accounts Receivable		1,868,707
Cash		472,227
CSV - Life Insurance		33,902
Receivable from SCENT Land		726,950
Total A/R, Cash and Marketable Securities		3,101,786
Divide by Three		3
Subtotal		1,033,929
Divided by Number of Shareholders		2
Subtotal (B)		516,964
(C) Minus: Amount owed by Departing Shareholder		-
Total Owed to Shareholder before 50% Adjustment		1,809,472
50% Adjustment Pursuant to Section 4.5		-
Total Owed to Shareholder	***$***	***1,809,472***

Plaintiff Exhibit 296.2

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I find that the amount to be paid Dr. Dyce was a liquidated amount and capable of being ascertained 60 days after the effective date of Dr. Dyce's termination on May 9, 2010 (July 7, 2010). Defendants have made none of the sixty (60) payments that were due nor did they issue a promissory note as contemplated under section 4.6.1 of the Shareholders Agreement. Therefore, Plaintiffs are entitled to prejudgment interest at the legal rate of eight and three-quarters percent (8.75%) from July 7, 2010 (60 days after the effective date of termination) until the date that this judgment is entered.[50]

2. Dr. Puchalski's purported termination of Dr. Dyce with cause was invalid and of no force or effect.

Dr. Puchalski contends that on May 8, 2010, he terminated Dr. Dyce for cause because Dr. Dyce had allegedly violated a management directive that Dr. Puchalski had issued on March 30, 2010.[51] For reasons stated supra and infra the "management directive" and the subsequent May 8 "Consent" terminating Dr. Dyce for cause are invalid and unenforceable.

The source of Dr. Puchalski's claimed authority to terminate Dr. Dyce for violating a "management directive" is paragraph 2.2(c) of the June 1, 2008 Employment Agreement.[52]

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[50]South Carolina Code § 34-31-20.

[51]Plaintiffs' Exhibit 22

[52]Plaintiffs' Exhibit 10. The signatures to Dr. Dyce's June 1, 2008 Employment Agreement state unequivocally that the document was signed on June 1, 2008. The first paragraph under the title of the agreement on page one states, "THIS AGREEMENT (the "Agreement") is entered into effective as of the 1st day of June, 2008 ("Effective Date")." Moreover, Dr. Puchalski testified that the June 1, 2008 date was of significance and it was the parties' intent that the document be effective as of June 1, 2008. November 25-26, 2013 Tr. 51:25 –. 52:16. Likewise, the Exhibit A Covenant (Defendants' Exhibit 10) states that it was signed on June 1, 2008 and the first paragraph of the Covenant clearly states that the agreement is made as of the first day of June 2008. The problem this causes is that the July 16, 2008 Shareholders' Agreement expressly provides in section 8.1 that "[a]ll other agreements dated prior to the date of this agreement are hereby superseded in their entirety by the terms and conditions of this agreement." Section 8.1 goes on to state, "provided however, that this Agreement shall not be deemed to supersede the terms and conditions of the Employment Agreements executed simultaneously with this Agreement."

Dr. Puchalski offered parole evidence that he did not sign the June 1, 2008 Employment Agreement and Covenant until July 16, 2008, the date of the July 16, 2008 Shareholders' Agreement. The record is unclear when Dr. Dyce actually signed the June 1, 2008 Employment Agreement and Covenant. However, the June 1, 2008

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Paragraph 2.2(c) requires both that the "management directive of the Group's Managing Shareholder" be (i) reasonable under the circumstances; and (ii) "approved by a majority of the Shareholders, after Physician has been advised in writing that failure to so comply may be grounds for termination."[53] Furthermore, Section 3.3 of the July 16, 2008 Shareholders' Agreement provides,

> Except as otherwise provided in this Section, each outstanding Share entitled to vote shall be entitled to one vote upon each matter submitted to a vote at a meeting of the Shareholders. In the event of a tie in the voting on any matter requiring a majority vote, the Managing Shareholder shall break the tie casting a second vote to decide the matter.

From the time the management directive was issued, on March 30, 2010, through the date of the May 8 "Consent" terminating Dr. Dyce for cause for having failed to comply with the management directive, Dr. Dyce remained a SCENT shareholder and was entitled to vote on whether the management directive was reasonable and whether it should be issued.[54] Dr. Puchalski unilaterally issued the March 30, 2010 "management directive" without submitting it to a vote of the shareholders as required by Section 2.2(c) of the June 1, 2008 Employment Agreement and Section 3.3 of the July 16, 2008 Shareholders' Agreement. Therefore, the management directive was not a properly authorized.

Employment Agreement and Covenant are unambiguous and, under applicable law, cannot be altered by the introduction of parole evidence. Because the Court finds that the Covenant contained in the June 1, 2008 Employment Agreement is unenforceable and because the Court finds that the management directive issued by Dr. Puchalski on March 30, 2010 (presumably pursuant to section 2.2(c) of the June 1, 2008 Employment Agreement) was unauthorized and therefore invalid and unenforceable, it does not appear to be necessary to adjudicate Dr. Dyce's contention that the provisions of the June 1, 2008 Employment Agreement and Covenant have been superseded and, on that additional ground, are of no force and effect. However, were it necessary to adjudicate that issue, the Court would find that the June 1, 2008 Employment Agreement has been superseded and is of no force and effect. This may be a harsh result, but the Court is not allowed to rewrite clear, unambiguous contracts for the parties.

[53]Plaintiffs' Exhibit 10.002 – 003

[54]While it is true that Section 3.3 of the July 16, 2008 Shareholders' Agreement gives Dr. Puchalski, as Managing Shareholder, the right to vote a second time and break any tie that might exist on a matter requiring majority approval, that section does not allow Dr. Puchalski to dispense with submitting issues to other shareholders and allowing them the opportunity to vote.

Dr. Puchalski contends that because Dr. Dyce previously had been terminated without cause on March 3, 2010, Dr. Dyce was no longer entitled to vote as a shareholder pursuant to Section 4.5 of the July 16, 2008 Shareholders' Agreement. That section states,

> Notwithstanding anything in this Agreement to the contrary, a Departing Shareholder shall not be entitled to any distribution from the Corporation nor be entitled to vote the Shares subsequent to the Event of Departure.

Dr. Dyce's termination without cause on March 3, 2010 was not a "Departure Event" and even assuming it was, it did not become effective for sixty (60) days after delivery of notice. Therefore, until May 9, 2010 Dr. Dyce remained entitled to vote his shares.

