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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

SC Court of Appeals

DeAndrea G. Benjamin, Circuit Court Judge
Diane S. Goodstein, Circuit Court Judge

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Consolidated Cases For Trial

SC Court of Appeals

Case No.: 2010-CP-28-322

Case No. 2010-CP-28-323

Jamie Curley, Plaintiff,

v.

SCENT Land Holdings, LLC, Amy Puchalski, and Robert Puchalski, Defendants
and Dr. Orville Dyce, Plaintiff,

v.

South Carolina ENT, Allergy & Sleep Medicine, P.A., Amy Puchalski, and Robert
Puchalski, Defendants

Of Whom Jamie Curley, and Dr. Orville Dyce are the Respondents/Appellants,

And

SCENT Land Holdings, LLC, Amy Puchalski and Robert Puchalski, South
Carolina ENT, Allergy & Sleep Medicine, P.A. are the Appellants/Respondents.

RECORD ON APPEAL VOL. II

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STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

IN THE COURT OF COMMON PLEAS

Jamie Curley,

Plaintiff,

vs.

SCENT Land Holdings, LLC,
Amy Puchalski and Robert Puchalski,
Defendants.

2010-CP-28-0323

Defendants Combined Memorandum In
Opposition to Summary Judgment on
Judicial Dissolution and Defendants'
Counterclaims

FILED FOR RECORD
2012 APR 11 AM 10:58
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

These cases are to be tried non-jury. Plaintiff has filed a motion for summary judgment asking this court to grant her the relief requested in her complaint and a second summary judgment motion asking that the counterclaims of Defendants be dismissed. These motions are without merit and should be denied. Furthermore, they serve no good purpose when the cases will be tried non-jury.

Summary judgment is only appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56c, SCRCP; *Mosteller v. County of Lexington*, 520 S.E.2d 620, 621 (S.C. 1999). "Since it is a *drastic remedy*, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Baughman v. AT&T*, 410 S.E.2d 537, 543 (S.C. 1991)(emphasis added). "Even if there is no dispute as to evidentiary facts, summary judgment is not appropriate where there is a dispute as to a conclusion to be drawn from those facts and to clarify the application of the law." *Tupper v. Dorchester County*, 487 S.E.2d 187,

191 (S.C. 1997). In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence *must be viewed in the light most favorable to the nonmoving party*. *Koester v. Carolina Rental Ctr.*, 443 S.E.2d 392, 394 (S.C. 1994). A “nonmoving party need only present a scintilla of evidence to withstand a motion for summary judgment.” *Hancock v. Mid-South Management Co.*, 673 S.E.2d 801, 803 (S.C. 2009).

FACTUAL BACKGROUND

This case arises out of an effort by Plaintiff Curley to block the construction of a physician office building owned by SCENT Land Holdings as part of a conspiracy to damage SCENT Land Holdings and an affiliated company, South Carolina ENT Allergy and Sleep Medicine. SCENT Land owns properties that are leased to South Carolina ENT for its physicians to practice medicine in. Defendant Dr. Robert Puchalski is a founding shareholder of South Carolina ENT and a managing member of SCENT Land. Curley is the wife of a former shareholder of South Carolina ENT, Dr. Dyce, and she was a member of SCENT Land.

In 2009, Dr. Dyce and Dr. Puchalski were the sole shareholders of the South Carolina ENT physician practice. They, along with Curley, agreed to build a new practice building, to be owned by SCENT Land and used by South Carolina ENT. Ground was broken and the building was started.

During this time, Dr. Dyce began to conspire with another physician employed by the practice, Dr. Gunnlauggson, to exert control over South Carolina ENT by blocking actions necessary to conduct the normal operations. Dr. Dyce began to refuse to allow normal transactions to occur such as acquiring new medical malpractice insurance, allow normal financing of operations, and allow agreements between the shareholders. Dr. Gunnlauggson,

with the assistance of Dr. Dyce, secretly began to establish a competing medical practice in the Richland market to compete against South Carolina ENT. Mrs. Curley and Dr. Dyce began to block the financing necessary for the completion of the new practice building.

The combined actions of the three conspirators brought South Carolina ENT and SCENT Land to a crisis point. The new building could not be completed because Curley and Dyce refused to agree to the necessary loans that were needed and anticipated by the parties when agreeing to build the structure. The general contractor threatened a mechanics lien and the subcontractors went unpaid. The building was vandalized, and South Carolina ENT began having to loan money to SCENT Land to meet obligations.

The actions of Plaintiff coupled with the actions of Dr. Dyce and Dr. Gunnlauggson caused severe damage to the Defendants and to South Carolina ENT, resulting in lost value, profits, expenses, and other damages.

ARGUMENT

I. Defendants did not breach the terms of the company's operating agreement

Plaintiff asserts that the Defendants breached the operating agreement by requiring the members to make a capital contribution to finish the construction of a medical office building. This assertion is completely unfounded.

The SCENT Landholdings operating agreement does not limit the ability of the company to require capital contributions of its members. Furthermore, no statute restricts SCENT Land's ability to require capital contributions. S.C. 33-44-103(a) specifically states that the provisions of operating agreements of limited liability companies control unless prohibited by statute.

With the consent of all members, SCENT Landholdings undertook to build a new office

building for the physician members to practice medicine in. Because of the actions and inactions of Plaintiff and Plaintiff's husband, the necessary loan closings could not be consummated to finish the construction. The general contractor and sub contractors were not being paid because of the refusal.

A vote was held by SCENT Landholdings to require the members to provide capital to enable the company to meet its obligations. Jamie Curley refused to meet the obligation required by the vote of the members. (Affidavit of Puchalski and exhibits).

The Operating Agreement does not limit the ability of the company to require a capital contribution upon sufficient vote. In fact, the Agreement specifically contemplates that the company may require a capital contribution "for a project that is approved by the Membership." (Agreement 6.9c). The same section contemplates that a member may be expelled for failure to do so.

In the current case, SCENT Land voted to require a capital contribution to cover costs needed for the medical building. Curley refused to meet her obligation and therefore she is no longer a member of the company. Summary judgment cannot be granted to Plaintiff because Plaintiff clearly breached her obligations.

II. SCENT Land does not owe Plaintiff anything

Plaintiff also argues that she should be granted summary judgment because SCENT Land did not offer to purchase her interest upon her departure from the company. However, SCENT Land is not obligated to purchase her interest. SCENT Land does not owe Plaintiff anything because Plaintiff breached her fiduciary obligations to SCENT Land and committed multiple acts damaging SCENT Land. Furthermore, under the formula set forth in the Operating Agreement

Plaintiff is not entitled to anything.

SCENT Land has claims asserting, among other things, that Curley breached her fiduciary duties by refusing to allow financing of the new practice building to be completed. SCENT Land further has claims pending that Curley breached her agreements, conspired against the company, committed unfair trade practices, and interfered with contractual relationships causing damages exceeding any claims that Curley could have. These claims far exceed anything that would possibly be owed by SCENT Land. *See e.g.* S.C. Code Section 33-44-701(f) (stating that any claims against a departing member are an offset).

III. Curley breached her fiduciary duty

Curley owed SCENT Land a fiduciary duty to act in good faith and in its best interests. She breached those duties. Under both statutory law and the agreement of the parties, Curley participated in the management of SCENT Land. Furthermore, under Section 11 of the operating agreement, Curley was bound to maintain the confidentiality of all confidential information.

The SCENT Land Operating Agreement explicitly states that a member shall have fiduciary obligations to the "extent of their participation in the management of the Company." (Paragraph 1.12). This obligation is supported by S.C. Code Section 33-44-409(h)(3), which states that a member assumes the duties of a manager when the member participates in the management of the company.

Curley was very involved in participated in the decision making process of the company regarding the construction of the new building. (Aff. of Puchalski and attachments). She and her husband, Dr. Dyce, approved the construction of the building and were involved in details of the construction, including furnishings. Curley personally approved colors for the building. Dr. Dyce

even conducted walk throughs of the construction and approved budgets and similar matters on behalf of Curley. Curley had a fiduciary obligation to act in the best interests of the company. Yet she violated her duties by refusing to allow the financing of the building and blocking its completion for no justifiable business reason.

Furthermore, the Operating Agreement states that when a member obtains or uses company information she is participating in the management of the company: (Paragraph 1.12b). Curley was provided with all information regarding the plan of the SCENT Land in constructing the building and the financial pros and cons of the construction. She and her husband were given information relating to the financial needs of the company. (Aff. of Puchalski and attachments). She and her husband were given company information regarding the actual construction process. She and her husband were given information relating to South Carolina ENT. Unfortunately, she used this information to stymie and block the legitimate and approved business operations of SCENT Land, damaging the company and violating her duties. Furthermore, she and her husband shared this information with her co-conspirators, directly violating the operating agreement.

IV. Curley conspired against Defendants, causing special damage

Curley was involved in a conspiracy with her husband, Dr. Dyce, and another physician at the practice, Dr. Gunnlauggson, to damage SCENT.

Conspiracy is simply the combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff. *Hackworth v. Greywood at Hamlett*, 682 S.E.2d 871, (S.C. Ct. App. 2009). All elements are met in this case.

During the periods of time that the building closings were being held up, Mrs. Curley's

husband, Dr. Dyce, was also refusing to allow the medical practice to make basic decisions, such as medical malpractice coverage. (Aff. Puchalski). Dr. Dyce and Dr. Gunnlauggson were seen often meeting privately during these periods of time, and Dr. Gunnlauggson was in the process of secretly creating his own medical practice to compete against SCENT's medical practice in the Richland County area. (*Id.* and attachments). Dr. Dyce and Gunnlauggson began a high level of text messaging during this time, even during meetings of the three physicians. (Aff. of Puchalski and attachments). Between the actions of Dr. Dyce, Dr. Gunnlauggson, and Mrs. Curley SCENT suffered extreme and special damages. As part of this conspiracy, Mrs. Curley presented false reasons for blocking the closing of the loans on the building, bringing the financial operations of SCENT Land and South Carolina ENT to a halt to gain leverage in control of the companies.

The special damages resulting from the conspiracy of these three persons included the diminution of market value for remaining South Carolina ENT stockholders, diminution of value in SCENT Land, loss of dividends, damage to business reputation, loss of corporate opportunities, and damage to corporate good will. (Aff. Puchalski).

V. Curley Intentionally Interfered with Third Party Contracts

A cause of action for Intentional Interference with Contracts exists when a person 1) intentionally interferes with a contractual relation, 2) for an improper purpose, 3) causing injury. *Crandall Corp. v. Navistar Int. Transp.*, 395 S.E.2d 179 (S.C. 1990).

Curley knew that her actions would interfere with third party contracts, including contracts between SCENT Land and South Carolina ENT and between SCENT Land and the general contractor of the new building. With approval of Curley, SCENT Land committed to

provide a new building for South Carolina ENT to conduct a medical practice from. SCENT Land was not able to timely deliver on that commitment due to Curley's intentional delays and refusal to finalize the financing of the building. Curley was reminded of these obligations, pleaded with for participation, and continued to provide false reasons for refusing to close the necessary loans. She did this in an attempt to stymie the business operations of SCENT Land and South Carolina ENT to gain leverage in controlling the companies.

Although Curley had agreed to the construction of the new facility, she interfered with SCENT Land's ability to fulfill its construction agreement by refusing to allow the financing to go forward. On numerous occasions, she was requested to fulfill her obligations, but intentionally refused so as to block completion and block SCENT Land's ability to pay under the construction contract. She also did this in an attempt to stymie the business operations of SCENT Land and South Carolina ENT.

VI. Curley engaged in unfair trade practices

A person is entitled to judgment for unfair trade practices when a defendant commits an unfair or deceptive act proximately causing damages. *Schnellmann v. Roettger*, 627 S.E.2d 742, 745-46 (S.C. Ct. App. 2006). An unfair act is associated with trade or commerce when it impacts the public interest. *Id.* at 746.

Curley engaged in unfair trade practices by refusing to allow SCENT Land from being able to pay its bills and support South Carolina ENT as required by the commitments she had previously approved. She did this by giving false reasons for delaying closings and financial support for SCENT Land and stymying the efforts of SCENT Land and SCENT to conduct its normal business.

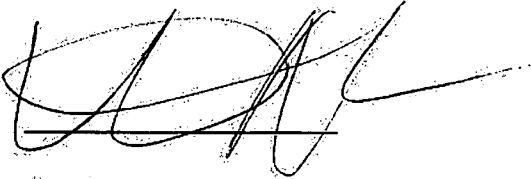
These unfair actions directly affected and injured the larger public by denying timely payments to numerous sub contractors who were entitled to pay for work done on the building. Ms. Curley engaged in these acts on a repeated basis, stopping closings from occurring on approximately five occasions causing the cascade of unpaid bills that affected the many subcontractors.

Curley's actions were unfair, deceiving, and impacted the public at large.

CONCLUSION

This case is extremely complex in its facts. There are scores of factual disputes in existence which a judge will determine in a non-jury trial. Summary Judgment to the Plaintiff would be entirely inappropriate. Therefore, the Court should deny Plaintiff's motion for summary judgment.

SAVAGE, ROYALL & SHEHEEN, L.L.P.

BY: 

Vincent A. Sheheen
Attorneys for the Defendant
Post Office Drawer 10
Camden, South Carolina 29021
(803) 432-4391

April 10, 2012

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

IN THE COURT OF COMMON PLEAS

Jamie Curley,

Plaintiff,

vs.

SCENT Land Holdings, LLC, and
Robert Puchalski,
Defendants.

2010-CP-28-00323

Affidavit of Robert Puchalski

FILED FOR RECORD
2012 APR 11 AM 10:58
JULIE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

The Affiant, Dr. Robert Puchalski, being duly sworn, swears and deposes that:

1. I have the legal and mental competency to give this sworn affidavit and give sworn testimony in court. I am a the chairman of South Carolina ENT, Allergy and Sleep Medicine P.A. I am also a member of SCENT Land Holdings, LLC.
2. SCENT Land Holdings, LLC is a company which owns properties that have been leased to South Carolina ENT, Allergy and Sleep Medicine P.A. for its physicians to practice medicine. SCENT Land also leases property to other entities.
3. SCENT Land Holdings members were Amy Puchalski, Jamie Curley, and myself as Founding Manager. Jamie Curley was admitted as a member even though she contributed no assets to the company. SCENT Land owned properties in Richland, Darlington, and Kershaw counties; counties in which South Carolina ENT maintained offices. Mrs. Curley's husband, Dr. Dyce treated the majority of patients in the Hartsville office, and another physician, Dr. Gunnlaugsson, treated the majority of the patients in the Richland office. Each physician at

different times treated patients in all areas that SCENT maintained offices.

4. In 2009 and 2010, the members of SCENT Landholdings, including Mrs. Curley, through her husband Dr. Dyce, approved the construction of a major new facility in Lugoff, South Carolina. Also during this time, Dr. Dyce and myself were in the process of negotiating new shareholder agreements for South Carolina ENT.

5. However, in the Fall of 2009 shortly after signing the SCENT Land operating agreement, Mrs. Curley and her husband, Dr. Dyce, began to refuse to participate in financing the building. They refused to attend loan closings, and Dr. Dyce refused to participate in other necessary management activities at the medical practice. Dr. Dyce and Mrs. Curley gave no legitimate reasons for their failures. They claimed that they were not being allowed to review financial records of South Carolina ENT, but all records were made accessible to them on the premises to review. It was clear they were trying to gain improper leverage for negotiating control over South Carolina ENT by stymying normal operations of both companies.

6. As a result of their actions, SCENT Land Holdings could not pay the bills coming due from the contractors for the building under construction in violation of SCENT Land Holdings' agreements with the contractors and the bank.

7. Construction on the building came to a halt because of the actions of Mrs. Curley and her husband, Dr. Dyce. Bills were not paid, and a mechanics lien was asserted against the property. Vandalism and other damage occurred to the building because it was open to the elements and not being completed. Because of the prominent location, the distressed building was obvious to patients, other doctors, and the public.

8. During this time, another physician at the practice, Dr. Gunnlauggson and his wife were

conspiring with Dr. Dyce and Mrs. Curley to bring about problems in operating both South Carolina ENT and SCENT Land. As part of this effort, Dr. Gunnlauggson prepared a draft affidavit for Dr. Dyce in an attempt to put undue pressure on the companies and ultimately take patient base away from South Carolina ENT. (See attached excerpt of Dyce Deposition). Dr. Dyce and Dr. Gunnlauggson were frequently seen conferring together during this time. Their text messaging and cell phone calls increased exponentially as later learned from their company cell phone records, even secretly texting while we were all three in meetings together.

9. In an effort to raise the capital necessary to ensure the survival of SCENT Land and the protection of the assets, SCENT Land voted to require a capital contribution. Mrs. Curley refused to participate in the capital contribution, thus further sabotaging the efforts of SCENT Land to effectively operate.

10. Mrs. Curley breached the most basic obligations of good faith that she owed to SCENT Land by purposefully refusing to allow the financing to go forward that was needed to complete the Lugoff Building with no good reason given. As a result, SCENT Land suffered damage to its property, higher interest costs, and other damages that are being calculated. SCENT Land also suffered poorer loan terms, higher construction costs, extra rental costs, and other damages.

11. During the periods of time that the building closings were being held up, Mrs. Curley's husband, Dr. Dyce, was also refusing to allow the medical practice to make basic decisions such as medical malpractice coverage, purchasing equipment, and recruiting physicians. Dr. Dyce and Dr. Gunnlauggson were seen often meeting privately, and Dr. Gunnlauggson was in the process of secretly creating his own medical practice to compete against SCENT's medical practice in the Richland County area. Between the actions of Dr. Dyce, Dr. Gunnlauggson, Mrs. Gunnlauggson,

and Mrs. Curley SCENT suffered extreme and special damages.

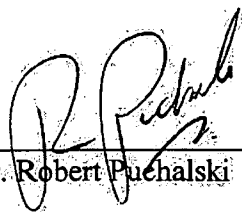
12. Mrs. Curley and Dr. Dyce were included in decision making and management of the two companies by making decisions regarding the new building. Dr. Dyce reviewed all plans for Mrs. Curley, approved the budget, and reviewed the building progress during construction. Under Section 1.12 of the Agreement, this was participation in the management of the company. Curley was so involved that she even made decisions relating to colors to be included in the building. (Email attachment from Curley). Furthermore, she was provided with all relevant information relating to the construction and finance of the building, and she made demands to the company about the financing and conditions for her participation. Although she was entrusted with financial and company information and with decision making authority, she breached her obligations by not acting in the best interests of the company.

13. The concerted actions of Dr. Dyce, Mrs. Curley, and Dr. Gunnlauggson and his wife combined to cause special and serious harm and damages to SCENT. The result of the combined actions was that SCENT received a huge loss of market share in the Cheraw, Hartsville, and Richland areas. The special damages resulting from this conspiracy include those specifically listed in the Complaint- the diminution of market value for remaining South Carolina ENT stockholders, diminution of value in SCENT Land, loss of dividends, damage to business reputation, loss of corporate opportunities, loss of patients, and damage to corporate good will. Her actions also contributed to significant interruption of medical services to patients and the public.

14. Mrs. Dyce also interfered intentionally and knowingly with other contracts that SCENT Land maintained. Among these contracts was SCENT Land's obligations to the general

contractor who was constructing the new SCENT Land building; the obligations of SCENT Land to provide a building to South Carolina ENT, Allergy and Sleep Medicine P.A. before its lease expired; to First Palmetto who was withholding interest and charges in anticipation of further financing; and SCENT Land's obligations to repay loans. These unfair actions damaged not only SCENT Land, but also South Carolina ENT and other members of the general public, including multiple contractors and sub contractors who went without pay for a number of months that they were due payment.

15. The buyout value of SCENT Land based upon the formula contained in the parties agreement was minimal because of the costs related to the improvements that had been or were being constructed in relation to the debts owed on them.



Dr. Robert Puchalski

SWORN to before me this 10
day of April, 2012



Notary Public for S.C.
My Commission Expires: 6/24/11

Exhibit 1

Theresa Williams

4
3 From: Jamie [jamiedyce@me.com]
Sent: Friday, January 22, 2010 8:04 PM
To: Theresa Williams
Subject: Re: Red Roof

Hi theresa! My vote is for black/brown shingles--hope that helps!

Sent from my iPhone

On Jan 22, 2010, at 10:09 AM, Theresa Williams <twilliams@southcarolinaent.com> wrote:

Good Morning-

I have attached 3 photos of projects with red shingled roofs. We are considering using red or black but would love your input. The first two are churches, the third is a house, but the design is very similar to our Lugoff building.

Thanks for your help. Have a great day!

Theresa

<IMG_2868.JPG>

<IMG_2864.JPG>

<IMG_2871.JPG>

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p.2

Exhibit 2

OPERATING AGREEMENT
OF
SCENT LAND HOLDINGS, LLC

PARTIES

This Agreement, dated as of September 30, 2009, is among the following parties (the "Initial Members"):

1.	Amy Puchalski- Founding Member	3 Puddle Lane Camden, SC 29020
2.	Jamie Curley- Member	401 Woodland Drive Hartsville, SC 29550
3.	Robert Puchalski- Founding Manager	



BACKGROUND

The Initial Members have formed the Company under the Limited Liability Company Act of the State of South Carolina (the "LLC Act"), [§33-44-101 et seq.] for the principal purpose of owning real estate in any Counties in South Carolina in which they may transact business, and any other endeavors authorized by this Agreement. This Agreement sets forth the agreement among the parties as to the internal affairs of the Company and the conduct of its business.

TERMS AND CONDITIONS

The parties, intending to be legally bound, agree as follows:

SECTION 1 PRELIMINARY PROVISIONS AND DEFINITIONS

1.1 EFFECTIVE DATE OF AGREEMENT

The effective date of this Agreement (the "Effective Date") shall be Sept 30th, 2009.

1.2 ENFORCEABILITY OF AGREEMENT

On the Effective Date and thereafter until the parties amend or terminate the Agreement, all rights, duties and liabilities of the Company and of the Members as Members shall be enforceable against the Company and the Members in accordance with the terms of the Agreement.

1.3 COMPANY FORMATION

A copy of the Articles of Organization (the "Articles") for the Company is attached to this Agreement as Exhibit A.

The Company shall be a legal entity separate and distinct from its Members.

1.4 COMPANY

The name of the Company shall be SCENT Land Holdings, LLC but shall be referred to in this document as the "Company".

1.5 PRINCIPAL PLACE OF BUSINESS OF COMPANY

Upon its formation, the Company's principal place of business shall be 1165 Highway 1 South, Lugoff, South Carolina 29078. The Manager may change the Company's principal place of business from time to time upon reasonable notice to the Members.

1.6 COMPANY DURATION

The duration of the Company shall be indefinite.

1.7 COMPANY PURPOSE

The Company's principal purpose shall be owning real estate in any Counties in South Carolina in which they may transact business, and any other endeavors authorized under this Agreement.

1.8 COMPANY POWERS

Except as expressly otherwise provided in this Agreement, the Company shall have all powers provided to Companies under the LLC Act.

1.9 COMPANY REGISTERED AGENT AND REGISTERED OFFICE

The Company's registered agent and registered office shall be as set forth in the Articles.

1.10 MEMBERS

A. On the date of formation of the Company, the Initial Members shall be the only Members of the Company. Additional Members shall be admitted to the Company in accordance with Section 5. "Members" are individuals who are either physicians employed by or in partnership with South Carolina ENT, Allergy and Sleep Medicine, P.A. or their spouse.

B. Disinterested Members are those Members claiming to have been harmed or injured in some fashion by and act or omission of the Manager acting on behalf of the Company.

1.11 LIMITED LIABILITY OF MEMBERS

No Member shall be personally obligated to any third party for any debt, obligation or liability of the Company solely by reason of being a Member. Members shall be liable for their conduct other than as Members as provided by law.

1.12 FIDUCIARY DUTIES AND LIABILITIES OF MEMBERS

Except as otherwise expressly provided in this Agreement, no Member in the Member's capacity as a Member shall have any fiduciary duties or liabilities to the Company or to the

other Members under this Agreement except to the extent of their participation in the management of the Company. For purposes of this Section 1.12:

(a) A Member's voting on Member Matters (as defined in Section 3.1) shall not constitute participation in the management of the Company;

(b) A Member's obtaining and using Company information shall constitute participation in the management of the Company as determined under applicable case law and under the relevant facts and circumstances.

1.13 RESERVATION OF COMPANY MANAGEMENT TO A MANAGER OR MANAGERS; APPOINTMENT OF INITIAL MANAGER

Except as otherwise expressly provided in this Agreement, the management of the business and internal affairs of the Company shall be reserved to one or more managers (the "Manager"). The initial Manager of the Company shall be Robert Puchalski.

1.14 TAXATION OF COMPANY AND MEMBERS

Under federal tax law and to the maximum extent possible under the tax laws of each state and the District of Columbia, the Company and its Members shall be taxable as a partnership and as partners.

The provisions of this Agreement shall be construed and applied in such a manner as to ensure full compliance with the provisions of the Internal Revenue Code applicable to partnerships and with the regulations thereunder.

1.15 ANNUAL ACCOUNTING PERIOD OF COMPANY

The Company's annual accounting period for financial and tax purposes shall be the calendar year.

1.16 COMPANY METHOD OF ACCOUNTING

The Company shall use the cash method of accounting to compute its taxable income.

1.17 ADDITION OF COMPANY AS PARTY TO AGREEMENT

Promptly after the formation of the Company, the Members and Manager shall sign this Agreement on behalf of the Company, and the Company shall become a party to the Agreement.

1.18 EFFECT OF LLC ACT

Except as otherwise provided in this Agreement or by law, the business and internal affairs of the Company shall be governed by the Company Act as in effect on the Effective Date.

1.19 RELATION OF AGREEMENT TO ARTICLES

If there is any conflict between the provisions of this Agreement and those of the Articles, then, in any dispute among the Members, the provisions of this Agreement shall prevail.

1.20 AMENDMENT OF AGREEMENT AND ARTICLES

No amendment of this Agreement or of the Articles shall be valid except upon the affirmative vote of all Members.

1.21 QUALIFICATION OF COMPANY IN OTHER JURISDICTIONS

Before conducting business in any jurisdiction other than South Carolina, the Company shall file all forms and shall do all other things required under the laws, including the tax laws, of that jurisdiction in order to conduct that business.

1.22 FOUNDING MEMBER AND MANAGER

Amy Puchalski shall be deemed Founding Member and Robert Puchalski shall be deemed Founding Manager for as long as they shall be associated with the Company in any way. As such, the Founding Member and Manager are vested with certain authorities and powers as set forth herein.

1.23 VOTING

Until the Company has more than four (4) Members, the vote of a majority of the Members shall control any vote taken. In the event of a tie vote, the Founding Member's vote shall break the tie. Once there are five (5) Members, the language referenced in this document requiring a majority vote shall be interpreted in accordance with this provision of section 1.22 and the vote of Seventy-five (75%) percent of the Members shall control any vote taken.

1.24 APPLICABILITY OF NAME

References in this agreement to South Carolina ENT, Allergy and Sleep Medicine, P.A., shall include references to its predecessors, Kershaw ENT, South Carolina ENT & Facial Plastic Surgery, Inc. and any subsequently re-named physician practice containing all, or substantially all, of the existing shareholders of South Carolina ENT, Allergy and Sleep Medicine, P.A..

SECTION 2 MEMBERS' CONTRIBUTIONS TO COMPANY, ETC.

2.1 CLASSES OF MEMBERS

The Company shall have a single class of Members.

2.2 CONTRIBUTIONS TO BE MADE BY MEMBERS IN EXCHANGE FOR THEIR MEMBERSHIPS

Promptly after the Company's formation, the Initial Members shall, in exchange for their Memberships, make contributions to the Company of the cash, non-cash property and services and the promises of cash, non-cash property and services as provided in the attached Exhibit A.

Members admitted to the Company after its formation shall make contributions in exchange for their Memberships as set forth in amendments to that exhibit.

2.3 VALUATION OF NON-CASH CONTRIBUTIONS

Before any Member makes a contribution to the Company in a form other than money, the manager shall determine the value of that contribution in dollars. In the absence of fraud and after consultation with the Company's Tax Advisor, the Founding Manager's determination shall be conclusive as to that value.

2.4 ENFORCEABILITY OF PROMISES TO MAKE CONTRIBUTIONS

No promise by a Member to make a contribution to the Company shall be enforceable unless set forth in this Agreement or in another writing signed by the Member.

2.5 DUTY OF DISABLED MEMBERS TO MAKE CONTRIBUTIONS, ETC.; COMPROMISES

Members or their representatives shall be obligated to perform enforceable promises to make contributions to the Company even if the Members are unable to do so because of their disability, death or otherwise. No such promise shall be compromised except by vote of a majority of the Members.

2.6 PENALTIES FOR FAILURE TO CONTRIBUTE

If any Member fails to make a contribution required or agreed to under 2.4, the other Members by vote of Members holding a majority of Member votes (exclusive of the votes

of the Member failing to make the contribution) may impose upon the Member any penalty that the other Members agree is reasonable in the circumstances, including:

- (a) Reduction or elimination of the Member's proportionate interest in the Company;
- (b) Forfeiture of all or a portion of the Member's Membership rights; or
- (c) Sale of all or a portion of the Member's Membership rights.

In determining which penalty to apply under this Section 2.6, the Members shall consult with the Company's accountant under Section 15.

2.7 NO INTEREST ON CONTRIBUTIONS

The Members shall earn no interest on their contributions under this Section 2.

SECTION 3 MEMBERS' NON-ECONOMIC RIGHTS

3.1 MATTERS ON WHICH MEMBERS MAY VOTE

Members in their capacity as Members shall have the right to vote on the following types of matters ("Member Matters"):

- (a) All matters on which this Agreement expressly provides them with a right to vote.

3.2 NUMBER OF VOTES THAT MEMBERS MAY CAST

Except as otherwise expressly provided in this Agreement, each Member shall have one vote on each Member Matter for:

- (a) Each percentage of ownership the Member has in the company; and

3.3 NUMBER OF VOTES NECESSARY TO DECIDE MEMBER MATTERS

Except as otherwise expressly provided in this Agreement, each Member Matter shall be decided by the affirmative vote of Members holding a majority of Member votes. In the event of a tie by the Members, the Founding Member shall vote to break the tie.

3.4 PROCEDURAL RULES GOVERNING MEMBER VOTING

In the absence of fraud or bad faith, no vote by the Members on any Member Matter shall be

deemed to be invalid on any procedural or similar ground, including any ground relating to lack of notice, lack of meeting, lack of quorum, or failure to record votes;

PROVIDED, that the Manager shall use his reasonable best efforts to make a written record of each significant vote by the Members and to circulate these records on a timely basis among the Members.

In the event a Member cannot be present at a properly called meeting for any reason, the Member may submit a proxy to the Theresa Williams, or the then acting Office Manager, indicating to whom the proxy is given. The proxy may, but is not required to, dictate a certain vote to the proxy recipient.

No vote on a matter requiring Member vote, including but not limited to the purchase or sale of real estate, can be called to question by anyone other than the Manager.

For purposes of this Section 3.4, the terms "procedural or similar ground" shall be construed broadly. Members may vote on Member Matters in person, by phone, by fax or by any other reasonable means.

3.5 MEMBERS HAVE NO AGENCY RIGHT OR POWER

No Member as a Member shall have the right or power to bind the Company in dealings with third parties, in statements about the Company or in any other manner.

3.6 RIGHT OF MEMBERS TO OBTAIN COMPANY INFORMATION

During normal business hours and after reasonable notice, each Member shall be entitled for any purpose reasonably related to the Member's Membership:

To view any financial information in the Company's possession or control; and

To inspect and, at the Member's expense, to copy any documents and other media in the Company's possession or control;

PROVIDED, that all information thus acquired by the Member shall be subject to the provisions of Section 11 (relating to the confidentiality of certain Company information).

3.7 RIGHT OF MEMBERS TO BRING ACTIONS AGAINST, IN THE NAME OF OR ON BEHALF OF THE COMPANY OR AGAINST OTHER MEMBERS

3.7.1 GENERAL PROHIBITION OF SUITS

No Member in the Member's capacity as a Member may bring an action in law or equity

against the Company or against any other Member in the other Member's capacity as a Member in any court for any reason except to enforce an arbitration order under Section 19.

3.7.2 VOTING REQUIREMENT FOR SUITS

No Member may bring a suit or action against any person in the name of or on behalf of the Company except with the affirmative vote of other Members holding a majority of Member votes (exclusive of the votes of the Member seeking to bring suit).

3.7.3 ARBITRATION

Any Member may assert in arbitration under Section 19 any claim that could be asserted in any suit or action against, in the right of or in the name of the Company.

SECTION 4 INTERIM ALLOCATIONS AND DISTRIBUTIONS TO MEMBERS; GUARANTEED PAYMENTS, ETC.

4.1 INTERIM ALLOCATIONS OF COMPANY PROFITS AND LOSSES

The Company shall make interim allocations of its profits and losses (as defined in Section 4.3) among the Members in proportion to their respective shares of aggregate contributions to the Company.

PROVIDED, that the Company shall allocate its income, gains, deductions and other tax items to Members in respect of contributed non-cash property in accordance with Internal Revenue Code section 704 (c) (1) (A) and the regulations thereunder.

For purposes of this Section 4, contributions shall (except as otherwise expressly provided in this Agreement) include only the value of contributions which the Company has actually received from the Members and has not returned.

4.2 ALLOCATIONS OF INTERIM DISTRIBUTIONS

The Company shall allocate to the Members Interim Distributions (as defined in Section 4.3) on the same basis on which it allocates its profits and losses.

4.3 DEFINITION OF INTERIM ALLOCATION AND INTERIM DISTRIBUTION

For purposes of this Section 4, the term "Interim Allocation" and "Interim Distribution" shall mean, respectively, any allocation of profits or losses among the Members and any

distribution of profits or other assets by the Company to the Members as their share of Company assets except allocations and distributions in connection with:

(a) The liquidation of a Member's Company interest (as the term "Company interest" is defined in Section 4.4); and

(b) The liquidation of the Company.

4.4 DEFINITION OF COMPANY INTEREST

For purposes of this Agreement, a Member's Company interest shall mean

(a) The Member's share of the Company's profits and losses; and

(b) The Member's right to receive distributions of the Company's assets.

4.5 DISTRIBUTIONS IN KIND

If this Agreement or applicable law requires the Company to make an Interim Distribution to any Member, the Member may not require the Company to make this distribution except in the form of cash. The Company may not compel a Member to accept an Interim Distribution except in the form of cash.

4.6 NO COMPANY DUTY TO MAKE INTERIM DISTRIBUTIONS

The Company shall have no duty to make Interim Distributions except as expressly provided in this Agreement or as determined from time to time by the Founding Manager, or his successor.

4.7 TAX DISTRIBUTIONS

In the event sufficient cash exists and the Founding Manager or his successor deems it prudent to do so, the Company shall make Interim Distributions to the Members to enable them to pay taxes on allocations to them of Company profits.

4.8 LIQUIDATING DISTRIBUTIONS

The Company shall make distributions to Members in connection with the liquidation of their Company interests in accordance with Section 5. The Company shall make distributions to Members in connection with the liquidation of the Company in accordance with Section 16.

4.9 UNLAWFUL DISTRIBUTIONS

The Company shall make no Unlawful Distribution of its assets to any Member. For purposes of this Section 4.9, a distribution is an Unlawful Distribution:

(a) If, as a result of the distribution, the Company would be unable to pay its reasonably foreseeable obligations as they become due; or

(b) If the distribution is unlawful under the Company Act as in effect from time to time.

4.10 LIABILITY FOR AUTHORIZING OR RECEIVING UNLAWFUL DISTRIBUTIONS

Members who vote to authorize Unlawful Distributions or who receive these distributions shall be liable as provided in the Company Act.

4.11 REIMBURSEMENT OF EXPENSES

If any Member or manager incurs a reasonable expense on behalf of the Company and reasonably documents this expense to the Company, the Company shall reimburse the Member for this expense as promptly as reasonably possible after receiving this documentation. A Reasonable Expense shall be deemed to be reasonable and reimbursable upon agreement by the Founding Manager, or his successor, after consultation with the Company Tax Advisor.

SECTION 5 TRANSFERS AND PLEDGES OF MEMBERSHIP RIGHTS, ETC.

5.1 RESTRICTIONS ON RIGHT OF MEMBERS TO TRANSFER AND PLEDGE THEIR MEMBERSHIP RIGHTS

Except as may be provided herein, any transfer or sale of economic or non-economic Member rights shall be directly to the Company, a physician member of South Carolina ENT, Allergy and Sleep Medicine, P.A., or the current spouse of a physician member of South Carolina ENT, Allergy and Sleep Medicine, P.A.. Upon the purchase by the Company of a Member's rights hereunder, the ownership percentages of the remaining Members shall be automatically adjusted so that each remaining Member shares equally in the profits and losses of the Company. The intent of this provision is that every Member shall be just as vested in the Company as any other Member.

ANY PURCHASE OF NEW MEMBERSHIP OR SURRENDER (BUY-IN OR BUY-OUT) OF EXISTING MEMBERSHIP, FOR ANY REASON DESCRIBED HEREIN, SHALL BE BASED UPON THE VALUATION AND PROCEDURE IDENTIFIED IN SECTION 5.5. BUYOUT DUE TO DEATH, DISABILITY, RETIREMENT OR DISSOCIATION WILL BE VALUED AND PAID ACCORDING TO THE TERMS IDENTIFIED HEREIN.

5.2 DEFINITION OF TRANSFER

For purposes of this Section 5, "transfer" shall include:

- (a) Transfers by sale;
- (b) Transfers by gift;
- (c) Transfers (whether by will, trust or otherwise) taking effect on the death of the transferor; and
- (d) Involuntary transfers, including transfers by operation of law and pursuant to divorce and bankruptcy decrees.

Transfers and pledges in breach of the terms of this Section 5 shall be void and of no effect.

5.3 ADMISSIONS OF ADDITIONAL MEMBERS BY THE COMPANY

The Company shall admit no person as a Member of the Company after the Company's formation except upon the affirmative vote of Members holding 75% of Member votes.

5.4 ELECTION UNDER INTERNAL REVENUE CODE SECTION 754

Before any Member transfers any of the Member's rights as a Member to any person, the Members shall negotiate in good faith and shall agree whether to file an election under Internal Revenue Code section 754 to adjust the basis of Company property in connection with that transfer.

5.5 VALUATION OF MEMBERSHIP INTEREST AND BUYOUT

Subject to (C) herein, the value of the Member's equity shall be determined as follows:

The determination of value for a Member either a) buying in to, at any time, or b) dissociating out of the Company after the first five (5) years of the member obtaining shares of SCENT Land Holdings, LLC and after the first seven and one-half (7.5) years of the member obtaining shareholder status in South Carolina ENT, Allergy and Sleep Medicine, P.A., shall be based on the appraised value of the assets of the property less any outstanding

mortgage indebtedness and the Member's ownership percentage thereof (in the event the appraised value is less than the mortgage balance, use the mortgage balance to determine value); or,

(B) For a Member dissociating from the Company prior to the 5th anniversary of the Member obtaining their Membership shares in SCENT Land Holdings, LLC and the seven and one-half (7.5) year anniversary of obtaining shareholder status in South Carolina ENT, Allergy and Sleep Medicine, P.A., the value of the Member's interest shall be the Member's ownership percentage multiplied by the difference between the cost of land acquisition and the construction of the improvements/buildings on the property, as computed by the Founding Manager, after consultation with the Company Tax Advisor, less any outstanding mortgage indebtedness.

(C) In the event a Member withdraws from the Company prior to the previously stated anniversaries of obtaining Membership interest and the properties appraised value is below the actual cost of actual acquisition and construction of the improvements, the withdrawing Member shall be entitled only to the lower value of the Company as computed by processes A and B above.

(D) The Member withdrawing or dissociating from the Company, after five (5) years of the Member obtaining shares of SCENT Land Holdings, LLC and after seven and one-half (7.5) years of obtaining shareholder status with South Carolina ENT, Allergy and Sleep Medicine, P.A., shall pay for an MAI certified, market based appraisal of the property and if the Company and the Member disagree on the value shown on the appraisal, the Company will pay for an additional appraisal and the two figures shall be averaged to determine the value of the property.

(E) For any Buy-out of Membership shares of the Company, the majority vote of the non-withdrawing Members of the Company shall vote to make buyout payments in either one payment or in equal payments spread out over no more than 5 years.

(F) For purposes of establishing dates of joining the company for the initial Members or Manager, Amy and Robert Puchalski's relative date is July, 2004 and Jamie Curley and Orville Dyce's relative date is July, 2007.

(G) Upon determination of the Buyout amount owed to the withdrawing Member, the Interim Distributions normally made to that Member shall cease and the withdrawing Member shall only be entitled to the funds due for buyout of that Member's interest in the Company.

SECTION 6 MEMBER DISSOCIATIONS

6.1 DEFINITION OF MEMBER DISSOCIATION

The dissociation of a Member means the termination of the Member's right to participate in the Company's business and internal affairs by voting on matters relating to the business, rights to Interim Distributions and internal affairs of the Company, by acting as an agent for the Company or otherwise.

6.2 EVENTS OF DISSOCIATION

The Company may require a Member to promptly sell all or any part of the Member's Company interest to the Company or to the other Members for the value set forth in 5.5 herein if a Member is dissociated. Under certain circumstances, a shareholder shall be required to transfer Membership interest, or proxy vote, to a physician spouse who is a shareholder of South Carolina ENT, Allergy and Sleep Medicine, P.A.. In no event can the Founding Member or Founding Manager ever be forcefully Dissociated.

A Member shall be dissociated only upon the occurrence of one of the following events:

(a) The Member dies, unless the Member is a spouse of the practicing South Carolina ENT, Allergy & Sleep Medicine, P.A. physician, in which case the Member's interest shall vest only in the South Carolina ENT, Allergy & Sleep Medicine, P.A. physician;

Notwithstanding anything to the contrary, any Member who is the surviving spouse (with no legal separation or divorce proceedings having been commenced) of a physician who has been a shareholder of South Carolina ENT, Allergy & Sleep Medicine, P.A. seven and one-half (7.5) years and also a Member of this Company for at least 5 years prior to the death of the physician shall be entitled to continued Membership privileges for the duration of his or her life. However, these privileges shall be of a personal nature to the surviving spouse and not transferrable to the surviving spouse's children or a subsequent non-South Carolina ENT, Allergy & Sleep Medicine, P.A. member physician spouse upon her remarriage.

(b) The physician or physician spouse incurs a Total Disability (as defined in Section 6.6), unless the physician has been a shareholder of South Carolina ENT, Allergy & Sleep Medicine, P.A. for at least seven and one-half (7.5) years;

(c) The Member resigns in accordance with Section 6.9;

(d) The Member transfers the Member's entire Company interest to another person, who is not the South Carolina ENT, Allergy & Sleep Medicine, P.A. physician

spouse of the Member;

(e) The South Carolina ENT, Allergy & Sleep Medicine, P.A. physician and Member spouse divorce. In this event, the shares owned by the Member spouse shall be transferred to the physician in any settlement proceedings. Until a determination is made by a Court of competent jurisdiction, the non-physician spouse will lose the non-economic rights vested in this agreement with proxy vote transferring to the physician spouse.

(f) The Member, or Member's spouse, is no longer employed by or a shareholder of South Carolina ENT, Allergy & Sleep Medicine, P.A. This will not apply in the event the Member or physician spouse has been a shareholder of South Carolina ENT, Allergy & Sleep Medicine, P.A. for a period of at least seven and one-half (7.5) years.

(g) In the event the Member (who is not a physician with South Carolina ENT, Allergy & Sleep Medicine, P.A.) becomes incapacitated or incompetent and therefore unable to participate in Company business, the Member's non-economic right to participate in any Company business shall vest in the physician spouse for the duration of the disability.

6.3 LOSS OF VOTING RIGHTS, ETC., UPON DISSOCIATION

Except as otherwise expressly provided in this Agreement, a Member upon the Member's dissociation shall immediately lose any right of the Member to participate in the business and affairs of the Company by voting on Member Matters, by acting as an agent for the Company, by initiating a dispute in the Member's capacity as a Member, by having access to Company information in the Member's capacity as a Member or by any other means.

6.4 NO DISTRIBUTIONS, ETC., TO DISSOCIATED MEMBERS

A Member's dissociation shall not entitle the Member to receive any distribution of Company profits or other assets or to receive any payment for the Member's Company interest, unless said profits, assets or payment for the Member's interest are owed to the Member from a date which precedes the Member's date of dissociation.

6.5 DEFINITION OF TOTAL DISABILITY

A Member, if a physician or Member's physician spouse, shall be deemed to have incurred a Total Disability within the meaning of Section 6.2 (b) as defined by the shareholder's agreement with South Carolina ENT, Allergy and Sleep Medicine, P.A.

6.6 DETERMINATION OF TOTAL DISABILITY

Whether a Member, or Member's physician spouse, has incurred a Total Disability and the date on which the Member, or Member's physician spouse, has incurred a Total Disability

shall be determined by the vote of other Members holding a majority of Member votes (except the votes of the Member about whose disability they are voting). All such determinations shall be subject to review in arbitration under Section 19.

6.7 DEFINITION AND EFFECTIVE DATE OF RESIGNATION

For purposes of this Section 6, the resignation of a Member means the Member's voluntary written renunciation of the Member's right to participate in the business and internal affairs of the Company. A Member shall be deemed to have resigned from the Company within the meaning of this Section 6 on the effective date of the notice of resignation described in Section 6.9.

6.8 RIGHT OF MEMBERS TO RESIGN FROM COMPANY; NOTICE OF RESIGNATION

A Member may without liability resign as a Member of the Company by giving written notice of resignation to the other Members. The resignation shall be effective 60 days after all of the other Members have received the notice.

6.9 EXPULSION OF MEMBER

A Member may only be expelled by the Company and forced to accept a buy-out of his or her interest as valued in Section 5 herein if the Member:

(a) is a physician owning an interest in the Company and the physician withdraws from practice with South Carolina ENT, Allergy & Sleep Medicine, P.A. prior his or her seven and one-half (7.5) year anniversary of Membership in South Carolina ENT, Allergy & Sleep Medicine, P.A.; or,

(b) is the spouse member of a South Carolina ENT, Allergy & Sleep Medicine, P.A. physician who leaves the practice prior to the 7.5th anniversary of the Member spouse's Membership in South Carolina ENT, Allergy & Sleep Medicine, P.A.; or,

(c) fails to make a mandatory capital contribution to the Company, within six (6) weeks of written notice given thereof, for a project that is approved by the Membership for such contribution to be made.

SECTION 7 MANAGER'S DUTY OF CARE; RELATED MATTERS

7.1 DUTY OF CARE - GENERAL RULE

In participating in or handling any matter (an "Company matter") relating to the business and

internal affairs of the Company, the Manager shall use his reasonable best efforts to further the interests of the Company;

PROVIDED, that the Manager shall be liable for violations of their duty of care as Manager only as provided in Section 7.2.

7.2 PERSONAL LIABILITY OF MANAGERS FOR FAILURE TO USE ORDINARY PRUDENCE

The Manager shall be personally liable to the Company for money damages and other relief if, in participating in or handling any Company matter as Manager:

They fail to exercise the care that an ordinarily prudent person would exercise under similar circumstances; and

They are unable to rely on the defenses to liability set forth in Sections 7.4 and 7.5.

7.3 DUTY TO OBTAIN INFORMATION

Before making any decision or taking any action in an Company matter, the Manager in his capacity as Manager shall use their best efforts to obtain all relevant information.

7.4 NO MANAGER LIABILITY IF A MANAGER RELIES ON COMPANY INFORMATION, ON OTHER COMPANY MANAGERS, ETC.

No manager as a manager shall be personally liable to the Company or to the Members for any claim of violation of the manager's duties under this Section 7 to the extent that, with respect to the matter in question, the manager has acted in reasonable reliance on:

- (a) Company records;
- (b) Other Company managers, employees or officers of the Company;
- (c) Other persons whom, at the time of the action, the manager reasonably believed to be competent in the matter in question; or
- (d) Any provision of this Agreement.

7.5 NO MEMBER LIABILITY FOR ACTIONS TAKEN IN GOOD FAITH, ETC.

No Manager in the Manager's capacity as a manager shall be personally liable for a breach of any duty of the Manager under this Section 7 if, with respect to the matter in question, the Manager has acted:

(a) In good faith; and,

(b) In the reasonable belief that the action was in the best interest of the Company; and,

(c) With reasonable diligence.

7.6 WHO MAY CLAIM BREACH OF THIS SECTION; MEMBER VOTE NECESSARY TO MAKE CLAIM

Only the Company may make a claim against a Manager for a breach of a duty of the Manager under this Section 7. The Company shall make no such claim except upon the unanimous vote of Members entitled to vote (exclusive of the votes, if any, of the Manager potentially subject to the claim). Regardless of the claim made by the Membership, no such claim for breach of a Managerial duty shall be maintained against Robert Puchalski or Amy Puchalski.

7.7 STANDARD OF PROOF

Any claim of breach of this Section 7 shall be deemed to be proven if supported by a preponderance of the evidence.

7.8 INDEMNIFICATION OF MANAGERS FOR CLAIMS UNDER THIS SECTION

If any person makes a claim against a Manager for a violation of a duty of the Manager under this Section 7, the Company shall indemnify the Manager for reasonable expenses and for damages or settlement amounts reasonably incurred by the Manager in respect of the claim if Disinterested Members holding a majority of Member votes (exclusive of the Member votes, if any, of the Manager who is the subject of the claim) determine that in respect of the matter in question:

The Manager has exercised the care that an ordinarily prudent person would exercise under similar circumstances; or

The Manager is protected from liability under Sections 7.4 or 7.5.

7.9 ADVANCEMENT OF ARBITRATION AND LITIGATION EXPENSES

The Company shall advance arbitration and litigation expenses to a Manager for the defense of claims against the Manager for breaches of the Member's duty under this Section 7:

If Disinterested Members holding a majority of Member votes (excluding the Member votes,

if any, of the Manager who is the subject of the claim) determine that in respect of the relevant matter, it is probable that the Manager has exercised the care that an ordinarily prudent person would exercise under similar circumstances or that the Manager is protected from liability under Sections 7.4 or 7.5; and

If the Manager promises to return all such advances to the Company if the court, arbitrator or other tribunal deciding the claim finds otherwise.

7.10 LIABILITY INSURANCE FOR MANAGERS

Whether the Company shall maintain an insurance policy to cover Manager liabilities arising under this Section 7 shall be determined by the affirmative vote of Members holding a majority of Member votes.

SECTION 8 MANAGERS' DUTY OF LOYALTY; RELATED MATTERS

8.1 DUTY OF LOYALTY-GENERAL RULE

In matters relating to the business and affairs of the Company, Manager in his capacity as Manager shall act solely for the benefit of the Company and not for their personal benefit.

8.2 DUTY NOT TO COMPETE AGAINST THE COMPANY

In any geographical area where the Company is engaged in business or has definite plans (as evidenced by Company documents) to engage in business, a Manager shall not directly or indirectly compete against the Company while the Manager is a Manager and until the second anniversary of the date on which the Manager ceases to be a Manager; PROVIDED, that the Manager may compete against the Company with the advance consent of Disinterested Members holding a majority of Member votes (exclusive of the Member votes, if any, of the Manager who wishes to compete against the Company).

8.3 DUTIES IN DOING BUSINESS WITH COMPANY

No Manager shall engage directly or indirectly in any business arrangement or transaction with the Company on the Manager's own behalf or on behalf of a disclosed or undisclosed third party except:

After making full disclosure to the Company, and After receiving the advance consent of Disinterested Members holding a majority of Member votes (exclusive of the Member votes, if any, of the Manager wishing to engage in business with the Company).

The terms of any business engagement permitted under this Section 8.4 shall be arm's-length terms.

8.4 DUTIES WITH RESPECT TO COMPANY BUSINESS OPPORTUNITIES

If a Manager or Member learns (whether in the course of Company business or otherwise) of a business opportunity potentially valuable to the Company, the Manager or Member shall promptly disclose the opportunity to the Company and shall not exploit the opportunity for the Manager's or Member's personal benefit unless:

(a) Within 10 business days after receiving written, faxed or emailed notice of the opportunity, the Company fails to provide either an acceptance or rejection to the Member or Manager disclosing the opportunity; or

(b) After accepting it, the Company fails to exploit it with reasonable promptness and diligence.

Whether the Company shall accept the opportunity shall be decided in each case by the affirmative vote of Disinterested Members holding a majority of Member votes (exclusive of the Member votes, if any, of the Manager who wishes to exploit the opportunity).

8.5 DUTY TO AVOID IMPROPER PERSONAL BENEFITS

If any Manager directly or indirectly receives from any person a monetarily significant benefit, including cash, in connection with the Manager's activities as a Manager of the Company, the Manager shall promptly transfer this benefit to the Company; PROVIDED, that the Manager may retain the benefit if authorized to do so:

(a) By this Agreement; or

(b) By the advance consent of Disinterested Members holding a majority of Member votes (exclusive of the Member votes, if any, of the Manager in question).

8.6 DUTIES OF GOOD FAITH AND FAIR DEALING

In all Company matters, Manager in their capacity as Manager shall act in good faith and shall deal fairly with the Company and with the Members.

8.7 WHO MAY CLAIM BREACH OF THIS SECTION; MEMBER VOTE NECESSARY TO MAKE CLAIM

Only the Company may make a claim against a Manager for a breach of the Manager's duty under this Section 8. The Company shall make no such claim except upon the affirmative vote of Members holding a majority of Member votes (exclusive of the Member votes, if any, of the Manager potentially subject to the claim).

8.8 STANDARD OF PROOF

Any claim of breach of this Section 8 shall be deemed to be proven if supported by a preponderance of the evidence.

8.9 ADVANCEMENT OF LITIGATION EXPENSES

The Company shall advance arbitration and litigation expenses to a Manager for the defense of claims against the Manager for breaches of the Manager's duty under this Section 8:

If Disinterested Members holding a majority of Member votes (excluding the Member votes, if any, of the Manager who is the subject of the claim) determine that in respect of the relevant matter, it is probable that the Manager has complied with the provisions of this Section 8; and

If the Manager promises to return all such advances to the Company if the court, arbitrator or other tribunal deciding the claim finds otherwise.

SECTION 9 MANAGER'S DUTY OF OBEDIENCE

The Manager shall promptly comply with all reasonable instructions approved by Members holding a majority of Member votes.

SECTION 10 MANAGER'S DUTY OF CANDOR

The Manager shall deal honestly with the Company and, promptly after learning of any information (including information about their own health and personal affairs) that is material to the business and affairs of the Company, they shall disclose this information to the Company to the other Managers (or, if there is only one Manager, to the Members).

SECTION 11 MEMBERS' AND MANAGER'S DUTY OF CONFIDENTIALITY

11.1 MEMBERS' AND MANAGER'S DUTY TO MAINTAIN CONFIDENTIALITY OF COMPANY INFORMATION

The Members and Managers:

- (a) Shall maintain the confidentiality of Confidential Information (as defined in Section 11.2);
- (b) Except as required in conducting the business and internal affairs of the Company, shall not disclose Confidential Information to any third party;
- (c) Shall make copies of documents and other media containing Confidential Information only for the benefit of the Company;
- (d) Shall use Confidential Information only for the benefit of the Company; and
- (e) Promptly after ceasing to be Members and Managers (as the case may be), shall return to the Company all documents and other media containing Confidential Information.

11.2 DEFINITION OF CONFIDENTIAL INFORMATION

For purposes of this Agreement, Confidential Information means:

- (a) The terms of this Agreement; PROVIDED, that a Member may disclose these terms on a confidential basis to his or her spouse and professional advisers;
- (b) Information that the Company maintains in confidence;
- (c) Information that the Member or Manager knows to be proprietary to the Company;
- (d) Financial information relating to the Company and to the Members;
- (e) Information relating to Company marketing and business plans and strategies;
- (f) Information concerning the design and manufacture of Company products and concerning methods of providing Company services;
- (g) Information in Company personnel files and similar files relating to Company Members and employees;

- (b) Information entrusted to the Company in confidence by third parties;
- (i) Information reasonably designated by the Managers as Confidential Information; and
- (j) Information disclosed by Managers under Sections 11 and 12.

11.3 EXCEPTIONS TO DUTY OF CONFIDENTIALITY

Section 11.1 shall not apply to information:

- (a) Which the Member or Manager in question (the "Recipient") already lawfully possess at the time of its disclosure to the Member or Manager by the Company or which the Recipient lawfully obtains thereafter;
- (b) Which is already in the public domain at the time of its disclosure to the Recipient or which thereafter enters the public domain through no fault of the Member;
- (c) The disclosure of which is required by final order of a court of competent jurisdiction;
- (d) The disclosure of which is made on a confidential basis to an arbitrator in an arbitration under Section 19; and
- (e) Which the Company discloses without restriction to any person other than the Recipient.

11.4 BINDING EFFECT; TERMINATION

This Section 11 shall bind each Recipient even after the Recipient ceases to be a Member or Manager. Subject to any contrary arrangement with a third party, this Section 11 shall terminate upon the termination of the legal existence of the Company.

SECTION 12 MANAGER QUALIFICATIONS, RESPONSIBILITIES, ETC.

12.1 MANAGER QUALIFICATIONS

The Manager shall be a natural person and shall be a shareholder of South Carolina ENT, Allergy and Sleep Medicine, P.A.

12.2 MANAGER TITLES

In performing management functions for the Company, Managers may use the title "Manager" or such other title or titles (including, without limitation, the title "President" or "Chief Executive Officer") as the Members may determine from time to time by affirmative vote of Members holding a majority of Member votes.

12.3 MANAGER RESPONSIBILITIES

The Manager shall have general responsibility for managing the day to day business and internal affairs of the Company. The Manager shall have any additional responsibilities that are set forth in this Agreement or that the Members may determine from time to time by affirmative vote of Members holding a majority of Member votes. If the Managers responsibilities are expanded pursuant to this section, the Manager may request a reasonable management fee to be determined by the Members based upon a fair market valuation of the services performed.

12.4 MULTIPLE MANAGER VOTING- N/A

12.5 METHOD OF APPOINTING MANAGERS AFTER INITIAL MANAGER

Subsequent to the terms of 12.6 herein, after the formation of the Company, Managers shall be appointed by the affirmative vote of Members holding seventy-five (75%) percent of Member votes.

12.6 MANAGER'S TERMS OF OFFICE

The term of office of each Manager shall be indefinite, but shall terminate upon the earliest of the date of the Manager's (a) death, (b) resignation, (c) disability (as determined by vote of Members holding a majority of votes) or (d) removal as a Manager. Regardless of any information contained in this document to the contrary, Robert Puchalski, as Founding Manager, shall remain as Manager for the duration of his association with the company, even if he is no longer a shareholder with South Carolina ENT, Allergy & Sleep Medicine, P.A.

12.7 MANAGER RESIGNATIONS

A Manager may resign as a Manager upon giving 60 days' written notice to each Member. Except as otherwise provided in this Agreement, the Manager shall have no liability to the Company or to the other Members for any such resignation; PROVIDED, that the resignation shall not absolve the Manager from any liabilities arising before the resignation.

12.8 MANAGER REMOVALS

The Members may, without liability, remove a Manager, except Robert Puchalski if he is serving as Manager, at any time with or without cause by affirmative vote of Members holding seventy-five (75%) percent of Member votes. Robert Puchalski may only be removed by the Members if a unanimous vote is taken to remove them and only as a result of an intentionally illegal action by or on behalf of the Company or he attempts to secure or sign a contract or any other document purporting to sell any real property asset of the Company or

obligate the Company to purchase additional real property without obtaining prior approval of the Members.

12.9 NO MANAGER LIABILITY AS MANAGER FOR CLAIMS AGAINST COMPANY BY THIRD PARTIES

No Manager as such shall have personal liability for a claim against the Company by any third party. Managers shall be personally liable for their personal misconduct as provided by this Agreement and by applicable law.

12.10 MANAGERS' EXCLUSIVE RIGHT TO BIND COMPANY, ETC. Only the Manager shall have the following rights:

12.10.1 CONTRACTS

The Manager shall have the right to bind the Company in dealings with third parties.

12.10.2 BUSINESS DECISIONS

The Manager shall have the exclusive right to decide all Company matters relating to the business of the Company.

12.10.3 CONDUCT OF BUSINESS AND AFFAIRS OF COMPANY

The Manager shall have the right to conduct the day to day business and internal affairs of the Company. The Manager shall have the right to employ accountants, attorneys, property or construction managers and other persons whose employ would benefit the Company. The Manager shall also have the exclusive right to determine appropriate distributions to Members based on their Membership interest and the cash position of the Company at the time of the anticipated distribution. Matters outside the normal operations of Company business, such as selling, buying or mortgaging of any Company real property asset, shall be handled by the Manager but upon written approval and direction of Members holding seventy-five (75%) percent of the Member votes.

12.11 DUTY OF MANAGER TO INFORM MEMBERS

The Managers shall use reasonable efforts to inform the Members on an annual basis, or as requested by the Members, concerning the internal affairs of the Company and the condition of its business.

12.12 MANAGER VALUATION OF CONTRIBUTIONS, ETC.

Whenever, after the formation of the Company, the Company admits a person as a new Member of the Company, the Manager (and not the Members):

Shall promptly determine in dollars a value for the contribution of that person in exchange for the person's Membership or that there was no contribution;

Shall record this determination in the records of the Company; and

Shall promptly notify all Members concerning the determination. Thereafter, in the absence of fraud, the determination shall be conclusive as to the value of the contribution or as to whether there was a contribution.

12.12 INITIAL MANAGER

The Company shall be managed by Robert Puchalski as the initial Manager of the Company.

12.13 APPOINTMENT OF SUBSTITUTE MANAGER(S)

The Members shall have the right to appoint a substitute "Manager" or "Managers" to operate the Company and to conduct its business in the event of illness, disability, or death of the primary Manager, and his stated successor. The Members shall also have the right to nominate or elect an additional Manager for the purposes set forth herein. The "Manager" shall have the rights, powers, and obligations granted or created herein to the initial Managers, except as the Members shall otherwise restrict or limit in the document appointing the "Manager".

SECTION 13 MEMBERS' REPRESENTATIONS AND WARRANTIES

13.1 REPRESENTATIONS AND WARRANTIES BY INDIVIDUAL MEMBERS

Each Member represents and warrants in the Member's capacity as a Member as follows:

13.1.1 FREEDOM OF MEMBER TO ENTER INTO AGREEMENT, ETC.

The Member:

(a) Is legally free to enter into this Agreement and to perform the Member's obligations under the Agreement in accordance with its terms; and

(b) Is not prevented from doing so by order of any court or other governmental authority, by any agreement with a third party (including an employment agreement, non-competition agreement or non-disclosure agreement) or by any other cause.

13.1.2 GOODFAITH DISCLOSURE, ETC. IN NEGOTIATING TERMS OF AGREEMENT

In negotiating and entering into this Agreement, the Member has acted fairly and in good faith and has disclosed to the other Members all information reasonably likely to be relevant to them in determining whether to enter into it.

13.1.3 ACCESS TO LEGAL ADVICE, ETC.

Before accepting the terms of this Agreement, the Member has had every reasonable opportunity to consider these terms and to review them with the Member's personal attorney.

13.1.4 FREE ACCEPTANCE OF TERMS, ETC.

Each Member has accepted the terms of this Agreement knowingly and freely.

13.2 DUTY TO UPDATE

If, after a Member signs this Agreement, the Member discovers that any of the above representations were erroneous when made or have become erroneous, the Member shall immediately so advise the other Members.

SECTION 14 COMPANY RECORDS, BOOKS OF ACCOUNT, REPORTS TO MEMBERS, ETC.

14.1 RECORDS TO BE MAINTAINED BY Company

The Company shall maintain at its principal place of business:

- (a) A copy of its Articles and operating agreement and all amendments of these documents;
- (b) Copies of all of its federal and state tax returns;
- (c) A current list of the name and last known business, residence or mailing address of each of its Members;
- (d) True and complete information concerning:

The amount of cash and a description and statement of the value of any other property or services which each Member has contributed to the Company or which any Member has

agreed to contribute to it;

Any return by the Company to a Member of cash or other property contributed by the Member; and

(e) A record stating the date on which each Member became a Member (unless this date is evident from the content of the Agreement).

14.2 BOOKS OF ACCOUNT

The Company shall maintain books of account concerning the business and affairs of the Company that shall be:

(a) Accurate;

(b) Reasonably current; and

(c) In compliance with financial and other standards normally applicable to the records of business organizations generally similar to the Company in size and business activities,

14.3 REPORTS TO MEMBERS, ETC.

Through the provision of written financial reports or through other appropriate measures, the Company shall advise the Members on a regular basis concerning the financial and business condition of the Company.

SECTION 15 TAX PLANNING AND COMPLIANCE

15.1 IMPORTANCE TO COMPANY OF TAX MANAGEMENT AND COMPLIANCE

The parties acknowledge the importance to the Company and the Members of:

Competent tax planning for the Company and for the Members as Members; and

Full compliance by the Company and by the Members with federal and state tax requirements applicable to the Company and the Members in their capacity as such.

15.2 APPOINTMENT OF COMPANY TAX ADVISER

In connection with its formation and on a continuing basis thereafter, the Members hereby appoint as the Company's tax adviser the individual or firm of Sheheen, Hancock & Godwin.

The Manager may change the Company's tax adviser from time to time.

15.3 COOPERATION WITH COMPANY TAX ADVISER

The parties shall cooperate with the Company's tax adviser to the maximum reasonable extent to ensure adequate Company tax planning and compliance.

15.4 COMPANY TAX RETURNS

On a timely basis each year, the Company shall accurately complete and file its federal tax return and all applicable state returns.

15.5 COMPANY PROVISION OF TAX INFORMATION TO MEMBERS

As soon as reasonably possible after the close of each of its taxable years, the Company shall provide each Member with completed federal and state tax forms and with all other documents and information relevant to the federal and state tax liabilities of the Member as a Member of the Company; PROVIDED, that each Member shall have sole responsibility for preparing and timely filing the Member's federal and state tax returns and for paying the Member's taxes, and the Company shall have no responsibility or liability with respect to these matters.

15.6 COMPANY COMPUTATION AND RECORDING OF MEMBERS' CONTRIBUTIONS, CAPITAL ACCOUNTS AND ADJUSTED TAX BASES

The Company shall compute on a current basis and in accordance with applicable U.S. Treasury Department regulations the contributions and capital accounts of the Members and their adjusted tax bases in their Company interests.

The Company shall maintain current and accurate records concerning Members' contributions, capital accounts and adjusted tax bases and, promptly after the request of any Member, shall make these records available to the Member.

15.7 PLANNING OF INDIVIDUAL TRANSACTIONS

Before undertaking any major transaction involving the Company or any Member in the Member's capacity as a Member:

- (a) The Company and each affected Member shall consult with one or more partnership tax experts concerning the tax implications of the transaction; and
- (b) The Company and affected Members shall make any tax elections and shall take any other actions necessary or appropriate in the circumstances to ensure tax compliance and maximum lawful tax avoidance.

The issue of the fairness of the transaction to the Company and to the Members shall be subject to arbitration under Section 19.

15.8 TAX DISTRIBUTIONS

If any Member requires a distribution of all or any portion of the Member's share of Company profits in order to pay the Member's federal or other taxes on the Member's share of these profits for any taxable year, the Company shall, to the extent that its financial condition reasonably permits, make this distribution to the Member on a timely basis; PROVIDED, that as a condition for the distribution, the Company may, under reasonable conditions of confidentiality, require the Member to disclose to the Company's tax adviser relevant information concerning the Member's tax and financial affairs.

15.9 TAX MATTERS PARTNER

Robert Puchalski shall serve as the Company's tax matters partner for purposes of unified administrative and judicial federal tax proceedings under Internal Revenue Code section 6231 (a) (1).

SECTION 16 COMPANY DISSOLUTION, WINDING-UP AND LIQUIDATION; LIQUIDATION DISTRIBUTIONS

16.1 DEFINITION OF COMPANY DISSOLUTION, ETC.

For purposes of this Agreement, the following terms shall have the following meanings:

16.1.1 DISSOLUTION

The dissolution of the Company shall mean the cessation of its normal business activities and the beginning of the process of winding up its business and internal affairs and of liquidating it.

16.1.2 WINDING-UP

The winding-up of the Company shall mean the process of concluding its existing business activities and preparing for its liquidation.

16.1.3 LIQUIDATION

The liquidation of the Company shall mean the sale or other disposition of its assets and the distribution of its assets (or the distribution of the proceeds of the sale or other disposition of its assets) to its creditors and to the Members.

16.2 EVENTS CAUSING DISSOLUTION

The Company shall be dissolved:

(a) Upon the affirmative vote of Members holding seventy-five (75%) percent of Member votes; PROVIDED, that upon any such dissolution, Members holding less than the required number of votes may seek damages and other relief in arbitration under Section 19 for any injury unfairly resulting to them or likely to result from the dissolution;

(b) Upon the issuance of an order of dissolution by a court or by the Secretary of State; or

(c) Upon the issuance of an order of dissolution by an arbitrator under Section 19.

16.3 EFFECTIVE DATE OF DISSOLUTION OF COMPANY BY VOTE OF MEMBERS

The dissolution of an Company by vote of the Members shall be effective on the date specified in that vote or, if the Members do not specify a date, then on the date of completion of the vote.

16.4 DETERMINATION OF DATE FOR DELIVERY OF CERTIFICATE OF CANCELLATION AND FOR EFFECTIVE DATE OF CERTIFICATE

The date on which the Company shall deliver a certificate of cancellation to the Secretary of State for filing and the effective date of this certificate shall be determined by the affirmative vote of Members holding seventy-five (75%) percent of the Member votes.

16.5 CESSATION OF COMPANY'S LEGAL EXISTENCE

Unless a court or administrative authority duly and finally determines otherwise, the Company shall cease to exist as a legal entity on the effective date set forth in the certificate of cancellation.

16.6 WINDING-UP OF COMPANY

After the Company is dissolved, the person or persons responsible for winding it up shall as expeditiously as reasonably possible:

(a) Wind up its business and internal affairs; and

(b) Cause its liquidation.

During the wind-up period, the Company shall accept no new business except to the extent necessary to dispose of existing inventory.

16.7 COMPLIANCE WITH THE LAWS OF THIS STATE APPLICABLE TO ENTITY DISSOLUTIONS AND LIQUIDATION

The Company shall make no distribution to Members or others in connection with its liquidation until it has complied with all applicable laws and regulations of this State (including tax laws and regulations) relating to its dissolution and liquidation.

16.8 DISPOSITION OF KNOWN AND UNKNOWN CLAIMS AGAINST COMPANY

Promptly after the dissolution of the Company, the Company shall take all reasonable measures under the laws of this State to dispose of (and, to the extent reasonable, to bar) known and unknown claims against the Company.

16.9 DISTRIBUTIONS UPON COMPANY LIQUIDATION

Upon completion of the Company's winding-up but, if reasonably possible, on or before the date of termination of the Company's legal existence, the Company shall (subject to any applicable provisions of section 704 (b) of the Internal Revenue Code and other applicable federal and state law) distribute its assets as follows:

First, the Company shall pay (or shall make adequate provision to pay) its creditors.

Second, the Company shall distribute its assets to Members in satisfaction of its liabilities for distributions to them under Section 4.

Third, the Company shall distribute its assets to Members for the return of their contributions.

Fourth, the Company shall distribute its assets to Members in accordance with their right to share in distributions of its assets under Section 4.

16.10 DUTY TO CONSULT TAX ADVISER IN CONNECTION WITH COMPANY DISSOLUTIONS, ETC.

Before the Members begin the wind-up and liquidation of the Company, the Company and the Members shall consult with their respective tax advisers and shall structure and implement the liquidation in a manner that is as fair as possible to each Member from a tax viewpoint.

SECTION 17 ASSIGNMENTS OF COMPANY INTERESTS

Except as otherwise provided in this Agreement:

17.1 DEFINITION OF ASSIGNMENT

For purposes of this Agreement, an assignment means a transfer by a Member of all or any portion of the Member's Company interest to another person.

17.2 NO ASSIGNEE RIGHT TO PARTICIPATE IN THE MANAGEMENT OF THE COMPANY

No person receiving an Assignment shall, solely by reason of the Assignment, have any right to participate in the business and affairs of the Company by any means, including participation by voting, by access to Company information, or by initiating lawsuits or arbitrations; PROVIDED, that, to the extent permissible under the Company Act, an assignee may initiate an arbitration on behalf of the Company in accordance with the provisions of the Company Act.

17.3 NO ASSIGNEE LIABILITY FOR CERTAIN OBLIGATIONS OF ASSIGNOR

No assignee shall be liable for obligations of an assignor of which the assignee was unaware and which the assignee could not ascertain from this Agreement.

17.4 CONTINUING LIABILITY OF ASSIGNOR FOR CERTAIN OBLIGATIONS

Notwithstanding an assignor's making an Assignment, the assignor shall remain liable for the assignor's obligations to make contribution to the Company and to return Unlawful Distributions received by the assignor.

17.5 NO ASSIGNEE LIABILITY FOR COMPANY OBLIGATIONS

No assignee as such shall be liable for any obligations of the Company solely by reason of the Assignment.

SECTION 18 TERM OF AGREEMENT; TERMINATION; SURVIVAL OF CERTAIN RIGHTS AND DUTIES, ETC.

18.1 TERM

Subject to the provision of Sections 18.2 through 18.4, the term of this Agreement shall begin on the Effective Date (as defined in Section 1.1) and, unless earlier terminated by the parties, shall terminate:

(a) If the Company is terminated by vote of the Members on the effective date of the certificate of cancellation of the Company's articles of organization;

(b) If the Company is terminated by decree of a duly authorized judicial or administrative authority, on the date of termination of the Company's existence as determined by that authority; or,

(c) If no clear date is established under Sections 18.1 (a) or (b) and if the Members can agree on no such date, by determination of an arbitrator under Section 19.

18.2 SURVIVAL OF ACCRUED RIGHTS, ETC.

Rights, duties and liabilities accrued by the parties under this Agreement before its termination shall continue in full force and effect after its termination.

18.3 ARBITRATION OF MATTERS RELATING TO COMPANY'S WINDING-UP, ETC.

Notwithstanding the termination of this Agreement, any party may, after that termination, initiate an arbitration under Article 19 to determine and enforce rights and duties of the party relating to:

(a) Matter arising before and during the Company's winding up;

(b) The Company's liquidation; and

(c) Matters arising after the cancellation of the Company's Articles.

SECTION 19 ARBITRATION OF COMPANY DISPUTES

19.1 MANDATORY ARBITRATION OF CERTAIN DISPUTED MATTERS

Any dispute between or among the parties relating to Arbitrable Matters (as defined in Section 19.2) shall be exclusively and finally resolved by arbitration by a single arbitrator (the "Arbitrator") without recourse to any court.

19.2 DEFINITION OF ARBITRABLE MATTER

Arbitrable Matters shall include only the following types of matters:

How to construe and enforce the provisions of this Section (including any matter concerning the scope of these provisions);

Whether the purchase price or the other terms of purchase of a Member's Company interest pursuant to the terms of this Agreement are fair to the Company and to the Members;

Any claim by a Member in the Member's capacity as a Member against any other Member in that other Member's capacity as a Member;

Whether any action by the Company or by the Members is (a) contrary to this Agreement or (b) seriously unfair to any Member;

Whether the expulsion of a Member under Section 6.9 is fair;

Whether a vote by majority Members concerning the Company's dissolution is fair to minority Members; and

Any other matter that, in the Arbitrator's view, is appropriate for decision under this Section.

19.3 EXCLUSIONS FROM DEFINITION OF ARBITRABLE MATTER

Arbitrable Matters shall not include:

(a) Routine business matters of the Company;

(b) Matters requiring urgent judicial relief; or

(c) Matters involving the enforcement of orders under this Section 19.

19.4 RULES GOVERNING ARBITRATION

Except as otherwise provided in this Section, any arbitration (an "Arbitration") under this section shall be governed by the Rules of Commercial Arbitration of the American Arbitration Association ("AAA").

19.5 NOTICE OF ARBITRATION

Any Member may initiate an Arbitration of any Arbitrable Matter. The initiating Member shall do so by providing written notice of the Arbitration to the other Members. The notice shall bear a current date, shall state the name of the initiating Member and shall briefly state the matter to be arbitrated.

19.6 SELECTION OF ARBITRATOR

If, within 15 business days after all the parties entitle to notice of an Arbitration have received that notice, the Members have not agreed among themselves as to the identity of the Arbitrator or the site of the Arbitration, the Company shall immediately refer these matters for resolution by the AAA office located in the city of Camden, South Carolina, or the AAA office nearest thereto. That office may resolve these matters without liability and in its sole discretion.

19.7 NO APPEAL, ETC.

No Member shall appeal to any court an order of an Arbitrator under this Section 19. The Company or any Member may enter any such order in any court of competent jurisdiction.

19.8 ALLOCATIONS OF COSTS, FEES, ETC.

The Arbitrator may allocate among the Members the costs, fees and other expenses relating to an Arbitration in any manner that the Arbitrator shall determine to be appropriate in his or her absolute discretion; PROVIDED, that if the Arbitrator determines that a party has initiated an Arbitration without a reasonable basis for doing so, the Arbitrator shall assess against that party the costs of the other parties relating to the Arbitration, including the reasonable attorneys' fees.

19.9 AWARDING OF LITIGATION COSTS TO PREVAILING PARTY

If, in a suit in law or equity, any party seeks judicial review of any issue arising in an Arbitration under this Section, an Arbitrator under this Section may allocate to the losing party in that suit all costs reasonably incurred by the prevailing party.

SECTION 20 GENERAL PROVISIONS

20.1 ENTIRE AGREEMENT

This Agreement contains the entire agreement among the parties concerning its subject matter and replaces all other agreements among them, whether written or oral, concerning this subject matter.

20.2 AMENDMENTS

No amendment of this Agreement shall be valid unless set forth in a writing signed by all parties.

20.3 INCORPORATION OF EXHIBITS

All exhibits identified in the Agreement as exhibits to the Agreement are hereby incorporated into the Agreement and made integral parts of it.

20.4 GOVERNING LAW

This Agreement shall be governed by and construed in accordance with the domestic laws of the State of South Carolina without giving effect to any choice-of-law or conflict-of-law provision or rule (whether of the State of South Carolina or of any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of South Carolina.

20.5 FORUM FOR LITIGATION; ACCEPTANCE OF PERSONAL JURISDICTION

If any party sues another party in a suit under or relating to this Agreement, the party bringing the suit shall do so in the courts of the State of South Carolina. The parties hereby irrevocably accept the personal jurisdiction of those courts in any such suit.

20.6 ASSIGNMENTS AND DELEGATIONS

Excepting powers previously granted to the Manager herein, no party shall assign any of its rights or delegate any of its duties under this Agreement to any third party except with the consent of the other parties to the Agreement, which consent these other parties shall not unreasonably withhold.

20.7 CAPTIONS

All captions in this Agreement are for convenience only and shall be deemed irrelevant in construing any provision of the Agreement.

20.8 NOTICES

All notices under this Agreement shall be in writing and shall be delivered to a party at the party's address as stated on the first page of this Agreement. A party may change this address upon reasonable notice to the other parties. Notices provided under this Agreement shall be deemed to be received when actually received.

20.9 MEANING AND CONSTRUCTION OF "INCLUDING" AND "PERSON"

The terms "including" and "includes" as used in this Agreement shall denote partial definitions. The term "person" as used in this Agreement shall mean a natural person or an entity as the context shall require.

20.10 NUMBER AND GENDER

As the context shall require:

The use of the singular in this Agreement shall denote the plural and vice versa; and
The use of a particular gender shall denote another gender.

20.11 WAIVERS

No delay of or omission by a party in the exercise of any right, power or remedy accruing to the party as a result of any breach or default by another party under this Agreement:

(a) Shall impair any such right, power or remedy accruing to the party;

(b) Shall be construed as a waiver of or acquiescence by the party in any such breach or default or of any similar breach or default occurring later.

No waiver by a party of any single breach or default under this Agreement shall be

construed as a waiver by the party of any other breach or default occurring before or after that waiver.

20.12 SEPARABILITY OF PROVISIONS

Each provision of this Agreement (a "Provision") shall be deemed separable. If any (a) Provision or (b) the application of any Provision to any person or circumstance shall be held invalid or unenforceable in any jurisdiction, the Provision shall be ineffective:

(a) Only in that jurisdiction;

(b) Only to the extent that it has been expressly held to be invalid or unenforceable in that jurisdiction; and

(c) Without invalidating any other provision of the Agreement or the application of the Provision itself to persons or circumstances other than those to which it was held invalid or unenforceable in the jurisdiction in question.

20.13 COUNTERPARTS

This Agreement may be executed in any number of counterparts and by different parties to this Agreement in separate counterparts. Each of these counterparts when so executed shall be deemed to be an original and all such counterparts taken together shall constitute one and the same agreement.

In witness of their acceptance of the above terms and conditions, the parties, in their capacities as Members and Manager, by themselves or by their duly authorized representatives, have duly signed and dated this Agreement as follows:

 Oct. 9, 2009
Amy Puchalski, Member

 09/30/09, 2009
Jamie Curley, Member

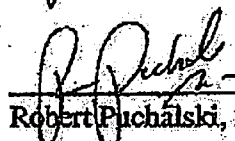
 10/8/09, 2009
Robert Puchalski, Manager of SCENT Land Holdings, LLC

EXHIBIT "A"

<u>Member</u>	<u>Contribution</u>	<u>Fair Market Value</u>
Amy Fuchalski	Building lots in Darlington/Richland Co.	\$110,000.00
Jamie Curley		

Exhibit 3

Theresa Williams

From: Theresa Williams
Sent: Wednesday, March 17, 2010 9:10 AM
To: alpuchalski@gmail.com; jamie curley
Cc: Robert Puchalski
Subject: SCENT Land Holdings, LLC
Attachments: Wiring Instructions.doc
Importance: High

Please allow this email to serve as notice of the mandatory two-stage capital call of the Members of SCENT Land Holdings, LLC (the "Company") as approved at the March 12, 2010 Member meeting held by teleconference. As approved, each Member will need to immediately contribute \$170,000 to the Company and then a second payment by each Member of \$465,000 will be due by April 19, 2010.

Recognizing that the Members will need to make arrangements to make the first contribution that is immediately due we would suggest that each of you make your first contribution in the next 10 days. As was relayed in the meeting, the Company's builder is owed this amount and we need to be prompt in getting him paid.

Wiring Instructions

Bank: First Palmetto Savings Bank,
F.S.B.
407 Dekalb Street
Camden, SC 29020

Fed ID #: 570961408

Routing or ABA No: 253271916

Bank Contact: Walter Long
803-424-5023

From: Theresa Williams
Sent: Thursday, March 11, 2010 11:57 AM
To: jamie.curley; alpuchalski@gmail.com
Cc: Robert Puchalski; Ed White
Subject: NOTICE OF SPECIAL MEETING OF THE MEMBERS03052010
Attachments: NOTICE OF SPECIAL MEETING OF THE MEMBERS03052010.docx
Importance: High

Please see the attached special meeting notice. Thanks, Theresa

**NOTICE OF SPECIAL MEETING OF THE MEMBERS
OF
SCENT LAND HOLDINGS, LLC**

A Special Meeting of the Members of SCENT Land Holdings, LLC (the "Company") will be held on Friday, March 12, 2010 by teleconference, at 10:00am. The dial in number for the meeting is 888-543-4442, passcode 803-255-9559.

It is expected that the following items will be discussed and that action, if deemed appropriate, will be taken with respect to them:

1. Status of the building being constructed on Hwy. 601, Lugoff, SC.
2. The Mechanics Lien on the building and the situation that exists where the contractor and his subcontractors have not been paid for their work and have communicated to the Company that they are in a negative cash flow position as a result of their work on the building.
3. Damage to the contractor, the subcontractors and the Company if the contractor remains unpaid.
4. A capital call and other steps to finance and complete the building.

Date: March 11, 2010
Lugoff, South Carolina

Robert Puchalski, M.D.
Manager
SCENT Land Holdings, LLC

Theresa Williams

From: Jamie [curleyjamie@hotmail.com]
Sent: Thursday, March 11, 2010 12:47 PM
To: Theresa Williams
Cc: <alpuchalski@gmail.com>; Robert Puchalski; Ed White
Subject: Re: NOTICE OF SPECIAL MEETING OF THE MEMBERS03052010

I will also be able to call in. I have over a 2 hour window, but will have to get the girls at 1200.

Thanks,
Jamie

Sent from my iPhone

On Mar 11, 2010, at 11:56 AM, "Theresa Williams" <twilliams@southcarolinaent.com> wrote:

> Please see the attached special meeting notice. Thanks, Theresa
>
> <NOTICE OF SPECIAL MEETING OF THE MEMBERS03052010.docx>

**NOTICE OF SPECIAL MEETING OF THE MEMBERS
OF
SCENT LAND HOLDINGS, LLC**

A Special Meeting of the Members of SCENT Land Holdings, LLC (the "Company") will be held on Monday, April 19, 2010 by teleconference, at 12:00 noon. The dial in number for the meeting is 888-543-4442, passcode 803-255-9559.

It is expected that the following items will be discussed and that action, if deemed appropriate, will be taken with respect to them:

1. Status of the building being constructed on Hwy. 601, Lugoff, SC.
2. Failure of Jamie Curley to pay the first installment of the capital call approved on March 12, 2010 and the expulsion of her interest.
3. Cancelling the second installment of the capital call approved on March 12, 2010 and moving forward with permanent financing of the building.

Date: April 16, 2010

Lugoff, South Carolina

Robert Puchalski, M.D.
Manager
SCENT Land Holdings, LLC

Theresa Williams

From: Robert Puchalski
Sent: Friday, March 26, 2010 5:41 PM
To: Jamie Curley
Cc: Theresa Williams; Amy Puchalski
Subject: RE: FW: SCENT Land Holdings

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Jamie, I followed the company documents and complied with the company requirements and I believe is a valid vote for the members to contribute more capital to the company. Why do you believe it was improperly issued?

Robert Puchalski, MD
Manager
SCENT Land Holdings, LLC

From: Jamie Curley [mailto:jamiedyce@me.com]
Sent: Thursday, March 25, 2010 11:57 AM
To: Robert Puchalski
Cc: ORVILLE
Subject: Re: FW: SCENT Land Holdings

I believe the capital call has been improperly issued and do not intend to honor it.

On Wednesday, March 24, 2010, at 05:53PM, "Robert Puchalski" <rpuchalski@southcarolinaent.com> wrote:

>

Thank you, Amy. This is a significant step toward rebuilding these damaged relationships. Jamie, has your capital call contribution been wired?

From: Charlie Lucas [mailto:LucasBuilt@sc.rr.com]
Sent: Wednesday, March 24, 2010 4:20 PM
To: Scotty Mills; Paul Scott; Mike Verzwylt; Matt Bridges; Gregg Corley; Faust, Delmar [Stock]; Everett H. Reynolds; Eddie Knight; cummingselectric@aol.com; Craig Otto; Charlie Smoak; Bonnie O'Connor; billy sturkie; Ben Easton
Cc: Robert Puchalski; Theresa Williams; Tammy Szymanski
Subject: Fw: SCENT Land Holdings

We received a payment towards the balance this afternoon and will be sending partial payments out tomorrow. We hope to get another payment shortly.

Thank you for your patients,

Charlie

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

From: Charlie Lucas

To: Wayne Surret ; Paul Scott ; Mike Verzyvelt ; Matt Bridges ; Kregg Corley ; Faust, Delmar [Stock] ; Everett H Reynolds ; Eddie Knight ; cummingselectric@aol.com ; Craig Otto ; Bonnie O'Connor ; billy sturkie ; smill@pasco-inc.com ; easton1499@aol.com ; acesmoak@windstream.net

Sent: Wednesday, March 17, 2010 1:47 PM

Subject: Fw: SCENT Land Holdings

Thanks,

Charlie

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

From: Charlie Lucas

To: Robert Puchalski

Sent: Wednesday, March 17, 2010 1:36 PM

Subject: Re: SCENT Land Holdings

Dr. Puchalski I appreciate the email and will forward to our subcontractors/suppliers. We do hope that we can receive some payment soon to help them with their's/our cash flow.

Thanks,

Charlie

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

From: Robert Puchalski

To: Charlie Lucas

Cc: Theresa Williams ; Ed White

Sent: Tuesday, March 16, 2010 7:21 PM

Subject: SCENT Land Holdings

Charlie:

SCENT Land Holdings, LLC has approved a mandatory capital call from its members to complete the construction of the building. We hope the money to complete the project will be available in approximately six weeks. The Company is still going to push for a closing on permanent financing prior to that time, but we cannot guarantee the closing will occur prior to the six week period. In the meantime, SCENT Land Holdings, LLC will attempt to secure short term financing from non-bank sources to meet the financial commitment we currently have with you.

We have not had any issues with your work and appreciate all your patience over the last few months. SCENT Land Holdings, LLC intends to honor its financial commitments to you and, on behalf of the Company, I want to apologize for the delays in the closing of the permanent loan. SCENT Land Holdings is not experiencing any difficulty getting a loan due to financial reasons. Quite the contrary, First Palmetto Bank has been prepared to close on the property on multiple occasions. The holdup is that SCENT Land Holdings, LLC is working through some internal issues that have hindered the closing.

Robert Puchalski, MD
Manager
SCENT Land Holdings, LLC

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Gus Dixon

From: Ed White
Sent: Tuesday, March 02, 2010 9:02 AM
To: Gus Dixon
Subject: [REDACTED]
Attachments: [REDACTED]
[REDACTED]

From: Robert Puchalski [mailto:rpuchalski@southcarolinaent.com]
Sent: Monday, March 01, 2010 10:07 PM
To: Dr Dyce; curleyjamie@hotmail.com; 'Amy Puchalski'
Cc: Theresa Williams
Subject: FW: SC ENT Lugoff invoice

This is what is owed to Charlie Lucas by SCENT Land Holdings to date (365 K). I am again pleading with you to please have Jamie sign the acceptance form for SCENT land Holdings financial data tonight (sent in previous email) or via fax tomorrow; submit it to Theresa tomorrow; confidentially take the SCENT Land Holdings financial data with you tomorrow (not a lot of transactions); review the financial data and the closing documents tomorrow, overnight, and throughout the day Wednesday; review it with Bruce; feel comfortable with it; and close on the building this Wednesday at 4 PM. This is the fourth scheduled closing. Please, I plead with all of you, for the sake of the building, to put aside other issues and act in the best interest of the corporation. I am begging you.

Manager
SCENT Land Holdings, LLC

From: Charlie Lucas [mailto:LucasBuilt@sc.rr.com]
Sent: Monday, March 01, 2010 7:08 PM
To: Theresa Williams; Walter Long
Cc: Robert Puchalski
Subject: SC ENT Lugoff invoice

Please call me if you have any questions.

3/2/2010

Thanks,
Charlie.

3/2/2010

Exhibit 4

Robert Puchalski

From: Chad Gunnlaugsson [cgunnlaugsson@southcarolinaent.com]
Sent: Thursday, May 03, 2007 8:31 AM
To: Robert Puchalski
Subject: RE: SC ENT - Elevation

Looks damn nice. Is there a butler?

*Chad Gunnlaugsson, M.D.
South Carolina ENT & Facial Plastic Surgery*



www.southcarolinaent.com

From: Robert Puchalski [mailto:rpuchalski@southcarolinaent.com]
Sent: Thursday, May 03, 2007 7:14 AM
To: 'Dr. Dyce'; 'Dr. G'; 'Vidrine, David'
Subject: FW: SC ENT - Elevation

Any thoughts?

From: Kevin Almers [mailto:kalmers@gilbertconstruction.com]
Sent: Wednesday, May 02, 2007 6:42 AM
To: rpuchalski@southcarolinaent.com
Cc: 'Theresa Williams'
Subject: SC ENT - Elevation

Bob,

I know everyone is ready to see something other than a floor plan. I have attached an elevation "sketch" of your new facility to begin a dialogue on the "look."

Feedback and comments are strongly encouraged. Thanks.

Kevin J. Almers | COLLINS & ASSOCIATES ARCHITECTURE
615 South Coit Street | Florence, SC 29501
PO Box 3009 | Florence, SC 29502
direct 843.292.9606 ext. 618 | fax 843.669.9109 | mobile 843.687.7710

Robert Puchalski

From: Chad Gunnlaugsson [cgunnlaugsson@southcarolinaent.com]
Sent: Thursday, May 03, 2007 9:07 AM
To: Robert Puchalski
Subject: RE: SC ENT - Revisions and Other

Looks great. Big time office.

*Chad Gunnlaugsson, M.D.
South Carolina ENT & Facial Plastic Surgery*



www.southcarolinaent.com

From: Robert Puchalski [mailto:rpuchalski@southcarolinaent.com]
Sent: Thursday, May 03, 2007 7:13 AM
To: 'Dr. Dyce'; 'Dr. G'
Subject: FW: SC ENT - Revisions and Other
Importance: High

What do you guys think?

From: Kevin Almers [mailto:kalmers@gilbertconstruction.com]
Sent: Wednesday, May 02, 2007 5:30 AM
To: rpuchalski@southcarolinaent.com
Cc: 'Theresa Williams'
Subject: RE: SC ENT - Revisions and Other
Importance: High

They are attached – dated 05/02/07.

Also, please advise if we can release Nesbitt on the topo survey of the site. Thanks.

Kevin J. Almers | C.E.L.I.N.S. & ASSOCIATES, INC. ARCHITECTURE

From: Robert Puchalski [mailto:rpuchalski@southcarolinaent.com]
Sent: Tuesday, May 01, 2007 10:45 PM
To: 'Kevin Almers'

Cc: 'Theresa Williams'
Subject: RE: SC ENT - Revisions and Other

Do we have any new scetches?

From: Kevin Almers [<mailto:kalmers@gilbertconstruction.com>]
Sent: Tuesday, April 24, 2007 5:13 PM
To: Robert Puchalski
Cc: odyce@southcarolinaent.com; Theresa Williams; Scott Collins
Subject: SC ENT - Revisions and Other
Importance: High

Bob,

Attached are the revised site plan and schematic design floor plans dated 04/24/2007. These are for your review and comment. We have incorporated many of your comments from our conversation on Saturday. We hope that this is getting closer to what you have envisioned for your new facility. Please note that the area for each floor is currently 3,150 SF. I am available to discuss should you have any questions or comments.

Other item:

We received a quote from David Nesbitt (Nesbitt Surveying) to provide the necessary topographic, boundary and utility survey of your site. His fee for this survey is \$900.00. Please advise if this is acceptable. Thanks.

Regards,

Kevin J. Almers | COLLINS & ASSOCIATES ARCHITECTURE
615 South Coit Street | Florence, SC 29501
PO Box 3009 | Florence, SC 29502
direct: 843.292.9606 ext. 618 | fax: 843.669.9109 | mobile: 843.687.7710

Exhibit 5

Theresa what time can we pick up the check tomorrow?

Thanks

Charlie.

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

From: Theresa Williams

To: 'Charlie Lucas'

Cc: Robert Puchalski; 'Walter Long'

Sent: Monday, March 08, 2010 1:11 PM

Subject: RE: SC ENT Lugoff invoices

Charlie-

I assure you that we are doing everything we can to get a closing on this property. I appreciate your patience and will contact you as soon as I can.

Thanks, Theresa

From: Charlie Lucas [mailto:LucasBuilt@sc.rr.com]

Sent: Monday, March 08, 2010 10:26 AM

To: Theresa Williams

Cc: Tammy Szymanski; Robert Puchalski

Subject: Re: SC ENT Lugoff invoices

Theresa we appreciate the payment that you are giving us on Thursday but can you please give us a proposed date on the closing. we are approaching time limitations on vendors/subcontractors that may place a lien on the property due to non payment. If liens are put in place this will probably affect the closing.

Thanks,

Charlie

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

From: Theresa Williams

To: 'Charlie Lucas'

Sent: Friday, March 05, 2010 3:17 PM

Subject: RE: SC ENT Lugoff invoices

Charlie- I spoke to Dr. P and we will have \$100k for you next Thursday and. Please know that we are doing everything that we can do to get you the rest of the balance and a closing scheduled.

Thanks for your patience.

Theresa

From: Charlie Lucas [mailto:LucasBuilt@sc.rr.com]

Sent: Friday, March 05, 2010 12:22 PM

To: Theresa Williams

Cc: Robert Puchalski
Subject: Fw: SC ENT Lugoff invoices
Importance: High

Theresa did you talk with Dr. Puchalski yesterday afternoon? Our company and some of the subcontractors/suppliers cash flow is negative.

Thanks,
Charlie:

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

From: Charlie Lucas
To: Theresa Williams
Cc: Robert Puchalski
Sent: Thursday, March 04, 2010 4:19 PM
Subject: Fw: SC ENT Lugoff invoices

Theresa please update us on our past due and current payment; our subcontractors and our company are loosing our relationships with our suppliers.

Thankyou,
Charlie

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

From: Robert Puchalski
To: 'Charlie Lucas'
Cc: 'Dr Dyce'; 'Jamie'; alpuchalski@gmail.com; 'Theresa Williams'
Sent: Wednesday, March 03, 2010 1:22 PM
Subject: RE: SC ENT Lugoff invoices

Charlie:

I assure you that we are doing everything in our power to facilitate the closing today. Your workmanship has been exceptional and I appreciate all of your patience with us.

From: Charlie Lucas [<mailto:LucasBuilt@sc.rr.com>]
Sent: Wednesday, March 03, 2010 9:58 AM
To: Robert Puchalski
Subject: SC ENT Lugoff invoices

Dr. Puchalski we are hopeful that the closing will be completed today as scheduled. We have had and hope to continue a very good working relationship. We are just giving you our concerns over the delays on the last two invoices which can (and has on some accounts) caused burdens on our vendors and subcontractors. Our vendors and subcontractors rely on timely payment in order to serve our customers with the best pricing and scheduling that we can offer. I hope that you are pleased with our workmanship, our strive for a quality product, and meeting your occupancy requirements.

If for any reason you are not fully satisfied with our efforts please let us know.