Page 2 of the July 16, 2008 Shareholders' Agreement defines a "Departure Event" as "any event described in Section 4.2, 4.3 and 4.4. Sections 4.2 and 4.3 are not pertinent. Although Section 4.4 does reference a termination for cause pursuant to paragraph 2.3(a) of the June 1, 2008 Employment Agreement, none of the referenced sections refer to a termination without cause under paragraph 2.3(c) of the June 1, 2008 Employment Agreement. Therefore, Dr. Dyce's termination without cause under paragraph 2.3(c) was not a Departure Event as defined in the July 16, 2008 Shareholders' Agreement.

Additionally, pursuant to the March 3 "Consent", purporting to terminate Dr. Dyce without cause, the termination without cause was expressly not effective until May 9, 2010; sixty (60) days after it was delivered. Therefore, even if the termination without cause could be characterized as a Departure Event, it was not effective until after the March 30, 2010 issuance of the "management directive." For both of these reasons, Dr. Dyce retained his right to vote his shares until the effective date of his termination without cause. Because the March 30, 2010, "management directive" was never submitted to the shareholders as required by paragraph 2.2(c), it was unauthorized, invalid and unenforceable.

The May 8 "consent" purporting to terminate Dr. Dyce for cause was itself an action on which Dr. Dyce was entitled to vote. While it is true that Section 3.3.2(iv) of the July 16, 2008 Shareholders' Agreement precludes a shareholder from voting his shares when the subject of the vote is termination of that shareholder's employment without cause, no similar provision precludes a shareholder from voting on his own termination for cause.[55] The July 16, 2008 shareholder agreement does not specifically address the voting requirement when terminating a shareholder for cause. Therefore, the voting requirement for terminating Dr. Dyce for cause would fall under the default rule in section 3.3 and only a majority vote of the shareholder is required to terminate a shareholder for cause at a properly noticed meeting.[56] However, there was never a meeting of the shareholders nor any attempt to convene such a meeting.

The authority to issue "consents," such as those issued by Dr. Puchalski in this case, is found in Section 3.3.3 of the July 16, 2008 Shareholders' Agreement. That section states:

> Informal Action by Shareholders. Any action required or permitted to be taken at a meeting of the Shareholders may be taken without a meeting if one or more consents in writing, setting forth the action so taken, shall be signed by all of the Shareholders entitled to vote with respect to the subject matter thereof and are delivered to the Corporation for inclusion in the minute book. A consent signed under this section has the effect of a meeting vote and may be described as such in any document.

As described above, Dr. Dyce was entitled to vote on the issue of his termination with cause. The issue was never submitted to him and he did not sign the May 8 "consent" as required by Section 3.3.3. Therefore, the May 8 "consent" was issued without the necessary authority and the alleged termination for cause is invalid and unenforceable.

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[55]Section 3.3.2(iv) does not help Dr. Puchalski in this dispute because Dr. Dyce does not contest his termination without cause and makes no argument that Dr. Puchalski's March 3 CONSENT terminating him without cause was deficient. It is only the action taken by Dr. Puchalski and SCENT to terminate Dr. Puchalski with cause that are contested.

[56]Section 3.3 further provides that "in the event of a tie in the voting on any matter requiring a majority vote, the Managing Shareholder shall break the tie by casting a second vote to decide the matter."

Even if the March 30, 2010 "management directive" had been validly issued, Dr. Dyce did not violate it. The March 30, 2010 "management directive" states,

> In accordance with Section 2.2(c) of your Employment Agreement, this is a management directive that you comply with your obligations under this directive as well as the provisions of the Shareholders Agreement and your Employment Agreement.

The May 8 "Consent" that states the reasons why Dr. Dyce was deemed to have violated the management directive states,

> Dr. Dyce shared numerous pieces of information regarding a proposed contract to other non-shareholder physicians of SCENT to further his own personal position.[57]

The Court finds even assuming arguendo, there was no requirement for proper notice and a shareholder meeting to issue the management directive, there is no evidence Dr. Dyce violated the agreement or the directive which makes reference to following the shareholders' agreement. To wit: The July 16, 2008 Shareholders' Agreement expressly allowed Dr. Dyce to discuss SCENT's information with other non-shareholder physicians of SCENT:

Section 3.7 of the July 16, 2008 Shareholders' Agreement states,

> Confidentiality. **The Shareholders shall not disclose any information relating to the Corporation** regarding the Corporation's operations, records, patients or procedures, **to any persons other than employees of the Corporation**, federal and state regulatory agencies, third-party reimbursement agencies, the Corporation's accountants, lawyers, consultants and other professional advisors, without the prior written consent of the Corporation or, as the case may be, an enforceable subpoena, or the final order of a court of competent jurisdiction. Each Shareholder shall use information related to the business of the Corporation to advance the Corporation's best interest, and not to benefit their personal interest. All forms, templates, systems (including billing systems) are the property of the Corporation and shall not be used apart from the Corporation by Shareholder or

[57]Plaintiffs' Exhibit 162.

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> Departing Shareholder without the written consent of the Corporation. (Emphasis added)[58]

Dr. Dyce, a fifty percent (50%) shareholder in SCENT, was confronted with his co-shareholder's actions directed towards securing to himself control of the corporation and arrogate largely to himself effectively all meaningful decision making authority and accomplish this before admitting Dr. Gunnlauggson as a shareholder. Under SCENT's written confidentiality policy, Dr. Dyce was within his rights to discuss information relating to the practice, particularly Dr. Gunnlauggson, an employee, who was on a shareholder track. I find that if Dr. Dyce discussed with Dr. Gunnlauggson the proposed changes in governance sought to be implemented by Dr. Puchalski, such a discussion did not violate Dr. Dyce's obligations under either the July 16, 2008 Shareholders' Agreement or his June 1, 2008 Employment Agreement.

Finally, the alleged termination of Dr. Dyce with cause was purported to be effective immediately, with no notice.[59] Dr. Puchalski contends that paragraph 2.2(c) of the June 1, 2008 Employment Agreement empowered him to terminate Dr. Dyce effective immediately for violating a management directive. However, there is nothing in the June 1, 2008 Employment Agreement providing that termination for violation of a management directive can be done and is effective immediately. On the contrary, paragraph 2.2(c) can be read to require that before the Group can terminate a doctor for an alleged violation of a management directive, the majority of the shareholders must first approve the termination. Moreover, paragraph 2.3(a) of the June 1, 2008 Employment Agreement expressly addresses the notice required to terminate the agreement for cause. That paragraph requires thirty (30) days' notice. The May 8 "Consent" states that Dr. Dyce is being terminated "for cause," pursuant to the clear provisions of the June 1, 2008

[58]Plaintiffs' Exhibit 7.

[59]Not only did Dr. Puchalski provide no time period before the purported termination for cause became effective, he did not provide Dr. Dyce with a copy of the May 8 "Consent". Dr. Dyce learned of it during discovery in this litigation. November 19-22, 2013 Tr. 206:17-19.

Employment Agreement, terminations for cause can only be done upon thirty (30) days' written notice. Therefore, because the purported termination with cause was issued without any notice, along with the other grounds articulated infra, it is invalid and of no force or effect.

3. The Covenant contained in Dr. Dyce's June 1, 2008 Employment Agreement is unenforceable.

Dr. Puchalski contends that any amounts owed to Dr. Dyce should be reduced by either the damages that SCENT allegedly incurred because Dr. Dyce allegedly violated his Covenant Not to Compete or by the stipulated damages in the amount of $750,000 set forth in Paragraph 3.11 of the June 1, 2008 Employment Agreement. The Court disagrees.

South Carolina law bars the Defendants from seeking to enforce the Covenant because as already discussed, the Court finds that the Defendants breached the June 1, 2008 Employment Agreement and the July 16, 2008 Shareholders' Agreement. As described above, there are were a number of ways in which Dr. Puchalski and SCENT breached their obligations to Dr. Dyce before Dr. Dyce accepted employment with Carolina Pines. These include, among other things, (i) Dr. Puchalski's causing SCENT to pay himself more than SCENT paid Dr. Dyce between February 1, 2008 and December 31, 2009;[60] (ii) Dr. Puchalski and SCENT failing to redeem Dr. Dyce's shares and begin paying the redemption price that was due commencing July 9, 2010; and (iii) Dr. Puchalski and SCENT breaching the July 16, 2008 Shareholders' Agreement and the June 1, 2008 Employment Agreement by attempting to terminate Dr. Dyce with cause.

Pursuant to the legal authority cited below, SCENT and Dr. Puchalski's breaches of their contractual obligations excuse Dr. Dyce from having to comply with the Covenant.

[60]As explained above, Drs. Robert and Amy Puchalski received $872,991.80 more than Dr. Dyce in distributions between February 1, 2008 when Dr. Dyce's buy-in was completed and the end of 2008. They received $48,542.08 more in distributions than did Dr. Dyce in 2009. The sum of the two is $921,533.88.

Where an employer materially breaches its contract with its employee, the employer may not thereafter enforce a non-competition agreement against the employee. *Williams v. Riedman*, 339 S.C. 251, 529 S.E.2d 28 (Ct. App. 2000).

In the instant case, the June 1, 2008 Employment Agreement incorporates, and is governed by, the terms of the July 16, 2008 Shareholders' Agreement.

> Except as otherwise provided in the Shareholders' Agreement, this Agreement contains the complete, full and exclusive understanding of the parties with respect to the Physician's engagement by the Group. . . . The parties acknowledged and agree that certain provisions of the Shareholders' Agreement may modify this Agreement and in the event of a conflict between any terms in this Agreement and the Shareholders' Agreement, the terms of the Shareholders' Agreement shall control.[61]

Defendants' breaches of the parties' agreements render the Covenant unenforceable.

4. <u>The covenant is overly broad in scope, and therefore, not enforceable</u>.

In South Carolina, "[r]estrictive covenants not to compete are generally disfavored and will be strictly construed against the employer." *Team IA v. Lucas*, 395 S.C. 237, 245, 717 S.E.2d 103, 107 (Ct. App. 2011) (citing *Rental Uniform Service of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983)). A covenant not to compete will only be upheld if it meets the following five part test:

1) It must be necessary for the protection of the legitimate interest of the employer;
2) It must be reasonably limited with respect to time and place;
3) It must not be unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a living;
4) It must be reasonable from the standpoint of public policy; and
5) It must be supported by valuable consideration.

[61]Plaintiffs' Ex. 0010.011.

EXHIBIT "A"

Id.

Significantly, "[i]f a covenant not to compete is defective in one of the above-referenced areas, the covenant is totally defective and cannot be saved." *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39 at 42, 455 S.E.2d 707 at 709 (Ct. App. 1995). In addition, "in South Carolina the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms." *Poynter Investments, Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583 at 588, 694 S.E.2d 15 at 18 (2010).

The covenant states:

> 1. For a period of eighteen (18) whole calendar months from the date of termination of the Employment Agreement, Physician shall not directly or indirectly practice medicine or provide medical services within a twenty (20) mile radius of any practice site maintained by the Group. Physician further covenants and agrees that during the eighteen (18) whole calendar month period immediately after termination of the Employment Agreement, Physician shall not directly, or indirectly, for himself or for any person, corporation, partnership, professional association, unincorporated association, limited liability company, limited liability partnership, or other entity by which Physician is compensated for performing medical services or in which Physician has an economic interest, call upon, solicit, accept business from, or provide health care or related services to, any Patient, except for any Patient who delivers to the Group a valid consent to release their medical records to Physician. In the event the Employment Agreement is terminated for a material breach by the Group related to the payment of Physician's Base Compensation or Variable Compensation (after the applicable cure periods in Section 2.3(a) of the Employment Agreement) or a change in law as described in Section 2.2(i) of the Employment Agreement, this Covenant Not to Compete shall not apply.

On its face, the covenant is overly broad. The restriction, as drafted, prohibits Dr. Dyce from (i) practicing **any** type of medicine; (ii) providing **any** type of medical services in the specified territorial area; or (iii) calling upon or accepting business from SCENT patients if he

works for **any** kind of entity in which he has an economic interest.[62] The last provision has no geographic limitation. SCENT's practice is limited to otolaryngology and the ancillary services incident to otolaryngology. For example, SCENT does not compete with general practitioners or with emergent care facilities. In fact, general practitioners are a primary source of SCENT's business.

The scope of the covenant's restriction is broader than necessary to protect SCENT's legitimate interests and unduly harsh and oppressive in limiting the legitimate efforts of Dr. Dyce to earn a livelihood. The covenant does not limit the entities in which Dr. Dyce is forbidden to have an economic interest to ones that provide otolaryngological services, or even medical services, and it does not limit the type of business Dr. Dyce can solicit. Clearly, the covenant contained in the June 1, 2008 Employment Agreement is overly broad and not reasonably necessary to protect SCENT's interests.