Thank you,
Charlie Lucas

Theresa Williams

From: Charlie Lucas [LucasBuilt@sc.rr.com]
Sent: Tuesday, July 06, 2010 2:00 PM
To: Theresa Williams
Cc: Tammy Szymanski
Subject: SC ENT security guard

Theresa we paid \$ 1,035.00 for approx 70 hours of unarmed on site security when we had the huge lumber delivery in December. Their rates are around \$15.00 per hour unarmed and \$25.00 per hour armed. Probably would have them on site from 6:00 pm til 7:00 am.

I called Roby and told him to put up a temporary wood barrier around the HVAC units that may provide a little security.

Thanks
Charlie

Exhibit 6

**ACKNOWLEDGEMENT OF RECEIPT
OF CONFIDENTIAL INFORMATION**

I, Jamie Curley, a member of SCENT Land Holdings, LLC acknowledge the receipt of copies of SCENT Land Holding account information (Check Detail and Deposit Detail) from SCENT Land Holdings, LLC and my responsibility under Section 11 of the Operating Agreement, a copy of which is attached to this acknowledgement.

Date

Jamie Curley

Theresa Williams

From: Theresa Williams [twilliams@southcarolinaent.com]
Sent: Wednesday, March 03, 2010 1:16 PM
To: 'Dr Dyce'
Cc: 'jamiedyce@me.com'
Subject: RE: Meeting
Attachments: modifiedACKNOWLEDGEMENT OF RECEIPT.doc
Importance: High

Dr. Dyce-

I have made your requested changes. I will be happy to bring these to you if needed.

Thanks, Theresa

From: Dr Dyce [mailto:drdyce@southcarolinaent.com]
Sent: Wednesday, March 03, 2010 12:12 PM
To: Theresa Williams
Cc: jamiedyce@me.com
Subject: RE: Meeting

Theresa:

Thanks for your email and the proposed receipt. In order to avoid any possible misunderstandings or mischaracterizations, please either strike the word "confidential" in the second line of the proposed receipt and substitute "under" for "to SCENT Land Holdings, LLC, pursuant to" beginning at the end of that line. Better yet, please make these changes and list the information being provided. Jamie will be happy to execute either form upon receipt of the information. I can't tell from your email whether the information is not complete, but it is a start. I need to receive all of the requested information.

As I told Bob earlier, I am not in a position to consider attending any closing until we have received all of the requested information and he has answered to my satisfactions several important business questions which I posed to him regarding the proposed loan.

Thanks, Orville

From: Theresa Williams [mailto:twilliams@southcarolinaent.com]
Sent: Wednesday, March 03, 2010 11:56 AM
To: 'jamie curley'; Dr Dyce
Cc: Robert Puchalski; alpuchalski@gmail.com

Subject: RE: Meeting
Importance: High

Hello Jamie-

I did test the file before we sent, but I will send again. Please let me know.

Thanks, Theresa

From: jamie curley [mailto:curleyjamie@hotmail.com]
Sent: Wednesday, March 03, 2010 11:46 AM
To: twilliams@southcarolinaent.com; odyce@southcarolinaent.com
Cc: rpuchalski@southcarolinaent.com; alpuchalski@gmail.com
Subject: RE: Meeting

Hi Theresa,

I've tried to open & print the "sign out form", but the page is blank. It says the document is 2.9 MB, but appears to be blank...? I've also reopened the various attachments that have come in from SCENT over the past 3 days, to see if any of them were this form, to no avail.

Please confirm that the form is not accidentally blank on your end and resend. Thank you!!
Jamie

Subject: RE: Meeting
Date: Wed, 3 Mar 2010 10:36:48 -0500
From: twilliams@southcarolinaent.com
To: Odyce@southcarolinaent.com
CC: curleyjamie@hotmail.com; RPuchalski@southcarolinaent.com; alpuchalski@gmail.com

Dr. Dyce-

I have the SCENT Land Holdings financial documents for your review and have them prepared for you to take once Jamie has signed the "sign out form" (1 sentence long). I will attach another copy of the "sign out form" that was also sent out last Monday and Saturday.
If you can get this signed and returned, I will be happy to courier these documents over to you or have them at the closing today at 4:00.

The reports consist of a list of checks and deposits (12 pages), but they are simple entries and should take no more than 10 minutes to review.

If you cannot have Jamie sign these out and you do not wish to have us courier the documents over to you, we will have these available at closing. I will alert Tammy Amerson that you have received this email and will also copy Jamie and Amy.

Thanks, Theresa

From: Dr Dyce
Sent: Wednesday, March 03, 2010 6:30 AM
To: Theresa Williams
Subject: Re: Meeting

Thanks for the email Theresa but as Dr. Pulchaski knows, I would like copies of documents which I have requested. A meeting is insufficient but copies would be great.

Sent from my iPhone

Orville Dyce MD
SCENT, Allergy & Sleep Medicine

On Mar 1, 2010, at 12:57 PM, "Theresa Williams" <twilliams@southcarolinaent.com> wrote:

Hello Jamie-

Dr. Puchalski asked me to follow up with you about scheduling a meeting to review the financial documents for SCENT Landholdings. I will be happy to schedule any time that you need between now and the Wednesday closing.

Please let me know what works for you.

Thanks,
Theresa

Hotmail: Trusted email with Microsoft's powerful SPAM protection. [Sign up now.](#)

Exhibit 7

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF KERSHAW

3

4 Dr. Chad Gunnlaugsson,

5 Plaintiff(s),

6 vs.

Civil Action No. 2010-CP-28-00475

7 South Carolina ENT,
8 Allergy & Sleep Medicine,
9 P.A. and Dr. Robert Puchalski,

CERTIFIED COPY

10 Defendant(s).

11

D E P O S I T I O N

12 WITNESS: Orville Dyce, M.D.

13 DATE: Monday, February 20, 2012

14 TIME: 8:42 a.m.

15 LOCATION: Bland & Richter
16 Peoples Building
17 Mezzanine Level
18 18 Broad Street
19 Charleston, South Carolina

20 TAKEN BY: Attorneys for the Plaintiff/Third-Party
21 Defendant

22 REPORTED BY: HEATHER M. CURLIN
23 Professional Court Reporter

24

25

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State of South Carolina	)	
County of Richland, Court of Common Pleas	)	C. A. No. _____
Chad Gunnlaugsson,	)	
Plaintiff,	)	
v.	)	
South Carolina ENT, Allergy and Sleep Medicine	)	
PA and Dr. Robert Puchalski (in his capacity as	)	
officer or agent of South Carolina ENT, Allergy	)	
and Sleep Medicine PA)	)	
Defendants.	)	

AFFIDAVIT

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

1. My name is Dr. Orville Dyce and (prior to the admission, as shareholder, of Dr. Gunnlaugsson) am a 50% shareholder of South Carolina ENT, Allergy and Sleep Medicine PA (SCENT).
2. Prior to the admission of Dr. Gunnlaugsson, the other 50% of shares in SCENT were held by Dr. Robert Puchalski.
3. Following the admission of Dr. Gunnlaugsson, we (myself, Dr. Puchalski and Dr. Gunnlaugsson) should each hold 33.3% of the shares of SCENT.
4. Dr. Gunnlaugsson has completed all payments and actions necessary to receive his shares and should be, in fact, a shareholder of SCENT. This understanding is based on my access to records of SCENT, my knowledge of the payments for shares made by Dr. Gunnlaugsson and my knowledge that SCENT contractually agreed to issue shares to Dr. Gunnlaugsson and that Dr. Gunnlaugsson has fully performed his part of that agreement.
5. Dr. Pulchalski is the President of SCENT and has exercised most managerial control. I have heard him state that Dr. Gunnlaugsson has completed his obligations for his shares and is entitled to receive them.
6. Dr. Pulchalski is blocking Dr. Gunnlaugsson's receipt of his shares because Dr. Pulchalski is attempting to force acceptance of a new shareholders agreement. The new shareholder agreement gives Dr. Pulchalski significant new rights, gives him additional control of SCENT, and imposes large monetary penalties on the other shareholders if he were ever to be voted out of SCENT by the other shareholders.



7. On Tuesday, February 2, Dr. Pulchalski called a meeting of the shareholders. At this meeting, he made a motion to terminate Dr. Gunnlaugsson's employment. I voted against and oppose any effort to terminate Dr. Gunnlaugsson's employment or access to SCENT offices, records, or patients or to interfere with his continued practice with SCENT.
8. The unanimous approval of the all shareholders is required before taking action to terminate or restrict Dr. Gunnlaugsson's practice of medicine at SCENT and no such approval has occurred.
9. Dr. Gunnlaugsson and I have significant disagreements and concerns with Dr. Pulchalski concerning the management of the practice. I myself have grave concerns over the proposed shareholders agreement which, through my attorney, I have expressed to SCENT. Despite these disagreements, I and Dr. Gunnlaugsson have been able to continue our practice at SCENT without these disagreements affecting the standard of care. We are able to deal with Dr. Pulchalski in a professional manner and I do not believe Dr. Gunnlaugsson's disagreements with Dr. Pulchalski will affect his ability to continue to practice within SCENT and, in fact, our individual practices within SCENT are largely independent and significant interaction between the physicians is not required.
10. If SCENT and Dr. Pulchalski were barred by this court from terminating Dr. Gunnlaugsson, there would be no harm to SCENT or Dr. Pulchalski. Dr. Gunnlaugsson is an excellent physician who performs his duties in a very proficient manner. He is very professional in his dealings with Dr. Pulchalski and resolution of this dispute should cause no professional difficulties. On the other hand, terminating Dr. Gunnlaugsson would cause irreparable harm to him and his patients. Dr. Gunnlaugsson has an extensive patient base which would erode if he lost access to them. In addition, Dr. Gunnlaugsson treats patients with significant injuries and immediate surgical and other medical needs. Terminating his employment would deprive the patients of care. In addition, Dr. Gunnlaugsson has unique skills and accreditations that would leave significant gaps in SCENT's ability to provide some services.

Dr. Orville Dyce

Notary Public, State of South Carolina
My commission expires _____
I acknowledge having sworn the affiant

1 A. Yes.

2 Q. Okay. Well, tell me what he told you about
3 that.

4 A. That I had a deposition today.

5 Q. Okay. He called you?

6 A. Well, no, he -- his attorney contacted my
7 attorney about the date.

8 Q. Okay.

9 A. But I think he did mention he was going to
10 try to depose me at some point, but that was about
11 where the discussion ended.

12 Q. And when was that relative --

13 A. I don't --

14 Q. -- generally?

15 A. -- remember.

16 Q. Did he tell you why?

17 A. No. He didn't go into the whys.

18 Q. Did he tell you what he hoped you would
19 say?

20 A. No, sir.

21 Q. Do you remember that patients from
22 Hartsville and Cheraw would be referred to
23 Dr. Gunnlaugsson for certain services, correct?

24 A. I remember everyone in the practice had a
25 specialty and occasionally would refer someone to

182

1 another physician for a second opinion about
2 something.

3 Q. Okay. So you recall that some of them --

4 A. Yeah.

5 Q. -- were being sent to Chad, Dr. Gunnlaugsson?

6 A. Yeah, maybe one or two a year.

7 Q. Okay..

8 MR. SHEHEEN: Let me have this marked as
9 Defendants' Exhibit 1.

10 (Discussion off the record.)

11 (Defendants' Exhibit No. 1 was marked.)

12 BY MR. SHEHEEN:

13 Q. Dr. Dyce, this is an affidavit that was
14 saved to the computer at SCENT. A draft affidavit,
15 excuse me. Do you recall ever seeing anything like
16 this?

17 A. Yes.

18 Q. Okay. Tell me who showed it to you.

19 A. I think Dr. Gunnlaugsson --

20 Q. Okay.

21 A. -- gave it to me.

22 Q. Is this in January of 2010?

23 A. I don't remember when it was.

24 Q. Okay. Was it before you left on May 6th?

25 A. Yes, it was before I left on May 6th.

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)
Dr. Jamie Curley,)
Plaintiff)
vs.)
SCENT Land Holdings, LLC, Amy)
Puchalski and Dr. Robert Puchalski,)
Defendants.)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2010-CP-28-000322

MOTION INFORMATION FORM
AND COVER SHEET

FILED FOR RECORD
2012 AUG 13 AM 11:41
JOYCE HODGSON
CLERK OF COURT
KERSHAW COUNTY, S.C.

Plaintiff's Attorney: Morris Ellison Jana Baker PO Box 999 Charleston SC 29402 phone: 843-720-4635 fax: 843-723-7398 e-mail: jabaker@wcsr.com	Defendant's Attorney: Vincent A. Sheheen Bar No. 11552 Address: PO Drawer 10; 1111 Church St Camden, SC 29020 phone: 803-432-4391 fax: 803-425-4816 e-mail: vsheheen@thesavagefirm.com other:

X MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information
Nature of Motion: Motion to Alter or Amend Judgment Pursuant to Rule 59(e) of the SC Rules of Civil Procedure
Estimated Time Needed: 15 minutes Court Reporter Needed: **X YES** / ☐ NO

SECTION II: Motion Type
X Written motion attached
☐ Form Motion –
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff/ **X Defendant** August 13, 2012
Date Submitted

SECTION III: Motion Fee
☐ PAID – AMOUNT: \$25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE: _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

Jamie Curley,

Plaintiff,

vs.

SCENT Land Holdings, LLC, Amy
Puchalski and Robert Puchalski,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL CASE NO.: 2010-CP-28-0322

**DEFENDANTS' NOTICE OF AND
MOTION TO ALTER OR AMEND
JUDGMENT PURSUANT TO RULE 59(e)
OF THE SOUTH CAROLINA RULES
OF CIVIL PROCEDURE**

FILED FOR RECORD
2012 AUG 13 AM 11:43
CLERK OF COURT
KERSHAW COUNTY, S.C.

TO: MORRIS A. ELLISON, ESQ., WILLIAM C. CLEVELAND, ESQ., AND JANAB. BAKER, ESQ., ATTORNEYS FOR PLAINTIFF:

PLEASE TAKE NOTICE that pursuant to the provisions of Rule 59(e) of the South Carolina Rules of Civil Procedure, Defendants intend to move and do hereby move before the Court on the tenth day after service of this Motion, or at such other time as established by the Court, to alter or amend the Order of the Honorable DeAndrea Gist Benjamin, dated July 31, 2012, and received via electronic mail by Defendants on August 1, 2012. The grounds for such motion are as follows:

1. That a Form 4 Order of Judgment (hereinafter "the Order") granting Plaintiff's Motion for Summary Judgment against Defendant SCENT Land Holdings, LLC (hereinafter "SCENT Land Holdings" or "the Company") seeking dissolution of the Company was signed by the Honorable DeAndrea Gist Benjamin on July 31, 2012.

2. The Order stated Plaintiff's Motion seeking dissolution of the Company was granted "solely on the grounds that the [C]ompany failed to deliver [Plaintiff] the purchase agreement as required by S.C. Code Ann. § 33-44-702(c)."

3. Implicit in Judge Benjamin's Order is the finding that Plaintiff was dissociated

from the Company. However, neither the date nor basis of Plaintiff's dissociation was given in the Order.

4. S.C. Code Ann. § 33-44-103(a) states

Except as otherwise provided in subsection (b), all members of a limited liability company may enter into an operating agreement, which need not be in writing, to regulate the affairs of the company and the conduct of its business, and to govern relations among the members, managers, and company. *To the extent the operating agreement does not otherwise provide, this chapter governs relations among the members, managers, and company.*

(emphasis added).

Furthermore, the official Comments to this code section provides, "The operating agreement is the essential contract that governs the affairs of a limited liability company." S.C. Code Ann. § 33-44-103, cmt. 1.

5. Section 6.9 of the Agreement, EXPULSION OF A MEMBER, provides, in pertinent part, that "A Member may only be expelled by the Company and forced to accept a buy-out of his or her interest as valued in Section 5 herein if the Member: . . .

(c) fails to make a mandatory capital contribution to the Company within six (6) weeks of written notice given thereof, for a project that is approved by the Membership for such contribution to be made.

6. On March 17, 2010, Plaintiff was provided written notice of the Company's decision to require a mandatory two-stage capital call of the Members of the Company as approved at the March 12, 2010 Member meeting.

7. Plaintiff failed to make the mandatory two-stage capital call within the required six weeks and was subsequently expelled from the Company.

8. Therefore, S.C. Code Ann. § 33-44-701 is not applicable because it only applies to a dissociated member as Article 7 deals solely with "Member's Dissociation When Business

Not Wound Up.” Accordingly, Judge Benjamin’s Order granting Plaintiff’s Motion for Summary Judgment for failure to comply with S.C. Code Ann. § 33-44-701, *et seq.* is an error of law.

9. Even assuming, *arguendo*, Plaintiff was dissociated from the Company, Section 6.4 of the Agreement governs the distributions to dissociated Members.

10. Section 6.4 of the Agreement, NO DISTRIBUTIONS, ETC., TO DISSOCIATED MEMBERS, provides

A Member’s dissociation shall not entitle the Member to receive any distribution of Company profits or other assets or to receive any payment for the Member’s Company interest, unless said profits, assets or payments for the Member’s interest are owed to the Member from a date which precedes the Member’s date of dissociation.

11. Thus, Section 6.4 of the Agreement overrides any time requirements of S.C. Code Ann. § 33-44-701 for the Company to deliver a purchase offer of Plaintiff’s distributional interest in the Company. *See* S.C. Code Ann. § 33-44-103(a).

12. Furthermore, under the Agreement and applicable statutory law any damages caused by the dissociating member must be offset against any amounts owed to the member, resulting in nothing being owed to Plaintiff and making the delivering of a purchase offer impossible.

13. Therefore, Judge Benjamin’s Order granting Plaintiff’s Motion for Summary Judgment is an error of law

WHEREFORE, Defendants pray that the court examine these issues and hold pursuant to Rule 59 (e), SCRCP, that: (1) the Order granting Plaintiff’s Motion for Summary Judgment seeking dissolution of the Company was issued in error because Plaintiff was not dissociated from the Company; or (2) the Order granting Plaintiff’s Motion for Summary Judgment seeking

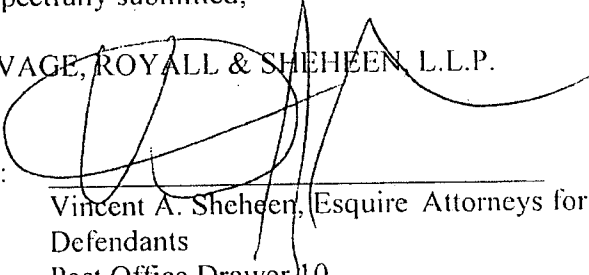
dissolution of the Company was issued in error because Plaintiff, even if dissociated from the Company, is bound by the terms of the Agreement regarding the Company's deliverance of a purchase offer of Plaintiff's distributional interest in the Company and S.C. Code Ann. § 33-44-701, *et seq* does not apply.

FURTHERMORE, Defendants pray that the Court, if it holds Plaintiff was dissociated from the Company, amend the Order and issue a specific finding of fact as to the date Plaintiff was dissociated from the Company and the basis and grounds for such finding.

Respectfully submitted,

SAVAGE, ROYALL & SHEHEEN, L.L.P.

BY:



Vincent A. Sheheen, Esquire Attorneys for
Defendants
Post Office Drawer 10
Camden, South Carolina 29021
(803) 432-4391

August 13, 2012

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

Jamie Curley,

Plaintiff,

vs.

SCENT Land Holdings, LLC, Amy
Puchalski and Robert Puchalski,

Defendants.

IN THE COURT OF COMMON PLEAS

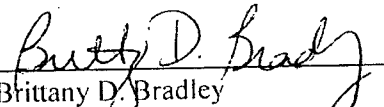
2010-CP-28-00323

CERTIFICATE OF SERVICE

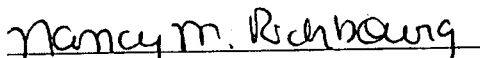
FILED FOR RECORD
2012 AUG 13 AM 11:41
JOYCE HODDAR
CLERK OF COURT
KERSHAW COUNTY, S.C.

I, the undersigned, an employee of Savage, Royall & Sheheen, L.L.P., do hereby certify
that I have mailed the foregoing Motion to Alter or Amend Judgment Pursuant to Rule 59(c) of the SC
Rules of Civil Procedure by depositing a copy of same in a United States Postal Mailbox, First Class
Mail, postage prepaid, addressed to the attorney as shown below on the 13th day of August, 2012.

Morris Ellison, Esquire
Jana B. Baker, Esquire
Womble Carlyle Sandridge & Rice, PLLC
PO Box 999
Charleston SC 29402


Brittany D. Bradley
Secretary for Vincent A. Sheheen
1111 Church Street
Post Office Drawer 10
Camden, South Carolina 29020
(803) 432-4391

SWORN to before me this 13th day of
August, 2012


Nancy M. Richardson
Notary Public for South Carolina
My Commission Expires: 9/22/18

WOMBLE
CARLYLE
SANDRIDGE
& RICE
A LIMITED LIABILITY
PARTNERSHIP



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Morris A. Ellison, Esq.
Direct Dial: 843-720-4614
E-mail: mellison@wcsr.com

December 10, 2015

VIA FedEx

Clerk of Court
Kershaw County Court of Common Pleas
1121 Broad Street, Room 313
Camden, SC 29020

RE: Dr. Orville Dyce vs. South Carolina ENT, Allergy & Sleep Medicine, P.A.
and Dr. Robert Puchalski
Kershaw County Case No.: 2010-CP-28-0323
Jamie Curley vs. SCENT Land Holdings, LLC and Robert Puchalski
Kershaw County Case No. 2010-CP-28-0322
WCSR File No.: 85182.0000.0

Dear Clerk:

Enclosed for filing please find the original and 2 copies of the Motion to reconsider and the Motion Cover Slip, along with a check for \$25.00 for the filing fee in regards to the above caption matter. Please file the original with the court and return the two stamped-filed copies to our office in the enclosed, FedEx envelope.

Thank you for your assistance in this matter.

Very truly yours,

Morris A. Ellison, Esq.

MAE/sjw

Enclosure

cc: Judge Diane S. Goodstein (via FedEx)
Vincent A. Sheheen, Esq. (Via FedEx) ✓
Michael D. Wright, Esq. (Via FedEx) ✓
Orville Dyce (Via U.S. Mail)

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

ORVILLE DYCE,

☒ Plaintiff

v.

South Carolina Ent, Allergy & Sleep Medicine, P.A.,

Amy Puchalski And Robert Puchalski,

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2010-CP-28-323

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
Vincent Sheheen, Esq., Bar No.
Address:
Savage Royall & Sheheen, LLP
P.O. Drawer 10
1111 Church Street
Camden, Sc 29020
phone: 843 fax:
e-mail: other:

Defendant's Attorney:
Morris E. Ellison, Bar No. 1881
Jana B. Baker, Bar No. 72487
Address:
Womble Carlyle Sandridge & Rice, LLP
P.O. Box 999
Charleston, SC 29402
phone: 843-722-3400 fax: 843-723-7398
e-mail: mellison@wcsr.com other: jabaker@wcsr.com

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

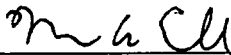
Nature of Motion: Motion to Reconsider

Estimated Time Needed: 45 Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☒ Plaintiff / ☐ Defendant

December 10, 2015
Date submitted

SECTION III: Motion Fee

- ☒ PAID - AMOUNT: \$25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCPP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by: _____

Date Filed:

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

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

**PLAINTIFFS' MOTION TO ALTER OR
AMEND JUDGMENT UNDER SOUTH
CAROLINA RULE OF CIVIL
PROCEDURE 59(e)**

I. Introduction

Plaintiffs Orville Dyce and Jamie Curley (collectively, the "**Plaintiffs**") move the Court under the provisions of South Carolina Rule of Civil Procedure 59(e) to alter, amend, supplement and/or reconsider portions of its Order dated November 25, 2015 and filed on December 8, 2015 (the "**Order**") to address or reconsider the issues outlined below. The Order largely grants the relief sought by the Plaintiff but does not address certain issues.

II. Attorneys' Fees

The Order does not address Plaintiffs' claim for attorneys' fees. Plaintiffs have been

successful in this lawsuit and have sought recovery of attorneys' fees on several grounds.

First, SCENT's Articles of Incorporation provide for an award of attorneys' fees to Dr. Dyce. Paragraph 10(f) states:

Indemnification. The corporation shall, to the fullest extent permitted by applicable law, indemnify, hold harmless and advance expenses to the shareholders...to the extent the shareholders...were or are a party or are threatened to be made a party to or are otherwise involved in the any threatened, pending or completed action, suit or other proceeding, whether civil, criminal, administrative or investigative and whether formal or informal, by reason of the fact that...the shareholders...are or were managing the business and affairs of the corporation in place of a board of directors against all expenses (including attorneys' fees), liabilities, losses, judgments, fines, amounts paid in settlement or other similar costs actually and reasonably incurred in connection with such action, suit or proceeding.¹

Dr. Dyce brought this action to compel SCENT to conduct its affairs in accordance with its obligations under applicable South Carolina law. The Court concluded in its Order that SCENT and Dr. Puchalski had breached these obligations. As such, Dr. Dyce is entitled under the very broad indemnification provision in SCENT's Articles of Incorporation to be indemnified for the attorneys' fees and expenses incurred in that effort.

Second, the South Carolina's Statutory Close Corporation Supplement provides additional legal support for the grant of attorneys' fees to Dr. Dyce. That statute provides that "[i]f a court finds that a party to the proceeding acted arbitrarily, vexatiously, or otherwise not in good faith, it may award other parties their reasonable expenses, including counsel fees and the expenses of appraisers or other experts, incurred in the proceeding." S.C. Code Ann. § 33-18-410.

Third, Plaintiffs believe that Plaintiff Jamie Curley is entitled to an award of attorneys' fees pursuant to the provisions of South Carolina Code Ann. §33-44-702.

¹Plaintiffs' Exhibit 108.003.

III. Equitable Distribution of SCENT Land's Assets

Plaintiff Jamie Curley does not object to the Court's appointment of Marty Outzs as the liquidating trustee for SCENT Land. However, Plaintiffs respectfully move that the South Carolina Limited Liability Company Act, South Carolina Code Ann. §§33-44-101, *et seq.* (the "**Limited Liability Company Act**") authorizes the Court to distribute SCENT Land's assets equitably, after accounting for monies received by SCENT Land since July 2010.

Plaintiff Jamie Curley respectfully moves that, as directed by the Court in its Order, Mr. Outzs should perform an accounting of all of SCENT Land's income and expenses since July 2010. Plaintiff Jamie Curley then respectfully moves that (i) SCENT Land's property located in Hartsville, South Carolina should be distributed to her free and clear of all debt; (ii) SCENT Land's Lugoff, South Carolina should be distributed to Amy Puchalski, free and clear of all debt; and (iii) SCENT Land's unimproved real property located in Richland County, South Carolina should be sold with the proceeds being divided between Ms. Curley and Amy Puchalski.

IV. Liability of Amy Puchalski

Plaintiffs respectfully move that the Court should reconsider its conclusion that Defendant Amy Puchalski should only be responsible for \$25,596.87 of the \$436,496.08 awarded to Dr. Dyce as a result of inequitable distributions during 2008.

SCENT'S general ledger reflects that between February 1, 2008 and December 31, 2008 SCENT distributed \$872,992.16 more to Dr. and Mrs. Puchalski than it distributed to Dr. Dyce. It is undisputed that Defendant Amy Puchalski was the recipient of these funds. Because Mrs. Puchalski received and exercised ownership over monies in the form of SCENT distributions that rightfully belonged to Dr. Dyce during this time period, Plaintiffs respectfully move that Amy Puchalski should be jointly and severally liable for the same amount of this part of the judgment granted by the court against SCENT and defendant Robert Puchalski.

V. Post-Termination Distributions

In its Order, the Court concluded that Dr. Dyce had been terminated without cause. Plaintiff Orville Dyce had argued that he is entitled to receive distributions since Dr. Dyce was terminated without cause and SCENT did not redeem his stock. The Court's Order does not address this claim.

Termination without cause is not included in the July 16, 2008 Shareholders' Agreement's definition of a "Departure Event." SCENT's and Dr. Puchalski's actions created two classes of SCENT shares, one entitled to distributions and one that is not. Creation of two classes of stock expressly violates the rules applicable to Subchapter S corporations and is prohibited by SCENT's Articles of Incorporation,² which provide, in part, that "[t]he corporation is authorized to issue a single class of shares of stock." *Id.* at ¶ 4 (emphasis added).

Stripping Dr. Dyce's shares of financial rights also violated Section 5.2 of the July 16, 2008 Shareholders' Agreement which prohibits any act that would cause the termination of SCENT's Subchapter S election. For both of these reasons, the provision purporting to cancel Dr. Dyce's right to distributions is ineffective and of no force or effect.

Because SCENT and Dr. Puchalski have never redeemed Dr. Dyce's SCENT shares, as they were required to do under the July 16, 2008 Shareholders' Agreement, Dr. Dyce remains a shareholder to this day and is entitled to his proportionate share of SCENT's distributions made after the termination of his employment.

V. SOMNUS

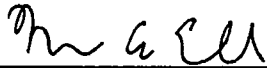
The Court concluded in its Order that Dr. Dyce was not entitled to prevail against Dr.

²Plaintiffs' Exhibit 261.

Puchalski, regarding Dr. Puchalski's failure to buyout Dr. Dyce's interest in SOMNUS because Somnus, LLC, was a necessary party to the instant action. Plaintiffs respectfully note that the claim is against Dr. Puchalski, not against SOMNUS and do not believe that SOMNUS is a necessary party.

WHEREFORE, Plaintiffs Orville Dyce and Jamie Curley respectfully requests that the Court alter, amend, supplement and/or reconsider its prior Order for the reasons set forth herein and as may be more fully discussed in a memorandum to be filed with the Court and upon oral argument.

WOMBLE CARLYLE SANDRIDGE & RICE LLP



Morris A. Ellison, Esquire
S.C. Bar No. 1881
Jana B. Baker, Esquire
S.C. Bar No. 72487
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Fax (843) 723-7398

Attorney for Plaintiff(s)

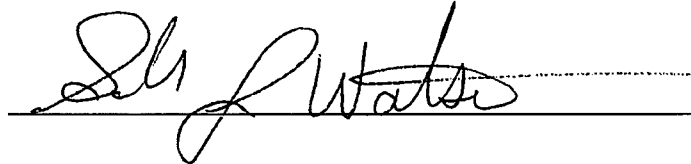
December 10, 2015

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing PLAINTIFF'S MOTION TO RECONSIDER was sent via Federal Express on December 10, 2015 to the following:

Vincent A. Sheheen (S.C. Bar No. 115552)
Michael D. Wright (S.C. Bar No. 78401)
Savage, Royall & Sheheen, LLP
Post office Drawer 10
Camden, SC 29021
Attorney for Defendant(s)

WOMBLE CARLYLE SANDRIDGE & RICE LLC

A handwritten signature in black ink, appearing to read "Sheryl F. Watson", is written over a horizontal line.

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

One West Fourth Street
Winston-Salem, NC 27101

No. 1300007293

66-021/530

Date: 12/10/2015

\$25.00

Twenty-five DOLLARS 00 CENTS

PAY
TO THE
ORDER
OF

KERSHAW COUNTY CLERK OF COURT

Wells Fargo Bank, N.A.

Two Signatures Required for Amounts in Excess of \$1,000.00

VOID AFTER 180 DAYS

SECURITY FEATURES INCLUDED. DETAILS ON BACK.

⑈ 1300007293 ⑈ ⑆ 121000248 ⑆ 2087310121920 ⑈

Invoice Date	Invoice #	Payment Amt	Invoice Narrative
12/10/2015	CCKERSHA/2015-1210	\$25.00	Motion File Fee for Motion to Reconsider

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

IN THE COURT OF COMMON PLEAS

Dr. Orville Dyce,

Plaintiff,

vs.

South Carolina ENT, Allergy & Sleep
Medicine, P.A., Amy Puchalski and
Dr. Robert Puchalski,

Defendants.

2010-CP-28-0323

MOTION INFORMATION FORM
AND COVER SHEET

Jamie Curley,

Plaintiff,

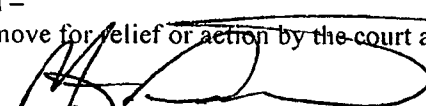
vs.

SCENT Land Holdings, LLC, Amy
Puchalski and Robert Puchalski,

Defendants.

2010-CP-28-322

FILED FOR RECORD
2010 DEC 17 PM 2:42
CLERK OF COURT
KERSHAW COUNTY, S.C.

Plaintiff's Attorney: Jana Baker, Esquire PO Box 999 Charleston SC 29402 phone: 843-720-4635 fax: 843-723-7398 e-mail: jabaker@wcsr.com	Defendant's Attorney: Vincent A. Sheheen Bar No. 11552 Address: PO Drawer 10; 1111 Church St Camden, SC 29021 phone: 803-432-4391 fax: 803-425-4816 e-mail: vsheheen@thesavagefirm.com other:
X MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: Motion to Alter or Amend and For Reconsideration Estimated Time Needed: 1 hour Court Reporter Needed: X YES / ☐ NO	
SECTION II: Motion Type X Written motion attached ☐ Form Motion – I hereby move for relief or action by the court as set forth in the attached proposed order.  Signature of Attorney for ☐ Plaintiff/ X Defendant Date Submitted December 17, 2015	

SECTION III: Motion Fee	
☐ PAID – AMOUNT: <u> \$25.00 </u>	
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	_____ JUDGE CODE: _____ Date: _____
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED – AMOUNT DUE: _____	

SCCA 233 (11/2003)

536

December 8, 2015. This motion is accordingly timely.

While the Court is aware of the facts involving this years' long dispute, the purpose of this motion is to direct the Court's attention to Defendants' arguments that the Court overlooked and to reconsider its decision for the reasons stated more fully herein.

I. Dr. Dyce Became a Shareholder on July 16, 2008.

The Court incorrectly found that Dr. Dyce became a shareholder on February 1, 2008. Dr. Dyce became a shareholder in SCENT on July 16, 2008 when he executed a Shareholders' Agreement and received his stock certificate for 50,000 shares in SCENT. (Pl. Ex. 7; Def. Ex. 13). In its own Order, the Court states "The July 16, 2008 Shareholders' Agreement is a binding agreement." (Order, P. 13). Additionally, while discussing a subsequent issue, the Court correctly cites Section 8.1 of the Shareholders' Agreement which states, in pertinent part, "[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." (Order, P. 21). Defendants' submit that the absolute best evidence and as a matter of law when Dr. Dyce became a shareholder of SCENT is the binding agreement Dr. Dyce executed while represented by his own counsel on July 16, 2008. Despite acknowledging that the Shareholders' Agreement is a binding agreement and despite the valid merger clause contained in Section 8.1 of the Shareholders' Agreement, the Court incorrectly found that Dr. Dyce was a shareholder in February 2008. In addition, in its original and First Amended Complaint, Dr. Dyce acknowledges that he executed the Shareholders' Agreement on July 16, 2008 and never once alleged that he became a shareholder prior to this date. Dr. Dyce himself stated in his deposition that he did not know when he became a shareholder and said he could not talk about it. (Def. Ex. 179, P. 59-60).

Ignoring the undisputed binding agreement, this Court found that 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." (Order, P. 5). A review of the testimony reveals that this was not Mr. Austin Sheheen's testimony at all. Mr. Austin Sheheen testified that Dr. Dyce became a shareholder in the summer of 2008 as evinced by the 2007 and 2008 tax returns that Dr. Dyce executed. (Vol. III, P. 276-277; P. 280; Def. Ex. 3; Def. Ex. 14). The Court improperly places too much weight on the fact that Mr. Austin Sheheen issued Dr. Dyce a 1099 in 2007 to correct the improper K-1 distribution designation and in 2008 placed all of his income on the K-1 instead of splitting it between a K-1 and a 1099. This fact is not evidence that Dr. Dyce was a shareholder on February 1, 2008. As Mr. Austin Sheheen aptly stated, "[Dr. Dyce] was a shareholder at the end of '08. He had received compensation before he was a shareholder and after. I needed a vehicle to make sure he reported his correct income. I could have issued another 1099. I chose not to. I put it all on his K-1. The net effect was if he'd paid tax on what he got, would have been the same as if I'd issued a 1099 and a K-1." (Vol. III, P. 419:4-10). Mr. Austin Sheheen used the K-1 to accurately reflect his income to the federal government; this was not used to indicate Dr. Dyce was a shareholder on February 1, 2008.

The Court also overlooked and did not address several other important pieces of testimony and evidence supporting Dr. Dyce's admission as a shareholder was on July 16, 2008 and not on February 1, 2008. Dr. Dyce did not guarantee the debt of SCENT or sign onto any lines of credit with financial institutions until July 16, 2008. (Vol. II, P. 203). In addition, Dr. Dyce was not listed as an owner for Workers' Compensation purposes until after July 16, 2008. (Vol. II, P. 203). Testimony was also presented that Dr. Dyce was welcomed as SCENT's newest owner in the summer of 2008, purchased a new home on Daniel Island after he became a partner

in the summer of 2008, and even played on the owners v. employees golf tournament that summer after he became a shareholder. (Vol. IV, P. 47-49). Evidence introduced at trial indicated that the parties were still discussing the “buy-in” and subsequent tax implications in June 2008 prior to Dr. Dyce being admitted as a shareholder. (Def. Ex. 11; Def. Ex. 12). Moreover, the Court failed to address the factual inaccuracies in the testimony of the Plaintiff’s expert witness, Richard Livingston. While Mr. Livingston opined that Dr. Dyce became a shareholder in February of 2008, he provides no factual underpinnings for his calculations. Instead, Mr. Livingston assumes a \$750,000 figure and then performs various calculations to back into a date of February 2008 as a date that Dyce became a shareholder. Moreover, it is important to note that Mr. Livingston failed to include any value for the accounts receivable for the “buy-in” as was clearly contemplated and outlined by Mr. Sheheen’s correspondence to counsel for both Dr. Dyce and Dr. Puchalski. (Def. Ex. 255; Vol. III, P. 329-331).¹ Additionally, Mr. Livingston did not account for the cash that existed in the bank as agreed upon by the parties. (Vol. III, P. 332). As the testimony from Mr. Sheheen reveals, Dr. Dyce was still short of his “buy-in” as of February 1, 2008 and therefore could not be a shareholder at that point until the parties agreed otherwise in the form of the Shareholders’ Agreement on July 16, 2008. (Def. Ex. 246).

The Court also failed to consider, as an additional sustaining ground, the Defendants’ affirmative defense of laches to Dr. Dyce’s claims that he became a shareholder prior to July 16,

¹ The Court places great weight and analysis on the accounts receivables for the “buy-out” as addressed in Section 4.5 of the Shareholders’ Agreement, but fails to consider the accounts receivables for the “buy-in” to the practice. The accounts receivable must be contemplated on both sides of the equation. If the Court finds that \$1.8 million is an acceptable figure to utilize as the accounts receivable for the “buy-out,” then this figure must be used for the “buy-in” as well. This is further evidence that Dr. Dyce was not a shareholder on February 1, 2008 because Dr. Dyce would have never provided enough “sweat equity” as of February 1, 2008 to satisfy such a large account receivable.

2008. As this Court is aware, laches is the negligent failure to act for an unreasonable period of time. Gibbs v. Kimbrell, 311 S.C. 261, 428 S.E.2d 725 (Ct.App. 1993). Under the doctrine of laches, if a party, knowing his rights, does not reasonably assert them, but by unreasonable delay suffers his adversary to incur expenses or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce these rights. Id. 428 S.E.2d at 730.

In the instant matter, Dr. Dyce filed an initial complaint on March 12, 2010. Dr. Dyce did not allege that he became a shareholder prior to July 16, 2008. Additionally, in Dr. Dyce's First Amended Complaint filed on May 10, 2012, Dr. Dyce stated he entered into a Shareholders' Agreement on July 16, 2008, and that pursuant to the agreement, "all other agreements dated prior to the date of this Agreement are hereby superseded in their entirety by the terms and conditions of this Agreement." The Defendants in this case were unaware that Plaintiff was taking the position that he was a shareholder prior to July 16, 2008 and certainly could not be aware of the specific date that Dr. Dyce alleges he became a shareholder as Dr. Dyce, his accountant, his expert witness, and his attorney all contend it was a different date (Vol. I, P. 8). In fact, Dr. Dyce refused to answer questions in his deposition on January 28, 2012 about when he became a shareholder. (Def. Ex. 179, P. 59). The Plaintiff had actual or inquiry notice as to this alleged position before trial, has failed to timely assert this known right, and allowing the Plaintiff to assert such a position at this stage materially prejudices the Defendant. See Provident Life & Acc. Ins. Co. v. Driver, 317 S.C. 471, 478-79, 451 S.E.2d 924, 929 (Ct. App. 1994).

Regardless of the additional cumulative testimony and evidence as to why the Plaintiff was not a shareholder in February 1, 2008, the best evidence is that the parties entered into a Shareholders' Agreement on July 16, 2008 that set aside all prior discussions, agreements, negotiations and agreed to the terms of being joint shareholders as of the date the agreement was

executed. It is not this Court's place to go behind and alter the agreement that the parties entered into. See Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994) ("The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.").

Respectfully, the Court misapplied the relevant facts and applicable law when reaching its findings of fact and conclusions of law and Defendants' request this Court to review the particular provisions cited herein to reconsider its Order and find that Dr. Dyce became a shareholder on July 16, 2008.

II. Dr. Puchalski was not paid any Excess Distributions not Attributable to his Capital Account.

Dr. Puchalski was not paid excess distributions that Dr. Dyce is entitled to. The amounts of money that Dr. Puchalski received during this time frame was from prior year's earnings which had already been taxed to him but not yet available to him because of a shortage of cash in the practice. Moreover, to the extent that there were excess distributions for 2008, it was because Dr. Dyce did not become a shareholder until July 16, 2008 and Dr. Puchalski naturally would have received more in distributions. The Court supports its findings of fact and conclusion of law that Dr. Puchalski was paid excess distributions while Dr. Dyce was a purported shareholder by referencing testimony from Mr. Austin Sheheen. Respectfully, the Court has misinterpreted and misapplied the facts and law of this case.

On numerous occasions, Mr. Austin Sheheen testified that Dr. Puchalski did not receive excess distributions above what Dr. Dyce received and that the money the Court has referenced as being overpaid to Dr. Puchalski is actually attributable to Dr. Puchalski's capital account that he had as a sole shareholder of the subchapter S Corporation before Dr. Dyce became a

shareholder on July 16, 2008. (Vol. III, P.400:11-24). Moreover, Mr. Austin Sheheen testified extensively that the practice incorrectly classified payments to the physicians as K-1 distributions prior to July 16, 2008. (Vol. III, P. 411:7-14). Specifically, Mr. Austin Sheheen stated, “Mr. Cleveland, as I indicated earlier, they misclassified everything K-1, everything that was distributed over there they called K-1, so we repeatedly informed them those were the wrong descriptions to apply.” (Vol. III, P. 7-10).

What Dr. Dyce has asserted as excess distributions are actually charges to Dr. Puchalski’s capital account that he maintained prior to Dr. Dyce’s admission as a shareholder on July 16, 2008. As Mr. Austin Sheheen explained, “[c]apital account is what [Dr. Puchalski] had in the company that he had already paid tax on, [but] had not drawn out.” (Vol. III, P. 329:1-2). The charges went against what Dr. Puchalski was already owed and Mr. Sheheen testified and introduced Defendant’s Exhibits 248 and 249 detailing that Dr. Puchalski was not paid any excess distributions. The Court highlights transcript testimony of an exchange between counsel for Dr. Dyce and Mr. Austin Sheheen to support the order that excess distributions were paid to Dr. Puchalski. Of particular importance is the fact that counsel for Dr. Dyce asked hypothetical questions and to assume certain conditions that simply were not true and was a misstatement of the facts. Dr. Dyce did not become an equal shareholder on February 1, 2008 and therefore the distributions for that period of time are not and should not be equal. Moreover, because Dr. Dyce did not become a shareholder until July 16, 2008, the distributions for the 2008 tax year between Dr. Puchalski and Dr. Dyce would not be equal.

Interestingly, the Court notes in attempting to determine if excess distributions were paid in 2009 that Dr. Dyce voluntarily endorsed a check for \$50,000 to Dr. Puchalski. The Court then deducts this from the total excess distributions the Court finds were paid to Dr. Puchalski. While

the Defendants' contend the Court misunderstood the facts as presented with regard to the excess distributions as discussed *supra*, it is important to note the Court's inconsistent rulings despite the "wisdom or folly" of Dr. Dyce's voluntary decisions. For instance, the Court indicates Dr. Puchalski should not have been entitled to the \$50,000 check that Dr. Dyce endorsed, but noted Dr. Dyce voluntarily assigned the check. Although, Dr. Dyce voluntarily, and with the advice and consent of counsel, executed a Shareholders' Agreement on July 16, 2008 that superseded all previous agreements, the Court improperly found that Dr. Dyce became a shareholder on February 1, 2008. Moreover, the Court incorrectly calculates the alleged excess distributions with respect to the \$50,000 check. The Court incorrectly contends that Dr. Puchalski received \$98,542.06 more than Dr. Dyce during the 2009 calendar year. The \$50,000 distribution check was actually given to Dr. Dyce and should be treated as a distribution to him. Although the court deducted the \$50,000 from the alleged excess distribution to Dr. P, the Court failed to credit the \$50,000 check as a distribution to Dr. Dyce. The result of both the credit to Dr. Dyce and the deduction from the alleged overpayment to Dr. P would be a net excess distribution to Dr. Dyce. This is consistent with the testimony of Mr. Sheheen who provided Def. Ex. 249 that indicated Dr. Dyce—not Dr. Puchalski—received excess distributions in 2009.

In addition to the testimony of Mr. Austin Sheheen, the expert's very detailed in exhibits referenced in Def. Ex. 248 and Def. Ex. 249 detail that the alleged excess distributions during 2008 and 2009 are simply nonexistent. The additional amounts that Dr. Puchalski was paid over Dr. Dyce after Dr. Dyce became a shareholder on July 16, 2008 was because it was charged to the capital account that was in place prior to Dr. Dyce ever being admitted as a shareholder.

Respectfully, the Court misapplied the relevant facts and applicable law when reaching its findings of fact and conclusions of law and Defendants' request this Court to review the

particular provisions cited herein to reconsider its Order and conclude that Dr. Puchalski was never paid any excess distributions above what he was entitled to receive as a shareholder in the practice.

III. Dr. Dyce's Bad Acts Resulted in him Being Properly Terminated for Cause Under the Employment Agreement.

The Court improperly found that Dr. Dyce was terminated without cause. (Order, P. 7). As an initial matter, the Court finds that "Dr. Puchalski testified that consolidating power in him was in SCENT's best interest." (Order, P. 8). There is absolutely no evidence in the record to support this finding of fact or that Dr. Puchalski ever testified to as such. This finding misconstrues the evidence and testimony presented at trial.

In a footnote, the Court discusses, but does not rule upon the validity of the June 1, 2008 Employment Agreement. (Order, P. 21-22). The Court would conclude that the June 1, 2008 Employment Agreement is not valid because it is superseded by the July 16, 2008 Shareholders' Agreement. This is an incorrect finding of fact and conclusion of law. As an initial matter, the Employment Agreement is not unambiguous. The Employment Agreement references the Shareholders' Agreement no less than thirty (30) times and contemplates that the Employment Agreement and Shareholders' Agreement were to be executed together and should be read in concert. (Def. Ex. 8). Additionally, the Shareholders' Agreement references an Employment Agreement no less than forty-five (45) times and specifically states that the Shareholders' Agreement "shall not be deemed to supersede the terms and conditions of the Employment Agreements executed simultaneously with this Agreement." (Pl. Ex. 7.022). The Agreements themselves contemplate that they would be executed together and would reference one another. The fact that the Employment Agreement references a Shareholders' Agreement and is

contemplated to be executed in conjunction with it is evidence enough to create an ambiguity to allow parol evidence. The Employment Agreement—nor the Shareholders’ Agreement—on their face express the whole agreement between the parties. Accordingly, parol evidence must be admitted to supply the deficiency and establish the true intent of the parties. Columbia East Assocs. V. Bi-Lo, Inc., 299 S.C. 515, 519, 386 S.E.2d 259 (Ct. App. 1989). The only parol evidence presented in this case is that the date on the Employment Agreement was a scrivener’s error and that it was in fact signed on July 16, 2008. Dr. Puchalski testified that he was traveling on the date in which the Employment Agreement purported to be signed on June 1, 2008 and submitted Def. Ex. 237 as his passport to indicate that he could not have signed the document on the date in which it indicates. Accordingly, the Court is incorrect in its finding that the Employment Agreement is superseded by the July 16, 2008 Shareholders’ Agreement and we respectfully request that the Court find and therefore conclude that they were executed in concert.

Dr. Dyce was initially terminated without cause according to the March 3, 2010 consent and was validly issued a Management Directive. SCENT notified Dr. Dyce that failure to abide by the Management Directives would result in immediate termination as required by section 2.2(c) of the Employment Agreement. (Def. Ex. 8; Def. Ex. 163). SCENT validly issued the Management Directive because Dr. Puchalski could break any tie by casting a second vote in his role as the Managing Shareholder. On May 8, 2010, SCENT issued an immediate termination of Dr. Dyce’s employment for violating the Management Directive as called for under Section 2.2(c) of the Employment Agreement. (Def. Ex. 68; Vol. II, P. 87-90, 300-302). In the termination, SCENT stated that Dr. Dyce was being terminated because he had violated the

management directives and confidentiality provisions. (Def. Ex. 68). Section 2.2(c) of the Employment Agreement does not require any period of notice for termination.

The Court overlooked and did not properly consider the numerous “bad acts” committed by Dr. Dyce against the practice to substantiate Dr. Dyce’s termination for cause. Following the initial notice of termination, SCENT had discovered multiple breaches of confidentiality by Dr. Dyce. SCENT had learned of Dr. Dyce’s secret theft of insurance contracts and his admonition to a staffer to “keep it on the down low.” (Vol. I, P. 390, 398; Vol. II, P. 61-62; Vol. III, P. 242). SCENT also learned of the affidavit for Dr. Dyce prepared by Dr. Gunnlauggson containing confidential information and the long telephone conversations Dr. Dyce and Dr. Gunnlauggson had on the day the affidavit was sent. (Def. Ex. 71; Vol. I, P. 518; Vol. II, P. 78-79, 179). SCENT also discovered on its computer server documents authored by Dr. Gunnlauggson, including his manifesto,² which contained further confidential information that most likely came from his voluminous communications with Dr. Dyce. (Def. Ex. 72; Vol. II, P. 78-79). SCENT further learned that Dr. Dyce and Dr. Gunnlauggson had been exchanging scores of texts and cell phone calls on SCENT issued cell phones, often times interspersed with calls to Dr. Gunnlauggson’s attorney. (Def. Ex. 86; Def. Ex. 133; Def. Ex. 134; Def. Ex. 135; Vol. 1., P. 379). Finally, when served with Dr. Gunnlauggson’s lawsuit, the practice had further proof that Dr. Dyce shared confidential information with Dr. Gunnlauggson contained in the verified complaint. (Def. Ex. 167).

² Only Dr. Dyce could have disclosed much of the information contained within Dr. Gunnlauggson’s manifesto (Def. Ex. 72). For example, only Dr. Dyce could have identified what was in the draft shareholders’ agreement that the shareholders were in the process of negotiating; only Dr. Dyce would have told Dr. Gunnlauggson that Dr. Dyce had retained an attorney because of shareholder disputes; only Dyce could have told Dr. Gunnlauggson about individual expenditures of SCENT; and only Dr. Dyce knew that SCENT had previously covered his legal expenses on contract negotiations. All of the detailed, confidential information in Dr. Gunnlauggson’s affidavit portrays Dr. Puchalski and SCENT in a negative light. Accordingly, Dr. Gunnlauggson’s testimony that Dr. Puchalski informed him of this confidential information is not credible.

Both Dr. Dyce's affidavit and the Manifesto of Dr. Gunnlauggson were prepared by Dr. Gunnlauggson with knowledge very likely gained from Dr. Dyce. The Affidavit was shared with Dr. Dyce, and he failed to disclose it to SCENT in violation of his duty of loyalty. Dr. Dyce also failed to disclose that Dr. Gunnlauggson was preparing for litigation with SCENT. The Affidavit and Manifesto contained information that only Dr. Dyce and Dr. Puchalski would have been privy to as shareholders in the practice. Defendants' respectfully request that the Court review the applicable facts and reconsider its ruling with respect to Dr. Dyce's bad acts.

IV. The Covenant Not to Compete is a Valid, Enforceable Agreement.

This Honorable Court incorrectly concluded that the Covenant Not to Compete ("Covenant") contained in Dr. Dyce's Employment Agreement is overly broad in its scope. (Order, P. 28). While the Court ruled it was overly broad, the Court did not address the remaining provisions of the five part test to determine a Covenant's validity. See Team 1A v. Lucas, 295 S.C. 237, 245, 717 S.E.2d 103, 107 (Ct. App. 2011). A review of the pertinent facts and applicable law regarding covenant not to competes in South Carolina reveals the Covenant is a valid, enforceable agreement. Accordingly, Defendants respectfully request that this Honorable Court reconsider its decision and find that any amounts owed to Dr. Dyce should be reduced by his two separate violations of the Covenant.

1. The Language of the Covenant.

The Covenant is not overly broad. Exhibit A to the Employment Agreement provides, "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." (Def. Ex. 233). The exact language of the Covenant in Dr. Dyce's employment agreement was

found enforceable on previous occasions in litigation with Dr. Gunnlauggson. (Def. Ex. 141). Furthermore, Judge Benjamin denied a Summary Judgment Motion filed by Dr. Dyce on the issue of the Covenant based on the same legal arguments put forth at trial.

Recent South Carolina rulings have enforced broad covenants not to compete in the field of medicine. A very similar covenant in the physician setting has been upheld recently by South Carolina Courts. See Order of the Honorable Deadra L. Jefferson granting Motion for Summary Judgment, Ophthalmology Associates of Charleston, P.A., v. Millin C. Budev, M. D., (upheld by the S.C. Supreme Court in Memorandum Opinion No. 2012-MO-029). In Budev, Judge Jefferson concluded the broad language preventing the defendant from “[undertaking] the practice of medicine within a twenty-five (25) mile radius of any office of the Practice . . .” was perfectly acceptable to protect the legitimate business interests of the practice. Additionally, this Honorable Court mistakenly concludes that the Baugh decision supports the position of Dr. Dyce. In Baugh v. Columbia Heart Clinic P.A., the court enforced a similar covenant and specifically found that “patients stay with and follow their doctors.” Baugh, 402 S.C. 1, 16, 738 S.E.2d 480, 488 (Ct. App. 2013). As in Budev and Baugh, the parties intended to keep physicians from practicing in the fields of medicine that would compete against SCENT, and they understood that patients follow a physician if a physician departs.

The language of the covenant not to compete in the Budev case is almost identical to the current one, as the Budev covenant prohibited the “practice of medicine” within an ophthalmologist medical practice. The trial court in Budev accurately stated that given the type of medical practice in the case “the intent of the agreement was to restrict the non-compete to the practice of ophthalmology.” Budev Order, P. 11. “It is the substance of the agreement, not the form, which must control the construction.” Id. The Court acknowledged that “the practice

of medicine is included in the practice of ophthalmology . . . and to read ‘the practice of medicine’ in any other way would be absurd.” The physicians in Budev were licensed in a specialty, ophthalmology. In the instant matter, Dr. Dyce is licensed in otolaryngology and related services.

Just as in Budev, this Court’s role is to enforce the meaning of the contract, and the testimony makes clear that the restrictions on the practice of medicine in the Covenant applied to otolaryngology and related services as allowed under SCENT’s Articles of Incorporation and the intent of the parties. The practice of medicine is included in the practice of otolaryngology and other related services and to read the practice of medicine in any other way would be absurd. Under SCENT’s Articles of Incorporation, the “corporation’s purpose [was] limited to rendering services in connection with the practice of otolaryngology medical services and all other services ancillary to such services which are permitted or authorized by the licensing authority of South Carolina applicable to the medical profession.” (Pl. Ex. 108.001). The practice was broad and included many ancillary services to the full extent the physicians were licensed to practice, including allergy and sleep medicine. (Pl. Ex. 108). The testimony presented throughout the trial through both Dr. Puchalski and Dr. Vidrine was that the Covenant was meant to restrict a departing physician from competing against SCENT in the areas of medicine in which they practiced—otolaryngology and other related services. (Vol. I, P. 623; Vol. II, P. 45, 107, 108; Vol. IV, P. 45). Moreover, the job description in Dr. Dyce’s employment agreement—the same agreement that contains the Covenant—states that the “Physician shall render a full range of professional services typically provided by a licensed physician practicing in the area of Otolaryngology at such of the Group’s practice sites as requested by the Managing Shareholder.” (Def. Ex. 8, Section 3.1). In addition, the

Employment Agreement references the field of practice of otolaryngology on four separate occasions. In ruling that the language of the Covenant is overly broad, this Court has ignored the remaining language of the Employment Agreement, the testimony in the record, and the clear intention of the parties.

i. The Agreement is Valid, Enforceable, and Not Contrary to Public Policy.

The restrictions contained in the Covenant are reasonable. As mentioned above, South Carolina courts uphold covenants not to compete between physicians. The public interests must not be offended by the restrictions contained in a covenant not to compete. Almers v. S.C. Na'l. Bank of Charleston, 265 S.C. 48, 52, 217 S.E.2d 135, 137 (1975). One of the determining factors of public interests is the economic consequences suffered by the employee, particularly the employee's opportunity to earn a livelihood. Id. at 52-53, 217 S.E.2d at 137. As discussed more fully herein, the restrictions did not hinder Dr. Dyce from practicing medicine or from earning a living in his chosen field. SCENT provided otolaryngology and related services care to patients in the Hartsville and Cheraw area prior to Dr. Dyce's departure from the practice. SCENT continued to provide these services until the competition from Dr. Dyce caused the practice to close the two locations. Restricting Dr. Dyce from practicing in this market would not have resulted in inadequate medical protection for the public.

ii. The Covenant was necessary to protect SCENT's legitimate interests.

The necessity and reasonableness of the covenant is best exemplified by Dr. Dyce's actions. Dr. Dyce has opened up a competing practice with SCENT, established his offices near SCENT's former office, practices with the hospital that controls much of the area's market, and has significant ties with referring physicians. To date, SCENT is aware of at least Four Hundred Thirty-Six patient transfers to Dr. Dyce based upon formal requests of the practice. (Def. Ex.

117; Vol. IV, P. 80). This does not include the loss of future patients from referrals that went to Dr. Dyce instead of SCENT. A current employee of Dr. Dyce, who formerly worked for SCENT, testified at trial that Dr. Dyce currently sees many of SCENT's former patients. (Vol. I, P. 559). Lance Jones, the former CEO of Carolina Pines, stated that Dr. Dyce's relationships from the Hartsville area benefited him when he went to work with the hospital . (Vol. I, P. 573; Def. Ex. 178).

When Dr. Dyce opened his practice, his incredibly high patient volume was solely contingent on SCENT's decrease in volume. (Def. Ex. 211; Vol. I, P. 559; Vol. IV, P. 82). And Dr. Dyce's monthly revenue gain was contingent on SCENT's loss of monthly revenue. (Def. Ex. 212). In fact, a conservative estimate of SCENT's losses is in excess of One Million Four Hundred Thousand Dollars (\$1,400,000) based solely upon those patient transfers. (Def. Ex. 218; Def. Ex. 122; Vol. II, P. 236). A review of the procedures performed by Dr. Dyce from October 1, 2010 to August 31, 2011 demonstrates that his practice was fully operational and lucrative from the first day, having completed over 19,269 different procedures in such a short period of time. (Def. Ex. 97; Def. Ex. 98; Def. Ex. 219). These were procedures that SCENT would have completed had Dr. Dyce not violated his Covenant. The reasonableness and necessity of the covenant provision has been fully established by the damage done to SCENT.

Furthermore, the contract was needed to protect legitimate and protectable interests of SCENT including patient base, trade secrets, and business goodwill. (Def. Ex. 233; Vol. II, P. 111). In his Employment Agreement, Plaintiff *expressly acknowledged* that "during the course of his employment," he would "become privy to and knowledgeable about the patients, services, rates, fees, systems, business customs and practices, and other information and trade secrets

concerning [SCENT's] business which would be injurious and damaging to [SCENT] if divulged, used or made known to a competitor." (Def. Ex. 233).

The South Carolina Supreme Court has allowed reasonable restrictions on competition to protect employers against the "precipitous raiding of clients, [and for the] protection of goodwill, and security of trade secrets," and that "[t]he Court will enjoin the invasion of those rights." Almers v. S.C. Na'l. Bank of Charleston, 265 S.C. 48, 58, 217 S.E.2d 135, 140 (1975). Dr. Dyce raided not only the good will of the practice, but also SCENT's patients.

Dr. Dyce acknowledged that SCENT's "business is highly competitive and that [SCENT] has a need to protect the anticipated value created by [Plaintiff's] exclusive practice for [SCENT]," which is also a legitimate, protectable interest. *See* 54A Am. Jur. 2d Monopolies and Restraints of Trade § 925 (2010) ("The continued success of a medical practice, which is dependent on patient referrals, is a legitimate interest worthy of protection [by covenants not to compete]."). As a Shareholder, Dr. Dyce was in a special position of authority over the acceptable nature of his own employment agreement and that of other employees. Accordingly, the covenant was necessary to protect SCENT's legitimate business interests.

iii. The Covenant is Reasonably Limited in its Operation with Respect to Time and Place.

a. Time Limitation

Dr. Dyce did not contest the time period in the Covenant. Dr. Puchalski and Dr. Vidrine stated the eighteen month provision in the Covenant was reasonable. (Vol. II, P. 103; Vol IV, P. 44-45). In addition, despite his conflicting and borderline perjured testimony at trial, Dr. Gunnlauggson originally stated—under oath—that the Covenant was valid and enforceable. (Def. Ex. 141; Def. Ex. 190). Moreover, Dr. Vidrine testified that non-competes were common

among doctors and that the length of the covenant at SCENT was designed to protect the practice because of the risk of hiring doctors, expense in recruitment, investment in support staff for the physicians, and the time spent introducing the physicians to doctors. (Def. Exs. 25, 26, 27; Vol. I, P. 558, Vol. IV, P. 44).

South Carolina courts have enforced covenants longer than the eighteen month provision in question here. See Rental Unif. Svc. v. Dudley, 278 S.C. 674, 676, 301 S.E.2d 142, 143 (1983)(enforcing three year covenant against a delivery truck driver for an industrial laundry operation) (citing Sermons v. Caine & Estes Ins. Agency, Inc., 275 S.C. 506, 273 S.E.2d 338 (1980)); see also Delmar Studios of the Carolinas v. Kinsey, 233 S.C. 313, 104 S.E.2d 338 (1958)(finding two year restraint reasonable); Saxton v. Coastal Dialysis & Med. Clinic, Inc., 470 S.E.2d 252 (Ga. Ct. App. 1996)(rejecting argument that two-year duration of a non-compete provision in physician's contract was unreasonable). Accordingly, the Covenant is reasonably limited under South Carolina law.

b. Geographical Area

“[I]n order to be reasonable, [the geographical restraint] must be necessary in its full extent for the protection of some legitimate business interest of the employer.” Standard Register Co. v. Kerrigan, 283 S.C. 54, 66, 119 S.E.2d 533, 539 (1961). “A geographic restriction is generally reasonable if the area covered by the restraint is limited to the territory in which the employee *was able*, during the term of his employment, to establish contact with his employer's customers.” Dudley, 278 S.C. at 676, 301 S.E.2d at 143 (citation omitted) (emphasis added). Dudley does not require that the employee actually worked in every portion of the covenant's geographic area. Instead, the Covenant should only cover the geographic areas where the employee was able to establish contact with customers. Id. Thus, covenants have been enforced

where the employee was "restricted only in the area in which [the employee] worked *or to which he was assigned at any time during his employment.*" Id. (internal quotations and citations omitted) (emphasis added).

In the present case, the geographical restriction was a twenty (20) mile radius of any practice site maintained by SCENT. (Def. Ex. 233). In addition to practicing in SCENT's Hartsville, Cheraw, and Lugoff offices, Dr. Dyce was introduced to referring physicians, advertised, and built a significant patient base in each of these locations. (Vol. II, P. 100-101). Dr. Dyce also saw patients in Richland and patients from all areas were referred to him for his specialty. (Vol. II., P. 105-106). The patients of SCENT generally do not have an exclusive relationship with any one specific SCENT physician and instead may see several SCENT physicians. (Vol. II., P. 105). Dr. Dyce's services were marketed at all of SCENT's locations. (Vol. II., P. 100-101). Dr. Dyce also performed surgical work in Columbia, had a clinic in Kershaw County, and helped conduct open house meetings in the various offices. (Vol. II., P. 105). Dr. Dyce's compensation was based, in part, on the revenues generated by other physicians and professionals at all of SCENT's offices. (Vol. II., P. 105-106). Furthermore, Dr. Dyce had intimate knowledge of all business practices, strategies, and plans for each geographic area of SCENT. (Def. Ex. 149; Vol. II., P. 106).

Dr. Dyce was routinely given financial information about the practice at monthly board meetings, and compensation was based in part on procedures performed in all of SCENT's offices. (Vol. II., P. 106). Dr. Dyce's Employment Agreement also required him to practice at any location as needed. (Def. Ex. 8). All of these activities enabled Dr. Dyce to establish contact with SCENT's patients in all areas, which is evident by the more than Four Hundred patient transfers to Dr. Dyce once he left SCENT.

Finally, approximately 86% percent of SCENT's patients resided within a twenty mile radius of at least one of its office locations. (Def. Ex. 143; Vol. II., P. 103). Likewise, SCENT has registered new patients to the practice in the past three years from all of the zip codes and counties covered by the geographic areas of Dr. Dyce's Covenant. (Def. Ex. 78). Based on Dr. Dyce's contact with patients at SCENT's locations, the narrowly tailored geographic area covered by the restriction, and the percentage and density of SCENT's patients, the Covenant's geographic restrictions are no broader than necessary to protect SCENT's interests. See Dudley, 278 S.C. at 676, 301 S.E.2d at 143; see also South Carolina Finance Corp. v. West Side Finance Co., 236 S.C. 109, 113 S.E.2d 329 (1960)(holding a three year, twenty-five (25) mile radius covenant not to compete reasonable in time and distance). Accordingly, this Court should find and conclude that the geographic restraint in the covenant is reasonable and enforceable.

iv. The Covenant is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood.

This Court should also find that the scope of the restriction in the Covenant is reasonable. The narrowly drawn covenant does not prevent Dr. Dyce from practicing medicine except to the minimum necessary to protect SCENT from unfair competition from its former employee. See e.g. Budev (construing a physician covenant not to compete to restrict the practice of medicine in the fields that were competitive to the practice).

In Dudley, our supreme court upheld a covenant against a delivery driver that prevented him from engaging "in the industrial laundry business . . . *in any capacity whatsoever*" for three years following his termination. Dudley, 278 S.C. at 675, 301 S.E.2d at 143 (omission in original)(emphasis added). The trial court found the covenant unreasonably broad and denied the employer's request for injunctive relief, but the supreme court reversed that decision and

found the covenant was reasonable where it was limited to three years and only covered the area where the employee had access to customers. Id. at 676, 301 S.E.2d at 143. The supreme court held that as long as a restrictive covenant is reasonable in time and place, then an employee may be restricted from *any aspect* of the employer's field of business. This Honorable Court found that there was no geographic limitation in the Covenant regarding Dr. Dyce calling upon or accepting business from SCENT patients if he worked for any kind of entity in which he has an economic interest. This is not accurate. As in Dudley, SCENT's restricted area is only where Dyce had access to patients. Moreover, the eighteen month period of the covenant is significantly shorter than the three year limitation that was upheld in Dudley. Because the covenant in question is reasonable as to time and place, it must be enforced.

Dr. Dyce could have practiced anywhere in the Midlands or the Pee Dee regions (or any other region of the state) outside of the geographic area covered by the Agreement. The covenant did not prevent Dr. Dyce from practicing in Florence, Sumter, or Lancaster. (Vol. II, P. 104-105). Moreover, Dr. Dyce currently travels to the Dorn VA Medical Center in Columbia, to practice medicine, which is a greater distance than Dr. Dyce would have had to travel to any of the above-referenced locations from his home. (Vol. II, P. 104-105). Dr. Dyce was not restricted from practicing medicine in any of these areas, and he could have continued to earn a living in his chosen field without violating the Covenant. Additionally, upon expiration of the eighteen month duration of the Covenant, Plaintiff would have been free to set up his practice without any geographic limitation. The narrow prohibitions in the Covenant do not go beyond the protection of SCENT's legitimate business interests, nor do they prevent Plaintiff from earning a livelihood. As the Budev case and the Baugh case show, South Carolina recognizes a real need for

covenants not to compete in the physician setting. Accordingly, the Covenant is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood.

v. The Covenant is Supported by Valuable Consideration.

The Covenant is supported by valuable consideration. When Dr. Dyce signed his Employment and Shareholders' Agreements and became a shareholder on July 16, 2008, he received a pay increase, additional bonuses, increased benefits, and certain protection provisions. (Vol. II, P. 98-99). Moreover, the parties specifically agreed that there was valuable consideration and mutual promises for the execution of the agreement. (Def. Ex. 233). Finally, a review of the average compensation for otolaryngologists reveals that Dr. Dyce's compensation was overly generous by industry standards despite Dr. Dyce's contention that doctors do not get paid enough. (Def. Ex. 74).

The Covenant is appropriate, fair, and was fully agreed upon by the parties. The liquidated damages provision of the Covenant was intended by the parties as the predetermined measure of compensation for actual damages for Dr. Dyce's breach of the agreement. See Tate v. Lemaster, 231 S.C. 429, 441, 99 S.E.2d 39, 46 (1957)(finding that if the sum stipulated is reasonably intended by the parties as the predetermined measure of compensation for actual damages for breach, the stipulation is for liquidated damages). As the evidence presented at trial demonstrates, the \$750,000 amount for each breach of the Employment Agreement is actually less than the actual damages suffered from Dr. Dyce's breach. In fact, by breaching the Covenant on two separate occasions after he left SCENT, Dr. Dyce obtained the very revenue that SCENT would have likely used to buy out his shares under the Shareholders' Agreement. Further, Dr. Dyce has neither contended nor offered proof that the \$750,000 provision of the Covenant is a penalty rather than liquidated damages.

Respectfully, the Court misapplied the relevant facts and applicable law when reaching its findings of fact and conclusions of law and Defendants' request this Court to review the particular provisions cited herein to reconsider its Order and find that Dr. Dyce violated the valid, enforceable Covenant and SCENT is entitled to liquidated damages in the amount of One Million Five Hundred Thousand Dollars (\$1,500,000) as specified in the contract for the two separate breaches of the Covenant.

V. The Trial Court Should Reconsider Whether Dr. Dyce Breached the Covenant Contained in the Shareholders' Agreement and Employment Agreement.

The Court found that the Defendants are barred from enforcing the Covenant because the Defendants previously breached the Employment and Shareholders' Agreement. Defendants respectfully submit that a review of the timeline of the relevant facts indicates that Dr. Dyce breached the Covenant and relevant agreements first. Accordingly, Defendants were excused from complying with the provisions of the agreements.

As discussed more fully *supra*, SCENT did not distribute more money to Dr. Puchalski than to Dr. Dyce than he was entitled to receive in 2008 and 2009 based upon the money Dr. Puchalski had in his capital account with the company. Additionally, Dr. Dyce was properly terminated with cause due to his breach of confidentiality and failure to follow management directives. Finally, SCENT was not required to redeem Dr. Dyce's shares and begin paying his redemption price because of Dr. Dyce's material breach of the Shareholders' and Employment Agreements. South Carolina law provides that in order to warrant a repudiation of a contract, the breach must be so fundamental and substantial as to defeat the purpose of the contract. See Ackerman v. McMillan, 314 S.C. 268, 442 S.E.2d 618 (Ct. App. 1994); Gibbs v. G.K.H., Inc.,

311 S.C. 103, 417 S.E.2d 710 (Ct. App. 1993). If the breach is not so material as to defeat the purpose of the contract, the non-breaching party is compensated by damages. Childress v. C.W. Myers Trading Post, Inc., 247 N.C. 150, 100 S.E.2d 391 (1957). In the instant matter, Dr. Dyce's actions are so fundamental and substantial as to defeat the purpose of the contract. Dr. Dyce's actions represented a material breach that it defeated the purpose of the Shareholder's Agreement and Employment Agreement in the following manner: 1) The Affidavit for Dr. Dyce that Dr. Gunnlauggson prepared and the long telephone conversation the physicians had the day the affidavit was sent. (Def. Ex. 71; Vol. I, P. 518; Vol. II, P. 78-79, 179); 2) Dr. Dyce stole insurance contracts that detail the negotiated reimbursement rates for more than forty different insurers, instructed staff to "keep it on the down low," and admitted they were for his own purposes and not for the benefit of SCENT. (Vol. I, P. 390, Vol. II, P. 61-62, Vol. III, P. 243); 3) Publicly filing a lawsuit against the practice despite the Agreement containing an arbitration provision (Pl. Ex. 7.023); 4) April 16, 2010 Letter from Dr. Dyce's counsel stating Dr. Dyce does not intend to comply with the non-competition provision of the Agreement (Def. Ex. 129); 5) Dr. Gunnlauggson's April 23, 2010 filed complaint against SCENT that contains information that he could have only received from Dr. Dyce (Def. Ex. 167); 6) Dr. Dyce clearly was setting up a practice in violation of the Covenant as evinced by the equipment quote that he received on June 21, 2010 from Karl-Storz Endoscopy-America, Inc. addressed to him at Carolina-Pines, the eventual place Dr. Dyce went to work. (Def. Ex. 231). Even though Dr. Dyce's name was on it and the equipment was clearly for an ENT office, Dr. Dyce testified that the equipment "could have been for their operating room" and denied it was for an ear, nose, and throat medical practice. (Vol. I, P. 328-329)³; 7) Dr. Dyce worked with his future employer, Carolina-Pines, to

³ After reviewing the medical equipment quote entered as Defendants' Exhibit 231, it is apparent that Dr. Dyce was

create a pro forma with the hospital (Def. Ex. 99) which included details about SCENT's payer mix, which is highly confidential and proprietary information that could have only been obtained by Carolina Pines if Dr. Dyce provided the information. (Def. Ex. 99; Vol. II, P. 76).

Most ironically, Dr. Dyce's repudiation and violation of the Covenant defeated the very revenue source that SCENT would have utilized to pay any legitimate buy-out claim from Dr. Dyce. Dr. Dyce's material and fundamental breaches occurred prior to the time in which SCENT would begin a payout under the Shareholders' Agreement. (Vol. I, P. 675; Vol. II, P. 76). SCENT was excused from performance in paying Dr. Dyce because he breached his obligations and because he violated the Covenant. Moreover, SCENT was excused from any amount allegedly due under a buyout because Dr. Dyce filed a lawsuit and SCENT had counterclaims that set-off any amounts owed. By repudiating and violating the Covenant, Dr. Dyce took for himself the millions of dollars in SCENT revenue that he is now claiming. In essence, Dr. Dyce is trying to double dip: get a buyout and take SCENT's patients and revenues. Accordingly, SCENT was not required to begin purchasing Dr. Dyce's shares on July 8, 2010.

Respectfully, the Court misapplied the relevant facts and applicable law when reaching its findings of fact and conclusions of law and Defendants' request this Court to review the particular provisions cited herein to reconsider its Order and find that Dr. Dyce materially breached the Shareholders' and Employment Agreements prior to SCENT's alleged breach of these agreements.

involved in requesting this quote as the quote was sent to his attention at Carolina Pines where he competed against the practice in violation of the Covenant. Moreover, it is apparent that the equipment is not for an operating room as Dr. Dyce suggested in his testimony, but is indeed for an ear, nose, and throat office. The quote contains waiting room chairs, decorations, pictures, and end tables, as well as equipment that would be used in an ENT office and not in an operating room. (Def. Ex. 231). It is evident Dr. Dyce's testimony that he was unaware of this quote and that this equipment was used for an operating room is not credible. (Vol. I, P. 327-329).

VI. The Court Misapplied the Evidence and Testimony in Analyzing the Purchase Price Calculation in Section 4.5 of the Shareholders' Agreement.

This Honorable Court misapplied the evidence in the record and applicable law in analyzing the purchase price calculation of the Shareholders' Agreement. The Court overlooked the only testimony as to the accurate amount of accounts receivables and improperly included amounts that are not cash equivalents in its analysis.

Part B of Section 4.5 of the buyout provision takes "one-third of the sum of the accounts receivable of the Corporation, booked in accordance with the 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." While the parties agree that the cash in the practice amounted to \$472,227.00, the parties disagreed about the cash equivalents and accounts receivables. Respectfully, the Court is incorrect in concluding the accounts receivables are \$1,868,707. Moreover, the Court erred in determining that the life insurance policy and the SCENT Land Loan in the instant matter are cash equivalents under the facts of this case and the applicable law.

a. Accounts Receivables

During a recess in trial, this Honorable Court ordered the parties to provide the accounts receivables of the practice. SCENT spent an extensive amount of time and expense in providing an accurate accounts receivable for the Court which was subsequently ignored.

As the language of the Agreement dictates, the departing shareholder would be entitled to 1/3 of the "accounts receivable of the Corporation, booked in accordance with the Corporation's normal accounting methods." It is evident that the words "booked in accordance with the Corporation's normal accounting methods" have some meaning that modify the words "accounts

receivable.”

The *only* testimony received explaining the “normal accounting methods of the corporation” came from Mark Quigley. Mr. Quigley works for the corporate accountant’s office, Sheheen, Hancock, and Godwin, LLP. Mr. Quigley was qualified as an expert in accounting and auditing and testified that the normal accounting methods of SCENT are a “cash basis” method. (Def. Ex. 229; Vol. IV, P. 73; Vol. IV, P. 131, 133). This accounting method is reflected on the corporate books, which include the ledger, the profit and loss statements, tax returns, and the practice’s balance sheet. (Def. Ex. 229; Vol. IV, P. 138; Vol. IV, P. 242). According to the testimony presented, under a “cash basis” method of accounting, the accounts receivables of the practice are booked at a value of zero. (Vol. IV, P. 139, P. 142). This is apparent upon an examination of the ledger, profit and loss statements, tax returns, and balance sheets. (Def. Ex. 6; Def. Ex. 241; Def. Ex. 244). A company is allowed to change its method of accounting, and SCENT could very well have changed its accounting method to a modified cash basis or to an accrual method. However, at the time of Dyce’s departure the practice’s normal accounting method was a “cash basis” method, which booked accounts receivable at zero value. (Vol. IV, P. 142-143). The accounts receivable for SCENT “booked in accordance with the Corporation’s normal accounting methods” has *zero* value. In its Order, this Honorable Court concluded that Mr. Quigley could not point to any authority to demonstrate that “booked” meant to record in the general ledger. (Order, P. 15). Respectfully, this finding ignores the fact that Mr. Quigley was qualified as an expert witness in accounting, auditing, financial analysis, has practiced for twenty years, and specifically stated that, as an accountant, the books of a practice are the general ledger. (Vol. IV, P. 142:7-9). While Mr. Quigley may not have had a legal definition as to the word “booked,” his experience and expertise as an accountant, auditor, and financial analyst

qualifies him to render opinions as to what constitutes booked. In this particular matter, Mr. Quigley concluded that booked meant to record in the general ledger. There was no other evidence presented as to what the accounts receivable booked in accordance with the Corporation's normal accounting methods. While recognizing that having an accounts receivable of zero accordingly to the language of the Shareholders' Agreement is a harsh result, this is what the parties agreed to and the Court cannot modify the agreement of the parties.

Additionally, the Court erred in concluding that the accounts receivable of the practice were \$1.8 million when evidence was presented as to what the actual accounts receivable of the practice were at the time of Dr. Dyce's departure. Mr. Quigley presented evidence of the painstaking process his firm engaged in to determine the accounts receivables are \$826,681.52. According to generally accepted accounting principles, account receivables for healthcare services are the net realizable value—that is the amount of cash that a practice expects to realize from their charges and services. (Def. Ex. 282; Def. Ex. 283; Vol. IV, P. 145, P. 151-152). The account receivables include payments due from patients, third-party payors and employers for provided healthcare services minus the contractual adjustments, discounts, and allowances for uncollectable amounts. (Vol. IV, P. 145). According to Mr. Quigley, the best indication of accounts receivables is what the practice actually received in hindsight. (Vol. IV, P. 159).

In order to determine the accounts receivables of the practice, Mr. Quigley conducted an analysis using two separate methodologies. (Def. Ex. 281). Mr. Quigley used Generally Accepted Accounting Principles to determine the accounts receivable including uncontested, published guidance set forth in Defendant's Exhibits 282 and 283. (Vol. IV P. 150-153, 159).

The methodologies of Mr. Quigley's analysis pulled data from the medical records company for SCENT for all charge. (Vol. IV, P. 150-153). Mr. Quigley analyzed 150,000 lines

of data to arrive at his calculations. (Vol. IV, P. 161). He tested the data. (Vol. IV, P. 162). He used two different methods of analysis to ensure accuracy. (Vol. IV, P. 160-166). Mr. Quigley analyzed the data in a second method to ensure accuracy. The results under each analysis were extremely close and thus he averaged the two to reach a final opinion. (Vol. IV, P. 165-166). Mr. Quigley's analysis revealed that an accurate accounts receivable at the time of departure was \$826,681. (Vol. IV, P. 166).

In its Order, this Honorable Court finds that the parties made an "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." (Order, P. 16). This is pure speculation and conjecture and there is no evidence in the record to support this finding. No party testified as to the intent of including this language in the Shareholders' Agreement; it could have been drafted in this manner because there were six providers in the practice and the two shareholders (Dr. Dyce and Dr. Puchalski) made up one-third of the providers. Regardless, an analysis premised upon this assumption when there are no facts to support said finding of fact is improper.

Plaintiff's expert's position that \$1.8 million dollars is the appropriate number for accounts receivables is not supported by the evidence in the record. First, that number was taken from collection efficiency reports, not the books of the corporation. These collection efficiency reports are not the books of SCENT because they contained figures that were not realizable by the practice and are not the normal accounting methods of SCENT. (Vol. IV, P. 169, P. 172). Moreover, testimony was presented that these internal reports were grossly inadequate and incorrect to utilize them to compute the buyout. Second, no analysis was done by Plaintiff as to

what accounts were included in that figure. Third, Plaintiff's expert did not purport to follow Generally Accepted Accounting Principles, nor did he use published accounting guidance such as Defendant's Exhibits 282 and 283. Plaintiff could have called its expert back to the stand in rebuttal of the testimony and guidelines used by Mr. Quigley, but chose not to call him back in rebuttal. Finally, the \$1.8 million accounts receivable figure more correctly reflects approximately one month's worth of gross billings of the practice, of which only a fraction is collected. (Vol. IV, P. 248). To utilize the figure advocated by Plaintiff would be punitive in nature and against the evidence and applicable law since it includes receivables that could never be collected.

b. Cash Equivalents

Part B of the buyout provision also includes the value of any cash equivalents at the time the shareholder departs. This Court concludes that the loan to SCENT Land from SCENT should be considered a cash equivalent and included in the buyout formula. Additionally, the Court found that a specific life insurance policy should be considered a cash equivalent. Respectfully, the evidence in the record and the applicable law conclusively determine that neither can be considered a cash equivalent for purposes of the purchase price calculation.

According to the evidence presented, the accounting, audit, and corporate standards classify a cash equivalent as a "short term, highly liquid investment that have both of the following characteristics: One, it's readily convertible to a known amount of cash. Two, it's so near their maturity that they present insignificant risks of change in value because of the changes in the interest rate." (Def. Ex. 284; Def. Ex. 285; Vol. IV, P. 178).

The insurance policy is not a cash equivalent. The only relevant testimony presented was that the insurance policy had a penalty greater than the cash surrender value of the policy. (Vol.

III, P. 337, P. 495; Vol. IV, P. 180). Mr. Sheheen further testified that while the cash value of life insurance is cash, if you cannot get the cash because the penalty is greater, then it is not an equivalent. (Vol.III, P. 337-338.) Mr. Sheheen specifically testified that he reviewed the respective policy and that the penalty clause was greater than the cash value. (Vol. III, P. 338:3-5). Moreover, the life insurance policy was not readily convertible to known amounts of cash as provided by the accounting standards and regulations. (Def. Ex. 284; Def. Ex. 285). Additionally, the original maturity date of the policy is greater than three months, and the accounting guidelines state that a cash equivalent should be near their maturity date. (Def. Ex. 284; Def. Ex. 285).

The loan from SCENT to SCENT Land is not a cash equivalent for purposes of the purchase price calculation, but is instead a loan. As an initial matter, there is no documentation referencing a maturity date related to the loan. (Vol. III, P. 338; Vol. IV, P. 182). Additionally, Mr. Quigley testified the auditing guidelines for healthcare industries provide that intercompany loans between parent companies and subsidiary companies are not cash equivalents, but are considered to be loans. (Def. Ex. 284; Vol. IV, P. 182-183). SCENT and SCENT Land are related parties, and the loan from SCENT to SCENT Land is an intercompany loan and not a cash equivalent. The fact that the Court notes the interrelated nature of the two companies on Page 19 of its Order supports the proposition that this is an intercompany loan and not a cash equivalent. Mr. Quigley testified extensively about and referenced the applicable healthcare guidelines introduced into evidence at Defendant's Exhibit 284 which unequivocally state that an intercompany loan is still a loan and is not to be considered a cash equivalent. Accordingly, the \$726,000 noted from SCENT to SCENT Land should not be considered a cash equivalent and therefore not included in the redemption formula.

Neither the life insurance policy nor the SCENT Loan satisfies the definition of a cash equivalent as testified to by Mr. Austin Sheheen, Mr. Marc Quigley, or as identified in the treatises entered into evidence at Defendant's exhibits 284 and 285. The Court points out that a "look back" approach when addressing the accounts receivable calculation is not acceptable, but finds this method perfectly acceptable when addressing the loan from SCENT to SCENT Land. The Court uses this "look back" approach to conclude that SCENT Land had readily available proceeds to pay back SCENT. The Court fails to note that the only reason SCENT Land had the necessary funds was because Dr. Dyce was terminated and Dr. Puchalski could then sign on behalf of SCENT Land to obtain the construction loan from the bank. This is an inconsistent treatment of important issues and valuations in the buyout agreement and Defendants respectfully request that this Honorable Court re-read the relevant portions of testimony and exhibits introduced into evidence to reconsider the decisions to include the life insurance policy and the loan as cash equivalents.

VII. Confidential Information.

This Honorable Court goes to great lengths in its Order to detail that Dr. Dyce never shared any confidential information with Dr. Gunnlauggson or other employees of the practice. Ultimately, the Court concludes that the language of the Shareholders' Agreement and Employment Agreement did not prevent Dr. Dyce from sharing the confidential information. The Court concludes that Dr. Dyce was able to share information with Dr. Gunnlauggson because Section 3.7 of the Shareholders' Agreement states that the "Shareholders shall not disclose any information relating to the Corporation regarding the Corporation's operations, records, patients, or procedure to any persons other than employees of the Corporation . . ." (Order, P. 38). Reading the relevant section in its entirety, however, results in a different conclusion. The rest of

Section 3.7 of the Shareholders' Agreement states that "[s]hareholders shall use information related to the business of the Corporation to advance the Corporation's best interests, and not to benefit their personal interest." (Pl. Ex. 7.011) (emphasis added). The Shareholders' Agreement also states that the "Shareholder shall not disclose any information related to the Corporation . . . without prior written consent of the Corporation." (Pl. Ex. 7.011). Further, Section 5.1 of the Employment Agreement requires that the "[p]hysician shall refrain from any conduct or actions which would ... negatively impact the Group members." (Def. Ex. 8). It was not just the fact that Dr. Dyce was sharing this information with Dr. Gunnlauggson. Instead, Dr. Dyce's actions harmed the practice because it resulted in Dr. Gunnlauggson becoming adverse to the practice, filing a lawsuit, and causing SCENT additional damages. This following evidence supports this conclusion:

1. The Affidavit for Dr. Dyce that Dr. Gunnlauggson prepared and the long telephone conversation the physicians had the day the affidavit was sent. (Def. Ex. 71; Vol. I, P. 518; Vol. II, P. 78-79, 179).
2. Dr. Gunnlauggson's Manifesto (Def. Ex. 72; Vol. II, P. 78-79).
3. The scores of text messages and cell phone calls on SCENT issued cell phones, often times interspersed with calls to Dr. Gunnlauggson's attorney. (Def. Ex. 86, Def. Ex. 133, Def. Ex. 134, Def. Ex. 135, Vol. 1., P. 379).
4. The lawsuit filed by Dr. Gunnlauggson (Def. Ex. 167).
5. The coordination between Curley and Dr. Dyce in halting construction.
6. The coordination of efforts between counsel for Dr. Dyce and counsel for Dr. Gunnlauggson. (Def. Ex. 86).

Moreover, Dr. Dyce admitted that he took the insurance contracts for his own personal

benefit—not for the benefit of the corporation. (Vol. I, P. 390, Vol. II, P. 61-62, Vol. III, P. 243). This admission is in direct contravention of Section 3.7 of the Shareholders' Agreement. Additionally, sharing the insurance contracts which contained information that Carolina Pines could not have gotten from anywhere else violated the confidentiality provisions of the agreements. (Vol. II, P. 61-62; Vol. III, P. 85; Vol. IV, P. 75, Def. Ex. 99; Vol. II, P. 130-131, Vol. IV, P. 75-76). Dr. Dyce violated these provisions, which were essential to protect the practice. Respectfully, this Honorable Court overlooks the importance and blatant evidence of Dr. Dyce violating the confidentiality provisions included in the respective agreements. Accordingly, Defendants respectfully request that this Honorable Court reconsider its rulings with respect to Dr. Dyce's sharing confidential information as it relates to Defendants' causes of action.

VIII. First Palmetto Construction Loan for Lugoff Building.

The Court additionally is incorrect in its finding of fact and conclusion of law regarding the construction loan for the Lugoff building. In the Court's analysis, it incorrectly concludes that First Palmetto would close the loan for construction funding without the necessity of Dr. Dyce's participation. (Order, P. 9). A review of the testimony from a representative of First Palmetto indicates that both Dr. Puchalski and Dr. Dyce had to sign the loan closing documents. (Vol. III, P. 217:6-18). The First Palmetto representative is an independent, neutral party which informed the practice of the bank's own internal requirements to finalize the construction loan. Additionally, a review of Plaintiff submitted exhibit 281.059, the bank authorization resolution, requires the signatures of both Robert Puchalski and Orville Dyce to borrow money on behalf and in the name of the limited liability company, and to sign, execute, and deliver promissory notes or other evidence of indebtedness. (Pl. Ex. 281.059). The First Palmetto representative

specifically informed the managers of SCENT Land that both Dr. Puchalski and Dr. Dyce would need to execute the loan documents as they were both listed as managers on the articles of incorporation and because the bank authorization resolution required them to do so. (Vol. III, P. 221:6-25). Indeed, the Articles of Incorporation introduced into evidence as Defendants Exhibit 279 specifically stated that “Pursuant to S.C. Code Ann. §33-44-301(c), in order to bind the limited liability company, all documents relating to real property, including without limitation all leases, deeds, mortgages, assignments, security agreements, and other documents of security, conveyance, transfer, or liens, must be signed on behalf of the limited liability company by Robert Puchalski and Orville Dyce, to bind the company to any agreement set forth herein.” (emphasis added). SCENT Land could not close any loan without Dr. Dyce’s participation and signature. A finding to the contrary does not accurately reflect the facts, testimony, and evidence in the record.

The Court notes throughout the Order that the practice was able to quickly close the loan after Dr. Dyce departed. The practice and SCENT Land were only able to move forward after executing Amended Articles of Incorporation and executing amended authorization resolutions for the bank which indicated Dr. Puchalski was the only manager at the time. (Def. Ex. 239; Pl. Ex. 283.097). This aspect further supports SCENT Land’s position that it was necessary to have Dr. Dyce sign as a manager of SCENT Land to close the construction loan with First Palmetto.

IX. Dr. Robert Puchalski’s Joint and Several Liability.

This Honorable Court has found that Dr. Dyce is entitled to judgment against SCENT and Dr. Robert Puchalski jointly and severally. Respectfully, the Court has not provided an analysis as to why Dr. Robert Puchalski is jointly and severally liable and a review of the facts in evidence and the applicable law indicate the actions Dr. Robert Puchalski took as CEO and

Chairman of the practice were in the best interests of the practice and were made in good faith.

As an initial matter, Defendants note that this Honorable Court stated in a footnote that all the testimony of Professor John Freeman regarding corporate governance is inadmissible and improper evidence. Defendants respectfully disagree and ask that the Court reconsider its ruling on this matter. A look at the evidence presented does not indicate that Plaintiff's counsel ever objected to much of Professor Freeman's testimony, which must be considered by the court. Professor Freeman testified and gave expert opinions in the field of corporate governance, including business entity management, opinions as to Dr. Dyce's conduct, and fiduciary duties owed to the parties. This Court even acknowledged that these would be appropriate fields for Professor Freeman to testify, stating, "What I would do then in those regards is just hold those because discussions regarding fiduciary duties are certainly an area I think that can be testified to as an expert." (Vol. I, P. 610:1-4). Additionally, the Court noted that testimony regarding corporate governance would be appropriate. (Vol. I, P. 610:8-10). Accordingly, we respectfully request that the Court reconsider its ruling to take into consideration the admissible testimony of Professor John Freeman.

Dr. Puchalski should not be individually liable for the actions of SCENT and his actions in managing SCENT. The "business judgment rule" immunizes management from liability in corporate transactions undertaken where there is a reasonable basis to indicate the transaction was made in good faith. See Kiriakides v. Atlas Food Sys. & Servs., Inc., 343 S.C. 587, 541 S.E.2d 257 (2001). Dr. Puchalski acted as the Chairman and CEO of SCENT and that his actions within that role are protected by the business judgment rule. This Court did not find, and there is no evidence in the record to support, the contrary. Moreover, and as is more fully discussed

supra, Dr. Puchalski did not receive any money he was not entitled to as a shareholder of the practice.

The Articles of Incorporation for SCENT provide, in pertinent part, that “Robert Puchalski, Managing Shareholder, shall be completely vested with all authority to transact business of any kind, including but not limited to signing leases, contracts, tax returns, purchasing orders, bills of sale, and any and all other documents incident to the operation of the business on a day to day business.” (Pl. Ex. 108.003-108.004). The Articles of Incorporation further provide that “the shareholders of the corporation may, from time to time delegate to the Managing Shareholder of the corporation some or all of the powers, duties and rights that would otherwise customarily belong to a board of directors.” (Pl. Ex. 108.001). Additionally, the 2008 Shareholders’ Agreement stated that Dr. Puchalski served as the managing shareholder of SCENT, supervising and controlling the daily business and affairs of the company. (Pl. Ex. 7.009). Dr. Puchalski determined staffing levels and assigned work for employees, presided over meetings of the shareholders, and handled the everyday affairs.

Professor Freeman testified that Dr. Puchalski’s actions through this tumultuous period were exercised in compliance with “sound business judgment” and that Dr. Puchalski made appropriate business judgments based on the facts that were presented to him. (Vol. I, P. 690, 692-693). Professor Freeman testified that Dr. Puchalski “navigat[ed] this practice into tough and through a tough economic year and with the possibility of Obama Care” and did so with “proper behavior, reasonable behavior, and that he made what you would call in business governance area sound business judgments or reasonable business judgments.” (Vol. I, P. 690). Moreover, Professor Freeman elaborated that Dr. Puchalski, in making the difficult decision to terminate Dr. Dyce, remained in his role as Managing Shareholder and functioned on behalf of

SCENT—not himself—when making these decisions. (Vol. I, P. 692). Dr. Vidrine, employee physician during the breakup and a current SCENT shareholder, further testified that Dr. Puchalski has always acted in the best interest of SCENT. (Vol. IV, P. 87). Finally, Austin Sheheen, who has been an accountant for fifty-six years and has advised a number of similar medical practices, testified that Dr. Puchalski has always acted in SCENT’s best interests. (Vol. III, P. 272).

Professor Freeman also testified that the provisions sought by the parties in the revisions to the 2008 Shareholders’ Agreement were not in bad faith. (Vol. I, P. 690). Specifically, Professor Freeman opined that Dr. Puchalski acted in “complete good faith” when negotiating a new shareholders’ agreement and testified that “dreaming big or asking for some very nice perks is not the same thing as being able to say [Dr. Puchalski] stole money or has acted as a thief or something.” (Vol. I, P. 690).

Dr. Dyce also claims that he is still a shareholder of SCENT and should receive distributions for his shares. Dr. Dyce claims that two class of stock have been created: one class in which Dr. Puchalski owns and gets distributions and one class in which Dr. Dyce owns and does not get distributions. (Vol. I, P. 21). Professor Freeman explicitly stated that this line of argument is a “red herring.” (Vol. I, P. 632). Section 4.4 and Section 4.5 of the agreement addresses this issue: if a shareholder’s employment is terminated, then he is no longer a shareholder. (Pl. Ex. 7.015). Accordingly, there are not two classes of stock and Dr. Dyce is not entitled to any distributions after his departure. (Vol. I, P. 40; Pl. Ex. 7.015).

Dr. Dyce also alleges that Dr. Puchalski received money he was not entitled to and was improperly reimbursed for personal expenses that were incorrectly classified as business expenses. This contention is completely without merit. SCENT’s accounting firm went through

every expense of the practice and categorized expenses as personal or business expenses. (Vol. I, P. 547). SCENT's former bookkeeper, Tammy Szymanski, testified that she and Dr. Puchalski did whatever the accounting firm said was appropriate in expense categorization. (Vol. I, P. 547, P. 550-551). The firm's accountant, Austin Sheheen, echoed the testimony of SCENT's bookkeeper, stating Dr. Puchalski complied with "whatever we suggested had to be done." (Vol. III, P. 362). Moreover, Austin Sheheen testified that Dr. Robert Puchalski never received any excess distributions or funds that he was not previously entitled to due to the build-up of his capital account.