Faces Boutique, Ltd. v. Gibbs, 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995) is particularly instructive in analyzing the enforceability of the SCENT Covenant. In *Gibbs*, the plaintiff had worked for Faces, a facial spa, as an esthetician who performed facials. While at Faces, she signed an employment agreement containing a post-termination non-compete clause prohibiting her from owning or working for any business in direct competition with Faces. Direct competition was defined to include facials, selling of cosmetics, and all cosmetic application or facial spa related services. After taking maternity leave, Ms. Gibbs decided not to return to Faces. Instead, she went to work for Tara's, a beauty salon, as a manicurist. Because

[62]Specifically, the Covenant provides that "Physician shall not...for...any...corporation...or other entity by which Physician is compensated for performing medical services **or** in which Physician has an economic interest, call upon, solicit, accept business from, **or** provide health care or related services to, any Patient, except for any Patient who delivers to the Group a valid consent to release their medical records to Physician." (Emphasis added).

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Tara's derived some of its revenues from facials, Faces brought suit against Ms. Gibbs seeking to enforce the non-compete agreement.

The trial court found the covenant defective and unenforceable. When Faces appealed, the Court of Appeals affirmed, using the following language directly applicable to the present case:

> We agree with the trial court the covenant not to compete violates the requirements that a covenant be 'necessary for the protection of the legitimate interest of the employer' and 'not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood.' Specifically, the trial court found '[t]he covenant seeks to prevent [Gibbs] from being associated in any capacity with any business which gives facials, sells cosmetics, etc. Such a prohibition goes beyond the protection of any legitimate business interest [Faces] may be able to articulate. This broad prohibition also prevents [Gibbs] from earning a livelihood through legitimate means.' The trial court noted that under the terms of the covenant, Gibbs would be unable to work for any of the various department stores which sell cosmetics, even if she worked in an area of the store not involved in the sale of cosmetics....

Id. at 42-43, 455 S.E.2d at 709.

Defendants rely on the recent case of *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013), which upheld the validity of a non-compete agreement involving two former Columbia Heart Clinic doctors. However, *Baugh* supports Dr. Dyce's position that the covenant is unenforceable. The non-compete agreements in that case prohibited the doctors from practicing medicine "*in the field of cardiology*" for a period of twelve (12) months "within a 20 mile radius of any Columbia Heart office at which Physician routinely provided services during the year prior to the date of termination ...."*Id.* at 9, 738 S.E.2d at 484 (emphasis added). As indicated above, the non-compete in *Baugh* prohibited the doctors from practicing medicine only in the field of cardiology. The prohibitions contained in Dr. Dyce's covenant do not contain such a limitation; rather, they provide, among other things, that he shall

not (i) "practice medicine or provide medical services" within the territorial restriction or (ii) have, call upon, solicit, accept any business from, any Patient on behalf of any type of business in which Dr. Dyce has an economic interest.[63] *Baugh* clearly demonstrates how easy it is to properly limit the scope of a non-compete to protect only the legitimate interest of the employer by limiting the breadth of the restriction. In this instant case the non-compete was not limited to the protection of a legitimate interest of SCENT but rather was an oppressive covenant denying Dr. Dyce from being able to making a living.

5. <u>Dr. Dyce did not conspire against SCENT or Dr. Puchalski.</u>

Defendants contend that (i) Dr. Dyce and Dr. Gunnlauggson conspired against SCENT and Dr. Puchalski in order to, among other things, compete with SCENT; (ii) Dr. Dyce solicited SCENT employees to assist him at Carolina Pines; and (iii) breached the confidentiality agreement in the July 16, 2008 Shareholders' Agreement and the June 1, 2008 Employment Agreement by sharing confidential information with SCENT employees. I find that the evidence fails to support these allegations.

Dr. Dyce testified he did not conspire with Dr. Gunnlauggson. Specifically, Dr. Dyce testified he did not engage in a coordinated legal strategy with him; never provided him copies of confidential information such as the 2010 draft shareholders agreement and/or employment agreement and never provided him copies of insurance contracts.[64] Dr. Dyce did not have conversations with Dr. Gunnlauggson about opening a separate practice or about SCENT's insurance contracts.[65] It is telling that Dr. Dyce did not even have malpractice insurance when he left SCENT on May 9, 2010 and did not work as a physician in any capacity from the time Dr.

[63] This provision fails to have a territorial limitation.
[64]November 19-22, 2013 Tr.294:1-295:1-8. Dr. Vidrine also corroborated Dr. Gunnlauggson's testimony when he admitted that Dr. Puchalski called a meeting which Drs. Vidrine and Gunnlauggson both attended. Dr. Vidrine recalled Dr. Puchalski stating that Dr. Dyce should be paid approximately $1.5 million for his interest in SCENT. November 24, 2014 Tr. 95:3-24.
[65]November 19-22, 2013 Tr. 313:8-16.

Dyce's employment ended with SCENT through the middle of August.[66] Dr. Gunnlauggson's testimony substantiated Dr. Dyce's testimony.[67] Any conversations that Dr. Dyce had were in order to obtain information from SCENT and to confer about the future of SCENT. The Court specifically finds that none of these conversations rise to the level of doing harm to the corporation. The Court affirmatively finds that the information that Dr. Dyce was attempting to obtain from the corporation of which he was a 50% shareholder was in SCENT's best interest. It is unreasonable that Dr. Dyce, a 50% shareholder, should be uninformed about any information regarding the entity of which he is an equal owner.

Finally, Defendants did not provide any evidence that Dr. Dyce solicited SCENT employees. On the contrary, Dr. Dyce's witness, Tammy Amerson, testified that she voluntarily left SCENT to work with Dr. Dyce at Carolina Pines. She discovered an opening to work with Dr. Dyce through the internet - - not through Dr. Dyce.[68]

Dr. Puchalski testified he believed that Dr. Dyce was conferring with Dr. Gunnlauggson about the terms of the proposed new shareholders agreement. Even if this was true, it would not violate SCENT's express written confidentiality policy that allowed disclosure of SCENT information to SCENT physicians.[69]

Dr. Dyce is entitled to the amount due him for the redemption of his shares as set forth above and his share of SCENT distributions, with no offset.

6. **To the extent Dr. Amy Puchalski received monies from SCENT for the benefit of her husband, Dr. Puchalski acknowledges that these funds were for his benefit and should be attributable to him.**

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[66]November 19-22, 2013 Tr. 318:16-21.

[67]November 19-22, 2013 Tr 487:16-24; 488:5-10, 25-499:3. Dr. Puchalski shared this information with Dr. Gunnlauggson - - not Dr. Dyce. November 19-22, 2013 Tr.488:8-24. Moreover, both Drs. Dyce and Gunnlauggson agreed that they spoke to each other more often in December 2009 and texted each other during this time period due to a patient who had complications and required emergency surgery. November 19-22, 2013 Tr. 489:6 – 490-14. Dr. Puchalski failed to prove that the increased communications was in reality a conspiracy against him and SCENT.