Based upon the evidence presented in the record, it is evident Dr. Puchalski's actions were in his capacity as President and Managing Shareholder of SCENT. Additionally, the testimony presented indicates that Dr. Robert Puchalski acted within his authority and his actions were without corrupt motive and in good faith. See Docksides Ass'n, Inc. v. Detyens, 291 S.C. 214, 217, 352 S.E.2d 714, 716 (1987) ("Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith.").

As an additional sustaining ground, SCENT may indemnify Dr. Robert Puchalski against any alleged liability. Section 33-8-510 of the South Carolina Code provides, in pertinent part:

A corporation may indemnify an individual made a party to a proceeding because he is or was a director against liability incurred in the proceeding if:

(1) he conducted himself in good faith; and

(2) he reasonably believed:

(i) in the case of conduct in his official capacity with the corporation, that his conduct was in its best interest; and

(ii) in all other cases, that his conduct was at least not opposed to its best interest.

In addition, SCENT's Articles of Incorporation provides for indemnification for the

Managing Shareholder if a lawsuit is brought against him for managing the business and affairs of the corporation. (Pl. Ex. 108.003). As discussed, Dr. Puchalski conducted himself in good faith in handling the affairs of SCENT during a difficult time and he reasonably believed that his actions were in the best interest of the practice. Accordingly, even if any liability were attributed to Dr. Puchalski, SCENT would indemnify Dr. Puchalski.

This Honorable Court has not ruled on, nor provided an analysis, as to Dr. Robert Puchalski's individual liability. There is no evidence in the record that Dr. Puchalski did not act in good faith in handling the affairs of SCENT and the testimony presented by John Freeman, Tammy Szymanski, Kimberly Koumas, Austin Sheheen, and Dr. Macy Vidrine all indicate that Dr. Robert Puchalski acted without corrupt motive and in the best interests of the practice. Accordingly, we respectfully request that the Court reconsider its ruling that Dr. Robert Puchalski is jointly and severally liable for Dr. Dyce's claims against SCENT.

X. Dr. Amy Puchalski's Joint and Several Liability.

The Court found that Dr. Amy Puchalski is jointly and severally liable for \$25,596.87 of excess distributions under theories of conversion and constructive trust. Respectfully, the facts supporting this conclusion were misapplied and are not supported by the evidence in the record or the applicable law.

As an initial matter and as discussed more fully *supra*, Dr. Robert Puchalski did not receive any excess distributions above what Dr. Dyce received that he was not entitled to receive. Mr. Austin Sheheen testified extensively that the monies Dr. Robert Puchalski received were charged to his capital account and consisted of funds he accumulated in the practice prior to Dr. Dyce becoming a shareholder on July 16, 2008. Moreover, because Dr. Dyce did not become a shareholder until July 16, 2008, the distributions for the 2008 tax year between Dr. Puchalski

and Dr. Dyce would not be equal. A convoluted hypothetical by opposing counsel that does not support the facts in evidence does not change this analysis.

Regardless, the funds Amy Puchalski received on behalf of her husband are not subject to attachment under theories of either conversion or constructive trust. The elements to recover for constructive trust or unjust enrichment based on quantum meruit, quasi-contract are: “(1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value.” Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000). Dr. Dyce has completely failed to establish that Amy Puchalski improperly received funds. Indeed, the *only* testimony presented was that Amy Puchalski received monies that her husband, Dr. Puchalski, was entitled to as a physician/owner of SCENT. (Vol. I, P. 548; Vol. III, P. 307, P. 347, P. 352, P. 358).

Tammy Szymanski, the former bookkeeper of SCENT and a witness called by the Plaintiffs, testified that Dr. Amy Puchalski only received monies earned by Dr. Robert Puchalski and that Dr. Amy Puchalski did not take anything that she or her husband were not entitled to. (Vol. I, P. 548). Additionally, the corporate accountant, testified that all monies received by Dr. Amy Puchalski were owed to Dr. Robert Puchalski for his employment and ownership of SCENT. (Vol. III, P. 355-360). Mr. Austin Sheheen further testified that any money received by Amy Puchalski was for Dr. Puchalski and “were part of his wages, part of his distributions” and that Dr. Puchalski paid taxes on all those wages. (Def. Ex. 250; Def. Ex. 251; Vol. I, P. 359). Evidence introduced at trial demonstrated that while a check would be made payable to Amy Puchalski, it would be charged to Dr. Robert Puchalski’s distribution account. (Def. Ex. 94; Def. Ex. 251). Moreover, Dr. Robert Puchalski testified that his wife received money directly as a

convenience because she handled all the household financial affairs. (Vol. II, P. 231). Mr. Austin Sheheen further testified that this process “would be the same as if [SCENT] wrote it to [Dr. Robert Puchalski] and he got it to [Dr. Amy Puchalski] and she took it to the bank.” (Vol. III, P. 307:20-22). Mr. Austin Sheheen corroborated Dr. Robert Puchalski by testifying that there was nothing wrong with the distributions being paid directly to Dr. Amy Puchalski and that the married couple did this as a matter of convenience. (Vol. III., P. 307:15-23).

The Plaintiffs failed to present any testimony—expert or otherwise—that the monies received by Amy Puchalski were anything other than normal disbursements for her husband. This absence of the slightest, contrary testimony further reinforces the testimony of Tammy Szymanski, Austin Sheheen, and Dr. Puchalski. The fact that a wife picks up payments owed to her husband is not grounds for a conversion claim nor for a constructive trust to be imposed. Accordingly, Dr. Dyce has utterly failed to show the payments to Amy Puchalski are inequitable. See Myrtle Beach Hosp., Inc., 341 S.C. at 8-9, 532 S.E.2d at 872.

The Plaintiffs also failed to present sufficient evidence that Dr. Amy Puchalski is liable for conversion. The Plaintiffs failed to present sufficient facts to support this court’s conclusion that Dr. Amy Puchalski “exercised a right of ownership over the goods or chattels of another, to the alteration of the condition or the exclusion of the owner’s rights.” Crane v. Citicorp Nat’l Services, Inc., 313 S.C. 70, 437 S.E.2d 50 (1993). Dr. Dyce failed to establish the first element to prove conversion in that he has not demonstrated an interest in the thing converted. Richardson’s Rests. V. Nat’l Bank of S.C., 304 S.C. 289, 403 S.E.2d 669 (Ct. Appl. 1990). As discussed *supra*, Dr. Dyce did not have an interest in the \$25,596.87 of excess distributions because these were properly charged to Dr. Robert Puchalski’s capital account and were monies he was rightfully entitled to. As Dr. Dyce cannot meet the elements of conversion, this cause of action

must fail. The only testimony in the record was that the distributions Amy Puchalski received on behalf of her husband were in fact Dr. Robert Puchalski's funds that were for his benefit and should be attributable to him. Accordingly, Defendants respectfully request that this Honorable Court reconsider its finding of fact and conclusion of law that Dr. Amy Puchalski is liable for \$25,596.87 of excess distributions under the theories of conversion and constructive trust and dismiss all claims against Dr. Amy Puchalski.

XI. Dr. Gunnlauggson.

The Court failed in its evaluation of the credibility of Dr. Gunnlauggson as a witness. Dr. Gunnlauggson attempted in this litigation to assert that he was a shareholder in SCENT, despite prior sworn testimony in a related case that he "is not and never was a shareholder or owner of South Carolina ENT Allergy and Sleep Medicine." (Def. Ex. 141; Def. Ex. 190).⁴ Dr. Gunnlauggson was on the verge of perjuring himself on the stand, yet the Court has found that his testimony substantiates that of Dr. Dyce's. Dr. Gunnlauggson's testimony is not credible and should not support the absurd assertion that the increased volume of calls and text messages were about patient care. Additionally, although Dr. Dyce denied that his lawyers were coordinating with the attorneys of Dr. Gunnlauggson, an email between Dr. Gunnlauggson and his attorney, clearly shows that Dr. Dyce and Gunnlauggson were having their attorneys contact each other (Def. Ex. 86). Ironically, Dr. Dyce denied to Dr. Puchalski that his attorney was working with Dr. Gunnlauggson's attorney, and that denial was captured on one of Dr. Dyce's secretly taped recorded conversations. (Def. Ex. 207; Vol. I, P. 423-424). Despite this, the parties formed a "Joint Legal Defense Strategy" That was litigated through the discovery of this case.

⁴ As the Court stated to the parties at trial, based upon the evidence presented and the prior sworn testimony of Dr. Gunnlauggson, "the fact exists and will remain to exist that Chad Gunnlauggson is not and never was a shareholder of South Carolina ENT Allergy and Sleep Medicine." (Vol. I, P. 62). Accordingly, Dr. Gunnlauggson was not and is not a shareholder of SCENT.

Respectfully, this Court should not rely upon any evidence either put forth by or substantiated by Dr. Gunnlauggson due to his evident lack of credibility. Accordingly, Defendants respectfully request that this Honorable Court review and reconsider its findings of fact and conclusions of law with respect to Dr. Gunnlauggson's testimony.

XII. SCENT LAND DISSOLUTION

Defendants respectfully request that this Honorable Court reconsider its Order with respect to the dissolution of SCENT Landholdings, LLC ("SCENT Land"). Specifically, the Defendants' request that this Court reconsider its ruling regarding whether Judge Benjamin's July 31, 2012 Order may be appealed, address the failure of Jamie Curley meeting her capital call, determine amounts that Dr. Amy Puchalski and Jamie Curley are owed from SCENT Land, rule upon the date of dissolution of SCENT Land, address the ownership interest of the other owners of SCENT Land, including Dr. Oliver Simmons and Dr. Macy Vidrine, and address the amounts that SCENT Land has paid on the respective notes since the date Jamie Curley was expelled by SCENT Land.

As an initial matter, Defendants contest this Honorable Court's conclusion that Judge Benjamin's order is the law of the case and may not be appealed. Following Judge Benjamin's Order, Defendant's filed a Notice of Appeal and submitted briefs to the South Carolina Court of Appeals. Respondent Jamie Curley filed a Motion to Dismiss arguing the appeal was interlocutory. The parties agreed and filed a joint dismissal of the appeal regarding Judge Benjamin's Order without prejudice. Writing for the Court, Chief Judge John C. Few ordered that the appeal was interlocutory and may be reviewed after final judgment according to section 14-3-330(1) of the South Carolina Code (1976). See Order of Chief Judge Few Attached as Exhibit A to this Motion. Accordingly, Defendants' contend that Judge Benjamin's Order is not

the law of the case and is still subject to review by the Court of Appeals. In that regard, Defendants respectfully request that this Honorable Court reconsider its decision to appoint a receiver for the winding up and liquidation of SCENT Land as this is not a settled issue which still must be reviewed by the Court of Appeals. Moving forward with the dissolution of SCENT Land would be unduly harsh and prejudicial to Defendants as this matter is not yet resolved.

Even if this Court were to determine that the dissolution of SCENT Land were to proceed, the Court did not conclude the amount Jamie Curley would be entitled to at the time of her expulsion from SCENT Land on April 21, 2010. Importantly, this Honorable Court did not rule on whether Jamie Curley failed to make the capital call issued by SCENT Land. SCENT Land could not obtain financing from First Palmetto Bank because the bank required both managers of SCENT Land to execute the necessary financial documents and Dr. Dyce refused to sign. (Vol. III, P. 104, P. 110, P. 210, P. 217, P. 220-221). Both Jaime Curley and Dr. Dyce refused to sign necessary documents, including closing documents, and five scheduled closings fell through. (Vol. II, P. 265). Finally, in an effort to stave off a financial collapse, SCENT Land validly issued a mandatory capital call pursuant to the terms of SCENT Land's Operating Agreement. (Def. Ex. 115, §6.9) The capital call was properly noticed and approved by the terms the Operating Agreement. (Def. Ex. 115, §6.9; Def. Ex. 154, Def. Ex. 155; Def. Ex. 156; Def. Ex. 157). Amy Puchalski honored the capital call, contributing \$170,000 to SCENT Land in an effort to pay overdue construction costs to vendors. (Def. Ex. 158). Jamie Curley failed to make the capital call as approved by SCENT Land. (Vol. II, P. 187). SCENT Land subsequently expelled Jaime Curley from membership in the company per section 6.9 of the Operating Agreement for failing to make a capital contribution. (Def. Ex. 115, §6.9).

Additionally, the Court did not specifically rule what Jamie Curley's value in SCENT

Land was at the time of her departure. The Operating Agreement of SCENT Land set forth the order for liquidation of the company. (Def. Ex. 115, §16.9.) Based upon the values of the properties provided by SCENT Land and the testimony established, SCENT Land's Hartsville building was worth \$1,350,000 with outstanding debt of \$1,044,048.96. The Lugoff building was not completed and no appraisal was performed on the half completed building.⁵ Using the cost of construction expended and cost of land purchase to arrive at the most accurate figure under this analysis, would equal \$1,127,906.60 minus outstanding debt of \$957,907.60.⁶ (Def. Ex. 218). Finally, the appraised value of the Park Central property was \$380,000 and the outstanding debt was \$387,359.69.

If the property were liquidated, a broker's real estate commission would have to be paid. Utilizing a six-percent (6%) brokerage fee would result in total likely sale value of \$2,686,432.20. After paying off associated debt as required under the Operating Agreement, net proceeds after creditors would equal \$297,116.95. The operating agreement then provides that the liquidating company must distribute assets to any Members in return for their contributions. (Def. Ex. 115, §16.9). Amy Puchalski made the only contribution to the company in an amount of \$110,000 which must be returned leaving \$187,116.95. (Def. Ex. 115, Ex. A; Vol. II, P. 198-199). This would leave \$93,558.48 cents owed to the two shareholders. However, the \$170,000 that Jaime Curley refused to contribute must be calculated to offset the amount that Amy Puchalski did contribute. This would then leave a balance owed to SCENT Land by Jamie Curley in the amount of \$76,441.52. (Vol. II, P. 191-200). Additionally, this type of liquidation

⁵ An appraisal arranged by Curley was done on the completed building much later, but this appraisal would not reflect the actual value of the building at the time of Curley's departure since it was only half finished at that time.

⁶ \$957,907.60 is the debt outstanding after taking into account the \$170,000 that Amy Puchalski contributed to the company for the capital call. Without considering Amy Puchalski's capital contribution, the debt would be \$1,127,907.60.

does not take into account the fees and costs incurred by the receiver in effectuating the liquidation of SCENT Land. In essence, SCENT Land will be dissolved to the benefit of no one.

Naturally, the date in which it was determined that Jamie Curley was expelled from SCENT Land is an important component in calculating that amounts she is allegedly owed and the Court did not rule upon her date of departure. Jamie was expelled from SCENT Land on April 21, 2010 when she failed to make her capital call. This Honorable Court must rule upon the date in which Jamie Curley was no longer a member of SCENT Land to properly determine the amounts allegedly owed.

In addition, the Court has not addressed the ownership interests of other members of SCENT Land. While Amy Puchalski and Jamie Curley were 50/50 owners in 2010 when Jamie Curley was expelled from the limited liability company, two other members have since joined SCENT Land, including Dr. Oliver Simmons and Dr. Macy Vidrine. The inclusion of these two new members will effect the amounts allegedly owed to Jamie Curley. Respectfully, the Court must rule upon this issue as well to appropriately determine ownership interest in SCENT Land and any amounts owed.

Finally, the Court has not addressed the amount of debt SCENT Land has paid down on the respective mortgages since Jamie Curley departed SCENT Land. As the Court is aware, it would be inequitable for Jamie Curley to benefit from debt that was paid off by SCENT Land in a company in which she did not contribute any since she was expelled.

It is evident that the dissolution of SCENT Land brings with it a number of attenuated negative consequences that may be avoided depending upon the appeal of Judge Benjamin's Order. Accordingly, Defendants respectfully request this Honorable Court reconsider its Order with respect to the appointment of a receiver and the liquidation of SCENT Land until this matter

is finally resolved. Alternatively, Defendants request that this Honorable Court rule upon the other issues addressed herein to provide guidance for the parties and preserve the record on appeal.

XIII. Defendants' Causes of Action

Defendants' respectfully move the Court to reconsider its findings of fact and conclusions of law with respect to Defendants' causes of action. The Court misapplied the facts in evidence and applicable law on several of Defendants' causes of action.

a. Breach of Arbitration Provision

This Court did not rule upon Dr. Dyce's breach of the Agreement to arbitrate the Shareholders' Agreement. As a provision of the Shareholders' Agreement, the parties committed they would arbitrate disputes instead of filing a public lawsuit. (Pl. Ex. 7.023). As explained by Professor Freeman, there is real value to professional parties in an agreement to arbitrate. (Vol. I, P. 639, 640). Primarily, arbitration avoids public disclosure of disputes that damage a professional practice, especially in a small town. As Dr. Puchalski testified, the allegations of mismanagement and oppression quickly spread throughout the community. (Vol. II, P. 60). Dr. Dyce breached his agreement to arbitrate causing the practice's internal disputes or "dirty laundry" to become public. This damage would have been avoided if Dr. Dyce had honored his agreement.

The Defendants' pled the arbitration provision of the agreement as an affirmative defense. It is evident the value of the arbitration agreement was lost once Dyce filed a public lawsuit. SCENT has chosen to remedy that breach and the injuries suffered as a result through this case. Dr. Dyce cannot un-ring the bell, and he cannot undo his breach of the arbitration agreement. Plainly, Dr. Dyce breached the Agreements by filing lawsuits in violation of his

commitment to arbitrate. While difficult to quantify the tremendous loss of goodwill endured as a result of Dr. Dyce's breach, the very essence of filing this public lawsuit was a repudiation of the contract, thereby also excusing SCENT's further performance.

b. Dr. Dyce's Breach of his Fiduciary Duty to SCENT, SCENT LAND, and Dr. Puchalski

Respectfully, this Court improperly applied the relevant facts and applicable law in failing to determine that Dr. Dyce breached his fiduciary duty to SCENT and to Dr. Puchalski. Dr. Dyce repeatedly breached his fiduciary duties owed as an officer and shareholder of SCENT and as a manager of SCENT Land. As an officer, shareholder, and an employee entrusted with confidential knowledge, Dr. Dyce owed SCENT a fiduciary duty. Dr. Dyce was made aware of the fiduciary duties he owed to the practice by corporate counsel before he began his path of destruction. (Def. Ex. 51). South Carolina courts have consistently found that officers and board members have fiduciary obligations. See e.g. Talbot v. James, 259 S.C. 73, 80, 190 S.E.2d 759, 764 (1972)(finding that officers and directors of a corporation stand in a fiduciary relationship to the individual stockholders which prevents them from using their fiduciary position to their own advantage and to the detriment of the corporation); Gilbert v. McLeod Infirmary, 219 S.C. 174, 185, 64 S.E.2d 524, 528-529 (1951)(holding officers of a corporation owe a fiduciary relation to the corporation and its shareholders). Moreover, the South Carolina General Assembly codified the fiduciary obligations that officers and board members owe. See S.C. Code Ann. § 33-8-420 et seq. Dr. Dyce breached his fiduciary duties to SCENT and SCENT Land in numerous ways.

i. Dr. Dyce Stymied the Operations of SCENT and SCENT Land.

Dr. Dyce consistently hindered the business operations of both SCENT as an officer and SCENT Land as a manager. (Def. Ex. 209; Def. Ex. 226; Vol. I, P. 356, P. 361, P. 544; Vol. II,

P. 147-148). Dr. Dyce made it impossible for SCENT to function normally, almost grinding it to a halt and pushing the practice to the brink of economic collapse. For example, Dr. Dyce refused to allow SCENT to change its malpractice carrier to a lower cost provider, failed to approve expenditures for Respironics and AllMeds, and refused to attend five separate closings for the new office building. Dr. Dyce's refusals to close the construction loan resulted in halted construction, collection requests by the contractor, and concerns from the bank. (Def. Ex. 47; Def. Ex. 49; 60; Def. Ex. 93; Def. Ex. 127; Def. Ex. 209; Def. Ex. 226; Def. Ex. 240). Dr. Dyce refused to execute loan documents as a manager of SCENT Land despite knowing the lease was expiring on the Lugoff location, jeopardizing the entire practice. (Vol. I, P. 361; Vol. III, P. 63-64, P. 246). Importantly, Dr. Dyce had no objections to signing the loan documents to construct a building in Hartsville where he primarily practiced, but that he refused to sign the necessary documents for the new Lugoff building. (Def. Ex. 16; Def. Ex. 151). Dr. Dyce also refused to regularly return phone calls, electronic mail, or other communications despite being a shareholder of SCENT and owing fiduciary duties to further the practice. (Vol. I, P. 339). This Court failed to rule upon Dr. Dyce's actions and the manner in which they stymied the practice. Moreover, this Honorable Court incorrectly concluded that Dr. Puchalski could close the construction loan without Dr. Dyce. As discussed more fully *supra*, Dr. Dyce had to be present to sign as a manager for SCENT Land because he was listed as a manager on SCENT Land's Articles of Incorporation filed with the bank and on the signature card with the bank. The bank refused to close the loan without his authorization as long as he was a required party. (Def. Ex. 279; Vol. II, P. 257; Vol. III, P. 104, P. 210, P. 217, P. 220-221).

Dr. Dyce's excuse for stymieing the practice and bringing a public lawsuit was his purported lack of access to information. The facts demonstrate this contention is without merit

and his assertion is not a proper justification for grinding the practice to a halt. Dr. Dyce repeatedly and falsely complained of a lack of access to information, while simultaneously refusing to sign a confidentiality agreement to take information off the premises. (Def. Ex. 54; Def. Ex. 64; Def. Ex. 161; Vol. II, P. 160). This is the same confidentiality agreement that Dr. Puchalski signed as a shareholder of the practice. (Def. Ex. 161). Dr. Dyce's contention that he was denied information is contrary to the overwhelming evidence.

In fact, no evidence except Dr. Dyce's self serving testimony supports a lack of access to information. Any review of the evidence reveals a consistent dialogue and exchange of information between SCENT and Dr. Dyce, Jamie Curley, and their personal attorney, Bruce Armon. See (Def. Exs. 24, 41, 44, 45, 46, 51, 52, 54, 55, 56, 59, 64, 88, 92, 93, 226). SCENT continuously provided closing documents, malpractice policies, financial documentation of the practice, and any other documents requested. Furthermore, Dr. Dyce admitted that SCENT offered to make all corporate documents available to him or his agent at SCENT's corporate headquarters. (Vol. I, P. 345). SCENT also offered to have an outside, neutral accountant review all documents that Dr. Dyce might request, but to no avail. (Def. Ex. 62). Moreover, Austin Sheheen testified that he would meet with Dr. Dyce to go over financial matters and discuss any information requested by Dr. Dyce. (Vol. III, P. 304, P. 312). Again, this Court failed to rule upon Dr. Dyce's lack of credibility and his purported lack of access to the information requested. The overwhelming amount of evidence presented at trial indicates that Dr. Dyce actively stymied the practice with no justification.

When asked at trial what documents he believed SCENT refused to provide him, Dr. Dyce only mentioned that he had not gotten all draft versions of shareholders negotiations and some credit card bills. (Vol. I, P. 356). Despite this statement, Dr. Dyce later admitted that he

reviewed versions of shareholder contracts and other information SCENT provided with his attorney. (Vol. I, P. 425, P. 429-430). This admission is supported by exhibits proving Dr. Dyce was actively involved in the shareholder negotiations in December 2009 and later. (Def. Ex. 24; Def. Ex. 29). This court incorrectly draws a conclusion from facts not in evidence that Dr. Dyce was not involved in shareholder negotiations since the first Shareholders' Agreement he received was purportedly version 35. The record is replete with examples of SCENT providing information to Dr. Dyce via electronic mail, yet Dr. Dyce conceded at trial that he "didn't always have the opportunity to check my e-mail." When asked in his deposition about information that he claimed he was owed, Dr. Dyce responded "I haven't thought about it, sir." (Vol. I, P. 339; Def. Ex. 179, P. 84). Additionally, this Honorable Court did not address the hours of tape-recorded conversations⁷ that Dr. Dyce took of SCENT's officers, employees, and advisors. A review of these tape-recorded conversations reveals that Dr. Dyce admitted that SCENT's attorney provided the requested documents to Dr. Dyce's attorney. On that recording, Dr. Dyce stated, "I think Ed sent Bruce Armon a bunch of stuff, probably even more than [Bruce] asked for, and he just started reviewing it last week, so I think that is—that all is tying into why he is taking so long." (Def. Ex. 207, P. 16; Vol. I, P. 423). This Court's finding that Dr. Dyce did not receive adequate information to make appropriate decisions as a shareholder is simply not supported by the evidence in the record. Dr. Dyce testified that he was not signing anything until he had a chance to review the information, but subsequently refused to sign the necessary documents even after being provided the requested information. (Vol. I, P. 360).

As Defendant's expert Professor Freeman testified, Dr. Dyce sought an excessive amount

⁷ The Defendants note that this Court did not address the tape-recorded conversations by Dr. Dyce. Additionally, this Court did not address the fact that Dr. Dyce did not turn over the secretly tape recorded conversations until a year and a half after they were originally requested by attorneys for SCENT.

of information, requesting “every scrap of paper that concerns every single outlay any of any sort for this business from the time the articles are filed to today.” (Vol. I, P. 668). Professor Freeman further testified that during his many years of experience in corporate governance he had never “seen such a broad request . . . as a condition precedent to closing a vitally needed, extremely important, crucial real estate loan.” (Vol. I, P. 665-666). It is evident that Dr. Dyce was given numerous documents, including closing statements, financial records, and that the entire records of SCENT were available to him if he chose to review them on the premises or off premises by signing a Confidentiality Agreement.⁸ Instead of reviewing whatever documents he desired on premises or signing a Confidentiality Agreement to remove them, Dr. Dyce continued to stymie the business, cast blame, and use a façade of lack of information to grind SCENT’s business to a halt.

ii. Failing to Alert SCENT that Dr. Gunnlauggson was Adverse to the Practice.

As an officer and shareholder, Dr. Dyce owed a duty to alert the practice that a key employee, Dr. Gunnlauggson, was adverse and damaging to the company. As stated by Professor Freeman, Defendants’ expert in corporate practices, “Dr. Dyce and Dr. Gunnlauggson have an obligation to speak accurately and truthfully concerning their behavior at SCENT, SCENT deserves that.” (Vol I., P. 675). The incontrovertible evidence proves that Dr. Dyce was well aware that Dr. Gunnlauggson was hostile and adverse toward SCENT, but failed to alert the practice. Moreover, Dr. Dyce facilitated the adverse actions of Dr. Gunnlauggson, which resulted in damages to SCENT.

The overwhelming amount of evidence presented at trial indicates Dr. Dyce knew that

⁸ This Honorable Court concludes that Dr. Dyce should have had access to this information without signing a Confidentiality Agreement. Respectfully, this Court fails to consider that Dr. Puchalski signed the same confidentiality agreement to access the information and that the agreements between the parties required each party to sign the Confidentiality Agreement.

Dr. Gunnlauggson was adverse to SCENT. Dr. Dyce received a proposed Affidavit from Dr. Gunnlauggson drafted by Dr. Gunnlauggson and his attorney and captioned as “Chad Gunnlauggsson, Plaintiff v. South Carolina ENT, Allergy and Sleep Medicine PA and Dr. Robert Puchalski ... Defendants.” (Def. Ex. 71). At trial, Dr. Dyce testified that he did not realize that the Affidavit was for a lawsuit or that it was adverse to the practice. (Vol. I, P. 370-371). This testimony is not credible. As more fully discussed herein, the Affidavit contained assertions detrimental to SCENT, including that Dr. Gunnlauggson was a shareholder. (Def. Ex. 71). Dr. Dyce breached his fiduciary duty by failing to tell SCENT about an adverse employee who was going to file a lawsuit against the practice. Dr. Dyce breached his duty by concealing Dr. Gunnlauggson’s subversion of SCENT.

The court also heard overwhelming evidence of extensive communications between Dr. Dyce and Dr. Gunnlauggson. Phone calls and text messages between Dr. Dyce and Dr. Gunnlauggson increased dramatically in late 2009 and into 2010 while Dr. Dyce attempted to stymie the practice. (Def. Ex. 133, Def. Ex. 134, Def. Ex. 135). The Court incorrectly found that the increase in calls and text messages was related to patient care. The Court failed to address, however, that as a result of these conversations, Dr. Dyce began requesting the same financial information that Dr. Gunnlauggson’s attorneys were requesting of the practice. (Vol. I, P. 35).

c. Conspiracy

Defendants respectfully request this Honorable Court reconsider its findings of fact and conclusions of law with respect to Dr. Dyce’s conspiracy with his wife and Dr. Gunnlauggson. Specifically, this Court did not address Defendants’ allegations that Dr. Dyce conspired with his wife and did not properly consider the special damages alleged by the party.

Conspiracy is simply the combination of two or more persons joining for the purpose of injuring and causing special damage to a party. Hackworth v. Greywood at Hamlett, 385 S.C. 110, 682 S.E.2d 871 (Ct. App. 2009)(holding the 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). A review of the evidence concludes that all elements of conspiracy have been met by a preponderance of the evidence and conclude Dr. Dyce conspired with his wife and Dr. Gunnlauggson, causing special damages to SCENT.

By refusing to execute five different closings, Dr. Dyce and Curley were sabotaging SCENT's efforts to finish construction and open the new building. Dr. Dyce and Dr. Gunnlauggson were seen often meeting privately during these periods of time, and Dr. Gunnlauggson was in the process of secretly creating his own medical practice to compete against SCENT in the Richland County area. (Def. Ex. 65). Correspondence between Dr. Gunnlauggson and the entity that he used to help secretly setup the practice even discussed Dr. Dyce coming on as a partner. (Def. Ex. 114; Def. Ex. 84; Def. Ex. 87; Vol. I, P. 521). This was the same period that Dr. Gunnlauggson began showing up to SCENT's Business Office asking questions about insurance company claims, coding procedures, and reimbursement process. (Vol. III, P. 244-245; Def. Ex. 166). Additionally, a former employee, Kieley Taylor, revealed that Dr. Gunnlauggson and Dr. Dyce engaged in a suspicious, confidential conversation during this time, and also that *both physicians* specifically requested off for April 23, 2010—the day Dr. Gunnlauggson publicly sued SCENT. (Def. Ex. 112). At the same time Dr. Dyce was stealing insurance contracts from the practice, Dr. Gunnlauggson was also trying to learn the business side to setup a practice for both of them to compete against SCENT.

Dr. Dyce's breach of his fiduciary duty and duty of loyalty gives rise to civil conspiracy

because of the nature of information shared, for the purpose of injuring SCENT, and the special damages resulting. While Dr. Dyce admitted to discussing the proposed Shareholders' Agreement with Dr. Gunnlauggson, Dr. Dyce denied discussing the details of the Agreement. (Vol. I, P. 376, 377, 388). This testimony is not credible. Moreover, Dr. Gunnlauggson's testimony that Dr. Puchalski informed him of the specific details in the proposed Shareholders' Agreement is nonsensical and is not credible. (Vol. I, P. 493). The only plausible source of the confidential information leaked to Dr. Gunnlauggson came from Dr. Dyce.

The overwhelming weight of the evidence establishes that the parties conspired to injure SCENT. The actions of Dr. Dyce, Dr. Gunnlauggson, and Curley caused SCENT extreme and special damages. As part of this civil conspiracy, Curley and Dr. Dyce gave false reasons for blocking the loans on the building to bring SCENT Land and SCENT to a halt. Moreover, the confidential information Dr. Dyce shared with Dr. Gunnlauggson resulted in further stymieing of the practice and two public law suits. Additionally, in conjunction with his wife, Dr. Dyce ran up the debt of the company while maximizing his own distributions and giving assurances he would sign a new shareholders' agreement that addressed the debt of the practice. (Vol. II, P. 141-143). Moreover, the physicians conspired by improperly asserting that Dr. Gunnlauggson was a shareholder of the practice, which was an attempt to disenfranchise Dr. Puchalski and dilute the value of the shares he owned in the practice.⁹ (Def. Ex. 71). The special damages resulting from the conspiracy and fraud include the diminution of market value for remaining SCENT stockholders, diminution of value in SCENT Land, half of the debt of SCENT at the time of Dr.

⁹ The Court also failed to address the fact that Dr. Dyce continued to maintain that Dr. Gunnlauggson was a shareholder of the practice despite the fact that Dr. Gunnlauggson's own sworn testimony indicates otherwise. Moreover, the Court failed to address the fact that Dr. Dyce never amended his tax return to properly advise the IRS that he was a 50% shareholder of the practice and not a 33% shareholder of the practice given Dr. Gunnlauggson's prior sworn testimony. This admissible evidence supports a finding of a lack of credibility of Dr. Dyce.

Dyce's departure, loss of dividends, damage to business reputation, loss of corporate opportunities, damage to corporate good will, and lost revenue in the Hartsville and Cheraw locations since the expiration of the Covenant. (Vol. II, P. 82; Def. Ex. 218). In total, the special damages are \$7,773,598.85. (Def. Ex. 218). These special damages are separate and apart from the damages the practice incurred as a result of Dr. Dyce's breach of his fiduciary duty and his breach of contract. This Honorable Court failed to properly consider the special damages SCENT incurred from Dr. Dyce's conspiracy.

Accordingly, we respectfully request that the Court reconsider its ruling with regards to the causes of action alleged by SCENT against Dr. Dyce and his wife Jamie Curley.

XIV. Miscellaneous

a. Discovery Abuse

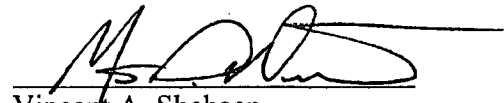
This Honorable Court failed to address the Plaintiffs' discovery abuse alleged by Defendants. As stated during trial, Jamie Curley obtained appraisals of the value of SCENT Land properties. Curley failed to disclose these appraisals during discovery. (Def. Ex. 136). Defendant issued a subpoena directly to the appraiser, which Curley attempted to block by filing a motion to quash. Judge Cooper denied Curley's motion to quash and Defendants eventually obtained the appraisals. In response to Defendants' Request for Production, Curley states on August 15, 2012 "that there are currently no written appraisals in her possession pertaining to real property owned by SCENT Land." An inspection of the information from the appraiser, C.S. McCall & Co., LLC indicates that the appraisals were completed on April 30, 2012 and an invoice was sent to counsel for Curley on the same date (Def. Ex. 137). The information further reveals that the invoice was not paid until August 13, 2012 when counsel for Curley submitted a check paying for the invoice. It is evident that Jamie Curley was not forthright with opposing party when

representing that she did not have copies of the written appraisals when in actuality they were completed four months prior to the discovery responses. The Defendants respectfully request that this Honorable Court rule upon Plaintiffs' discovery abuse with regard to these appraisals.

CONCLUSION

For the reasons more fully stated herein, Defendants respectfully request that this Honorable Court reconsider its findings of fact and rulings of law in the instant matter. This motion is further based upon any memorandum of law to be filed and other evidence as may be submitted to the Court prior to a hearing on this motion.

Respectfully submitted,

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

Vincent A. Sheheen
Michael D. Wright
Savage, Royall & Sheheen L.L.P.
PO Drawer 10
Camden, South Carolina 29021

December 17, 2015

EXHIBIT A

The South Carolina Court of Appeals

Jamie Curley, Respondent,

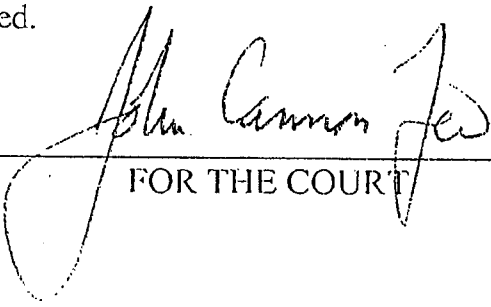
v.

S.C.E.N.T. Allergy & Sleep Medicine, P.A. and Dr.
Robert Puchalski, Appellants.

Appellate Case No. 2013-000448

ORDER

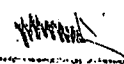
Respondent has filed a motion to dismiss this appeal as interlocutory. Thereafter, the parties filed an agreement, which is in effect a motion seeking the dismissal of this appeal without prejudice. It appears the parties have contemplated that the issues raised in the underlying order may be appealed after a final judgment. This court agrees the underlying order may be reviewable after final judgment under section 14-3-330(1) of the South Carolina Code (1976). Accordingly, the parties' request to dismiss this appeal is granted.



FOR THE COURT

Columbia, South Carolina

cc:
Vincent Austin Sheheen
Michael Dennis Wright
Morris Arthur Ellison
Jana Bebergal Baker

FILED
8/21/13 

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

IN THE COURT OF COMMON PLEAS

Dr. Orville Dyce,

Plaintiff,

vs.

South Carolina ENT, Allergy & Sleep
Medicine, P.A., Amy Puchalski and
Dr. Robert Puchalski,

Defendants.

2010-CP-28-0323

MOTION INFORMATION FORM
AND COVER SHEET

Jamie Curley,

Plaintiff,

vs.

SCENT Land Holdings, LLC, Amy
Puchalski and Robert Puchalski,

Defendants.

2010-CP-28-322

FILED FOR RECORD
2015 DEC 17 PM 2:40
CLERK OF COURT
KERSHAW COUNTY, S.C.

Plaintiff's Attorney: Jana Baker, Esquire
PO Box 999
Charleston SC 29402
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Defendant's Attorney: Vincent A. Sheheen
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e-mail: vsheheen@thesavagefirm.com other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

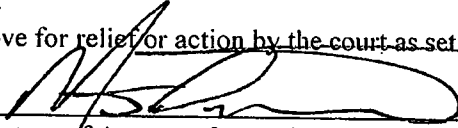
Nature of Motion:

SECTION II: Motion Type

☒ Written Motion Objecting to Appointment of Receiver

☐ Form Motion –

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff/ ☒ Defendant

December 17, 2015

Date Submitted

SECTION III: Motion Fee	
☐ PAID – AMOUNT: <u> \$25.00 </u>	
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE _____ CODE: _____ Date: _____
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED – AMOUNT DUE: _____	

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

Jamie Curley,

Plaintiff,

vs.

SCENT LAND HOLDINGS, LLC, Amy
Puchalski, and Robert Puchalski,

Defendants.

Dr. Orville Dyce,

Plaintiff,

vs.

South Carolina ENT, Allergy, & Sleep
Medicine, P.A. Amy Puchalski, &
Robert Puchalski,

Defendants.

) IN THE COURT OF COMMON PLEAS

) FIFTH JUDICIAL CIRCUIT

) Civil Action No. 2010-CP-28-322

) Civil Action No. 2010-CP-28-323

) **Objection to Appointment of Receiver**

FILED FOR RECORD
2015 DEC 17 PM 2:40
CLERK OF COURT
KERSHAW COUNTY, S.C.

Pursuant to its Order entered on December 8, 2015 and received by Defendants on December 9, 2015, this Honorable Court requested objections to its Order appointing a receiver by December 18, 2015. The Defendants respectfully object to the appointment of a receiver at this juncton and ask that such an action be stayed until determination and review by the Court of Appeals of any appellate matters.

Specifically, the Court incorrectly stated in its ruling that Judge Benjamin's July 31, 2012 Order was not appealed. In fact following Judge Benjamin's Order, Defendant filed a Notice of Appeal and submitted briefs to the South Carolina Court of Appeals. Respondent Jamie Curley

filed a Motion to Dismiss arguing the appeal was interlocutory. The parties agreed and filed a joint dismissal of the appeal regarding Judge Benjamin's Order *without prejudice*. Writing for the Court, Chief Judge John C. Few ordered that the appeal was interlocutory and may be reviewed after final judgment according to section 14-3-330(1) of the South Carolina Code (1976). See Order of Chief Judge Few Attached as Exhibit A to this Motion. Accordingly, Judge Benjamin's Order is not the final law of the case and is still subject to review by the Court of Appeals.

To appoint a Receiver and wind down the company now, without allowing the Defendant opportunity to seek appellate review, would defeat the agreement of the parties and the order of the Court of Appeals allowing appeal. Such a drastic action would not only end the existence of a company without allowing appellate review explicitly contemplated and agreed to by the parties, but it would likely cause the termination of employment of over 40 employees who currently work within the premises.

In that regard, Defendants respectfully request that this Honorable Court reconsider its decision to appoint a receiver for the winding up and liquidation of SCENT Land as this is not a settled issue and still must be reviewed by the Court of Appeals. Moving forward with the dissolution of SCENT Land would be unduly harsh and prejudicial to Defendants as this matter is not yet resolved.

CONCLUSION

For the reasons more fully stated herein, Defendants respectfully request that this Honorable Court reconsider its ruling regarding the appointment of a receiver. This motion is further based upon any memorandum of law to be filed and other evidence as may be submitted to the Court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "V. A. Sheheen", written over a horizontal line.

Vincent A. Sheheen
Michael D. Wright
Savage, Royall & Sheheen L.L.P.
PO Drawer 10
Camden, South Carolina 29021

December 17, 2015

EXHIBIT A

The South Carolina Court of Appeals

Jamie Curley, Respondent,

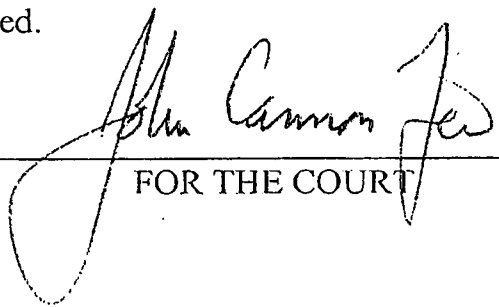
v.

S.C.E.N.T. Allergy & Sleep Medicine, P.A. and Dr.
Robert Puchalski, Appellants.

Appellate Case No. 2013-000448

ORDER

Respondent has filed a motion to dismiss this appeal as interlocutory. Thereafter, the parties filed an agreement, which is in effect a motion seeking the dismissal of this appeal without prejudice. It appears the parties have contemplated that the issues raised in the underlying order may be appealed after a final judgment. This court agrees the underlying order may be reviewable after final judgment under section 14-3-330(1) of the South Carolina Code (1976). Accordingly, the parties' request to dismiss this appeal is granted.



FOR THE COURT

Columbia, South Carolina

cc:

Vincent Austin Sheheen
Michael Dennis Wright
Morris Arthur Ellison
Jana Bebergal Baker

FILED
8/21/13

C O N T E N T S

INDEX OF EXHIBITS:

(There were no exhibits introduced.)

INDEX OF WITNESSES:

(There were no witnesses called.)

1 THE COURT: I know Judge Barber scheduled this all
2 day, and so I don't have anything else, even though I
3 think Aaron said some of you may have told him that it may
4 not take all day to do.

5 But we do have all day, and if we need to take a
6 break for lunch, we will take a break for lunch or we can
7 just keep going straight through if we need to.

8 All right. And let's see. If somebody can just give
9 me an idea as to who represents who because I know we have
10 a -- I've taken a --- we've looked over the files and the
11 motions last week, but if somebody can give me an idea as
12 to who represents who --

13 MR. ELLISON: Sure, Your Honor.

14 THE COURT: -- and some background on the case, I'll
15 give you some time.

16 MR. ELLISON: Your Honor, I'm Morris Ellison. First
17 of all, thank you. I've never had the pleasure of
18 appearing before you before. Along with my associate,
19 Jana Baker, we represent -- we're from the Womble Carlisle
20 firm. We're from the Charleston office, and we represent
21 Dr. Orville Dyce who is -- and Jamie, who is over to
22 Ms. Baker's left.

23 Dr. Dyce is married to Jamie Curley. They are the
24 plaintiffs, separate plaintiffs, in two different cases.
25 I guess I can do all of the -- well, I'll let Vincent take

1 care of his end of things.

2 THE COURT: Okay.

3 MR. SHEHEEN: Your Honor, thank you, and I hope you
4 are feeling okay.

5 THE COURT: I'm fine.

6 MR. SHEHEEN: Your Honor, I represent -- there's --
7 you're going to hear three cases today.

8 THE COURT: Okay.

9 MR. SHEHEEN: I represent -- I'll just tell you who I
10 represent. I represent SCENT Land Holdings. I represent
11 Dr. Robert Puchalski and his wife Amy in that case. I
12 also represent South Carolina ENT, which is SCENT for
13 short, which is actually the medical practice.

14 Corey Manning is here from Nelson Mullins. They
15 formerly represented SCENT.

16 THE COURT: Okay.

17 MR. SHEHEEN: And they are going to be appearing on
18 one motion related to discovery.

19 MR. MANNING: I'm not representing anybody here
20 today --

21 THE COURT: All right.

22 MR. MANNING: -- except the law firm Nelson Mullins.

23 MR. SHEHEEN: And then in these cases, that's the
24 only parties we have right now.

25 THE COURT: All right.

1 MR. ELLISON: So, Judge, we think that what makes the
2 most sense is for us to go forward with the Curley and
3 Dyce cases first. They're much simpler cases, but I'll
4 let Mr. Bland do the introductions for Dr. Dyce.

5 THE COURT: All right.

6 MR. BLAND: Good morning, Your Honor.

7 THE COURT: Good morning.

8 MR. BLAND: I am Eric Bland, and I have the pleasure
9 of representing Dr. Chad Gunnlaugsson and his -- as a
10 matter of fact, it's Southeastern Ear, Nose and Throat.

11 Chad, Dr. Gunnlaugsson, also has a lawsuit against
12 Robert Puchalski, and SCENT and a pending motion against
13 his wife to amend the complaint, Amy Puchalski.

14 Dr. Gunnlaugsson used to be an employee and arguably
15 a shareholder of SCENT, as well, like Dr. Dyce.

16 THE COURT: All right. And so Mr. Ellison, you are
17 representing Dr. Curley and Dr. Dyce?

18 MR. ELLISON: I think it's actually -- she may think
19 she is a doctor sometimes, but it's Ms. Curley --

20 THE COURT: Oh, okay.

21 MR. ELLISON: -- is married to Dr. Dyce.

22 THE COURT: And she -- she has some interest in the
23 land.

24 MR. ELLISON: She and Amy Puchalski are the two
25 members, sole members, of SCENT Land Holdings.

1 THE COURT: Okay. Okay.

2 MR. ELLISON: As a matter of fact, Dr. Dyce was a
3 shareholder in SCENT, South Carolina ENT, which as
4 Mr. Sheheen said, was a -- is an ENT practice. So they
5 have different interests in the different entities.

6 THE COURT: Okay.

7 MR. SHEHEEN: And, Your Honor, the only other lawyer
8 who is here is John Robinson who has come into the case
9 recently in the Gunnlaugsson case to assist with matters
10 relating to discovery.

11 THE COURT: All right.

12 MR. SHEHEEN: So he is here --

13 THE COURT: On behalf of the defendant?

14 MR. SHEHEEN: Yes, ma'am. Yes, ma'am, I'm sorry, on
15 behalf of the defendant. So in these motions, he is not
16 involved but in the other case, he will be involved.

17 THE COURT: All right. And if you all -- if you want
18 to, I guess, go ahead and place on the record just a
19 summary of --

20 MR. ELLISON: That suits --

21 THE COURT: -- what the issues are.

22 MR. ELLISON: -- exactly -- well, Judge, what -- I
23 thought your initial suggestion actually was great, which
24 is sort lay out the facts and the situation which gives
25 rise to the whole matter prior to getting into the

1 motions.

2 THE COURT: Okay.

3 MR. ELLISON: I think that would make a lot more
4 sense.

5 MR. SHEHEEN: Your Honor, we can do that, or we can
6 do that as part of the motions. There are going to be,
7 obviously, many, many different --

8 THE COURT: Yes.

9 MR. SHEHEEN: -- interpretations of facts.

10 MR. ELLISON: But what we tried to do, Judge, is we
11 tried to set out a timeline that I'll go through with the
12 Court. I have a copy for you, and we'll take a few
13 minutes to go through this. But I think this will give
14 the Court the factual context of all of this.

15 THE COURT: All right.

16 MR. SHEHEEN: Your Honor, Mr. Morris just gave me
17 this, so I might agree with all of it. I might not. I
18 don't know. You know, I'll have to digest it, but I'm
19 sure he'll just try to stick to what the basic facts are.

20 MR. ELLISON: And that's all I'm trying to -- what I
21 try to do. I always get burned in the courtroom when I
22 say that nobody is going to argue with this because
23 somebody always finds a reason to argue with something,
24 but I try to make it as simple as I could to stay away
25 from inferences and just lay out a timeline.

1 Mr. Bland has a more complex timeline because
2 Dr. Gunnlaugsson's case is more complex. I think that the
3 most -- there are a couple of things that sort of shape
4 this entire matter.

5 The -- I mean, frankly, Judge, this involves a --
6 what I would call major falling out among what were
7 friends.

8 Dr. Dyce and Dr. Puchalski went to the same college.
9 They both went to Cornell. They both trained a year apart
10 at the University of Pennsylvania, which makes me very
11 happy because my daughter just graduated from U Penn. She
12 doesn't -- can't think of a finer university in the
13 country. They were a year apart.

14 Dr. Puchalski came to South Carolina in 2004 and
15 formed South Carolina ENT, but it had a different name at
16 the time. That's not on the contract. You know, I'm just
17 trying to put this in context.

18 THE COURT: All right.

19 MR. ELLISON: Dr. Dyce followed a year later, and he
20 began working for SCENT in February of 2005. Now, SCENT
21 was formed as a Statutory Close Corporation under
22 applicable South Carolina law, which in broad strokes
23 means there's certain formalities you don't have to worry
24 about, but again, these guys were friends.

25 Dr. Gunnlaugsson, incidentally, followed a year

1 later. He follows in 2006 but -- so SCENT is formed as a
2 Statutory Close Corporation, and in the spring of 2006,
3 again, SCENT hired Dr. Gunnlaugsson.

4 The idea is that after two years, that Dr. Dyce would
5 become a member. They used the term partner a lot because
6 medical practices and legal practices like using those
7 terms, but you have got a Statutory Close Corporation, so
8 they both can be shareholders.

9 So in March 2007, Dr. Dyce begins being paid as a
10 shareholder and begins an agreed upon buy in, a negotiated
11 buy in.

12 I don't think -- for purposes of motions today, we've
13 stayed away from what the terms of that buy in were and
14 all those -- although, we may get into that later, but in
15 March 2007, that's when that starts happening.

16 In August 2007, there are several documents that are
17 executed between Dr. Dyce and Dr. Puchalski, including a
18 shareholder agreement, a stock purchase agreement and a
19 bill of sale.

20 Approximately five months later, in a joint letter
21 which we provided to the Court, Dr. Puchalski and Dr. Dyce
22 together, as the owners of SCENT, they offer ownership in
23 SCENT to Dr. Gunnlaugsson.

24 On -- well, to sort of tell you, in June and July
25 of 2008, SCENT and Dr. Puchalski and Dr. Dyce execute new

1 employment agreements. They also execute new shareholder
2 agreements. That's at point eight -- I'm sort of
3 summarizing points six through eight in the timeline.

4 In June of 2008, Dr. Gunnlaugsson begins being paid
5 as a SCENT shareholder, and he begins his process of a buy
6 in.

7 Now, I know the Court is familiar with what a -- in
8 broad strokes with what an S Corporation means. An S
9 Corporation means you have to be paid. Essentially,
10 unless you have an employment agreement saying otherwise,
11 you've got to be paid in the corners with your ownership
12 interest.

13 If you don't, if you -- the expression in the tax
14 world is if you blow the S Election -- there's a lot of
15 things I understand about -- that I don't understand about
16 the tax world, but blowing the S Election is something I
17 do understand, because if you blow the S Election, if you
18 don't pay people in accordance with their ownership
19 interest, then not only do the individual owners get taxed
20 at one level of taxation, the corporation also gets taxed
21 at a separate level of taxation.

22 So the word that we learned in law school are double
23 levels of taxation, double taxation. That's not a good
24 thing. So it's very important to keep the S status of a
25 corporation up all the way through.

1 In September 2008, a second entity is formed. This
2 entity is called SCENT Land Holdings. The members of
3 SCENT Land Holdings were Amy Puchalski, Dr. Puchalski's
4 wife, and Jamie Curley, Dr. Dyce's wife.

5 The practice is making a lot of money. These guys
6 are making literally millions of dollars. They are making
7 a lot of money. It is only in, really, the fall of 2009
8 that things get off the tracks.

9 This wasn't Dr. Dyce's choice. I mean, this was Dr.
10 -- well, this is an inference. This was Dr. Puchalski's
11 choice. Vincent can argue with that as much as he wants,
12 but let's go through again the dates on the timelines.
13 Again, I think the dates tell a lot.

14 In November 2009, Dr. Puchalski loaned \$496,000 --
15 we're not taking about little numbers here -- to SCENT at
16 10 percent interest for the purchase of an interest in the
17 Hartsville syndicate.

18 Dr. Dyce and Dr. Gunnlaugsson did not object to the
19 purchase, but they said, "Why should we be borrowing money
20 from you at 10 percent interest when we can get a bank
21 loan at less than 5 percent interest?"

22 At the same time, Dr. Puchalski on his own stopped
23 making profit distributions from SCENT to both
24 Dr. Gunnlaugsson and Dr. Dyce without the permission of
25 either of them.

1 The way these physicians in broad strokes were being
2 paid, they got a salary which they were entitled to get
3 under the terms of their employment agreement, and then
4 they got bi-weekly sweeps is what they called it.

5 In other words, they swept the profit out, and they
6 paid each other a portion of the profits basically every
7 two weeks. That's what stopped in November of 2009.

8 Now, there are other -- there are other payments, but
9 in broad strokes, that's the way these guys were getting
10 paid. Again, we're talking about a lot of money.

11 In January 2010 -- and now the dates, you'll see they
12 really start coming much closer together, and you can see
13 who is doing what.

14 In January 2010, Dr. Puchalski admitted that
15 Dr. Gunnlaugsson had completed paying for his buy in.
16 Also, on January 13th through Ed White, a lawyer at Nelson
17 Mullins, Dr. Puchalski for the first time presented
18 Dr. Dyce with version 35 of a new shareholder agreement
19 and version 23 of a new employment agreement which Nelson
20 Mullins had prepared.

21 Dr. Dyce had never seen any of the prior versions of
22 those documents, and we will likely get into that later
23 on.

24 In the winter of 2010, Dr. Puchalski wants Dr. Dyce
25 to -- and he is looking to Dr. Dyce to do it, even though

1 Ms. Curley is actually a member in SCENT Land.

2 He wants SCENT Land to close on a construction loan
3 for a new office building in Lugoff, South Carolina that
4 SCENT Land is going to own.

5 Dr. Dyce starts asking for information. The
6 information is not forthcoming. Dr. Puchalski was using
7 the withheld sweeps to pay -- from SCENT to pay the
8 contractor for SCENT Land's new building. One of -- and
9 Dr. Dyce didn't know about it.

10 One of the things in connection with the closing --
11 Dr. Dyce said, "Well, let me have some information. Let
12 me see copies of the loan documents," never would furnish
13 them. "Let me see a copy of the lease between SCENT and
14 SCENT land," never furnished him with them.

15 "Let me see a copy of a closing statement or a draft
16 of a closing statement," never shown it. I mean, the
17 fundamental documents, Dr. Dyce is asking to see, and he
18 is not being furnished with them.

19 Dr. Dyce was also requesting some other information,
20 and that information wasn't forthcoming. Now, in March
21 of 2010 is when the timeline gets very compressed. There
22 was a meeting on March 3rd, 2010 supposedly involving the
23 shareholders in SCENT.

24 Well, under Dr. Puchalski's theory of the case, there
25 are only two shareholders in SCENT, that was Dr. Dyce and

1 Dr. Puchalski. There was only one member, one
2 shareholder, present.

3 The only shareholder present at the March 3rd, 2000
4 meeting was Dr. Puchalski, and in the presence of three
5 SCENT employees: Teresa Williams, Tammy Szymanski and
6 Keeley Taylor, there was a vote to terminate Dr. Dyce
7 without cause, and it says that specifically in the
8 documents.

9 Again, Dr. Dyce -- he wasn't present. He didn't know
10 about it. He finds out about it on the second page. One
11 week later, on March 10th, 2010 when Dr. Puchalski
12 purports to terminate him without cause, again at a
13 shareholder meeting that was attended by Dr. Dyce,
14 Dr. Puchalski, Ed White of Nelson Mullins, and some other
15 SCENT employees.

16 On March 11th, 2010, Dr. Puchalski through Teresa
17 Williams, the office manager, sends an e-mail notice of a
18 special meeting for SCENT Land. Again, the SCENT Land
19 members are Amy Curley -- excuse me, Jamie Curley and Amy
20 Puchalski.

21 What are they going to do at this special meeting
22 that they're going to hold by telephone, which isn't
23 authorized by an operating agreement? They are going to
24 vote as to whether they were going to make a capital call.
25 The operating agreement at SCENT Land doesn't authorize a

1 capital call, and there will be more discussions about
2 that later on.

3 On March 15th, having been terminated, asking asked
4 for information that was not forthcoming, having
5 participated in this meeting at SCENT Land, March 15th,
6 2010, Dr. Dyce files a very simple lawsuit.

7 He is not -- and one of the things that becomes
8 important also in terms of the number of shareholders is
9 if Dr. Gunnlaugsson is a shareholder, then Dr. Puchalski
10 did not have the authority to terminate Dr. Dyce because
11 you would have to have the majority of the shareholders to
12 do that.

13 This isn't a wrongful termination suit that gets
14 filed. It's a very simple lawsuit. An accountant, tell
15 us what's going on and make an accounting if there are any
16 financial dealings that are not appropriate. It's a very
17 simple lawsuit.

18 On March 17th, 2010, Dr. Puchalski sends an e-mail
19 again with respect to this capital call that we'll be
20 arguing about later on today, and then from March 23rd,
21 2010 until March 31st, 2010, Dr. Puchalski, unbeknownst to
22 Dr. Dyce who has -- is a 60-day period for which Dr. Dyce
23 is supposed to continue to work for SCENT before the
24 termination takes effect, between March 23rd, 2010 to
25 March 31st, 2010, there are a series of consents executed

1 on behalf of SCENT by Dr. Puchalski that -- to use the
2 Navy expression "start gun decking the records".

3 It says, for instance, to Dr. Puchalski has the sole
4 authority to transact business on behalf of SCENT. He has
5 got the sole authority to execute loan documents. He has
6 got the sole authority to execute leases. He has got the
7 sole authority to do anything.

8 He also retroactively -- do you remember that
9 November 2009 loan, there's a consent executed at the end
10 of March that authorizes it going back to November 2009.
11 Dr. Dyce knew nothing of this. We only found out about
12 this through discovery.

13 On April 23rd, 2010, Dr. Gunnlaugsson gives SCENT
14 notice that he is leaving. Again, that's a different
15 lawsuit.

16 At the same time, he files suit against SCENT and
17 Dr. Puchalski, Dr. Dyce is continuing to work through the
18 60 days, but he is supposed to leave on May 9th. That's
19 the effective date of Dr. Dyce's termination, and pursuant
20 to the SCENT Land Holdings document, since Dr. Dyce is no
21 longer an employee of SCENT as of May 9th, she has been
22 disassociated by the terms of the operating agreement of
23 SCENT Land from SCENT Land as of that day. That's
24 expressly provided in the SCENT Land operating agreement.

25 Four days later, and it's really interesting how this

1 all works -- and we provided the Court with a copy of the
2 e-mails that confirm exactly what we're saying here -- on
3 May 13th, Dr. -- a loan closes involving SCENT Land.

4 Dr. Puchalski pays himself \$252,000 and pays Nelson
5 Mullins \$252,000 from what would have come out of the
6 sweeps that Dr. Dyce would have been entitled to if the
7 monies had been distributed for SCENT rather than being
8 put into the SCENT Land building which Dr. Puchalski had
9 been doing without any authorization.

10 So four days after he is gone, a half a million
11 dollars is distributed, half of which goes to Nelson
12 Mullins.

13 On May 23rd, 2010, that's Dr. Gunnlaugsson's last day
14 of employment with SCENT, they are already in what I would
15 call rather heated litigation, and there is a hearing held
16 before Judge Barber on SCENT's request to enforce a
17 non-compete agreement against Dr. Gunnlaugsson.

18 In June 2010, finding very specifically that SCENT is
19 unlikely to prevail on the merits of the claim on the
20 non-compete, Judge Barber denies the request for the
21 injunction.

22 Now, remember we talked about the consent -- or
23 excuse me, the notice of meeting back in March of 2010
24 where Dr. Dyce was allegedly terminated saying it was
25 without cause and everything else in March said without

1 cause, as well.

2 When Dr. Dyce filed for unemployment, a new decision
3 is made, "Well, we really meant to fire Dr. Dyce with
4 cause."

5 On August 20th, 2010, the Employment Security
6 Commission in connection with an appeal by SCENT and
7 Dr. Puchalski file an order saying no, the termination was
8 without cause.

9 In the fall of 2010, that's when this -- these two
10 lawsuits where we represent Dr. Dyce and Ms. Curley,
11 that's when it becomes -- they become different lawsuits
12 because we have got enough information to suggest
13 different things, and we filed an amended complaint in the
14 fall of 2010.

15 I tried to distill the timeline as simple as I could.
16 I know it's a lot. I really wanted it to be short, but
17 that's a broad stroke factual scenario that gives rise to
18 all of this.

19 THE COURT: All right.

20 Yes, sir.

21 MR. SHEHEEN: Thank you, Your Honor.

22 Your Honor, I will try to be very brief, because
23 we're going to spend probably more time on the motions
24 than we'll enjoy.

25 THE COURT: All right.

1 MR. SHEHEEN: So let me just give you a quick -- our
2 version of the background, because after listening to
3 Mr. Ellison, I can say that one thing that we agree on,
4 and that is that this is a dispute of former friends.

5 THE COURT: Okay.

6 MR. SHEHEEN: But that's probably about all we can
7 agree on, and if I didn't hear about 100 facts that there
8 is conflicting inferences and frankly, interpretations of
9 just then, then I know how, of course, you rule on these
10 motions.

11 Your Honor, we actually -- when Dr. Puchalski
12 actually came to Camden in 2002 and established his
13 practice, he did bring his friend Dr. Dyce in, later in
14 2005, as an employee. We agree on that. We did not pay
15 him as a shareholder until he became a shareholder. I've
16 heard that said.

17 We -- I believe that Ms. Curley came into SCENT Land
18 in 2009. The record will speak for itself. You have
19 that.

20 She came in without bringing any capital, whereas Dr.
21 -- Amy Puchalski, Dr. Puchalski's wife, and SCENT Land had
22 capital and assets that it had accrued when we brought her
23 in as a member anyway.

24 Your Honor, the crux of this is you have got a guy,
25 Dr. Puchalski, who created this practice, SCENT. He grew

1 it to four locations: Hartsville, Cheraw, Richland
2 County, Kershaw County.

3 He brought in -- there were other doctors that were
4 brought in. In fact, there was one, Macy Vidrine who was
5 brought in, I believe, right after Dr. Gunnlaugsson
6 eventually become a shareholder who is still with the
7 practice.

8 Your Honor, what happened in the fall of 2009 after
9 Ms. Curley, remember Dr. Dyce's wife, Ms. Curley, was
10 allowed to be a member is there was a building being
11 corrected that everybody agreed would be constructed.

12 Dr. Dyce had agreed, the other shareholder,
13 Dr. Puchalski had agreed. It was a big building where
14 they were going to operate out of owned by SCENT Land
15 Holdings.

16 They were also negotiating the shareholder agreements
17 that we vigorously dispute. They weren't included in
18 negotiations. There was a number of drafts because they
19 were back and forth about how these drafts should have
20 looked.

21 There was some dissatisfaction on the part of
22 Dr. Dyce about what he believed Dr. Puchalski was
23 negotiating in the shareholder stuff, and you saw
24 Dr. Dyce, Jamie Curley, refused to allow the completion of
25 this building that they had agreed would be built.

1 In fact, in that fall, in that winter, the loans were
2 supposed to be closed so the construction could go on, and
3 they refused to participate in the loan closings. This
4 building was basically mothballed midway through.

5 It began to have water damage. It began to be
6 vandalized. There were threats of liens being filed
7 against it. There were subcontractors not being paid.
8 There were contractors not being paid.

9 Our contention is they were using this as leverage to
10 try to exert more control over the company. At the same
11 time, we know that Dr. Gunnlaugsson and Dr. Dyce were
12 sharing information and also Ms. Curley. That's where
13 you'll hear our conspiracy claims come from.

14 We also know that Dr. Gunnlaugsson began to explore
15 and take steps to set up a competing practice in Richland
16 County during this time while he was an employee of SCENT,
17 while he has all kind of agreements that he had signed to
18 not do those things and while he owed a duty of loyalty to
19 the company.

20 It came to a point where this company was about to
21 fail because they could not -- their lease had run out
22 where they were operating in Kershaw County.

23 They could not finish this building. They had
24 threats from the contractors, the subcontractors, and so
25 SCENT and Dr. Puchalski took the steps that had to be

1 taken under the agreements.

2 Judge, there is going to be all kinds of disputes and
3 disputed facts about these agreements and what they mean.
4 I can go ahead and tell you that. You will hear a lot of
5 them today, but -- and you will understand when I tell you
6 that this case -- there is no way these cases can be
7 decided on summary judgment.

8 Dyce, we contest that Dyce didn't know about SCENT
9 loaning this money. He knew. We contest that he didn't
10 get access to financial documents, and that's a key
11 dispute between the parties of whether or not he was
12 allowed to look at them or not.

13 There were lawyers already involved at this point,
14 Judge. Judge, our contention is, and we believe the facts
15 show that the only choice to keep the company from
16 basically folding was to exercise the rights under the
17 agreement.

18 Dr. Dyce was required to leave. At that point, there
19 was a capital call, a call for money in the SCENT Land
20 around the same time.

21 There is dispute about whether or not that capital
22 call could be made. The company had no other choice but
23 to try to complete this building and continue doing
24 business.

25 Your Honor, there was some talk about the money

1 dispersed after Dr. Dyce left. That money was SCENT's
2 money unquestionably about how any money that goes into a
3 corporation could not be considered that money, and it
4 could be spent to pay legal bills or legal fees or a legal
5 retainer.

6 There is nothing wrong with that. It certainly isn't
7 something to be decided at the summary judgment stage
8 anyway.

9 Your Honor, then there was a question about whether
10 he -- whether there was cause for his employment agreement
11 to end. We say there was. They say there wasn't.

12 So you can see already in just 20, 30 minutes,
13 there's not a whole lot of agreement on the facts, the
14 inferences on the facts or what they mean.

15 There is some general agreement on some of the
16 timeline of when somebody got there, when they didn't get
17 there, but certainly not their status as the shareholder
18 at any particular time. There is a -- there is a dispute
19 about that.

20 There's the basic facts and kind of gist. You have a
21 number of motions to hear. The summary judgment motions,
22 I believe, of course, we thought would be the most
23 appropriate to hear first --

24 MR. ELLISON: Right.

25 MR. SHEHEEN: -- in the Curley case and the Dyce

1 case, and then there's some miscellaneous motions that you
2 have to hear, and I think you already heard those on that.

3 THE COURT: All right.

4 MR. SHEHEEN: Thank you.

5 THE COURT: That we'll get -- after we hear that,
6 then we'll get to Mr. Bland.

7 MR. BLAND: Well, Judge, I'm enjoying the view.

8 THE COURT: All right. And then you have --

9 MR. MANNING: Your Honor, I'm sorry --

10 THE COURT: The summary judgment on the
11 counterclaims.

12 MR. MANNING: Your Honor, since I don't really have a
13 dog in the summary judgment motions, can we hear the
14 motion to compel Nelson Mullins so I don't have to stay
15 here all day?

16 MR. ELLISON: Your Honor, it's out of context. I
17 mean, I appreciate the inconvenience to the Nelson Mullins
18 folks, but it will be completely out of context to do it
19 in that order.

20 THE COURT: Now, as -- but the motion to compel
21 regarding Nelson Mullins has nothing to do with Mr. Bland,
22 right? It's just...

23 MR. ELLISON: Well, without getting into argument,
24 Dr. -- any more than I have to, Dr. Dyce unquestionably
25 was a shareholder in SCENT.

1 Nelson Mullins purports to have represented SCENT,
2 and the question is whether a member of a Statutory Close
3 Corporation is entitled to -- is entitled to -- and he
4 paid fees, effectively, is entitled to file on some very
5 specific issues.

6 THE COURT: All right.

7 MR. MANNING: We argued the motion for Mr. Bland's
8 client on the very same point two months ago in front of
9 Judge Lee.

10 MR. BLAND: It's not quite the same point. My
11 situation is that I found an e-mail when I was at a
12 third-party subpoena production that disclosed this
13 payment to Nelson Mullins, and his situation is arguably
14 different because he is a defined member under a Statutory
15 Close Corporation, so it's not the same argument.

16 MR. MANNING: Fair point. I just was saying this
17 motion has nothing to do with Mr. Bland.

18 THE COURT: Okay. So his is already...

19 MR. MANNING: That's correct. I didn't mean to
20 imply --

21 THE COURT: So we'll -- I'll go ahead and let him
22 make his other motions. We'll have you stick around with
23 us.

24 MR. ELLISON: Judge, I understand, but if it would
25 not be out of context, I would be happy to. But it would

1 be completely out of context.

2 THE COURT: All right.

3 MR. ELLISON: The first motion, Judge, I think we
4 want to take up is -- and we're not trying to resolve the
5 entire case on summary judgment, but the first one is our
6 motion seeking judicial dissolution. We provided the
7 Court with this notebook.

8 THE COURT: Is this the same?

9 MR. ELLISON: Yes, Your Honor, that's the same one.

10 THE COURT: All right.

11 MR. ELLISON: Now, and I'm going to do my best not to
12 repeat what's in the memorandum.

13 THE COURT: All right.

14 MR. ELLISON: Some things, unnecessarily, we'll have
15 to repeat.

16 The salient facts for purposes of this motion, SCENT
17 Land was formed in 2008 by the filing of Articles of
18 Organization with the Secretary of State's Office. Those
19 articles are attached as Exhibit A.

20 The operating sole members of SCENT Land were Jamie
21 Curley and Amy Puchalski. Third, they signed an operating
22 agreement in September 2009.

23 Under South Carolina law, you can have a limited
24 liability company without having a signed operating
25 agreement. You just have to operate under the terms of

1 the statute.

2 If you -- and this is one of the fundamental points
3 of disagreement between Mr. Sheheen and myself. If you
4 want to take it, the company, out of the statute, you have
5 to have an operating agreement. The operating agreement
6 takes priority over the statute. It's not the reverse.

7 For whatever reason, and I don't think the reason is
8 relevant, they waited until September of 2009 to sign an
9 operating agreement, and that's the document that we're
10 dealing with.

11 SCENT Land owns buildings and real property. We
12 talked about the termination. I don't want to get into
13 the for cause, without cause. That's irrelevant for
14 purposes of this motion.

15 You can go through the operating agreement which
16 consists of nearly 40 pages, and there are two things that
17 you will not find.

18 You will not find any ability to call telephone
19 meetings in the operating agreement. You will also not
20 find any provision authorizing capital costs.

21 You can look anywhere in the Operating Agreement.
22 You won't find it. As we talked about earlier in March
23 2010, there was a telephonic meeting purportedly called by
24 Dr. Puchalski.

25 At that point, it was supposedly a capital call to

1 get -- not authorized by either the operating agreement or
2 by the statute. If you want to have a capital call as a
3 limited liability in South Carolina, you've got to provide
4 for it in the operating agreement. We'll get into that in
5 a couple of minutes.

6 You default to the statute. If it's not in the
7 operating agreement, then the statute does not authorize
8 capital calls.

9 Dr. Dyce was terminated. Whether it was with cause
10 or without cause, it doesn't matter for purposes of this
11 motion. He ended his employment effective May 9th, 2010.

12 I don't think my friend, Mr. Sheheen, will argue with
13 any of that. He might argue with the priorities about the
14 statute versus operating agreement. Those facts -- I
15 don't think he's going to argue them.

16 If you look at the operating agreement, section 1.10
17 defines members of the company. Members of the company
18 are defined as individuals who are either physicians
19 employed -- and it confuses partnership here -- but
20 physicians employed by SCENT or their spouses.

21 Again, Ms. Curley is married to Dr. Dyce, and
22 Mrs. Puchalski, I think, is married to Dr. Puchalski.
23 That, I can't say. Whether we have a disputed fact or --

24 MR. SHEHEEN: Yes, we stipulate to that.

25 MR. ELLISON: All right. Good. But this is what the

1 operating agreement says.

2 The operating agreement then says very specifically
3 that the members shall be disassociated -- that's a legal
4 term under the statute -- upon the occurrence of certain
5 events. One of which is if the member or the member's
6 spouse is no longer employed by or a shareholder in SCENT.
7 That's what the operating agreement says.

8 As a result, on May 9th, 2010, Ms. Curley was
9 disassociated under the terms of the operating agreement
10 from SCENT Land.

11 The statutes require that a written purchase offer be
12 delivered to Ms. Curley within 30 days. It says that in
13 section 33-44-701(B) of the Uniform Act, and the legal
14 part of this is all in the memorandum. Again, I'm going
15 to try to stay away from reading that. They didn't do
16 that.

17 Under section 33-44-702(B), if they didn't deliver
18 the written offer, the Court is authorized to judicially
19 dissolve SCENT Land. That's the way the statute works.
20 That is the first reason why with regard to the issue of
21 liability we think that Ms. Curley is entitled to summary
22 judgment.

23 There is a second reason. The second reason under
24 section 33-44-801(4)(E) as in Edward, it provides that
25 oppressive or unfair conduct are grounds for the Court to

1 enter into judgment in favor of Ms. Curley as a member and
2 to dissolve the company.

3 We'll probably hear that it is a factual issue as to
4 whether it was oppressive conduct, but there are two
5 things that there are no questions about.

6 The first is, again, the operating agreement doesn't
7 authorize telephonic meetings, but more importantly, the
8 operating agreement doesn't authorize capital calls.

9 Now, if there is no provision authorizing capital
10 calls, you can't require them, and the alternative for a
11 Court is to dissolve them or for the individual members to
12 dissolve the company. Since they have chosen not to
13 dissolve it, we think the Court is entitled to do it.

14 One of the issues that's raised in the two memoranda
15 is what's the interplay between -- and this is a purely
16 legal issue.

17 What's the interplay between an operating agreement
18 and a statute? For better or worse, I have the dubious
19 pleasure of drafting lots of these operating agreements.

20 What happens, again, is -- and I think it's set out
21 very clearly in section 33-44-103(A) that if you don't --
22 you can trump the statute by putting it in the operating
23 agreement.

24 So since the operating -- since the statute doesn't
25 authorize capital calls, if you want to have them, and

1 most -- frankly, most companies do, that's provided for in
2 the operating agreement. It's not in this one.

3 Trying to make a capital call when it's not
4 authorized, we believe constitutes oppressive conduct.
5 Again, we can argue about the facts about lots of other
6 things, but there is no argument about the fact that there
7 was an attempted capital call. There is no argument about
8 the telephone notice of the meeting and holding the
9 meeting by telephone.

10 If the Court finds as a matter of law that trying --
11 if we lose on the first issue, which I don't think we
12 should, obviously, but the second reason to dissolve is
13 there was an attempt to make an unauthorized capital call.

14 Mr. Sheheen also makes a really interesting argument,
15 as well, when he says that Ms. Curley owed and owes a
16 fiduciary duty to SCENT Land. That's a real interesting
17 argument given that the statute says very specifically
18 nope, a member does not offer -- owe a fiduciary duty to
19 the other members of a company, particularly in a
20 manager-managed company, and the memorandum that we filed
21 cites to that very specific statutory provision, which is
22 33-44-49--- I'm sorry, 409(H)(1).

23 It says quite clearly quoting, "A member who is not
24 also a member which" -- I apologize, "who is also not a
25 manager owes no duty to the company or to the other

1 members by reason of being a member."

2 The LLC statute sets forth what the duties are in
3 section 409, and fiduciary duty is not one of them owed by
4 a member to other members. The rest of the arguments, I
5 think, should be taken up with regards to the
6 counter-claims, but again, regards to liability questions,
7 not the amount.

8 The two fundamental points are there is no issue of
9 material fact that the notice wasn't given and the tender
10 wasn't made within 30 days of disassociation.

11 Secondly, I think it is a legal question as to
12 whether trying to make an unauthorized capital call
13 constitutes oppressive conduct or not. If it does, under
14 either one of those theories, Ms. Curley is entitled to
15 summary judgment.

16 Thank you, Your Honor.

17 THE COURT: Thank you.

18 MR. SHEHEEN: May it please the Court.

19 THE COURT: Yes, sir.

20 MR. SHEHEEN: Thank you, Your Honor.

21 Your Honor, first I want to step back for a minute
22 and explain the posture of this case. I think it's
23 important for you to understand that.

24 First, these cases -- these two, not the
25 Gunnlaugsson's case, these two, are nonjury cases. In

1 other words, the judge is going to hear from -- the
2 complaint didn't ask for a jury trial, and the
3 counterclaims did not ask for a jury trial.

4 Your Honor, we are about to begin depositions of
5 these cases. We have not taken any depositions. Your
6 Honor, you know the standard for summary judgment, and it
7 is described by our court to be a drastic remedy. If
8 there is a scintilla of evidence supporting the position
9 of the nonmoving party, then it should not be granted.

10 Your Honor, these issues that Mr. Ellison just set
11 forth are classic, classic factual disputes and
12 interpretations. Let me give you the first one. I think
13 it's really the basis of his argument, and that is that
14 SCENT could -- SCENT Land, excuse me if we misspeak
15 sometimes, but there are these two companies, SCENT Land,
16 could not make a capital call.

17 A capital call is when the company says we need money
18 so that we can operate. We need money for whatever. In
19 this case, it was we need money because this building
20 ain't getting built, and it's being damaged because you
21 guys won't follow through with the financing. So there
22 was a capital call made.

23 Your Honor, whether or not this agreement allowed a
24 capital call is a classic factual determination. That's
25 what factual determinations are when there is a dispute.

1 Is there a dispute? Yes, there is a dispute. 6.9(C)
2 says in the agreement that -- this is talking about when a
3 member may be expelled. "If they fail to make a mandatory
4 capital contribution to the company within six weeks of
5 written notice given for a project that is approved by the
6 membership for such contribution to make."

7 Your Honor, a mandatory -- this agreement
8 contemplates that mandatory capital contributions will
9 have to be made. It discusses it specifically in this
10 provision about expulsion of members.

11 Dr. Dyce's lawyers or Dr. Dyce's case disagrees with
12 that interpretation. Okay. That's fine. We're confident
13 that it is correct. We're confident that there is no
14 other reason that it would be in there, and that the trier
15 of fact will make a determination that, in fact, the
16 agreement allows capital contributions to be required, to
17 be made, for a project that is approved by the membership.

18 It's interesting how well this offense would have
19 occurred. There was a capital -- there was a project
20 approved by the membership building the building.

21 In fact, Ms. Curley even picked out the color of, it
22 think it was the shingles, okay, which gets you into the
23 fiduciary relationship, which I don't really think we have
24 to get into on this motion but we are on the counterclaim.

25 She was involved. Her husband was deeply involved on

1 her behalf, as well, Dr. Dyce, who is the shareholder in
2 SCENT, the medical practice.

3 There was a project approved by the membership, and
4 then there was a mandatory capital contribution call.
5 Then she refused to pay it, and the rest is basically why
6 we're here.

7 So I understand the argument of Dr. Dyce. We don't
8 believe it's supported by the agreement, and certainly
9 there is a factual dispute. There is no way summary
10 judgment could be granted.

11 Your Honor, I think the second claim they have is for
12 a judicial dissolution. The question was -- that was
13 drawn up by counsel -- that was that an offer had been
14 made once she was no longer a member.

15 Your Honor, the offer was zero. There was no offer.
16 Maybe it was zero because we believe -- SCENT Land
17 believes and asserts in this case is what this whole case
18 is about that she owes SCENT Land. She owes SCENT Land
19 for breaching her fiduciary duty, for intentionally
20 interfering with contracts, for conspiring against the
21 company. Your Honor, she owes SCENT Land. They don't owe
22 her anything.

23 Your Honor, there is a formula in the agreement, the
24 membership, the member agreement, that talks about the buy
25 out for relieving a member.

1 Your Honor, that is a factual determination that has
2 to be made. Your Honor, there is no way that you can
3 grant a summary judgment appropriately on their claims and
4 essentially end the case in their favor when there are
5 these factual disputes that are clearly pending.

6 I'm not going to take up a lot of time because I
7 think it's pretty simple, and that is this is not
8 appropriate for summary judgment.

9 We need to go ahead and allow the judge to understand
10 and hear all of this in context because, Judge, this is so
11 complicated that being here for an hour or two or three is
12 just going to give you the initial feel of what a finder
13 of fact, a judge, needs to understand to make a just
14 verdict and outcome in the case.

15 Thank you.

16 THE COURT: Thank you.

17 Anything on reply?

18 MR. ELLISON: Yes, Your Honor. I think it's a legal
19 issue as to what the document means. I think it's legal
20 issue as to what the statutes mean.

21 If I were Mr. Sheheen, I'd be saying a lot of the
22 same things. There could be -- even though the operating
23 agreement doesn't authorize it, there could be a mandatory
24 capital call, but the only way to get it is by having the
25 members unanimously agree to make it. That's set out th

1 way the capital -- excuse me, the way the operating
2 agreement is laid out.

3 Mr. Sheheen did not say that the statutes -- although
4 his memo says it. He didn't say just now that the
5 statutes authorize a capital call. The only way you get
6 to a mandatory capital call is if the members agree to
7 make it and what the terms are.

8 All you've got to do is look at the way sections 2.6
9 and 2.4 of the operating agreement play together. 2.4
10 says there can be no -- if you a look -- no promise by a
11 member to make a contribution to that company may be --
12 the company shall be enforceable unless set forth in this
13 agreement or in another writing signed by the member.

14 Well, if Ms. Curley had promised to pay in writing,
15 there would be a mandatory capital call. Look at section
16 2.6. Again, this is a purely legal issue to interpret the
17 documents.

18 If any member fails to make a contribution required
19 or agreed to under section 2.4 which we just went through,
20 other members by vote -- the other members by a vote of
21 members holding the majority of member votes may impose
22 various penalties.

23 Ms. Curley, there is no factual issue that Ms. Curley
24 never signed the writing required under section 2.4.

25 The operating agreement doesn't provide any other

1 place for any other type of mandatory capital call, how it
2 would be made, not only how much, what the terms would be,
3 what would happen if you didn't make it.

4 The only way you'd get there is if there is a
5 unanimous agreement to it. The mandatory nature of the
6 capital call comes because Dr. Puchalski and his wife
7 decided there should be a capital call.

8 It can't -- that's not what operating agreement says.
9 There has to be a written promise to pay by Ms. Curley,
10 and there is no factual issue that there was one.

11 Mr. Sheheen doesn't argue that they didn't provide
12 notice. They're still required to provide the notice, and
13 they didn't do it. How one interprets the operating
14 agreement and the statute is a legal question, and we
15 shouldn't have to spend tens of thousands of dollars doing
16 discovery in a case where as a matter of law it's clear
17 that Dr. Puchalski and his wife did not comply with the
18 operating agreement.

19 They didn't comply with the statutes, and as a matter
20 of law, Ms. Curley is entitled to have the company
21 dissolved as of the date of her disassociation which was
22 in May of 2010.

23 Thank you, Your Honor.

24 THE COURT: All right. I'm going to take a look at
25 the agreement and the statutes, and I'll get something

1 back to you on that.

2 MR. SHEHEEN: Your Honor.

3 THE COURT: Yes.

4 MR. SHEHEEN: Your Honor, just --

5 THE COURT: Yes, sir.

6 MR. SHEHEEN: 2.4 and 2.6 were mentioned there the
7 first time. If I could just say one word about it.

8 THE COURT: Yes, sir.

9 MR. SHEHEEN: Which is 2.4 and 2.6 talk about a
10 promise by a member. We're not claiming she made a
11 promise. We're claiming we can do a capital call.

12 If you look at 3.3, which I know you will, it says,
13 "In an event by a tie of the members, the family member
14 will break the tie."

15 I just think you can understand that as you look
16 through those factors, and again, classic factual
17 determination is the meaning for a document. It is not a
18 legal document.

19 THE COURT: Let me ask you this: So is it your
20 position that she had notice?

21 MR. SHEHEEN: Yes, Your Honor. There is an e-mail
22 that I think I included in your document where she has
23 e-mailed saying, "We're going to have a capital call."
24 Then there's a discussion back and forth between them
25 about why she has not been on our capital call.

1 THE COURT: And it's your position that she did not
2 have notice?

3 MR. ELLISON: She had electronic notice of a
4 telephone deal.

5 THE COURT: But it was not...

6 MR. ELLISON: That's not sufficient under the
7 statutes.

8 THE COURT: Okay.

9 MR. ELLISON: I'm not -- there is no factual issue
10 that she got an electronic notice of a purported
11 telephonic notice. That's why we talked about the fact
12 that the statute doesn't authorize telephone meetings or
13 electronic notice and neither does the operating
14 agreement.

15 MR. SHEHEEN: Your Honor, over the telephone, of
16 course -- there is nothing that says we can't have
17 telephone notice.

18 I mean, there is nothing that's in the statute that
19 says they have to meet in a certain room or whatever.
20 It's they had a meeting. It had to be put forth by some
21 way.

22 THE COURT: Teresa William is the -- what is her
23 position?

24 MR. SHEHEEN: She was the office manager for SCENT.

25 THE COURT: Office manager for SCENT.

1 MR. SHEHEEN: SCENT, and she also handles SCENT Land
2 office stuff.

3 THE COURT: All right.

4 MR. SHEHEEN: Your Honor, the only other point that I
5 think needs to be made -- we didn't do this -- I don't
6 think that anybody will disagree with this -- is the SCENT
7 Land is current -- I don't know that you -- I want to make
8 sure you understand that SCENT Land is currently still
9 operating an LLC that owns assets and whatnot.

10 THE COURT: Uh-huh.

11 MR. SHEHEEN: I just want to make sure that that's
12 clear.

13 THE COURT: All right. With that, I will get all of
14 this.

15 I believe, Mr. Ellison, you also had some summary
16 judgment motions or do you want --

17 MR. ELLISON: Oh yeah.

18 THE COURT: -- Mr. Manning's --

19 MR. ELLISON: The motion that I'd like to take up
20 next is the motion for summary judgment on the
21 counterclaims on the SCENT Land case.

22 THE COURT: Okay.

23 MR. ELLISON: Which is this one.

24 THE COURT: Yeah. Yours looks a little bit
25 different.

1 MR. ELLISON: A little bit, a little bit.

2 THE COURT: Okay. There is a motion against Ms.
3 Curley. All right.

4 (Pause).

5 All right. Yes.

6 MR. ELLISON: Your Honor, as it stands, there are
7 four counterclaims asserted against Ms. Curley by SCENT
8 Land and by Dr. Puchalski and by Amy Puchalski.

9 The first counterclaim is for a breach of fiduciary
10 duty; the second counterclaim is for civil conspiracy; the
11 third counterclaim is for tortious interference with a
12 contractual relationship, and the fourth is for
13 violations -- alleged violations of the South Carolina
14 Unfair Trade Practices Act which seems to be a ubiquitous
15 claim which I see a lot.

16 Even if there is no public interest satisfying the
17 Nola case and that whole line of cases, which is what we
18 think we have here.

19 So to take that one up first since that seems to
20 always be the catchall, and it's addressed in the last
21 part of our memorandum. Under the Unfair Trade Practices
22 Act, the Supreme Court has said that a plaintiff has to
23 show some kind of impact upon the public interest. That's
24 under the Nola Enterprises case and the line of cases
25 after that.

1 There are two general ways to do it. You have to
2 show potential repetition. To do it under the Carlton
3 Motor Cars decision, which again is cited in the material,
4 you've got to either show that some kind of action -- the
5 same kind of action occurred in the past, thus making it
6 likely that actions will continue absent some deterrence
7 or by showing the company's procedures create a potential
8 for repetition of the unfair and deceptive acts.

9 Under no set of facts, particularly since Ms. Curley
10 is disassociated from the company, do we see any ability
11 for potential of repetition on what is really solely a
12 breach of contract claim.

13 It gets back to a degree with regard to whether there
14 was a mandatory capital call, but clearly, Ms. Curley was
15 associated, from the company, in May 2010. I think that
16 one is very simple.

17 I also think that the breach of fiduciary duty claim
18 is simple. As we talked about a few moments ago, the
19 statute is clear. Under section 33-44-409(H)(1) which
20 says, "In a manager managed company, a member who is not
21 also a manager owes no duties to the company or to the
22 other companies solely by reason of being a member."

23 You can also look at section 1.12 of the company's
24 operating agreement, and again, I think we defer to the
25 act anyway. The act is quite clear what the duties are

1 between members.

2 There's a -- if you have a member-run company, which
3 we don't have here, you have a duty of loyalty which is
4 set forth in the statute. This is a manager-run company
5 and duty of loyalty is different from a fiduciary duty, as
6 well, but I'm sort of getting far afield.

7 Under no set of circumstances, given the law, given
8 what the statute says, could the court possibly find that
9 there is any kind of fiduciary duty imposed on Ms. Curley.

10 The other claims are civil conspiracy and under --
11 it's interesting, to a degree having been married for 24
12 years, it seems that the allegation is that if you're
13 married, that satisfies the definition of a conspiracy,
14 but I don't think that Dr. Puchalski really means that,
15 but that's the way the pleadings seem to read.

16 Because that is a combination of two or more persons.
17 Hopefully it's only two persons, but you have got a
18 requirement in showing special damages.

19 And in the response to -- as Mr. Sheheen pointed out,
20 we haven't taken any depositions yet, but in response to
21 the written discovery, all of the damage claims read
22 exactly the same.

23 There is a requirement in order to plead civil
24 conspiracy of special damages. None have been pled. None
25 have been identified in responses to written discovery.

1 They don't satisfy the requirements in order to state
2 a cause of action for civil conspiracy. The fourth
3 counterclaim which we think, which is the last one that
4 has been pled today which can be dismissed as a matter of
5 law is the argument for tortious interference with a
6 contractual relationship.

7 It's interesting, sort as a sidebar, to try to
8 understand where the damages are, because what they're
9 saying is, "Well, there was a mandatory capital call,"
10 even though the statute doesn't say that you can have one,
11 even though the operating agreement doesn't say one, but
12 because there was -- "because we say there was one, that
13 breached the contract. That breached some kind of
14 contract with some other party."

15 They have provided no contract with another party,
16 and I just don't see how they can show the existence of a
17 valid contract that was tortiously interfered with.

18 They haven't pled any allegations to support the
19 allegation that the acts were intentional. They
20 haven't -- I mean, what we've got here is a refusal to
21 honor an unauthorized capital call.

22 They say, "Well, that constitutes enough to claim
23 tortious interference with a contract with another party.
24 We don't think so as a matter of law."

25 Distilled to its essence, those are the arguments on

1 the four counterclaims that have been pled.

2 THE COURT: Yes, sir.

3 MR. SHEHEEN: Thank you, Your Honor.

4 Your Honor, again, these are exactly the types of
5 claims and issues that have to be determined by a trier of
6 fact.

7 I will start with the fiduciary duty claim. Your
8 Honor, our position, and we believe, and we believe a
9 factual finding of the trier of fact will determine that
10 Curley absolutely owed a fiduciary duty.

11 If you look, again this is in -- you have to look at
12 the agreement. It says that members don't owe a fiduciary
13 duty or a liability except -- this is 1.12.

14 THE COURT: Where are you at now?

15 MR. SHEHEEN: On the agreement.

16 THE COURT: One point --

17 MR. SHEHEEN: 1.12 and it's on the -- I don't know if
18 you have it in front of you, but it's page four. It
19 starts on page three, and it goes to page four, except to
20 the extent of their participation in the management of the
21 company.

22 And this is -- exactly for this reason, because in
23 these loosely knit companies, many members engage in
24 management. They confer. They decide things together.
25 They pick out colors for the roof of the building. They

1 look through the building under construction and make
2 decisions.

3 It says that if -- if they engage in management of
4 the company -- and this is consistent with the statute --
5 then they do have fiduciary relations -- fiduciary
6 responsibilities.

7 In B, it also says, of that same provision, that a
8 member that a member's obtained and using company
9 information shall constitute participation in the
10 management of the company as determined under applicable
11 case law and under the relevant facts and circumstances.

12 Your Honor, this is exactly what we were alleging has
13 occurred in this case and have provided you with
14 supporting documentation even before we had depositions,
15 and that is that she agreed to build this building.

16 She was involved in details of this building. In
17 fact, through her husband, he would walk through and see
18 how things would go and make comments, and they would
19 confer about it. And then using the information that she
20 gained along with her husband, they brought the whole
21 thing to a halt.

22 Now, this is exerting not only management duties but
23 brunt force in this entity. She owed a fiduciary
24 responsibility. Your Honor, we've all hired experts, and
25 I feel quite sure that our expert in a court of law will

1 testify at trial when he is deposed that she owed
2 fiduciary responsibilities.

3 She was given confidential information falling
4 squarely into B. Unfortunately, she used that
5 confidential information in tandem -- this gets to the
6 conspiracy, the conspiracy claims which are critically
7 important in this case -- with Dr. Gunnlaugsson and
8 Dr. Dyce to almost crash this company. It came within a
9 hair's breath.

10 So if you have confidential information, if you're
11 exerting control over the company, you fall squarely
12 within your responsibilities to owe a fiduciary duty.
13 That's just common sense. It's compliant with the law and
14 complies with what the agreement says.

15 Your Honor, on the conspiracy claim, again, we've not
16 completed discovery. I hope we'll learn even more damages
17 related to what they've done.

18 I have a feeling we will, but Your Honor, in the
19 complaint, we specifically set out separately special
20 damages that were caused by the conspiracy. There was a
21 loss of dividends, damage to business reputation, lost
22 legal opportunities. These are things that specifically
23 flow from her conspiracy.

24 If there is -- at this point in the case, if there is
25 confusion from my discovery responses, there is nothing

1 that keeps us from supplementing discovery responses.
2 There is nothing that keeps us from amending discovery
3 responses. That would be entirely inappropriate to grant
4 summary judgment on at this point.

5 Your Honor, the conspiracy that we're alleging was
6 not -- is not just a damages from the breach of the
7 fiduciary duty, for example, when she brought this company
8 within a hair's breath of the real problems.

9 They had real problems, but even more severe problems
10 but also the conspiracy with Dr. Dyce and Gunnlaugsson,
11 Your Honor, and you'll hear later, which resulted in
12 Dr. Gunnlaugsson opening a competing practice here in
13 Richland in the same building in violation of his
14 agreement, in violation of his fiduciary responsibilities
15 as an employee on a shareholder track.

16 Your Honor, the damages under her conspiracy claim
17 dwarf what the damages on the other cause of action are.
18 They certainly are different and special.

19 Your Honor, there was an argument that are there was
20 no interference with a third-party contractor. Your
21 Honor, you've got e-mails I've included where the
22 contractor literally who was building this building was
23 not paid timely where he was threatening and actually sent
24 over a document referencing a lien to be placed against
25 the building.

1 I don't think there is any dispute, or shouldn't be
2 any dispute, that SCENT Land had third-party contracts
3 that were interfered with because of what Ms. Curley did.

4 Your Honor, there was a contract with a bank to close
5 on these loans that resulted in higher interest for my
6 client and resulted in him having to stay in the other
7 building because they couldn't complete the contract in a
8 timely manner and pay extra rent.

9 Your Honor, we had subcontractors that we weren't
10 able to pay. All of this -- all of these repercussions
11 were known to Ms. Curley, yet she still did refuse to
12 allow the company to close on these loans.

13 These are disputed facts. They're going to dispute
14 this. I understand that, but for your purposes, there is
15 no perfect way to grant summary judgment.

16 Your Honor, finally, there is an Unfair Trade
17 Practices claim. The touchstone there, Your Honor -- the
18 touchstone is impact on the public. That's the touchstone
19 the Court looks to in cases.

20 Your Honor, there were, again, contractors not paid,
21 subcontractors not paid in the Kershaw County area. There
22 was the patient confusion. Your Honor, if this lease had
23 run out, these patients -- it did run out. The lease ran
24 out.

25 If the lease -- if they had not been allowed to stay

1 the extra few months, these patients would have not been
2 treated or would have had to come elsewhere to be treated,
3 which also obviously impacts the public. So you have the
4 impact to the contractors, the subcontractors, and the
5 patients, and the Unfair Trade Practice claim should
6 certainly be heard by the trial judge.

7 Thank you, Your Honor.

8 THE COURT: All right. Thank you.

9 MR. ELLISON: Your Honor, a couple of very, very
10 brief points. Again, I think the memo -- memorandum
11 covers virtually all of this.

12 I kept listening to hear what contract had been
13 breached. I still haven't heard it. He talks about
14 potential breach. He hasn't shown where anybody didn't
15 get paid.

16 So if -- what the cause of action, tortious
17 interference says is that you have to show an actual
18 breach. They haven't shown any breach. They show threats
19 of breaches but nothing was ever breached.

20 A fiduciary duty, even if Mr. Sheheen can get around
21 the statute, you have to show where there was a reposing
22 of trust and confidence in a person who owes the alleged
23 fiduciary duty.

24 I fail to see how an e-mail discussing the colors for
25 an office building creates a fiduciary duty. I also fail

1 to see where there is a factual issue with regard to being
2 involved with management by being consulted with regarding
3 the colors of a building.

4 With regard to the claim now that we're hearing
5 about, "Oh, well, there was all of this confidential
6 information that was used by Ms. Curley." What
7 confidential information? Nothing has been identified
8 other than Mr. Sheheen's testimony from the podium as to,
9 "Oh, well, there's all this confidential information that
10 Ms. Curley had."

11 I guess it was the colors in the building that's
12 considered confidential information. The statute says
13 what the duties are and are not. That's pretty clear.

14 The cause of action under the Unfair Trade Practices
15 Act, I think, is dealt with. I mean, Ms. Curley was
16 disassociated from the company in May 2010. I just don't
17 see how they get there.

18 Thank you very much.

19 THE COURT: Thank you.

20 MR. SHEHEEN: Your Honor, I think we discussed that
21 thoroughly, but I wanted to make sure the Court
22 understood. I had combined in my memo his summary
23 judgment motion on the judicial dissolution and the
24 counterclaim.

25 THE COURT: Yes, sir.

1 MR. SHEHEEN: Okay. Thank you.

2 THE COURT: All right. And then there is a -- I've
3 got quite a bit here, so I'm going to pull up the statutes
4 and take a look at it.