[68]November 19-22, 2013 Tr. 554:13-555:15.

[69]See discussion above.

Monies were distributed to Dr. Amy Puchalski after February 1, 2008 through August 2009, a time when Dr. Dyce was a SCENT shareholder entitled to receive distributions equal to those paid to Dr. Robert Puchalski and for his benefit. Dr. Amy Puchalski has been joined as a party because she received distributions, some of which should have been paid to Dr. Dyce. Although Dr. Amy Puchalski received monies in the form of SCENT distributions that belonged to Dr. Dyce during this time period, Dr. Robert Puchalski's testimony is clear that these distributions were in actuality distributions to Dr. Puchalski and should be considered as such. While the Court acknowledges and appreciates the representations of Dr. Robert Puchalski, because there were monies paid to Dr. Amy Puchalski that rightfully belonged to Dr. Dyce, Dr. Dyce is entitled to judgment against Dr. Amy Puchalski for those distributions paid to her as those funds were converted by her receipt. As to these sums, Dr. Amy Puchalski, Dr. Robert Puchalski, and SCENT are jointly and severally liable.

7. **Defendants SCENT and Drs. Robert and Amy Puchalski are Liable to Dr. Dyce for Conversion.**

Defendants SCENT and Dr. Robert Puchalski are jointly and severally liable to Dr. Dyce under his conversion claim in the amount of $460,767.11 representing Dr. Dyce's share of distributions SCENT made in 2008 and 2009. SCENT and Dr. Robert Puchalski are additionally liable for $1,809,472.00, the amount to which Dr. Dyce was entitled for the buyout of his SCENT shares. The two of these totaling $2,270,239.11.

Defendant Dr. Amy Puchalski is only liable for the portions of the excess distributions that she received. Mr. Livingston and Austin Sheheen both testified regarding the amount of distributions that Dr. Amy Puchalski received from 2008 to 2009. Defendant's exhibit 250 purports to be the excess distributions that were made for the benefit of Dr. Amy Puchalski. Austin Sheheen explained that the final four distributions on this exhibit were not for the benefit

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of Dr. Amy Puchalski. The Court finds as such. The three payments to AT&T were for periods of time where Dr. Robert Puchalski was using Dr. Amy Puchalski's cell phone and therefore these were proper reimbursements of a business expense which Dr. Amy Puchalski absorbed. The payment to Nelson Mullins should likewise not be attributed to Dr. Amy Puchalski. Although this payment description indicates that this payment was related to the 310 Ocean Oaks property testimony showed that this payment was actually for drafting of a new partnership for Dr. Robert Puchalski. Therefore, Dr. Amy Puchalski is only jointly and severally liable for $25,596.87.

To recover for conversion, one must show the following three elements: (i) an interest by the plaintiff in the thing converted; (ii) the defendant converted the property to his or her own use; and (iii) the use was without the plaintiff's permission. *See Richardson's Rests. v. Nat'l Bank of S.C.*, 304 S.C. 289, 403 S.E.2d 669 (Ct. App. 1990). To establish the first element, plaintiff must show either title or right to possession of personal property. *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990). As to the second element, conversion "may arise by some illegal use or misuse, or by illegal detention of another's chattel." *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 497, 220 S.E.2d 116, 119 (1975) (citing *Castell v. Stephenson Finance Co.*, 244 S.C. 45, 135 S.E.2d 311 (1964)). "Money may be the subject of conversion when it is capable of being identified and there may be conversion of determinate sums even though the specific coins and bills are not identified." *Id.* Finally, the third element requires proof that "defendant gained control and possession of the plaintiff's property without the plaintiff's permission." *Castell v. Stephenson Finance Co.*, 244 S.C. 45, 135 S.E.2d 311 (1964).

Dr. Dyce has sustained his burden of proof and shall have judgment against Defendants

SCENT and Dr. Robert Puchalski, jointly and severally, under the conversion cause of action in the amount of $460,767.11 representing the sum of $436,496.08 and $24,271.03 together because of the failure by Dr. Puchalski and SCENT to make equal distributions in 2008 and 2009 as discussed herein. Dr. Amy Puchalski received $25,596.87 of the above referenced amount. While responsible for this entire amount, Dr. Dyce is entitled to one half of this amount as an excess distribution for the benefit of Dr. Robert Puchalski. Therefore, Dr. Amy Puchalski is only jointly and severally liable for $25,596.87 of the $436,496.08 referenced above.

8. **Defendants Drs. Robert and Amy Puchalski accepted monies that did not belong to them, and therefore, are liable to Dr. Dyce under the cause of action for constructive trust.**

Dr. Robert Puchalski is liable to Dr. Dyce under his constructive trust claim in the amount of $460,767.11 for Dr. Dyce's share of distributions SCENT made in 2008 and 2009. Dr. Amy Puchalski is jointly and severally liable for $25,596.87 of the above amount. Defendants SCENT and Dr. Robert Puchalski are jointly and severally liable in the amount of $1,809,472 as the amount to which Dr. Dyce was entitled as the purchase price for his SCENT shares.

Drs. Robert and Amy Puchalski accepted monies that did not belong to them, and therefore, are liable to Dr. Dyce under the cause of action for constructive trust. "A constructive trust arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust." *Cox*, 301 S.C. 500, 392 S.E.2d 793-94. "A constructive trust arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it." *Id.* 500, 794-795. A constructive trust can result when money has been paid by "accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty." *McNair v. Rainsford*, 330 S.C. 332, 356, 499 S.E.2d 488, 501 (Ct. App. 1998). A party must demonstrate

that the money was wrongfully obtained by clear and convincing evidence. Dr. Dyce sustained his burden by clear cogent and convincing evidence. The Court specifically finds that these monies were wrongfully obtained.

9. SOMNUS

Dr. Dyce also asserts that he is entitled to monies from a company called Somnus, LLC ("Somnus") of which Dr. Dyce and Dr. Puchalski were members. SOMNUS is not a party to this lawsuit and a necessary party. Due Process dictates if relief is requested of SOMNUS then it must be before the Court. As a result the Court will not be considering any issues regarding SOMNUS.

10. Defendants' counterclaims against Dr. Dyce are dismissed with prejudice.

Defendants asserted the following counterclaims against Dr. Dyce: (1) breach of contract; (2) breach of fiduciary duty; (3) conspiracy; (4) interference with contract; (5) defamation; (6) payment of debt; (7) shareholder oppression; and (8) breach of contract accompanied by fraudulent act. The defendants have failed to meet the burden of proof with regard to those causes of action.

a. ***Defendants' failed to prove their counterclaim for breach of contract.***

The preponderance of the evidence fails to prove that Dr. Dyce breached his contracts. Defendants contend Dr. Dyce breached the terms of the June 1, 2008 Employment Agreement and July 16, 2008 Shareholders' Agreement by sharing confidential information with Dr. Gunnlauggson, who was not a shareholder of SCENT. First, Dr. Puchalski has not established that Dr. Dyce shared any confidential information with Dr. Gunnlauggson. Dr. Gunnlauggson testified that he obtained copies of an unsigned 2010 shareholders' agreement from Dr.

Puchalski.[70] Moreover, Section 3.7 of the July 16, 2008 Shareholders' Agreement states that the "Shareholders shall not disclose any information relating to the Corporation regarding the Corporation's operations, records, patients, or procedures to any persons other than employees of the Corporation . . ."[71] It is undisputed that Dr. Gunnlauggson was an employee of SCENT. Therefore, even if Dr. Dyce shared confidential information with Dr. Gunnlauggson, it would have not have constituted a breach of the July 16, 2008 Shareholders' Agreement.

Second, Defendants claim Dr. Dyce breached the June 1, 2008 Employment Contract by violating the Covenant.[72] As stated above, the Covenant is unenforceable.[73]

Third, Defendants claim that Dr. Dyce breached the non-solicitation clause in the June 1, 2008 Employment Agreement by soliciting SCENT employees to work with him at Carolina Pines. The evidence failed to support these assertions. These allegations largely involve Dr. Dyce's hiring of Tammy Amerson. Tammy Amerson, as stated above, testified that she voluntarily left her job at SCENT and, through her own internet search, discovered a job opening with Dr. Dyce.[74] Accordingly, Dr. Dyce did not breach the non-solicitation provision.

Accordingly, Defendants' breach of contract counterclaim is dismissed *with prejudice*.

b. ***Defendants' failed to prove their counterclaim for breach of fiduciary duty.***

Defendants assert that Dr. Dyce breached his fiduciary duty to SCENT and Dr. Puchalski on the grounds that Dr. Dyce knew of Dr. Gunnlauggson's plans to open a new office and would compete with SCENT.[75] Dr. Dyce testified he never knew that Dr. Gunnlauggson intended to open a practice and he only discovered this when Dr. Gunnlauggson called him after he had

[70]November 19-22, 2013 Tr. 509:2- 510:5.
[71]Plaintiffs' Ex. 0007.011.
[72]November 25-26, 2013 Tr. 236.
[73]See Conclusions of Law Section of this Order.
[74]November 19-22, 2013 Tr. 554:17-555:15,
[75]November 25-26, 2013 Tr. 242.

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opened the office.[76] The Court had extensive opportunity to observe and listen to the witnesses and judge their credibility regarding all of the issues raised in the summons and complaint and counterclaims. Based upon the evidence presented, including the testimony of Dr. Dyce, Dr. Gunnlauggson, and Dr. Puchalski the court is satisfied that Dr. Puchalski has failed to meet his burden of proof that Dr. Dyce breached any fiduciary duty owed to SCENT or Dr. Puchalski. Moreover, Defendants have not provided any evidence that they have been damaged by the alleged failure to notify SCENT or Dr. Puchalski that Dr. Gunnlauggson would open a competing practice. Dr. Puchalski simply stated that Dr. Dyce should not receive $340,000.00 in compensation.[77] Based upon the foregoing, defendants' counterclaim for breach of fiduciary duty is dismissed with prejudice.

c. ***Defendants' failed to prove their counterclaim for conspiracy.***

Defendants assert a counterclaim for conspiracy. Under South Carolina law, "[t]he tort of civil conspiracy has three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage." *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App.1989); *see also Pye v. Estate of Fox*, 633 S.E.2d 505, 511 (2006) ("The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se.").

Defendants failed to sustain their burden of proof that Drs. Dyce and Gunnlauggson conspired. Dr. Dyce testified that he did not conspire with Dr. Gunnlauggson. Dr. Dyce testified he did not engage in a coordinated legal strategy with Dr. Gunnlauggson, never provided copies of confidential information such as the 2010 draft shareholders agreement and/or employment

[76]November 19-22, 2013 Tr. 314:5-15.
[77]November 25-26, 2013 Tr. 242:24 – 243:2

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agreement and never provided copies of insurance contracts. The Court finds Dr. Dyce did not have conversations with Dr. Gunnlauggson about opening a separate practice or conversations with him regarding SCENT's insurance contracts. The Court is satisfied that while both Dr. Gunnlauggson and Dr. Dyce separated from SCENT, clearly Dr. Dyce's departure was non-voluntary. The timing of each doctor's return to practice is very different as is their practice post SCENT. The Court finds that there is no credible evidence that Dr. Dyce conspired with Dr. Gunnlauggson or anyone else to injure or damage SCENT or Dr. Puchalski.

Even if a preponderance of the evidence had supported Defendants' conspiracy claims, which it does not, Defendants have failed to prove special damages as required in order state a claim for conspiracy. An essential element under this cause of action is pleading and proving special damages. Defendants generally plead that they have been specially damaged, but they have not itemized or otherwise described those damages. "Special damages... are not implied at law because they do not necessarily result from the wrong. Special damages must, therefore, be specifically alleged in the complaint to avoid surprise to the other party." *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 682 S.E.2d 871, 875 (Ct. App. 2009). If plaintiffs merely repeat the damages from another claim instead of specifically identifying the special damages sustained, the conspiracy claim should be dismissed. *Hackworth*, 385 S.C. 110,682 S.E.2d at 875; *Vaught*, 300 S.C. at 208, 387 S.E.2d at 95 ("The damages sought in the conspiracy cause of action are the same as those sought in the breach of contract cause of action. Because no special damages are alleged aside from the breach of contract damages, we hold the conspiracy action is barred."). As set forth in *Hackworth*, special damages must differ entirely from the alleged damages described in the other causes of action.

Defendants have not pled or proven any damages differing from the damages allegedly

sustained in the other counterclaims. Accordingly, for the reasons stated above, Defendants' conspiracy counterclaim is dismissed with prejudice.

d. ***Defendants' failed to prove their counterclaim for interference with a contract.***

Defendants asserted a counterclaim against Dr. Dyce for interference with a contract. Defendants claim that Dr. Dyce's failure to close on the $1,700,000 construction loan damaged SCENT and SCENT Land. However, First Palmetto Bank personnel testified, and the bank's own files confirm, that Dr. Dyce's guaranty was not required to close the loan. On the contrary, Dr. Puchalski could have closed the loan in February 2010 without Dr. Dyce, as evidenced by the First Palmetto Bank Savings Bank, FSB Loan Approval/Loan Summary Memorandum dated February 10 2010.[78] Moreover, the closing did occur two (2) months later on May 5, 2010 based on the Palmetto Bank Savings Bank, FSB Loan Approval/Loan Summary Memorandum dated February 10 2010. As a result of the closing, SCENT received $725,000.00 and Dr. Amy Puchalski benefitted because she was repaid $170,000.00 that she previously loaned to SCENT Land.[79] Therefore, neither SCENT nor SCENT Land was damaged by Dr. Dyce's refusal to guarantee the May 5, 2010 loan closing.