5 You also have a motion for summary judgment on behalf
6 of Dr. Dyce; is that correct?

7 MR. ELLISON: Yes, Your Honor, except I think we
8 could take up the Nelson Mullins motion now so he doesn't
9 have to sit through that one. That one -- even though
10 that's not in the order we wanted to do it in, I am
11 respectful of their time, if the Court chooses.

12 THE COURT: I'll be glad to, glad to hear it.

13 MR. ELLISON: That's the big fat volume.

14 THE COURT: Yes.

15 MR. ELLISON: Thank you, Your Honor. I think it
16 would help the Court, probably, if I set out some
17 procedural history here in terms of our efforts to try to
18 get this information.

19 Again, all of this is contained in -- with one
20 exception at the end based on information that we received
21 from Nelson Mullins on Friday afternoon. All of this
22 is -- and we'll get to that in a few minutes -- all of
23 this is in the memorandum.

24 On December the 12th, 2011, we served a third set of
25 requests for production on the defendants seeking, among

1 other things, Nelson Mullins' files.

2 The defendants objected. They said, "We're not going
3 to produce them," and they claimed attorney/client
4 privilege. We tried to get this information from SCENT.

5 After the 35 days had expired on January 23rd, 2012,
6 I was working with Mr. Manning to try to get the
7 information, and I mailed him a subpoena requiring the
8 information.

9 They are 100 percent right. It is a broad request.
10 We will be -- we can try to narrow that later. There's
11 been no discussions about trying to narrow it. We can
12 narrow it, if requested, later.

13 He accepted the service of the subpoena on
14 January 25th. On February 5th, Mr. Manning sent a letter
15 objecting to the subpoena, and one -- the basics were that
16 they failed -- that we had to go to SCENT first, which we
17 did, and that everything was protected by attorney/client.
18 We don't think it is, and I don't say that lightly.

19 As we talked about in the opening, SCENT is a
20 Statutory Close Corporation. We're not talking about IBM.
21 We're not talking about South Carolina Electric and Gas.

22 We're talking about a Statutory Close Corporation
23 where Dr. Dyce is one of either two or three shareholders.
24 That's it, and there is no question that he paid
25 substantial amounts of legal fees as a shareholder, monies

1 that otherwise would have come to him.

2 Nelson Mullins has consistently tried to maintain
3 that they represented the corporation, and that they did
4 not represent Dr. Puchalski individually.

5 In January 2010, for the first time -- this is one of
6 the things that came out in Nelson Mullins' memorandum on
7 Friday afternoon. For the first time, Dr. Dyce and his
8 counsel were presented with four documents that Nelson
9 Mullins had prepared. You can see it on the footers that
10 are on the bottom of the documents.

11 The first was -- I'm sorry. It's only two documents,
12 but they provided copies of other things, as well. The
13 first was a proposed unexecuted shareholders agreement
14 involving SCENT and the shareholders that has a document
15 number that's in the materials that we furnished to the
16 court, document number 5989473.35.

17 In most circumstances, those last two digits indicate
18 what version of the document it is, so this was the 35th
19 version of this document.

20 There was also a proposed unexecuted employment
21 agreement having the following documentation number,
22 document number 6002030.23. Again, if those footers are
23 like most footers, there are 22 prior versions.

24 On Friday afternoon, the folks at Nelson Mullins
25 provided a supplemental memorandum in which they talked

1 about negotiations having taken place, and that this
2 January 13th e-mail which transmitted everything was not
3 the first thing.

4 That prior draft -- what I got -- I don't know if it
5 specifically said that, "Oh, well, there had been
6 negotiations prior to that, prior to our exchange." They
7 didn't provide copies of the attachments to the e-mail.
8 Here they are. I'll be happy to give the Court -- we
9 happen to have that e-mail.

10 I think it's most instructive. That first document,
11 Your Honor, is version 23 of the employment agreement.
12 We've asked for the prior 22 versions. We haven't been
13 able to get them, but the document that's the most
14 interesting is the black line of the shareholder's
15 agreement.

16 Take a look, Your Honor. We just -- we got it
17 yesterday. I called Mr. Harmon and asked for it. Look at
18 the documents that are being compared. That first
19 document number -- I'm sorry, on the left. Here, let me
20 get you another copy, please.

21 The first number -- and I'm not good at this. That's
22 why I wore glasses today. My eyes are giving out. My age
23 is showing. Document number 5989473.10. That's the
24 original that they are comparing it against.

25 The document on the right is document 5989473.35.

1 Guess what document 5989473.10 is? That's the 2008
2 shareholder agreement.

3 There were no prior copies of this document
4 delivered. This is exactly why we want access to the
5 file. Unless there be an argument, here are copies of
6 some e-mails saying, "Where are the documents?"

7 Bear with me for just one second, Your Honor. I got
8 these yesterday afternoon. It's copies of the chain of
9 e-mail between Ed White at Nelson Mullins and Bruce Harmon
10 and Paul Ewing saying on January 6th, 2010, "Where are the
11 document you" -- I'm sorry. You were looking at the
12 document number. It's there. "Where are the documents?"

13 If that's not enough, Mr. Harmon has agreed to be
14 available by telephone, and I'll proffer this to the
15 Court. There were no documents provided prior to
16 January 13th, 2010. This is the first time that any
17 documents were provided. We want to see the drafts.

18 We want to see whether Nelson Mullins was
19 representing Dr. Puchalski or whether they were
20 representing SCENT.

21 We have a Statutory Close Corporation. Again, this
22 is not IBM. This is a Statutory Close Corporation. There
23 are not the normal formalities you have with a normal
24 corporation.

25 We cited the Court in the materials to the issues

1 arising out of Statutory Closed Corporations. You've got
2 the Charactaties decision (phonetic) which we have cited
3 in the materials. We've also cited the fact that South
4 Carolina follows the majority of jurisdictions that
5 qualify attorney/client.

6 Dr. Dyce, unlike Dr. Gunnlaugsson -- there is an
7 argument about whether Dr. Gunnlaugsson was a shareholder
8 or not. Quite candidly, and I know Mr. Sheheen will take
9 issue with this, it is not to our benefit, to Dr. Dyce's
10 benefit, for us to take the position that there were
11 actually three shareholders as opposed to two.

12 The reason for that is because we give up, and with
13 the denominator under the buy-out formula, basically a
14 third of what we think Dr. Dyce is entitled to under the
15 buy out formula, but we think that documentation makes it
16 very clear if you're going to preserve the S Election,
17 that Dr. Gunnlaugsson was a third shareholder.

18 Whether there are three or two, you've got a quarter
19 of a million dollars that on Nelson Mullins' advice, and
20 we provided this court with the e-mail, within four days
21 of Dr. Dyce's termination, a quarter of a million dollars
22 from the sweeps is provided to Nelson Mullins to pay legal
23 fees.

24 If those monies had been distributed as they were
25 supposed to be distributed, then Dr. Dyce would have been

1 significantly better off financially.

2 A Statutory Close Corporation, we're entitled to see
3 the corporate documents. The case law on the State is
4 very clear on that.

5 We think that the leading case in this entire area is
6 the 5th Circuit's case in Garner against Wolfenbargin --
7 Wolfenberger, I'm sorry, cited in the materials which
8 talks about the attorney/client privilege having viability
9 for corporate clients, but the corporation is not barred
10 from asserting it merely because the people demanding it
11 are shareholders.

12 We've alleged malfeasance on the -- in the SCENT case
13 on the part of Dr. Puchalski. There are things that we
14 have tried to find out from SCENT that they just won't
15 tell us.

16 It's gotten so bad in the Gunnlaugsson case that one
17 of the motions you're going to hear this afternoon is
18 Mr. Bland's motions for sanctions with e-mails that
19 magically appear later on.

20 Well, again, Friday afternoon, we didn't get the
21 attachments. I've given the Court the attachments because
22 I happen to have them, but we're entitled to see this
23 material in its native format.

24 We can't get it from SCENT. We've tried.
25 Dr. Gunnlaugsson has tried, but we're -- Dr. Dyce is

1 clearly a shareholder. They argue about whether
2 Dr. Gunnlaugsson is, but for purposes of this motion with
3 Dr. Dyce, Dr. Dyce is unequivocally a shareholder; paid
4 substantial amount of monies effectively for those legal
5 services allegedly rendered to the corporation, and we're
6 entitled to see the documents.

7 Now, with regard to the specific areas that we can --
8 we can narrow this, and we're happy to narrow it. There
9 are six areas that we want production from Nelson Mullins
10 on.

11 THE COURT: All right. What are these?

12 MR. ELLISON: Those areas are the draft agreements
13 and the agreements themselves, both the documents and any
14 surrounding e-mail, any surrounding documentation both
15 hard copy and native format dealing with the 2007
16 employment agreement -- I'm sorry, 2007 shareholder
17 agreement which they may not have been involved with.

18 We know they were involved with the 2008 document
19 where there are ten versions. Dr. Dyce never saw any of
20 them and these 2010 drafts. So we want the documentation
21 both in hard copy and in native format dealing with the
22 employment agreements and the shareholder agreements.

23 The second thing that we want is we want
24 documentation surrounding Dr. Dyce's alleged termination,
25 all of which takes place in a very narrow period of time

1 in 2009.

2 We don't know exactly when that might have been, when
3 that might have started, until probably August of 2010
4 when the Employment Security Commission appeal hearing was
5 held.

6 The third area that we want information on is
7 information regarding the S Corporation status of SCENT.
8 This has tremendous ramifications to all of these doctors.

9 If the S Corporation election is blown, again,
10 there's double taxation which has tremendous ramifications
11 to all of these people, and we're entitled to see all of
12 the communications.

13 There are some -- we produced some of it. We argued
14 way more with regard to some of it because some of it has
15 been produced. I'm not going to get into everything
16 that's in the memorandum.

17 The fourth area is any communications dealing with
18 the loan involving SCENT Land which closed sometime in the
19 spring of 2010, we understand.

20 The fifth area is documentation dealing with or
21 surrounding the formation of Somnus, S-O-M-N-U-S, LLC and
22 Somnus USA, LLC. The sixth and final area --

23 THE COURT: What is it about --

24 MR. ELLISON: Both Somnus and Somnus USA?

25 THE COURT: Yeah.

1 MR. ELLISON: I was trying to stay away from that in
2 order to not get distracted.

3 THE COURT: It's okay.

4 MR. ELLISON: Somnus, LLC was a limited liability
5 company that was formed between Dr. Dyce and
6 Dr. Puchalski, in I believe in 2009. I think it was 2009.
7 I'm not 100 percent sure, but I think it was --

8 MR. BLAND: 2009.

9 MR. ELLISON: -- in which there was a contractual
10 relationship of some type that certain services were taken
11 from SCENT, LLC where Dr. Gunnlaugsson may have been
12 entitled to some of those monies, but those services were
13 put over to Somnus, LLC dealing with a certain type of
14 medical services that were being provided by the practice.

15 By moving it over, it's a way to -- if you're looking
16 to -- if you're looking to not split money additional
17 ways, it's a way in which there would only be two
18 shareholders, at least initially, as opposed to three or
19 four. Dr. Dyce could tell me what kind of services.

20 MR. BLAND: Sleep disorders.

21 MR. ELLISON: Sleep disorders which ENT folks deal
22 with that --

23 THE COURT: Okay.

24 MR. ELLISON: But probably where the name Somnus
25 comes from, but some of these documents put me to sleep.

1 So I let Ms. Baker deal with them.

2 MR. BLAND: Morris.

3 MR. ELLISON: Excuse me one moment.

4 (Pause.)

5 In the final area, Judge -- I'm sorry.

6 The final area is correspondence that would have been
7 taking place from May -- from probably late April 2010
8 until June of 2010 surrounding two specific issues.

9 Number one is notices or the lack thereof that were
10 provided SCENT patients, because we think there was a
11 requirement to provide certain notices that weren't
12 provided, and the second deals with Nelson Mullins'
13 invoices surrounding the payment and how that \$250,000
14 were dealt with.

15 For instance, was it a retainer for future services?
16 Was it payment for past services? I mean, we don't know
17 whether this is proper or not.

18 If the -- if the monies are paid to Nelson Mullins
19 for services provided for Dr. Puchalski individually, then
20 Dr. Dyce shouldn't have to pay them.

21 If they are services rendered truly for corporate
22 purposes, then that's a whole different matter. So again,
23 I can re--- rehash the memorandum. It's lengthy.

24 I don't want to take the Court's time with it, but
25 there's been no argument presented that says that in this

1 circumstance involving Statutory Close Corporation that
2 Dr. Dyce is not entitled to company documents,
3 specifically the documents in allegedly the corporate
4 counsel's files that he paid substantial amounts towards.
5 Again, I can go through the memorandum. I don't think the
6 Court really wants me to do that.

7 THE COURT: All right. Thank you.

8 MR. SHEHEEN: He's going to be heard first.

9 THE COURT: He is, okay.

10 MR. MANNING: Well, I'm glad to hear that the
11 subpoena sounds like it's been pulled because the original
12 document asked for the entire file of Nelson Mullins, the
13 entire file of Nelson Mullins and all e-data, all
14 electronic data and all formats thereof. I'm glad to hear
15 that that's no longer their request.

16 Mr. Ellison talks about how he tried to get this
17 information from SCENT. I didn't see a motion to compel
18 SCENT. I'm not sure why attorneys need to be involved in
19 this.

20 Former counsel needs to get a subpoena in order to
21 get information that's within SCENT's possession, custody
22 and control. I've told Mr. Ellison that. I told him that
23 the first day. Our files are within SCENT's possession,
24 custody and control.

25 They're available to be discovered, and I still get a

1 subpoena, and I tell them I'm going to object based on
2 these bases and undue burden, something that's not even
3 addressed, I guess.

4 I guess the holdback from the entire file was a way
5 to address that, but the entire file of a nonparty, much
6 of which is privileged, and yes, even to Dr. Dyce and yes,
7 even to former shareholder of a closed corporation. It's
8 set forth in our memo, our -- two of them.

9 I apologize for filing one on Monday of last week,
10 but prior to the opposition, I have -- this interesting
11 civil procedure that we have in state court where you
12 don't have to file anything until a couple of days before,
13 that's why we filed it up with a memorandum last Friday,
14 in addition to address some of the statements made in the
15 improper affidavit that was attached to the memorandum.

16 Dr. Dyce's affidavit needed to come with a motion.
17 It didn't. It came with a memorandum. It violates Rule
18 6. Even so, it contains falsehoods, and that's why we
19 filed our documents on Friday, to show that he had been
20 represented by counsel when he is painting a picture in
21 the memorandum allegedly supported by the improper
22 affidavit that he somehow went through this all alone, and
23 big bad Dr. Puchalski was somehow trying to pull one over
24 on him.

25 He was represented by counsel. Mr. Ellison knows

1 that. I mean, it was his brother-in-law in Philadelphia
2 who represented Dr. Dyce, so this -- this attempt to sort
3 of paint a disgruntled shareholder as some sort of victim
4 of a closed corporation, it's just -- it's matted.

5 I sat and listened to an hour-and-a-half of
6 information that if it were so germane to this motion, I
7 wish I would have gotten copies of everything but I
8 didn't. I found it to be the same story over and over.

9 The bottom line here is that SCENT has valid
10 privilege claims to this. Nelson Mullins can't waive
11 those. The client owns those, just like the client owns
12 the file.

13 The undue burden analysis is in our brief. We don't
14 think Garner applies here. This isn't a situation where
15 there is a huge fraud going on by members of the -- by
16 members of this corporation to try to destroy it. This
17 was a disgruntled shareholder who didn't like the deal he
18 was getting, so he was going to hold the company hostage.

19 As a result -- I think as a result of the advice he
20 got from his lawyer in Philadelphia, he was fired. He was
21 terminated, as was SCENT's right, rights under the
22 agreement.

23 Now, these documents -- Mr. Ellison said it was real
24 simple what he needed in his initial colloquy. They want
25 to know what's going on, and they want to have the

1 financial docs. If it's so simple, again, why the entire
2 file at Nelson Mullins? I mean, the over breadth here is
3 staggering.

4 THE COURT: Okay. So now he said he is just giving
5 us the six areas, so let's kind of discuss...

6 MR. MANNING: I still think they're privileged for
7 the reasons stated in my papers.

8 THE COURT: Do you not agree he would have been a
9 share--- that he -- if he was a shareholder, and I guess
10 the first area of draft agreements and surrounding e-mails
11 2007, 2008 shareholder agreement, employment agreement
12 2010 drafts, how is that not -- how is that privileged?

13 MR. MANNING: We represented the company in this
14 matter. We were advising the company on hiring and on the
15 company structure. We were not advising Dr. Puchalski
16 individually. We were not advising Dr. Dyce individually.

17 This question of a common benefit is a little
18 humorous in the sense that Dr. Dyce engaged counsel to
19 help him through all of this. So the idea that there was
20 a common benefit here, Nelson Mullins was representing a
21 corporation here.

22 THE COURT: Do you know when he engaged --

23 MR. MANNING: They were representing SCENT, at least
24 as early as December 2010. Those are the earliest
25 communications that I have, and any implication that we

1 were trying to sandbag folks by holding documents back and
2 bringing them on Friday, we are only produced documents on
3 Friday that were also sent to Dr. Dyce and his previous
4 counsel.

5 So like Morris said, they have the documents. I
6 apologize for not including all of those in the -- in the
7 production.

8 I think Garner doesn't apply here because of those
9 reasons. This is not a derivative case where we have got
10 a shareholder who is trying to protect the company.
11 Again, this shareholder was upset with the deal he has
12 got. He -- the deal he received.

13 He was terminated, and now he has set out to actually
14 destroy the company. This is the last person that would
15 need or would -- we would desire to have any sort of
16 documents relating to confidential conversations that the
17 company had with its counsel.

18 The law even under Garner supports that. As set
19 forth in our memorandum, we go through the Garner factors.
20 Should the Court determine that Garner does apply here, we
21 think they weigh heavily in our favor.

22 The additional arguments brought up in the opposition
23 about the fiduciary exception, the fiduciary exception to
24 the attorney/client privilege in this instance, that's
25 been expressly rejected by the South Carolina Legislature.

1 You can find it in the Probate Code. It's 66-1-110,
2 and it says, "We expressly -- we pass this to expressly
3 reject any fiduciary duty exception to any attorney/client
4 privilege."

5 I've got copies of those. I'll hand them out. It's
6 a one-page thing. The Common Benefit Doctrine, again,
7 that doesn't -- that doesn't apply here to release the
8 privilege. Nelson Mullins represented SCENT. We did not
9 represent Dr. Puchalski. We did not represent Dr. Dyce.

10 All roads lead back to this as a fight that
11 Mr. Ellison should be having with SCENT. Get the
12 documents from them.

13 I didn't see a motion to compel them. They are going
14 to have more of the information on the background and not
15 have to sift through motions that aren't necessarily
16 relevant to their -- to their claim.

17 So I would ask the Court to deny the motion to compel
18 the subpoena and tell them to go to SCENT with their
19 six -- six additional bases or six narrowed-down pieces of
20 information that they want.

21 MR. SHEHEEN: Your Honor, I'll be brief because most
22 of this has been covered, but we're -- our interest in
23 this is asserting our privilege, which is why we didn't
24 turn over discovery, as Mr. Morrison said, in his request
25 to produce.

1 Your Honor, and I want to make this point crystal
2 clear. It's critically important. I think it was
3 addressed in the brief, Nelson Mullins. Just because
4 you're a shareholder does not mean you then get to learn
5 of the corporate attorney/client discussions.

6 This is critical. Your Honor, otherwise, any
7 shareholder who doesn't like what's going on is just going
8 to -- you would not be able to have attorney/client
9 communications with the managing shareholder, which is the
10 person who controls the privilege.

11 The managing shareholder controls the privilege.
12 There is a reason for that. The reason is so that you
13 don't have a shareholder who decides, "Hey, I don't like
14 what's going on, so I'm going to blow everything up." You
15 cannot have attorney/client communications with the
16 corporation if you adopted their approach.

17 Your Honor, I'm not sure I follow all of the stuff
18 about the various versions of the shareholder agreement
19 except to say if they weren't negotiating the shareholder
20 agreement, it's pretty obvious they were negotiating back
21 and forth. That's why the versions were being created.

22 Your Honor, there was a mention of money paid to
23 Nelson Mullins. Your Honor, that money was SCENT's
24 corporate money. They could have gone out and given
25 checks to everybody if they wanted to. That was corporate

1 money that did not belong to Dr. Dyce. That was for the
2 corporation to decide how it would be spent and what was
3 the best interest. That was true for every corporation.
4 That was true for SCENT in previous years. Nobody owned
5 that money except for the corporation.

6 Your Honor, as a coincidence, the reason that money
7 came in is because they were finally able to close the
8 loan that SCENT had been funding which they had been
9 styming the closing of, but nevertheless, that money --
10 that argument just does not hold any water at all, Your
11 Honor.

12 Finally, Your Honor, I think it's important you think
13 about this: You have a party who is adverse to the
14 corporation, Dr. Dyce, who had hired a lawyer, I
15 believe -- I didn't bring it. I believe in July 2009, but
16 we know in December of 2009, because remember all this
17 stuff happened in the winter of '09 and then '10 in the
18 spring culminating in his leaving the country.

19 So you have a lawyer -- a party who is adverse to the
20 company who wants to get attorney/client communications of
21 that company when it's critical that you allow this
22 communication back and forth to the corporation.

23 It's contrary to the law. It's addressed in the
24 brief. We do not waive the privilege in this document.
25 Thank you, Your Honor.

1 THE COURT: Yes.

2 MR. ELLISON: Your Honor, I think it's pretty clear
3 we're not going to get the documents from SCENT. You
4 know, it's pretty clear that we shouldn't have to spend
5 what, ten, 15, \$20,000 to file a motion for sanctions when
6 they won't produce those.

7 You know, Mr. Manning says, "Well, go get them from
8 SCENT." Well, he is saying pretty clearly, "You're not
9 going to get them."

10 I didn't hear anybody address the six areas that we
11 talked about, but I think the most instructive document of
12 all, Your Honor, is Exhibit F to the memorandum.

13 It's an e-mail -- I'll wait.

14 (Pause).

15 Your Honor, it's an e-mail that Dr. Puchalski sent to
16 Vincent Sheheen and Austin Sheheen in March 2011.

17 MR. SHEHEEN: And, Your Honor, just to protect the
18 record, we object to that as attorney/client privilege
19 because it included a necessary party and the attorney but
20 go ahead.

21 THE COURT: Yes, sir.

22 MR. SHEHEEN: Thank you.

23 MR. ELLISON: Your Honor, look at the last big
24 paragraph on the page, and this speaks -- this gets to the
25 heart of the matter.

1 We can't get the documents from SCENT. Look in the
2 middle of the last comment paragraph "warning" all caps,
3 "he", meaning Dr. Dyce, "is absolutely going to claim that
4 we tried to throw him out so that we wouldn't have to
5 distribute the money from the bank closing."

6 "N.M," I think it's clear who that is, "warned of
7 this, and that's why we ended up giving half of the
8 closing proceeds to N.M. for legal fees." Then
9 Dr. Puchalski writes, "This would have been his share had
10 he stayed with SCENT."

11 One of the fundamental questions in this case is
12 whether Dr. Puchalski was using company money -- this is
13 why we wanted to argue the other motion first -- was
14 whether he was using company money for his own personal
15 benefit improperly.

16 There are a lot -- I will agree with Mr. Sheheen.
17 There are a lot of factual issues on that one, but here,
18 you have got a quarter of a million dollars that
19 Dr. Puchalski says was Mr. Dyce's money that he is giving
20 to Nelson Mullins to allegedly further company purposes.

21 What's also interesting is to take a look in
22 chambers, since I'm sure the Court is going to take this
23 under advisement, look at the changes made to the
24 shareholder's agreement.

25 Oh, well, if you listen to Mr. Manning, they are just

1 innocuous things. If you look at the memorandum that they
2 filed, oh, they are just little changes. They aren't
3 radical changes.

4 Take a look at the breathtaking scope of changes that
5 were made to protect Dr. Puchalski to the disadvantage of
6 Dr. Dyce who clearly was already a shareholder or to any
7 other prospective share shoulders.

8 The absolute control that it would have given to
9 Dr. Puchalski, oh these are just little changes. One of
10 the questions that we'll get to, not today, but at the
11 trial will be was: Are these proper expenses of the
12 company, or are they proper expenses of Dr. Puchalski if
13 the advice that's being given is really when you look at
14 this material, and we have no way of getting it.

15 Mr. Sheheen has made that very clear. The Court
16 asked about the six areas. We can limit it to that.
17 We're willing to do that, but we want that -- those
18 materials to see who were they really representing?

19 Were they really representing Dr. Puchalski, or were
20 they representing SCENT? Take a look at the changes in
21 that black line shareholder's agreement. They are
22 breathtaking.

23 Look at the advice that Nelson Mullins has given,
24 whether that's proper for the company or for
25 Dr. Puchalski. Who are they really, really representing?

1 To make us go and spend ten or 20 or however many
2 thousands of dollars to file a motion to compel that
3 Mr. Sheheen has already said they'll oppose that, too,
4 which is why Mr. Bland has already been in the court once.
5 He's going to be in the court again this afternoon. It's
6 just wasting money.

7 We're entitled -- this is a Statutory Close
8 Corporation, which it is. We're entitled to the documents
9 even if we didn't have these e-mails. Even if we didn't
10 have the allegation -- the nature of the changes in the
11 agreement. Who were they representing?

12 Was Dr. Puchalski using company money to get personal
13 legal advice? He was in another instance that we all know
14 about in terms of his estate planning, but who are they --
15 who is Nelson Mullins really representing here?

16 We're entitled to find out on these six areas,
17 certainly. Again, the rest of it is covered in the
18 materials, but I think that that black line employment
19 agreement, which they didn't furnish on Friday afternoon
20 when they filed this supplemental memorandum and the
21 e-mail that we attached in Exhibit F speak volumes to
22 that. That's one of the reasons we're -- well, two of the
23 reasons why we're entitled to this information.

24 THE COURT: Thank you.

25 MR. MANNING: If I may?

1 THE COURT: Yes, sir.

2 MR. MANNING: The \$250,000 e-mail, my response to
3 that is so what. That's corporate money. That's
4 corporate money that they were allowed -- that SCENT was
5 allowed to use in whatever manner it saw fit. That's my
6 response to that.

7 The changes? The changes to the document that you
8 have that we didn't produce on Friday, again another
9 manufactured discovery dispute, he was represented by
10 counsel. We sent it to his counsel.

11 So where is the -- where is the fire there? Where is
12 the fire if he is being represented by counsel and we sent
13 him a red line, regardless if there's 1,000 versions of
14 it? Where is the fire there? I just don't get it.

15 We're talking about costs, too, about not spending
16 ten or \$20,000 to -- to compel SCENT to do this, but we'll
17 do it with Nelson Mullins? I mean, that's sort of the
18 whole argument, I think.

19 He has chosen to do this with a law firm not because
20 it's going to provide him a better avenue. It's leverage.
21 It's leverage for a negotiation.

22 My last point is Mr. Ellison keeps harping on this
23 fact that it's a Statutory Close Corporation. I assume
24 he's talking about he wants you to go to the corporate
25 code, to, and see what we're -- what we're required to

1 give shareholders.

2 You won't see any lawyer's file in that list. You
3 won't see any lawyer's file on that list.

4 Thank you, Your Honor.

5 THE COURT: Thank you.

6 MR. ELLISON: Your Honor, one last point, just in
7 response to that. Yes, we got versions 35, but we didn't
8 get versions one through 34.

9 Yes, we got version 23, but we didn't get versions
10 one through 22, and we don't know what went into the
11 drafting of those documents.

12 THE COURT: All right.

13 Let's see. I think the court reporter needs to take
14 a break.

15 You have -- Mr. Ellison, you have -- it looks like
16 one more motion.

17 MR. SHEHEEN: Judge, a motion for summary judgment on
18 the --

19 MR. ELLISON: We have one more relative of -- we have
20 one more motion that I'm going to argue. We have several
21 that Ms. Baker is going to handle.

22 I think that there are -- we have two others.
23 Mr. Sheheen has three others. There are six motions still
24 left in these cases.

25 MS. BAKER: Actually, I think Mr. Sheheen may have

1 four. You have two motions to amend in each case and then
2 a motion to compel and a motion to consolidate that's
3 going forward.

4 MR. SHEHEEN: And, Your Honor, I think -- you know,
5 the summary judgment is going to take a while. The rest
6 of them -- I won't speak for y'all -- because you have
7 those.

8 I think the motion for summary judgment will take --
9 you know, you saw the other judgment motions, maybe a
10 little longer than that, and then the rest of the motions
11 shouldn't take very long. They're -- they either are or
12 they are not.

13 MS. BAKER: I don't think they'll take very long
14 either. We have a motion to amend, as well. Yeah, there
15 are some procedural motions. That shouldn't take very
16 long.

17 MR. SHEHEEN: So, really, one is substantive, and the
18 rest are...

19 We have a discovery service I might have one --

20 THE COURT: You have a motion, as well, right?

21 MR. SHEHEEN: Yes. I'm going to act like
22 Mr. Morrison, I guess, righteous, and then -- then we've
23 got a motion to amend, a motion to compel date.

24 MS. BAKER: Motion to rehash the order, yeah. They
25 are -- they shouldn't take long.

1 MR. SHEHEEN: Three --

2 MS. BAKER: Motions --

3 THE COURT: Okay. I know we started late. I don't
4 know if you -- I'm sure you all want to -- if you all
5 don't, I'm sure the clerk and the court reporter probably
6 want to take a -- I'm thinking this might be a good time
7 to take a short break, grab some lunch.

8 MR. ELLISON: Judge, what time would you want us back
9 here? It's about 1:20 now.

10 THE COURT: I'm thinking -- how many motions does
11 Mr. Bland have?

12 MR. BLAND: I have six but one will take about 45
13 minutes, and the rest will be quick.

14 THE COURT: Not --

15 MR. BLAND: If you grant a motion to amend, it's
16 going to -- that will eliminate some of the motions.

17 MR. SHEHEEN: Come back at two kind of thing?

18 THE COURT: Yeah. I guess let's take about an hour,
19 and we'll -- it's 1:20 now, so about 2:20, 2:15, and then
20 we'll come back and hear -- finish hearing your motions
21 and then Mr. Sheheen's motions.

22 Now, your motions -- you have some pertaining to this
23 case and...

24 MR. SHEHEEN: Your Honor, I don't have many motions.
25 I might have one or -- one or two.

1 THE COURT: You have a motion to consolidate, right?

2 MR. SHEHEEN: Yeah. So I have a few procedural
3 motions in this case.

4 MR. BLAND: He has none in mine.

5 MR. SHEHEEN: So I don't have a lot of motions. I'm
6 easy.

7 THE COURT: Okay. All right. So we'll just start
8 back at 2:15 then.

9 MR. ELLISON: Thank you, Judge.

10 (WHEREUPON, a lunch break was taken.)

11 THE COURT: Yes, sir.

12 MR. ELLISON: Judge, during the lunch break, we were
13 thinking of ways to speed this up a little bit.

14 THE COURT: Okay.

15 MR. ELLISON: I don't think you would mind that.

16 We've -- you've already heard most of the arguments
17 at this point dealing with the motion for summary judgment
18 in the SCENT case.

19 There were six causes of action, and you've already
20 heard the argument regarding breach of fiduciary duty
21 basically, civil conspiracy, the interference with
22 contractual relationship and the Unfair Trade Practices
23 Act.

24 To the extent that you haven't heard it, we're
25 comfortable relying on what's in the brief.

1 THE COURT: All right. You mean as to Mr. Dyce,
2 Dr. Dyce?

3 MR. ELLISON: Dr. Dyce, yes.

4 THE COURT: What -- let me ask you this: As to
5 Dr. Dyce -- or maybe I need to ask Mr. Sheheen this, on
6 the tortious interference with the contract, which
7 contract are you all alleging that he -- because I know on
8 the wife, you already said it was the contract --
9 subcontractors and contractors regarding the building.

10 MR. SHEHEEN: Yes, ma'am. Your Honor, we're alleging
11 that, as well, with Dr. Dyce, but we're also alleging that
12 he interfered with the employment contract of
13 Dr. Gunnlaugsson.

14 THE COURT: Okay.

15 MR. SHEHEEN: So, you know, there's obviously a
16 factual dispute about that. They'll say no. We'll say
17 yes, but that answers your question, I hope.

18 THE COURT: All right.

19 MR. SHEHEEN: Thank you, Your Honor.

20 MR. ELLISON: Your Honor, what that leaves as far as
21 the -- our summary judgment motion in the SCENT case, is
22 the breach of contract claim and the defamation claim.

23 The breach of contract argument is almost the same
24 with regard to the employment agreement between --
25 involving Dr. Dyce and Dr. Gunnlaugsson.

1 So in talking with Mr. Thompson, what we thought, it
2 would make more sense as far as speeding things up is if
3 we handled those summary judgment motions together rather
4 than you hearing the same argument twice in two different
5 cases.

6 At the risk of -- to use Mr. Sheheen's language a
7 little bit, if we're not tag teaming him a little bit,
8 there is one argument that he -- that Mr. Sheheen raised
9 last week that I would deal with, otherwise defer to
10 Mr. Thompson with regard to most of this, but we think
11 that would speed things up a little bit.

12 THE COURT: All right. So what -- and then the
13 motion to consolidate.

14 MR. ELLISON: That would be after that.

15 MR. SHEHEEN: Can I just...

16 The motion to consolidate is just -- just to make
17 sure that we all understand, that's just Curley.

18 THE COURT: All right.

19 MR. ELLISON: Thank you.

20 THE COURT: You don't want to handle that one?

21 MR. ELLISON: Ms. Baker has been sitting here all day
22 chomping at the bit, and I was going to let her handle
23 that one.

24 THE COURT: Okay.

25 MR. ELLISON: But I think it would make sense, again,

1 to handle the summary judgment motions together right now.

2 MR. SHEHEEN: Your Honor, in the interest of justice
3 and speed, I'm more than happy to do that, as well. I
4 might have to -- I hope with everything I don't have to
5 jump back and forth a little bit between the two.

6 MR. ELLISON: I understand.

7 THE COURT: Okay. And then Mr. Thompson, yours is --
8 now, you represent...

9 MR. THOMPSON: Dr. Gunnlaugsson.

10 THE COURT: Okay.

11 MR. THOMPSON: I was the attorney for
12 Dr. Gunnlaugsson when we were before Judge Barber at the
13 beginning of this case defending against SCENT's motion
14 for a temporary injunction to try to prevent
15 Dr. Gunnlaugsson from leaving and opening his own
16 practice.

17 THE COURT: Okay.

18 THE COURT REPORTER: Can you tell me your first name?
19 I'm sorry.

20 MR. THOMPSON: Charles.

21 THE COURT REPORTER: Charles. Okay. I don't have
22 you down.

23 THE COURT: Yeah, I think we -- we didn't get him in
24 the beginning.

25 MR. THOMPSON: So, Your Honor, the only thing I'm

1 going to be arguing -- I'm going to make it real easy
2 because I'm going to reduce my argument to one thing,
3 which is what Judge Barber hung his hat on at the
4 beginning of this case.

5 SCENT filed a motion at the very beginning of the
6 case for a temporary restraining order to try to stop
7 Dr. Gunnlaugsson from going out and setting up a competing
8 practice.

9 Then we're relying on a provision in his employment
10 agreement, a non-confidentiality clause -- I'm sorry, a
11 non-competition clause.

12 Your Honor, the noncompetition clause in the
13 agreement relevant to this argument -- what it says is for
14 18 months after the termination of his employment, and
15 this is the same provision in Dr. Dyce's case.

16 18 months after that, the physician purportedly is
17 not allowed to directly or indirectly practice medicine,
18 any medicine, within 20 miles of any practice site of
19 SCENT.

20 At the time, they had practice sites in Hartsville,
21 in Lugoff, in Columbia and in Cheraw. All right. So you
22 draw 20-mile circles around there, those locations, and
23 the physician was not allowed to practice any medicine
24 within those circles.

25 I don't want to belabor it. You may be familiar with

1 the South Carolina law about non-competition clauses.
2 It's something you probably heard before, but just real
3 quickly before the Court, it's greatly disfavored in South
4 Carolina, strictly construed against the employer. If
5 they're defective in any respect, the whole thing fails.

6 Your Honor, I know Mr. Sheheen keeps mentioning fact
7 issues. The South Carolina Supreme Court has made clear
8 that the reasonableness of the non-compete is a matter for
9 the judge to decide, and with respect to the one argument
10 I'm going to make, there are no factual issues.

11 Even if it were, we have had two years to conduct
12 discovery, and this -- this is ripe for decision. This
13 non-competition needs to be taken out of the case and
14 should be taken out of the case today.

15 The fatal flaw -- one of the fatal flaws -- and the
16 one that Judge Barber hung his hat on at the beginning of
17 the case was that the provision attempts to prevent a
18 physician from practicing any medicine, not just the
19 medicine that would be competitive with SCENT, which is
20 basically ear, nose, throat possibly sleep disorders and
21 allergies. Instead, it's any medicine.

22 Dr. Gunnlaugsson -- neither Dr. Gunnlaugsson nor
23 Dr. Dyce could go do anything else in those restricted
24 areas. That's clearly overbroad under South Carolina law.

25 In my memo, I point out the Faces Boutique case.

1 That's the one, Your Honor, where the business tried to
2 prohibit the gal that did facial treatments from doing
3 cosmetics for another employer.

4 The Court said, "No. You can't do that. You can
5 tell the employee don't go do for a competitor what you
6 did for us, but you can't tell the employee you can't go
7 do anything for another competitor regardless of whether
8 it's competitive or not."

9 It's a so-called any capacity restriction, which the
10 South Carolina courts have routinely said -- not just
11 routine, but 100 percent have said that's overbroad.

12 Your Honor, somewhere in the record -- I don't know
13 if you have it -- I did some exhaustive research on every
14 other jurisdiction to consider these any capacity
15 restrictions.

16 Every -- it's not just a majority view. Every court
17 that's considered this type of restriction has said it is
18 overbroad. "You can't do it, employer. If you try to do
19 it, the whole non-compete is out."

20 I have yet to hear from Mr. Sheheen or Nelson
21 Mullins, the prior attorneys in this case, any case law to
22 try to get around them.

23 There should be -- there's even a footnote in my
24 memorandum, Your Honor, that cites a number. I don't even
25 know if I've counted them. It's over 30 cases, I think.

1 Among those are --

2 THE COURT: Excuse me, do you have another copy of
3 those?

4 MR. THOMPSON: Yes.

5 THE COURT: Because we have quite bit, and I don't
6 have -- I have the defendant's memorandum.

7 MR. THOMPSON: May I approach?

8 THE COURT: For some reason, I don't have yours.
9 Thank you.

10 MR. THOMPSON: Do you have a copy of Judge Barber's
11 order handy, Your Honor? I brought an extra copy of that.

12 THE COURT: Thank you.

13 MR. THOMPSON: Page five, Your Honor, footnote two is
14 where I cite all of these cases from all these
15 jurisdictions.

16 Every case holding that in any capacity restriction
17 is going to be overbroad and is fatal to the non-compete.
18 In two of those cases, Your Honor, the Wisconsin case and
19 the New York case, they actually involve the same
20 restriction that we have in this case, and that is that
21 you -- against a doctor saying you can't practice any
22 medicine.

23 Mr. Sheheen is not going to be able to stand up here
24 and say -- and cite you any case law indicating I'm wrong
25 on that, and that's what Judge Barber hung his hat on when

1 he denied the motion for temporary injunction and decided
2 that SCENT was unlikely to prevail on the non-compete.

3 There's no facts that go into this argument. It's
4 clearly a legal issue. There's no fact. I challenge
5 Mr. Sheheen to try to argue that there's any fact that
6 needs to be determined in discovery to resolve this issue.

7 We have other arguments. They're in my memorandum,
8 Your Honor, but I'm just going to go on that one because
9 there's just no way that the defendant can get around it.
10 So we're asking Your Honor to grant us summary judgment on
11 the cause of action for violation of the noncompetition
12 provision.

13 THE COURT: All right. Yes, sir.

14 MR. ELLISON: Your Honor, I likewise will be very
15 brief and very quick. I will not try to -- and I won't
16 repeat anything. I said that before. Mr. Sheheen is
17 laughing at me.

18 Largely, the memorandum which Mr. Sheheen filed last
19 week in Dr. Dyce's case largely parrots the same arguments
20 that were made before Judge Barber. There is one
21 noticeable exception, and that argument is contained for
22 the first time on the bottom of page four of Mr. Sheheen's
23 memorandum.

24 THE COURT: It's the memorandum in opposition of...

25 MR. ELLISON: Defendant's memorandum in opposition to

1 summary judgment in the Dyce vs. SCENT case.

2 THE COURT: Okay. In the Dyce. Let me see.

3 MR. SHEHEEN: Your Honor, this in my brief.

4 THE COURT: That's what I'm looking for.

5 MR. ELLISON: His brief.

6 THE COURT: I have yours regarding, Dr. Gunnlaugsson.

7 MR. SHEHEEN: Gunnlaugsson.

8 THE COURT: Am I pronouncing that? I'm trying to
9 find -- I had yours earlier. I know I did because I saw
10 it.

11 MR. SHEHEEN: I can give you my copy. May I
12 approach?

13 THE COURT: Yes.

14 MR. SHEHEEN: If you want, I can just temporarily
15 give you my copy.

16 THE COURT: Thank you.

17 MR. SHEHEEN: It's here. Some of it is upside down.
18 If I have any notes in there, please disregard it.

19 THE COURT: Okay.

20 MR. SHEHEEN: Which I don't think I do but...

21 THE COURT: Okay.

22 MR. SHEHEEN: Like as in, "Mr. Ellison is crazy."
23 Just disregard that if I wrote it.

24 THE COURT: All right. Page four?

25 MR. ELLISON: Yes, Your Honor.

1 THE COURT: Okay.

2 MR. ELLISON: The -- in the middle of the page under
3 the heading of Dr. Dyce's employment and shareholder
4 agreements, do you see that document, Judge?

5 THE COURT: Yes.

6 MR. ELLISON: I'm trying to make sure we're on the
7 same --

8 THE COURT: Yes.

9 MR. ELLISON: Literally on the same page. The
10 argument that I saw for the first time that I don't
11 believe that has been made in Dr. Gunnlaugsson's case is
12 the argument that begins with -- and the Court finds at
13 the bottom of the page when Mr. Sheheen writes,
14 "Importantly, the buy-out provision of the shareholder
15 agreement was based on the expectation that a leaving
16 physician would not steal the patient base, thus allowing
17 the buy out to occur without damaging SCENT."

18 What you see here in several other places is this
19 argument that, "Oh well, if you throw out the non-compete,
20 then you have to throw out the buy out formula in the
21 shareholder's agreement."

22 Now, there are a couple of problems with that. In
23 the first place, Mr. Leamon (phonetic) has already tried
24 to raise that argument in the hearing before Judge Barber,
25 and Judge Barber specifically addressed that argument.

1 Bear with me for a moment. This is with Exhibit K to
2 our motion on page six, pages five and six. It's the
3 second fattest notebook, Judge.

4 THE COURT: You said...

5 MR. ELLISON: The page at Tab K, Judge Barber's
6 order.

7 THE COURT: All right.

8 MR. ELLISON: He starts at the very last paragraph
9 addressing this question as to whether or not the Court
10 can blue pencil, I think is the expression that's used in
11 the employment law world, the non-compete.

12 The additional argument that was raised was the
13 severability provision that it was contained in the
14 employment agreement which says, "Well, if you throw out
15 one provision, you don't throw out the rest of them,"
16 which is not the law in the state when it comes to
17 employment agreements.

18 But the context that Mr. Sheheen makes the argument
19 with now -- and this was the first time I saw it last
20 week -- was that if the non-compete is thrown out, you
21 have to throw out the entire shareholder agreement.

22 There is no mention this time of the severability
23 provisions of both the employment agreement and the
24 shareholder agreement which Dr. Dyce signed.

25 Now, we think -- I mean, we agree, obviously, with

1 what Mr. Thompson said, but it's a matter of state law
2 that you can't blue pencil the non-compete, but if they're
3 going to take the position that well, all of the documents
4 come out, I think they have problems because of the
5 severability of the documents, of both the employment
6 agreement and the shareholder agreement.

7 And I don't think they can do that, but if they're
8 going to try it, I think it is fair to note that that
9 means that the entire formula comes out. In other words,
10 to the extent that the formula does not represent, and I'm
11 not taking a position on this today. I want to be very
12 clear on this.

13 If the entire shareholder agreement comes out like
14 they're trying to suggest now, that means that the entire
15 buy-out formula comes out which means that not only do the
16 things that you subtract from go away or that they can add
17 to it, but we can look at the value of the entire
18 practice, where quite candidly, these physicians were all
19 making over \$1 million-and-a-half each.

20 We can look not at what the value, for instance, of
21 the receivables were or a specific number of \$750,000, but
22 we can value the entire practice.

23 So the point I want to make to the court is we agree
24 with what Mr. Thompson says, but more to the point with
25 this new argument that's getting made that we think that

1 as a matter of state law, you can't blue pencil it, but
2 that the provisions of the buy out state what they are.

3 You can't add to them or subtract to them, and this
4 argument that oh well, the severability clauses don't
5 apply or you should just ignore them, that doesn't wash.
6 But if the Court holds differently, that the whole buy out
7 structure changes, and that dramatically changes the scope
8 of discovery and the scope of what we're looking at in
9 this case.

10 THE COURT: Yes, sir.

11 MR. SHEHEEN: Thank you, Your Honor. May it please
12 the Court.

13 THE COURT: Yes, sir.

14 MR. SHEHEEN: Thank you, Your Honor.

15 Your Honor, I need to backtrack a little bit, with
16 your permission, to some of the broader facts in the case
17 because they're important to the covenant and the
18 agreements.

19 These things rise -- they're contained in documents
20 that interplayed with each other. I don't think -- I
21 understand there is a dispute about how they interplay,
22 but I don't think there is any dispute that they
23 interplay.

24 Your Honor, my client and the practice, Dr. Puchalski
25 and SCENT had a large, broad practice. They did ear, nose

1 and throat. They did cosmetics. They did hair surgery,
2 dermatology, sleep medicine, GI, pulmonary. They do
3 mental health advising to some of the these patients,
4 urgent care, and I could go on and on, pediatrics with
5 patients. This is a broad practice, Your Honor.

6 Your Honor, the attempt by the defendants to
7 basically take out a critical and large portion of this
8 case would leave SCENT basically having to live up to
9 obligations such as the buy out while their client or the
10 litigants can basically walk away from all of their
11 obligations.

12 It would severely damage the ability of SCENT to
13 defend itself in this case. I want to first hand you --
14 there's been a lot of talk about Judge Barber's order, so
15 let's address that, if that's okay.

16 Your Honor, you understand, as the Court, the high
17 threshold for a temporary injunction. You understand, as
18 the Court, that the prior case law -- and I urge you to
19 read through what -- all the case law that's cited -- and
20 you'll see that almost every case that talks about why
21 covenants are difficult to enforce are an attempt to
22 enforce the stoppage of work.

23 In other words, "Hey, you can't go work," and we
24 understand the Court frowns upon that. Judge Barber
25 didn't grant that request.

1 I think it is important to mention, though, that it
2 was actually Mr. Gunnlaugsson that filed the case and
3 asked for an injunction to allow him to practice, and then
4 he dropped that, I believe shortly before the hearing.
5 Then they went forward on SCENT's counterclaim to prohibit
6 him from practicing. Not that all that matters, but it
7 was just the way it was stated. I wanted the Court to be
8 clear.

9 So Judge Barber can't reach the merits of this case.
10 He can't reach the merits because he is there on a
11 temporary injunction. He can't reach the merits because
12 he doesn't have a factual record before him.

13 We haven't completed discovery in this case, done
14 taking depositions, but we have more facts than he did.
15 All he had was the allegations, Your Honor.

16 There -- it would have been improper for him to reach
17 the merits of this case, and he doesn't reach the merits
18 of this case. He rules on the temporary injunction.

19 Very important even with the request for an
20 injunction, a very high threshold. He orders in another
21 order that part of the provision be enforced.

22 I'm going to hand you that order. I don't think it
23 was discussed, but there is an order that says, as far as
24 soliciting patients -- may I approach?

25 THE COURT: Yes.

1 MR. SHEHEEN: As far as soliciting patients, as far
2 as soliciting employees, using confidential records, all
3 of which is a part of the restrictions in the agreement,
4 he awarded that. That's even on a temporary injunction,
5 Your Honor.

6 I would say that it's very relevant because Dr. Dyce
7 has moved to strike the whole provision. In other words,
8 he says that if you find that the covenant is not
9 enforceable, then you also have to strike the restrictions
10 of them taking our employees, taking our patients.

11 So you can't have your cake and eat it, too. You
12 can't say, "Your Honor, you should strike these other
13 provisions because the case law says that. Oh, but leave
14 the rest of the agreement intact which several
15 disadvantages my client."

16 Your Honor, also I want to interject, let you know
17 that he had to go to the operating room this afternoon.
18 That's why he's not here and I apologize.

19 THE COURT: That's fine.

20 MR. SHEHEEN: Your Honor, let me talk a little bit
21 about the covenant and the law. I think the most
22 important thing to understand here is we're not attempting
23 to enjoin him from practicing.