As set out in detail herein, Dr. Dyce began to take certain actions as a direct consequence of his inability to receive financial information regarding SCENT and due to the deteriorating relationship between Dr. Dyce and Dr. Puchalski. The Court is not convinced that the refusal to guarantee a loan for SCENT Land[80] resulted from anything other than that mentioned above. The Court determines that the Defendants have failed to meet their burden of proof that Dr. Dyce interfere with a contract from which the defendants were damaged.

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[78]Plaintiffs' Ex. 0283.0176.
[79]November 25-26, 2013 Tr. 274:20-25.
[80] SCENT Land is an entity of which Dr. Dyce has no interest. It should be noted his wife, Jamie Curley is a member of SCENT Land.

Accordingly, Defendants' interference with contract counterclaim is hereby dismissed with prejudice.

e. ***Defendants' failed to prove their counterclaim for defamation.***

Defendants asserted a counterclaim for defamation against Dr. Dyce. Defendants failed to meet their burden to prevail under this counterclaim. Defamation is a tort action encompassing libel and slander. Defendants must allege and prove the following: (1) a defamatory meaning; (2) publication with actual or implied malice; (3) falsity; (4) publication by the Plaintiffs; (5) the message concerns the Defendants; and (6) legally presumed damages or special damages to the Defendants. *Parker v. Evening Post Publishing Co.*, 317 S.C. 236, 452 S.E.2d 640 (Ct. App. 1994).

"The intent and meaning of an alleged defamatory statement must be gathered not only from the words singled out as libelous, but from the context; all of the parts of the publication must be considered in order to ascertain the true meaning, and words are not to be given a meaning other than that which the context would show them to have." *Jones v. Garner*, 250 S.C. 479, 158 S.E.2d 909 (1968) (citing 33 Am. Jur., LIBEL AND SLANDER, Section 87). Malice, in actions for libel or slander, is of two kinds: implied malice or malice in law, and actual malice or malice in fact. *Id.* at 488, 158 S.E.2d at 913. "Malice in law, or legal malice, is a presumption of law and dispenses with the proof of malice when words which raise such presumption are shown to have been uttered." *Id.* at 488-89, 158 S.E.2d at 913-914. "This form of malice is not necessarily inconsistent with an honest or even laudable purpose and does not imply ill will, personal malice, hatred, or a purpose to injure." *Id.*

As to falsity, truth is a defense to this element. *Beckman v. Sun News*, 289 S.C. 28, 344 S.E.2d 603 (1986). To render the defamatory statement actionable, the statement must have been communicated to someone other than the Defendants in this case. *Tyler v. Macks Stores of South*

Carolina, Inc., 275 S.C. 456, 272 S.E.2d 633 (1980) (stating "[a] mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain). *Duckworth v. First Nat'l Bank*, 254 S.C. 563, 570, 176 S.E.2d 297, 301 (1970) (stating [t"]he burden of proof was upon the respondent to show not only that the statement was made, but that such was communicated or published to some third person.").

The alleged statement must be about the claimant. *Burns v. Garner*, 328 S.C. 608, 493 S.E.2d 356 (Ct. App. 1997). "To prevail in a defamation action, a plaintiff must establish that the defendant's statement referred to some ascertainable person and that the plaintiff was the person to whom the statement referred." Finally, for recover the claimant must show special damages. *Capps v. Watts*, 271 S.C. 276, 246 S.E.2d 606 (1978).

Defendants presented no evidence showing that Dr. Dyce defamed SCENT and/or Dr. Puchalski. Accordingly, the counterclaim is dismissed *with prejudice.*

f. ***Defendants' failed to prove their counterclaim for payment of debt.***

Defendants assert a counterclaim for payment of debt. Payment of debt is not a cause of action recognized in South Carolina. Furthermore, no evidence supports this claim. Accordingly, the counterclaim is dismissed *with prejudice.*[81]

g. ***Defendants' failed to prove their counterclaim for shareholder oppression.***

Defendants assert a counterclaim for shareholder oppression. Defendants presented no evidence that Dr. Dyce had oppressed Dr. Puchalski. At best, the evidence presented tended to

[81]Defendants claim that Dr. Dyce is responsible for SCENT debt. However, as previously stated, debt is not part of the buyout formula in the July 16, 2008 SCENT Shareholders' Agreement. Dr. Dyce is not responsible for payment of SCENT's debt. Significantly, Section 4.5 of Dr. Vidrine's Shareholders' Agreement, which governs the purchase price of his shares upon Dr. Vidrine's departure from SCENT, suggests that his buy-out will be reduced by the corporation's debt as this provision states, in part, that Dr. Vidrine's shares will be "the net asset value . . .minus *liabilities.*" Plaintiffs' Exhibit 0111.017 -.018 (emphasis added). This holds true for Section 4.5 unsigned 2010 shareholders' agreement created by Dr. Puchalski's attorneys. Plaintiffs' Exhibit 0011.013. The July 16, 2008 Shareholders' Agreement does not state anywhere in Section 4.5 or the agreement that the value of his shares shall be reduced by the corporation's liabilities or debt. Plaintiffs' Exhibit 7.016.

show a deterioration of these two people's relationships particularly as they related to SCENT. At least, the evidence tended to show oppression of Dr. Dyce by Dr. Puchalski and SCENT. Accordingly, this counterclaim is dismissed *with prejudice*.

h. ***Defendants' failed to prove their counterclaim for breach of contract accompanied by fraudulent act.***

Defendants' asserted a counterclaim for breach of contract accompanied by fraudulent act. Defendants' counterclaim fails because the Court has determined infra that Dr. Dyce had not breached his agreement with SCENT and/or Dr. Puchalski. Accordingly, Defendants breach of contract accompanied by fraudulent act counterclaim is dismissed *with prejudice*.

Dissolution of SCENT Land Holdings, LLC.

On July 31, 2012, The Honorable DeAndrea Benjamin ordered that "Plaintiff's Motion for Summary Judgment against SCENT Land seeking dissolution of the company is granted solely on the grounds that the company failed to deliver [the Plaintiff] the purchase agreement as required by SC Code Ann. §33-44-702(c)." The order was not appealed and therefore is the law of the case. After over three years, dissolution of the company has not taken place. Therefore, this Court hereby orders that pursuant to 33-44-803(a) SCENT Land shall be wound up. The Court further finds that the Plaintiff has shown good cause that there should be judicial supervision of the winding up.

SCENT Land, LLC is an ongoing business with ongoing issues such as maintenance, taxes, and insurance. As a result of the ongoing concerns of the LLC the court is in need of assistance in supervising the winding up and liquidation of the LLC. Pursuant to the Court's inherent authority and in order to provide effective and efficient judicial supervision, the court appoints Marty Ouzts to assist the court in supervising the winding up of SCENT Land, LLC's business. Courts have the inherent power to do all things reasonably necessary to insure that just

results are reached to the fullest extent possible. *Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983). The Court is familiar with and finds that Mr. Ouzts is a well-respected CPA with extensive experience working with the court system and is knowledgably in the duties and responsibilities to the parties and to the court in such matters.

Mr. Ouzts shall be empowered to collect all information needed to provide an accurate accounting of assets and liabilities of SCENT Land and to assist the court in marshaling the assets, selling the assets, paying debts, and making a report and recommendation regarding winding up of the LLC. The parties are ordered to immediately cooperate fully with Mr. Ouzts. Mr. Ouzts shall as quickly as possible have the property of the LLC appraised and placed on the market with a real estate agency of his choosing. The property shall be listed at the fair market value and the parties are ordered to cooperate with showing the property. Any offer to purchase the property shall be referred to the court and a hearing held in the event that the parties object to the sale of the property at the offered price. In the event that the property has not sold within 12 months of being placed on the market, the property shall be scheduled for judicial sale by the court.

The LLC shall continue to make all mortgage payments, taxes, insurance, and all other expenses associated with maintaining these properties. In the event that the LLC is not able to make all payments, Mr. Ouzts shall make a recommendation to the court and the court will order an appropriate amount of rent to be paid to the LLC for the use of the property.

Mr. Ouzts shall make a report to the parties and the court every 6 months and the court will hold a status conference on the record to review the report and any objections or other concerns that the parties may have at that time

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The Court finds that Dr. Amy Puchalski and Ms. Jamie Curley are 50/50 owners of SCENT Land and therefore are entitled to equal distributions. The Court finds that the tax returns provided to the Internal Revenue Service are the best evidence of the ownership of the LLC. Those documents show that Dr. Amy Puchalski and Ms. Jamie Curley shared equally in profits and losses of the LLC.

Fees and costs incurred by Mr. Ouzts in carrying out this matter shall be borne equally by Dr. Amy Puchalski and Ms. Jamie Curley. Dr. Amy Puchalski and Ms. Jamie Curley shall each escrow $25,000.00 to Mr. Ouzts for services to the court. Mr. Ouzts shall be paid monthly from escrow and present an accounting of the fees to the members and provide a copy to the court. In the event that Dr. Amy Puchalski or Ms. Jamie Curley should have an objection to the payments made to Mr. Ouzts she shall notify the court and a hearing will be held. If at any time the escrow should reach an amount below $10,000.00 then Dr. Amy Puchalski and Ms. Jamie Curley shall replenish the escrow equally to the amount of $50,000.00.

While the Court has appointed Mr. Ouzts if the members of SCENT Land agree to another qualified person by December 18, 2015 that person may be substituted for Mr. Ouzts. Any objection to this appointment shall be submitted to the Court by December 18, 2015 and a hearing will be convened.

CONCLUSION

Based on the reasons set forth in this Order it is hereby Ordered, Adjudged and Decreed that:

1. Dr. Dyce is entitled to judgment in the amount of one half (1/2) of the excess distributions paid to Drs. Robert and Amy Puchalski in 2008. I hereby award Dr. Dyce judgment against SCENT and Dr. Robert Puchalski, jointly and severally, in the amount of $436,496.08, on Dr. Dyce's breach of contract claim, his accounting claim, his

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constructive trust claim and his conversion claim plus prejudgment interest that shall accrue at the legal rate from December 31, 2008 until the entry of the order of judgment. Dr. Amy Puchalski is jointly and severally liable with SCENT and Dr. Robert Puchalski for $25,596.87 of the $436,496.08, on Dr. Dyce's constructive trust claim and his conversion claim plus prejudgment interest that shall accrue at the legal rate from December 31, 2008 until the entry of the order of judgment.

2. Dr. Dyce is entitled to judgment in the amount of one half (1/2) of the excess distributions paid to Dr. Robert Puchalski in 2009. I hereby award Dr. Dyce judgment on his breach of contract claim, his accounting claim, his constructive trust claim and his conversion claim against SCENT and Dr. Robert Puchalski, jointly and severally, in the amount of $24,271.03, plus prejudgment interest that shall accrue at the legal rate from December 31, 2009 until the entry of the order of judgment.

3. Dr. Dyce is entitled to judgment for the redemption of his shares pursuant to the formula set forth in Paragraph 4.5 of the July 18, 2008 Shareholders' Agreement. I hereby award Dr. Dyce judgment on his breach of contract claim, his accounting claim, his constructive trust claim and his conversion claim against SCENT and Dr. Robert Puchalski, jointly and severally, in the amount of $1,809,472, plus prejudgment interest that shall accrue at the legal rate from July 8, 2010 until the entry of the order of judgment.

4. Total Judgement to the plaintiff is the sum of one half of the excess distributions made to Dr. Puchalski in 2008 ($436,496.08), one half of the excess distributions made to Dr. Puchalski in 2009 ($24,271.03), and the redemption value of the Dr. Dyce's Stock ($1,809,472). Total judgement shall be $2,270,239.11 plus prejudgment interest as set forth above.

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5. Defendants counterclaims, namely, (1) breach of contract; (2) breach of fiduciary duty; (3) conspiracy; (4) interference with contract; (5) defamation; (6) payment of debt; (7) shareholder oppression; and, (8) breach of contract accompanied by fraudulent act are hereby dismissed *with prejudice*.

6. Ms. Jamie Curley has shown good cause that there should be judicial supervision of the winding up of SCENT Land Holdings, LLC and the Court appoints Marty Ouzts[82] to assist the court in winding up the business of the LLC as set forth herein.

IT IS SO ORDERED!

The Honorable Diane Schafer Goodstein
Circuit Court Judge

November 25, 2015
Dorchester, South Carolina

[82] Or other qualified person as addressed herein.

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