24 Understand what happened. Once he was allowed to
25 practice, he opened in the same building as SCENT. He

1 took hundreds of patients. Our patients had to walk right
2 by his office, see his signs.

3 He had been the primary doctor for the Richland
4 County office for SCENT. That's exactly why you need a
5 covenant. He had been building his relationships with
6 patients, and then the day he left -- or the day we first
7 got notice that he was leaving, he served a lawsuit on us.
8 That's how SCENT learned he was leaving. He served a
9 lawsuit on us saying, "I'm going to go open up another
10 practice."

11 He had been working on it. You could see in the --
12 some of the attachments. He had been working on it
13 unbeknownst to us acting in this disloyal way.

14 Your Honor, Judge Barber also raised in his order
15 that an alternative remedy existed besides injunction, and
16 that's what we're here for today.

17 What we're here for today is to say, "Your Honor,
18 please allow -- they're trying to enforce the agreements,
19 the buy outs."

20 Mr. -- Dr. Gunnlaugsson is claiming that he is a
21 shareholder, which we -- is a serious factual argument,
22 and they want to enforce these documents while at the same
23 time carving out a big part of the document that set up
24 how this would work? This is why it's so important, Your
25 Honor, to understand.

1 Dr. Dyce opened up in Hartsville. That was a major
2 area of our practice. We have Hartsville, Cheraw,
3 Richland County, Kershaw County.

4 Dr. Gunnlaugsson opened up a competing practice in
5 the same building in Richland. They took over -- we
6 believe, and we've got -- we're going to develop this
7 evidence, over \$1.5 million of revenues in each place, and
8 now they want a buy out?

9 If you allow them to exclude the contractual
10 provisions that say, "Hey, you're not going to go take our
11 patients. You're not going to go take our personnel.
12 You're not going to compete against us," then you're
13 allowing them to get what they claim they're entitled
14 while we can't make any claim based on that particular
15 provision.

16 Your Honor, it's important to understand, I believe
17 as well, that Dr. Dyce and Dr. Gunnlaugsson both signed
18 they believed this agreement was reasonable.

19 Your Honor, let's -- I want to talk about this
20 provision that Mr. Thompson mentioned. The case law is
21 pretty clear. Faces Boutique says this, that you must
22 look at each case on its own facts in determining the
23 covenant and whether or not it's enforceable, and that is
24 on an injunction.

25 Your Honor, it's critical that the trial judge be

1 able to evaluate all of the facts of this case. For
2 example, they did not -- when we're talking about the
3 breadth of the prohibition, first of all, it was only 18
4 months. Clearly, it had been upheld before in many cases.

5 Second of all, it was only 20 miles from the
6 locations of SCENT, clearly reasonable. When you look at
7 this, they're now resting their claim on saying, "Well, it
8 said no medicine."

9 Judge, let's look at the practical side of this.
10 First of all, SCENT had a very broad practice. I've
11 listed just some of the areas that they practiced in.

12 Your Honor, they are ENTs. They specialize in ENT,
13 as well. They went out and took these patients. It's not
14 right for our client to then not be able to perform under
15 the agreement.

16 The case law is not clear, and that's why the facts
17 are very important. The facts are absolutely important to
18 the breadth of the covenant to the agreement not to
19 compete because the facts inform the judge as to whether
20 or not it is reasonable.

21 The law is not at all clear. They're asking you
22 essentially to make new law. There is no cases that I can
23 find in South Carolina on point with the doctors and the
24 practices in this state.

25 There are two ENTs, I believe, that graduated in

1 South Carolina in a year. There is a reason why
2 Dr. Puchalski was recruiting these people from out of
3 state.

4 He spent thousands -- you'll see in his affidavit, he
5 spent thousands and thousands of dollars to recruit them
6 here, paid way more than he was required to pay under
7 their basic employment contracts. Spent -- in the case of
8 Dr. Gunnlaugsson, paid for his malpractice tail coverage
9 from when he left Florida.

10 Your Honor, he would have no incentive to recruit
11 these physicians into his practice. SCENT would have no
12 incentive to recruit them into the practice, doctors
13 wouldn't. If they're going to be able to do what these
14 two gentlemen did and go set up in the same building or,
15 you know, down the street in the case of Dr. Dyce...

16 There is an important case called the Dudley case,
17 which I cite to you, where the Supreme Court specifically
18 allowed the enforcement of what I would tell you was a
19 much less sophisticated employee.

20 Basically, I believe it was a delivery driver type
21 person, and in that -- in that particular realm, which was
22 a laundry type thing, the court held up a provision that
23 said that that gentleman could not compete in any manner,
24 not just driving a car or whatever, but couldn't compete
25 in that industry in any manner.

1 The other side would say, "Well, the Court didn't
2 specifically rule on the words." Well, Your Honor,
3 they're quoted in the case.

4 Did the Court say this is or is not okay? They
5 didn't specifically address that, but they specifically
6 said that because the time -- I can't remember what it
7 was. I think it might have been three years. It was more
8 than 18 months -- and the geography were appropriate.
9 Therefore, we uphold it. Therefore, we uphold it.

10 Your Honor, they want you to make new law based on a
11 set of facts that have not been presented, and it would be
12 inappropriate to do that in the summary judgment level
13 without all of the facts being heard before the judge.

14 Your Honor, the cases -- case law they cited
15 certainly doesn't have all of the facts that you've
16 already just heard today involved.

17 This is a very unique case where these agreements are
18 tied together. Mr. Ellison addressed a very important
19 point. I think it's critical, and it's critical as to why
20 this case is different than a classic injunction case
21 where you try and say, "Okay. We've got a covenant. You
22 can't go compete against us."

23 Your Honor, the shareholder agreement references the
24 employment agreement. The employment agreement of both
25 these gentlemen has very specific financial rewards, has

1 breadth to them that are assumptions that these gentlemen
2 aren't going to go out and take patients, take the
3 customers, take the personnel and cost the practice an
4 incredible amount of money.

5 In that covenant, there is something that says, "You
6 shall not -- you agree you won't hire our employees."
7 That's been violated. In that covenant, there is
8 something that says, "You agree not to treat our
9 patients." That's been violated.

10 Your Honor, Faces Boutique itself, where they ruled
11 against an injunctive relief, says that you must look at
12 the facts of each case, and practically, Your Honor, if,
13 doctor -- for example, Dr. Dyce had just waited 18 months
14 or driven to Winnsboro or Sumter or Orangeburg where he
15 wasn't in our territory, we wouldn't be having this
16 dispute.

17 Instead, he chose to practice in Hartsville, and that
18 cost us over \$1.5 million. He wants this court to say
19 it's okay for me to do that, to violate my agreements, and
20 then I still get this huge buy out that he believes he is
21 entitled to.

22 In Dr. Gunnlaugsson's case, he agreed that he would
23 give 12 months' notice before he would leave. Why? It's
24 in his employment agreement, because it takes a lot of
25 money to recruit a physician. We lose revenue when a

1 physician isn't there, potentially. He violated that.

2 Your Honor, these gentlemen advertised in our
3 territory. They set up shop in one case, you know, in the
4 same building and made claims that somehow or another,
5 that wouldn't affect us. If you look through the Judge
6 Barber transcript, you will see that.

7 We lost, we believe, over \$3 million in revenue.
8 They essentially took their buy out. Well, Dyce took the
9 buy-out provision by taking the patients and the clients,
10 and now they're asking you to take case law that talks
11 about injunctions and prohibiting somebody from working
12 and throw out their employment agreement and their
13 shareholder agreement, Dr. Dyce's shareholder agreement in
14 part, so that the parts that favor our client -- that were
15 put in there for a very specific purpose -- so that we
16 can't enforce them and essentially left naked while they
17 come in and claim that they can enforce the rights.

18 They're asking this Court to make new laws with
19 specific factual situations that have to be determined by
20 the Court at a later date when all of the facts are placed
21 before the Court.

22 Your Honor, thank you. I know it's a little bit
23 complicated. It's a little bit different factual
24 scenarios, but I think the court understands this is
25 critically important to the case and certainly is an

1 attempt to gut the claims of SCENT.

2 Thank you, Your Honor.

3 THE COURT: All right. Thank you.

4 MR. THOMPSON: Your Honor, Mr. Sheheen has done the
5 best he could to try to complicate what's a very
6 straightforward and totally legal question, and that is
7 can you have a restriction that prohibits the employee
8 from doing anything in the geographic areas.

9 We're not here arguing about the length of the time,
10 the geographic area, how big it is, how small it is. The
11 only question here, Your Honor, is whether or not you can
12 restrict an employee from working in any capacity or some
13 other entity.

14 In Dr. Gunnlaugsson's case, he was qualified go out
15 and do -- not that it's relevant, but he could have gone
16 and done some other things. He could have worked in the
17 ER or done other things, but the restriction -- and that's
18 really all we need to look at -- is does it attempt to
19 restrict a doctor from practicing any medicine? It
20 clearly does.

21 The law is so settled. I practiced in this area,
22 Your Honor. Labor employment law is all I do. I have --
23 I don't think I've seen anything in the non-compete area
24 that is so settled.

25 I would like to talk about the RUS case, and Nelson

1 Mullins did the same thing bringing up this case. And
2 I've heard it come up before, defendant employers trying
3 to attempt to argue their non-competes are enforceable.

4 In the RUS case, there was any capacity restriction
5 that the employee -- that was in his non-compete, that he
6 was not allowed to work for competitor in any capacity.
7 But guess what, Your Honor. The employee's attorney never
8 argued that that made it invalid.

9 It was not a question that the Supreme Court
10 considered, so of course, it's meaningless. So the fact
11 that that was the type of restriction in that case doesn't
12 matter at all because that was not an issue that the
13 Supreme Court considered or ruled upon.

14 Your Honor, Mr. Sheheen went into a number of issues.
15 I'm not -- I'm not going to try to address it. I could
16 stand up here for the next 30 minutes and talk about all
17 the very good reasons that Dr. Gunnlaugsson felt that he
18 needed to terminate his employment.

19 And by the way, he did give proper notice. They were
20 in breach of the agreement. We don't need to get into
21 that, but he gave proper notice, worked out his notice.

22 And because his only choice was to go out and
23 practice -- and he needed a decision on the non-compete --
24 that's why we filed a motion and withdrew that motion as
25 soon as we saw that SCENT was, indeed, going to fight us

1 on that. They filed their own motion, so our motion
2 became irrelevant.

3 We're not here on the non-solicitation provisions.
4 I'm only talking about the non-compete. It is clearly
5 invalid, Your Honor.

6 You know, as I said before, it's not just the -- a
7 majority position of the courts in the United States. It
8 is the only position.

9 If you'll notice that Mr. Sheheen didn't give you a
10 single case, trying to give you the RUS case, which I just
11 explained, to get around the weight of this authority.
12 There is no way around it.

13 It's a pure legal question. There is no fact
14 involved, just as there were no facts before Judge Barber.
15 It doesn't matter if we're here on an injunction or now on
16 summary judgment.

17 It's the same legal question which the Supreme Court
18 has said, "Judge, you must decide this. You must decide
19 whether this is reasonable or not."

20 There is really no point in further litigating or
21 trying to develop any facts around these questions. You
22 either have good non-compete or you don't. This one is
23 bad.

24 If they want to sue Dr. Gunnlaugsson for other
25 things, then there's lots of things in there, in those

1 counterclaims. That's fine, but the non-compete should be
2 out.

3 THE COURT: Thank you.

4 MR. ELLISON: Your Honor, I'll be very brief. One
5 thing I did not cite a specific provision of severability
6 in the shareholder agreement. It's section 8.12 on page
7 20, a virtually identical provision contained in the
8 employment agreement.

9 That has been discussed -- I think with -- another of
10 this particular argument comes down to is the prohibition
11 on either Dr. Dyce or Dr. Gunnlaugsson practicing any type
12 of medicine, and then if you conclude that's not
13 enforceable, you don't have to get to a whole bunch of
14 other questions, but I think it's important to note that
15 there is a bit of a factual difference that Mr. Sheheen
16 tried to allude to as he tried to paint Dr. Dyce with the
17 same brush as Dr. Gunnlaugsson.

18 I think it is correct that Dr. Gunnlaugsson set up a
19 practice immediately in Richland County, I think in the
20 same building as SCENT's building was, and he talks about
21 how Dr. Dyce set up his practice.

22 What he doesn't mention is that Dr. Dyce went to work
23 for a hospital system. He didn't set up his own practice.
24 He went to work for a hospital system in August 2010 after
25 being fired without cause, and he goes -- he has got a

1 prohibition on the practice of any type of medicine.

2 He does all of this in order to reduce his income
3 from \$1.5 million dollars down to less than a third of
4 that. I mean, this is what we're dealing with.

5 I think that there is a reason why the courts
6 throughout the United States have said this prohibition on
7 any type of medicine is simply unenforceable as a matter
8 of law that Mr. Thompson has alluded to.

9 MR. SHEHEEN: Your Honor, just to touch on this very
10 briefly. Your Honor -- and I'm not sure I'm articulating
11 this as well as I should -- this is not just a covenant
12 not to compete. This is a measure of the damages that
13 we're entitled to if they go and do these things.

14 We're not saying at this point -- obviously, we're at
15 a preliminary injunction hearing. At this point, it is
16 you have breached your agreement, and you agree that if
17 you did these things, you would owe us blank, blank,
18 blank, blank.

19 Otherwise, these gentlemen can waltz out, take all of
20 the patients, take all the revenue, and then claim they're
21 entitled to blank amount of money. This is part of the
22 agreements that they had together, and it is part of how
23 you calculate the damages from their breach of these
24 agreements.

25 Your Honor, the -- him going to work for the hospital

1 system versus practicing doesn't matter. Individually, it
2 doesn't matter. He established his practiced with the
3 hospital. He's taking the patients, taking the revenue,
4 and the result is the same.

5 The critical point being that for the trier of fact,
6 for a judge, even if they were to rule on a directed
7 verdict motion or a motion after the trial has to
8 understand the full breadth of what was going on, has to
9 hear the fact.

10 This is the most factually complicated case I've ever
11 been involved with, and you've just got a taste of it.
12 Thank you, Your Honor.

13 THE COURT: Let me ask you this real quick.

14 MR. SHEHEEN: Yes, Your Honor.

15 THE COURT: Mr. Thompson made the point. His -- and
16 if I'm wrong, Mr. Thompson will correct me.

17 I believe you were saying that -- he's saying that
18 the non-compete is not valid, and that those issues that I
19 think you just brought up regarding, I guess, the taking
20 of the clients and the revenue, that those would be
21 covered under -- I guess your claims of breach of contract
22 and the other counterclaims that -- and I guess what I'm
23 trying to figure out is how were they not covered under --
24 under the other claims if -- if I were to agree with
25 Mr. Thompson?

1 MR. SHEHEEN: Your Honor, the date -- the breach of
2 contract claim is the claim that they're breaching their
3 contract by practicing against us, practicing in
4 competition with us. The result of them practicing in
5 competition with us is all wrong. So it really is all
6 intertwined. Our breach of contract claim is the
7 violation of the agreement not to compete in this case.

8 Now, and with Dr. Gunnlaugsson, there is also a claim
9 that he violated -- I'm not sure if it's included in this
10 or not -- but he violated within the one-year period he
11 was supposed to give before he left. I hope that answers
12 your question. You can't separate them out as easily as
13 they claim is the issue.

14 THE COURT: So you're saying you can't separate the
15 breach of contract and the covenant?

16 MR. SHEHEEN: Yes. If you think of the covenant
17 as -- as what Judge Barber looked at, which was can you
18 keep them from practicing, yeah, you can separate that
19 out. You could say, "I'm not going to enforce him not
20 being able to actually practice."

21 What we're saying is different, which is that he
22 breached the contract itself. The contract itself is that
23 -- what we would call the covenant at the injunctive
24 level.

25 The contract sets out liquidated damages provision,

1 for example, I believe \$750,000 if he goes and establishes
2 a practice and competes against us and takes the patients,
3 et cetera.

4 So the traditional covenant argument and the cases
5 that have been cited to you are that injunctive relief.
6 "Don't let him open up. Don't let him practice."

7 What we're talking about it the same language, but
8 now it's the agreement in enforcing the damages from the
9 agreement. They wish to create, you know, the new
10 contract and apply new law. We're in somewhat uncharted
11 territory, frankly, because there is no case in South
12 Carolina exactly like this.

13 THE COURT: Yes.

14 MR. THOMPSON: I'll say it again, Your Honor, the
15 territory is well chartered, and the case law is clear.
16 If they want to try to get Dr. Gunnlaugsson on the hook
17 for as they call it improperly taking patients, they're
18 going to have to find some other hook than the
19 non-compete. It's just not that one.

20 THE COURT: All right.

21 MR. SHEHEEN: Thank you, Your Honor.

22 THE COURT: All right. And let's see, the -- I think
23 there's a summary judgment motion as a defamation claim.

24 MR. ELLISON: They haven't alleged -- I mean, I'll
25 just say what's in the memorandum. They haven't alleged

1 anything.

2 In fact, if you looked at Mr. Sheheen's memorandum,
3 they are alleging that Dr. Gunnlaugsson defamed
4 Dr. Puchalski.

5 There is nothing anywhere that Dr. Dyce has done
6 anything that supports a defamation claim, including their
7 own mouth. I'm sure we're about to hear something, but
8 there's nothing so far.

9 MR. SHEHEEN: I did inadvertently leave out the
10 argument with them. I apologize.

11 Your Honor, with this particular cause of action, we
12 have not had the opportunity -- there is a scheduling
13 order in place. We have not had the opportunity to depose
14 people that we believe are going to give us information.
15 If not at the end of the day, then, you know, we would
16 have a case to do.

17 An important point I want to make, which may be a
18 later motion --

19 THE COURT: Okay.

20 MR. SHEHEEN: -- is -- I don't know what the motion
21 says, but we have asked for documents from the hospital,
22 e-mails, that type of thing. They have moved to quash
23 that subpoena, I believe. You'll hear that motion.

24 You know, certainly, we need to -- we think there
25 might be a defamatory statement in there. We deserve to

1 be able to look at them, but we can deal with that motion
2 later. I just wanted to mention that because it plays
3 into the defamation claim.

4 THE COURT: All right. Mr. -- so that covers all of
5 your...

6 MR. ELLISON: The summary judgment motion, yes, sir.

7 MR. SHEHEEN: Your Honor, I believe if Ms. Baker can
8 help me, I believe there was a motion to squash, which I
9 just mentioned.

10 MS. BAKER: Motion for a protective order.

11 MR. SHEHEEN: Protective order, and then there was a
12 motion --

13 MS. BAKER: We have a motion to amend the complaint
14 in the SCENT case pending.

15 MR. SHEHEEN: And I have a motion to amend. I think
16 you had a motion to quash my -- maybe I had a motion to
17 compel their response to discovery, as a matter of fact.
18 I think that's all that's been...

19 MS. BAKER: Exactly and motion to consolidate.

20 THE COURT: All right.

21 MR. SHEHEEN: Those should not take very long.

22 THE COURT: All right.

23 MR. SHEHEEN: I can start with the motion to
24 consolidate since I haven't had any motions yet.

25 THE COURT: All right.

1 MR. SHEHEEN: Your Honor, this is really simple.

2 Your Honor, rule -- this is -- this is the motion to
3 consolidate Curley and Dyce. I probably don't even need
4 to say anything at this point, because you understand how
5 interwoven these cases are, but 42(A) sets out the
6 standard if they involve common questions of law and fact.

7 Your Honor, we're claiming that the conspiracy was
8 between Dyce and Curley. We claim that they both
9 interfere with the same contract.

10 All of this stuff is -- arises from the same fact
11 pattern which was the halting of the construction of the
12 building, the shareholder negotiation disputes that were
13 going on.

14 Your Honor, this -- furthermore, this thing is going
15 to be tried. It's nonjury. It's going to make no sense
16 to have these two cases tried separately when they involve
17 the same lawyers, the same witnesses, the same facts,
18 essentially, and the same claims, as well.

19 So we're just simply asking to consolidate them. I
20 think under Rule 42(A), it's entirely appropriate.

21 Thank you.

22 THE COURT: All right. Thank you.

23 Mr. Ellison?

24 MR. ELLISON: Ms. Baker.

25 THE COURT: I'm sorry. Ms. Baker.

1 MS. BAKER: May it please the Court, Judge. We have
2 a -- actually probably your smallest book.

3 THE COURT: I have it.

4 MS. BAKER: That's for this one.

5 Your Honor, again, my name is Jana Baker sitting here
6 next to Morris Ellison. I agree with Mr. Sheheen, of
7 course, Rule 42(A) governs this case; however, we oppose
8 this motion.

9 The point, you know, in order to consolidate cases is
10 to prevent the multiplicity of litigation, state the
11 necessary cause, judicial economy and prejudice. However,
12 the Court should not grant the motion to consolidate if it
13 would complicate issues of fact, delay the trial.

14 It would be difficult to the parties, to the jury or
15 to the Court to present or apply the law to the evidence
16 or the case or if it would result in prejudice to the
17 parties.

18 In this case, the motion should not be granted.
19 First, the SCENT case as we've been calling it, and the
20 SCENT Land case are completely two different cases. The
21 SCENT Land case is just a clean case dealing with what's
22 the value of the real estate holdings.

23 Again, as Mr. Ellison explained when we started out,
24 SCENT Land just deals with a dispute between two members:
25 Mrs. Puchalski and Ms. Curley.

1 When Mr. Dyce was terminated from SCENT, then at that
2 point, May 9th, 2010, we needed to determine what's the
3 value of Ms. Curley's interest in the company. That's the
4 only issue there.

5 We're going to have an appraiser. We're going to
6 have a real estate appraiser to determine what was the
7 fair market value at that time. That's the only issue
8 there, and that's going to be the testimony. And, of
9 course, the testimony, you know, may be of Mrs. Puchalski
10 and Ms. Curley. That's it.

11 The SCENT case is lot different, as you know. I
12 mean, the testimony, we're going to have accountants,
13 forensic accountants, who are going to determine what was
14 Mr. Dyce's value in SCENT the date that he was fired.

15 There's going to be testimony, different witnesses,
16 you know, of SCENT former employees, SCENT former
17 partners, you know, Mr. Puchalski.

18 We also have to deal with -- you know, unless you
19 grant summary judgment motion, the non-competing issue.
20 So the issues are completely different.

21 The SCENT Land case is going to be a short, quick
22 case to try, and if it's -- if the cases are consolidated,
23 it's going to result in prejudice to us. It's going to
24 delay the trial. It's going to complicate issues, and
25 you're also looking at two different documents: An

1 operating agreement versus a shareholder's agreement.

2 You're under two different -- you know, the
3 Corporations Code or the Limited Liability Act. So to
4 keep it easy, in-complicated, and not prejudice the
5 parties, the cases should not be consolidated.

6 THE COURT: All right. Anything else in regard to
7 that?

8 MR. SHEHEEN: No, ma'am, Your Honor. Thank you.

9 THE COURT: All right. Well, I think I am going to
10 consolidate. It's the same lawyers on both.

11 I think earlier y'all -- part of the reason you said
12 that, I guess, she was disassociated with the SCENT Land
13 was because of his disassociation with SCENT. So I guess
14 in the interest of judicial economy, I will consolidate
15 those two, the husband and the -- Curley and Dr. Dyce.

16 All right. And you said there's some other...

17 MR. SHEHEEN: Your Honor, those are the motion of --
18 Ms. Baker filed for a protective order. Maybe we should
19 take that up.

20 MS. BAKER: Sure.

21 THE COURT: This is Ms. Baker's?

22 MR. SHEHEEN: Yes, ma'am. It's my subpoena and it's
23 her -- let me see. Yeah. My subpoena to -- I don't want
24 to...

25 MS. BAKER: Oh yes. Sure. Yes, we filed an amended

1 motion for protective order on February 2nd, 2012. We
2 made a copy of our motion, I think. Do you have a copy,
3 or do you want me to...

4 THE COURT: I'm sure we do have a copy up here, but
5 if you have an extra, that would make it a whole lot
6 easier for us. I'm trying to go through all of the
7 documents. Thank you.

8 Would you like a copy, as well?

9 THE CLERK: Thank you.

10 MS. BAKER: Your Honor, Mr. Sheheen served a subpoena
11 to Hartsville HMA, LLC doing business as Carolina Pines.
12 Exhibit A -- we attached as Exhibit A to the motion the
13 amended subpoena.

14 What Mr. Sheheen has requested is extremely very
15 broad. He wants from Hartsville HMA, LLC all of the
16 documents, communications, e-mails, memoranda or other
17 similar matter, whether electronic or tangible form from
18 November 2009 to forward involving or discussing
19 employment by Dr. Orville Dyce or his affiliated
20 companies, contractual agreements with Dr. Dyce or his
21 affiliated companies or involving Dyce's discussions or
22 comments mentioning in any way Dr. Puchalski or South
23 Carolina ENT and Sleep Medicine, PA or its affiliates.

24 We object and we filed a protective order pursuant to
25 Rule 26(C)(1), (2) and (4). Again, because it's overly

1 broad. It's ambiguous, and first of all, there's no time
2 period.

3 You know, they want all documents from November 2009
4 forward. I mean, we would be fine if it was limited from
5 2009 to May 9th, 2010, but there's no reason to have it
6 after that.

7 THE COURT: And when do you start with...

8 MR. ELLISON: October 2010, Your Honor, is when he
9 went to work, Your Honor.

10 MS. BAKER: October 2010.

11 THE COURT: So you said you're fine with November
12 2009 until when, May 2010?

13 MS. BAKER: Until May 9th, 2010, exactly.

14 THE COURT: But he didn't start with the hospital
15 until October.

16 MS. BAKER: Well, there's -- I think there is no
17 reason to have it after that. They have allegations -- I
18 mean, I think it's just overly broad with respect to the
19 time period because if he was engaged in anything for any
20 type of -- the alleged harmful conduct that would have
21 happened while he was working with SCENT, not after.

22 THE COURT: All right. Yes, sir.

23 MR. SHEHEEN: Your Honor, a couple of points: One is
24 it sounds like they are okay with it just up to a certain
25 time, but that's not acceptable, Your Honor.

1 This is -- we've got several claims that are directly
2 relevant to this. One is a defamation claim, and we
3 deserve to know if there are e-mails in 2010, 2011 with
4 Hartsville or this employer.

5 The other one is damages, Your Honor. This is very
6 relevant. His taking these patients, his remuneration,
7 what he's making, is all very relevant to the damages that
8 we suffered.

9 I need to understand, and I need to know it so I can
10 plug that into how my client was affected by him. So this
11 is not broad. I mean, this is pretty tailored to 2009
12 forward, discussion points to that. I didn't say every
13 e-mail. You know, I didn't say, "I want all the copies of
14 everything you've got that talks about it."

15 This is their employment, their contractual
16 agreement, with him and his ability with the company -- he
17 also had the company that he formed that has -- an
18 equipment company where he gets paid.

19 I'm not sure I understand all of those ramifications,
20 and I think that we deserve to have it. You notice that
21 HMA has not filed a motion to quash. They have sent me a
22 letter saying that, you know, they're waiting on what
23 happened here.

24 Thank you, Your Honor. I think it's pretty clear.

25 MS. BAKER: I mean, and just to go over, I mean,

1 y'all do ask for all e-mails, documents, I mean pretty
2 much everything. It's a whole laundry list.

3 THE COURT: All right. So tell me what you -- what
4 you all agree to.

5 Yes, Ms. Baker. As far as time, you're saying
6 November 2009 until May of 2010; is that correct?

7 MS. BAKER: That's correct, Your Honor.

8 THE COURT: And documents, as far as documents?

9 MR. SHEHEEN: Your Honor, the only documents I'm
10 asking for are those discussing employment with
11 Dr. Orville Dyce or his affiliated companies or
12 contractual agreements or his abilities with the companies
13 or discussions about that, you know, the employment
14 relationship and what he's making and all that kind of
15 stuff.

16 MS. BAKER: During that time period, we would agree
17 to that, up to May 9th, 2010.

18 THE COURT: And it starts in October of 2010. All
19 right.

20 MR. SHEHEEN: Your Honor, with SCENT, it's
21 interesting but I would submit to you that these -- you
22 know, the defamation claim is not related to the time at
23 all.

24 In fact, we suspect that it could have happened after
25 this, and the damages claims are ongoing. We need to

1 understand. For example, what if there had been a change
2 in the agreement? It's very relevant to this case. I
3 don't know if it has been or hasn't.

4 Thank you.

5 MS. BAKER: He was asking, you know, originally for,
6 you know, anything regarding, you know, Dyce's employ---
7 or Dr. Dyce's employment. That's what -- and the
8 documents concerning that or agreements.

9 MR. SHEHEEN: Your Honor, in fairness, I had filed a
10 subpoena, and then I amended it to narrow it, so the
11 original one was broader than this.

12 THE COURT: Is this the narrow?

13 MR. SHEHEEN: The one where she filed an amended
14 motion for a protective order would be in there.

15 MS. BAKER: Right.

16 MR. SHEHEEN: And she attached it.

17 MS. BAKER: Right, I attached it, and I still think,
18 again, it's overly broad.

19 (Pause).

20 THE COURT: All right. What I'll do is the documents
21 from November 2009, and he started in October 2010. The
22 documents from November 2009 to November 2010.

23 As to the last part, any discussions or comments
24 mentioning in any way Dr. Robert Puchalski or South
25 Carolina ENT, Allergy and Sleep Medicine, I guess for the

1 purposes of the defamation, that would be ongoing, but
2 that would be any discussions or comments mentioning --
3 limited to anything mentioning Dr. Puchalski.

4 MR. SHEHEEN: After that October date.

5 THE COURT: After the November date, yes.

6 MR. SHEHEEN: I'm sorry, after the November date,
7 thank you.

8 THE COURT: All right.

9 MR. SHEHEEN: Your Honor, if I could interject?

10 THE COURT: Yes.

11 MR. SHEHEEN: I had a motion to compel. It's very
12 simple. I requested discovery copies of Dr. Dyce's K-1's
13 or other IRS documents.

14 I'm assuming he wouldn't -- he may have a K-1 for the
15 equipment company. I don't know, but I think it's pretty
16 black letter law that we're entitled to the production of
17 them, and I'm only asking for two years.

18 THE COURT: What years?

19 MR. SHEHEEN: 2009 forward. They're directly
20 relevant to damages to the amount of what he's been able
21 to take and our claims, and that was a motion to compel.

22 THE COURT: So you're asking for the '09, '10 and
23 '11?

24 MR. SHEHEEN: Yes, ma'am.

25 MS. BAKER: You're asking for personal documents?

1 MR. SHEHEEN: Yes, ma'am.

2 MS. BAKER: Judge, I object. I mean, we think
3 they're irrelevant. This is -- it's under Rule 26, the
4 purpose of it is to protect parties from annoying,
5 suppression, embarrassment or undue burden.

6 I think it's just a fishing expedition. It's not
7 relevant at all to this case, and also, Your Honor, you
8 haven't even ruled on the issue of the covenant. So at
9 this point, it's just premature.

10 THE COURT: All right. Let me ask you, but you have
11 certain claims for damages, too, don't you? Are you --
12 doctor -- are you asking for --

13 MR. ELLISON: Your Honor, they don't relate to the
14 tax returns at all.

15 MS. BAKER: Yeah, they don't.

16 MR. ELLISON: Although, I will -- I think it's worth
17 noting based on the new damage theory that we're hearing
18 today and we started hearing last week -- we need to get
19 SCENT's tax returns and Dr. Puchalski's tax returns.

20 They've already objected to all of that, too...

21 MR. SHEHEEN: Your Honor --

22 MR. ELLISON: But Dr. Dyce's tax returns have nothing
23 to do with the damage claims at all. You know, what a K-1
24 says as far as what his income is is irrelevant.

25 MR. SHEHEEN: Your Honor, even on a wreck case, you

1 get tax returns to show -- we have our claims, and our
2 claims are that he has a variety of things that he
3 benefited from that. We're entitled to damages. This is
4 not an unusual request, and I frankly never had objected
5 to it before.

6 THE COURT: What's your position regarding SCENT?

7 MR. SHEHEEN: I'm happy to give them to him.

8 MS. BAKER: And Dr. Puchalski?

9 MR. SHEHEEN: I'm happy to give it to them.

10 THE COURT: All right. All right. Well, that will
11 be 2009, 2010, 2011, and it will be mutual.

12 MR. SHEHEEN: And, Your Honor, subject to, I'm
13 assuming both sides want a confidentiality order?

14 MR. ELLISON: That's fine, Judge.

15 THE COURT: Yeah, a confidentiality order.

16 MS. BAKER: Judge, we had filed a motion to amend the
17 complaint in the SCENT case.

18 THE COURT: Yes, ma'am.

19 MS. BAKER: We can take that up next if you would
20 like, and I have an extra copy.

21 MR. BLAND: That's a motion I want to join in, too.
22 That's the same way I can short circuit.

23 THE COURT: Okay.

24 MS. BAKER: Do you -- Your Honor, do you need an
25 extra copy? I know there's a lot of paperwork up there.

1 THE COURT: If you have an extra copy.

2 MS. BAKER: I do.

3 Your Honor, we're here today -- this is for the SCENT
4 case to move pursuant to Rule 15 to amend the complaint.
5 We are -- in the SCENT case. We're seeking to amend the
6 complaint twofold: First is to add a new party, Amy
7 Puchalski, and to add two causes of action: One
8 conversion and two, constructive trust.

9 As you're well aware, South Carolina law is clear
10 that would lead to amend the pleadings pursuant to Rule 15
11 shall be freely given when justice so requires and does
12 not prejudice any other party.

13 Prejudice envisions -- which would prohibit amendment
14 of a pleading is a lack of notice that the new issue is
15 going to be tried and the lack of opportunity to refute
16 the issue.

17 The party opposing the amendment has the burden of
18 establishing prejudice. With this -- we want to name
19 Mrs. Puchalski and add these two causes of action because
20 recently at the end of 2011, we discovered, you know,
21 through discovery that Amy Puchalski was receiving SCENT
22 money.

23 We received that because we actually -- you know, we
24 looked at the checks and got that at the end of 2011. We
25 also found out, because in Mr. Gunnlaugsson's case, there

1 were two depositions taken, one recently on March 5th.
2 That was Teresa Williams, who was a former employee at
3 SCENT, and then March 12th, Bob -- or Dr. Puchalski's
4 deposition was taken.

5 In both depositions, it was determined that Amy
6 Puchalski was never an employee of SCENT. She was never
7 an employee -- a shareholder. Yet, we received, you know,
8 from discovery information, you know, images of checks
9 that Amy Puchalski was receiving money from SCENT.

10 And, therefore, as soon as we verified the fact in
11 March 2012, we immediately filed the motion. I believe it
12 was filed March -- well, you have that motion there. I
13 don't have it in front of me, maybe March 28th, to amend
14 the pleadings.

15 This amendment will not prejudice the parties.
16 Discovery -- we've conducted written discovery. We
17 haven't taken a deposition in the case yet. The first
18 deposition is scheduled for Friday, and in light of these
19 facts, the -- this amendment will not prejudice any of the
20 parties.

21 If you grant this motion, we'll be happy to even, you
22 know, amend the scheduling order, if need be.

23 THE COURT: That that's going to be up to Judge
24 Barber.

25 MR. SHEHEEN: We've --

1 THE COURT: He's already shaking his head no.

2 MR. SHEHEEN: Your Honor, you know, there's a --
3 you've heard it today. You're going to keep hearing it.
4 There's these -- just tangents get thrown up throughout
5 this case.

6 One of these tangents is that Ms. Puchalski has been
7 taking money from SCENT. Okay. Here is what the
8 testimony was in the deposition: That Dr. Puchalski, who
9 is an owner of the company, was entitled to money, pay.

10 Instead of Dr. Puchalski coming to get it, she would
11 get it. They would write her a check. She would put it
12 in her bank account saying -- you know, I'm not sure how
13 their account is structured, but essentially, you know,
14 they're married.

15 So the accountant said there is absolutely nothing
16 wrong with this. There is not a meritorious claim related
17 to it. Therefore, it should not be granted.

18 Here is what's really important, Judge. They're
19 asking not to sue her. They're asking in this, in this
20 allegation, for a constructive trust to be imposed.

21 There is no allegation in here from what they put to
22 allow a constructive trust to be imposed. Your Honor,
23 there is specific criteria for constructive trust, and
24 this ain't it.

25 You could -- you could sue anybody and ask to impose

1 a constructive trust against them under the theory of --
2 well, this is the same motion in both cases. That is
3 entirely inappropriate.

4 This is not a claim that is meritorious, and
5 therefore, it should not be granted. This is money that
6 the owner was entitled to have. If he give it to his
7 wife, there is absolutely nothing wrong with that.
8 Certainly, you can't impose a constructive trust on that.

9 Thank you, Your Honor.

10 MR. BLAND: Your Honor, Eric Bland on behalf of
11 Dr. Gunnlaugsson. I take umbrage to the allegation that
12 this is not a meritorious claim. He may not like the
13 claim.

14 I'm not asking the Court to impose a constructive
15 trust. What we're asking the Court to do is permit under
16 Rule 15(A), where justice requires were there won't be
17 prejudice on the other side, to amend the first amended
18 complaint so that Amy Puchalski can be a party to this
19 case.

20 It's not quite as simple as what Mr. Sheheen said.
21 If I may provide, Your Honor, on March 5th and March 12th,
22 I took the depositions of Teresa Williams, Dr. Puchalski.

23 On March 5th -- and I'll provide the testimony, this
24 specific testimony -- Teresa Williams admitted that Amy
25 Puchalski is not an employee or a consultant or a

1 shareholder of SCENT.

2 She admitted that she gets -- she got over \$2.5
3 million dollars during the time period when Dr. Dyce was a
4 shareholder and Dr. Gunnlaugsson was buying in and reached
5 the pinnacle when he became a shareholder.

6 She received over \$2.5 million dollars, and it wasn't
7 just Dr. Puchalski's paycheck. It wasn't just
8 Dr. Puchalski's regular hospital call check. It wasn't
9 Dr. Puchalski's K-1 distribution. It wasn't
10 Dr. Puchalski's sweep money, and it wasn't just
11 Dr. Puchalski's part of Dr. Gunnlaugsson's buy in.

12 He took more money under the general ledger than his
13 50 percent ownership while Dr. Dyce was his parter and his
14 one-third ownership when Dr. Dyce and Dr. Gunnlaugsson was
15 their partner.

16 For every check that these two got at times, he took
17 two. We would take one in his name, and he would take one
18 in Amy's name, but Amy would get both checks.

19 When I took Dr. Puchalski's deposition, I asked him
20 explain to me how she got \$2.5 million dollars in two
21 years. He said, "Because she is the brains for us. She
22 is smarter than me."

23 I asked him, "Well, what do you mean smarter than
24 you?"

25 "Well, she has got all the brains, so I can give her

1 all the money."

2 The fact is the allegations in the proposed amended
3 complaint say that Dr. Puchalski sheltered money with her.
4 The allegations show that he received twice as much call
5 checks on certain months than Dr. Dyce did and
6 Dr. Gunnlaugsson; then he received additional profit sweep
7 money that Dr. Dyce didn't get. He withheld it from
8 Dr. Gunnlaugsson.

9 Amy Puchalski got cell phone paid. She was not an
10 employee. She was not a consultant. She was not a
11 shareholder.

12 Amy Puchalski got \$15,000 a month Visa bills paid at
13 times. She was not an employee. She was not a
14 consultant. She was not shareholder.

15 She got lake house payments paid for. She got boat
16 ramp payments paid for. She got jet ski payments paid
17 for. All these things are alleged in our complaint.

18 I'm asking the Court to impose a constructive trust,
19 but I am entitled when I get evidence -- I made my motion
20 within seven days of the deposition, and all I'm asking is
21 for Amy Puchalski to be named as a party.

22 He can file his motion for summary judgment. I've
23 taken five depositions so far. Vincent has taken none.
24 He has a deposition with Dr. Gunnlaugsson scheduled
25 Friday; Mrs. Gunnlaugsson on Monday. I'm taking

1 Mrs. Puchalski on Monday.

2 Rule 15 is clear. We're under a scheduling order.
3 Discovery in this place doesn't close until July 31st.
4 She has 180 days before she has to face trial. We're on
5 no trial docket in this case.

6 He is free to make his motion for summary judgment,
7 but I don't have to try my case at this time. Under Rule
8 15, where justice freely grants, motions to amend are
9 freely given.

10 MR. SHEHEEN: Your Honor, just let me respond to the
11 second argument. There is an incredible factual dispute.
12 We don't agree -- that fact's not true -- the record shows
13 that she -- that Dr. Puchalski received money that he
14 wasn't supposed to; that she received money that he wasn't
15 entitled to.

16 In fact, the testimony of the accountant, I believe,
17 was that -- they know what I'm saying. They know what I'm
18 talking about -- but essentially that if there were
19 charges to the Puchalski's, then it was allocated toward
20 his share of income under the practice, and that -- that
21 was allocated on his tax return, and that he was not to
22 get anything he was not owed from the practice.

23 If Amy Sheheen comes to pick up the check from the
24 Savage Law Firm, there ain't nothing wrong that. If I
25 tell the bookkeeper to write Amy Sheheen, put it in our

1 bank account, there is nothing wrong with that.

2 There is no evidence to the contrary of that. Your
3 Honor, I understand they want to join her. I understand
4 they want to have these claims against her, but alleged --
5 there is no meritorious claim to have a constructive
6 trust.

7 We agree that any money she received was money that
8 Dr. Puchalski had to have been entitled to receive. Thank
9 you, Your Honor, or a reimbursement from her for an
10 expense that was legitimate.

11 THE COURT: All right. Let me ask you one question.

12 MR. SHEHEEN: Yes.

13 THE COURT: Under Rule 15, being that y'all are early
14 like you all haven't done any discovery --

15 MR. SHEHEEN: Yes, ma'am.

16 THE COURT: -- how is -- how is your client
17 prejudiced?

18 MR. SHEHEEN: It's a very perceptive question, Your
19 Honor. My argument today is that there is no meritorious
20 claim.

21 THE COURT: Okay.

22 MR. SHEHEEN: Thank you.

23 THE COURT: All right.

24 MR. BLAND: Your Honor, under the four corners of my
25 proposed amended complaint, I have to just meet the

1 elements.

2 There's no such thing whether it's meritorious or
3 not. That's a motion for summary judgment. The fact is
4 that I have alleged in the proposed amended complaint that
5 Dr. Puchalski took money belonging to Dr. Dyce and
6 Dr. Gunnlaugsson and sheltered it with his wife.

7 If I get a judgment against Dr. Puchalski, I can't
8 collect it against Amy. Every single asset, he testified
9 to, including his bank account down to his last dollar is
10 put in his wife's name. So if I get a judgment and now I
11 have evidence -- I have pled it in my complaint -- if I
12 get a judgment against Robert Puchalski, I cannot collect
13 it against Amy.

14 I'm asking the Court to permit me to assert a
15 pleading for a constructive trust. I have to meet that
16 burden.

17 He will file a motion for summary judgment. You're
18 not -- by sanctioning today by giving me the right to
19 amend, you're not saying I get a constructive trust.
20 You're just saying under Rule 15, I get to move forward on
21 my claim.

22 THE COURT: All right. Well, I'm going to allow --
23 I'm going to grant the motion to amend the complaint, and
24 Mr. Sheheen will have an opportunity to file a motion for
25 summary judgment at a later time once y'all get into the

1 facts of it.

2 MR. SHEHEEN: Thank you, Your Honor.

3 Your Honor, I think --

4 MS. BAKER: Do you want us to submit a proposed
5 order? I mean or you'll just do a form?

6 THE COURT: That's fine.

7 MS. BAKER: All right.

8 THE COURT: I think you already -- I have attached
9 copies of the amended complaint.

10 MS. BAKER: Yes. Yes, we did attach that.

11 MR. SHEHEEN: Your Honor, I mean, I don't -- if you
12 don't want to attach a proposed order, you can serve it on
13 me. You have to figure out service of the new party.

14 MS. BAKER: Okay. How ever you want to do that.

15 THE COURT: I'll do that.

16 MR. SHEHEEN: Thank you, Your Honor. I just don't
17 want to make any more work.

18 I think the last -- do you have my motion?

19 MS. BAKER: You have your motion to amend.

20 MR. SHEHEEN: I have a motion to amend, Your Honor.

21 THE COURT: Oh, you have a motion to amend, all
22 right.

23 MR. SHEHEEN: All right. My motion to amend is in
24 the Dyce and the Curley cases. It's simply to assert
25 counterclaims. Let me look at their motion. I'm sorry.

1 That basically the payment of debt that we allege is
2 owed out of both of these, that they owe us because of
3 both of these companies. I could go into it in more
4 detail, but I have a feeling that if the Court is going to
5 allow them -- based on -- due to -- I mean, obviously, if
6 there is no prejudice to me. There ain't no prejudice to
7 them, but we'll let them argue it. I'll be happy to
8 mention it.

9 THE COURT: Yes, ma'am. How are you all prejudiced
10 at this point?

11 MS. BAKER: Oh, I guess here is my argument for this
12 one: Typically, Rule 15, as you know, great amendments
13 really branch. However, take a look at Jennings v.
14 Jennings, 389 SC 190, or 697 SE2d 671.

15 It says, "Although leave to amend should generally be
16 freely given, this court has held that it may be denied
17 where the proposed amendment would be futile."

18 This is a perfect example of that. Payment of debt:
19 I ran a Westlaw search yesterday or Lexis search, excuse
20 me. I couldn't find any cause of action called payment of
21 debt.

22 I looked at the elements of civil cause of action.
23 Was it in there? It's not in there. However, what they
24 were trying to say, and if you read their proposed
25 amended -- or I guess amended answer is that somehow we

1 would be -- we're responsible for a portion of the debt.
2 So they made up this pay off the debt as a counterclaim.

3 However, if we were, it would have been in an
4 employment agreement or in a shareholder agreement, in
5 some type of agreement. Then it would have been breach of
6 an agreement, breach of contract.

7 It's not in there. We're not responsible for debt.
8 That's why the counterclaim is not for a breach of
9 employment agreement or a breach of shareholder's
10 agreement.

11 I've never, ever seen this pay off of debt.
12 Therefore, it would be this is a classic example of a
13 cause of action that would be futile because they can't
14 recover on this cause of action, because one, it doesn't
15 exist. If it did exist, it would have been in the
16 contract. It's not in the contract, so there is no breach
17 of contract action.

18 MR. SHEHEEN: Your Honor, it's funny how the shoe
19 sometimes gets put on the other foot, because they sound
20 like me, and I sound like them.

21 Your Honor, if they want to file a motion for summary
22 judgment, they're welcome to file it. We believe we have
23 a valid claim on the debt. He owes us, essentially.

24 The title of your cause of action is not what you put
25 into it, but we're claiming that he owes us under the

1 contracts and under the debt that was obligated by both of
2 these parties or all three of these parties and that we're
3 entitled to that.

4 Again, it's them wanting to get their money but not
5 have to pay us what we're owed. I would ask that you
6 allow the counterclaims to be amended.

7 I guess counterclaims are going to be amended anyway
8 because their complaint is going to be amended, but we ask
9 if we could amend it. Do you understand what I'm saying?
10 We're going to amend the counterclaims because they're
11 about to file --

12 THE COURT: I know you're going to file it.

13 MR. BLAND: And it's moot.

14 MR. SHEHEEN: Yeah. I think it might be moot,
15 really.

16 MR. BLAND: You can't --

17 MR. ELLISON: I think it is going to be moot, but
18 here is one thing that's very troublesome I mentioned from
19 a little earlier: It has a dramatic impact on the scope
20 of discovery.

21 If we're dealing with the buy out agreement that's
22 contained in the shareholder agreement, that's one thing.
23 If they're saying, "Oh no, that doesn't apply. We're
24 going to throw the whole thing out," then what we're left
25 with is -- and I don't know if the word, proper verb is

1 left with, but then what we have to address is what is the
2 value of the practice as of the date of the termination.

3 That is a dramatically different statement, and that
4 has a huge impact on the scope of discovery and the
5 expense of discovery, and as Ms. Baker was saying a moment
6 ago, if they're saying, "Oh well, throw out the buy out
7 provisions," then the whole issue of debt probably does
8 come up if that's what the Court rules.

9 But if the Court -- and this is not before the Court
10 today so I'm not quite sure --

11 THE COURT: Yeah. You kind of confused me at this
12 point --

13 MR. ELLISON: Well --

14 THE COURT: -- because are you back on the issue of
15 the covenant?

16 MR. ELLISON: No, no. I'm trying to deal with --
17 part of the reason why we filed some of these motions was
18 to strip down the discovery, not to have to spend lots of
19 money on discovery, and -- that doesn't need to be spent.

20 But now I'm hearing about this payment of debt
21 argument, and that all plays into whether the buy out
22 provisions frankly are enforceable or not.

23 If they're going to take the position -- I'm not
24 quite sure how to posture this. They're going to take the
25 position that the buy out provisions aren't enforceable.

1 Then you look at the value of the practice as of the date
2 of the termination.

3 That's a very different case, and the discovery is
4 much broader. I'm not saying we're not -- we wouldn't
5 agree to that. Because, frankly, the number gets to be a
6 lot bigger, I'm pretty sure. I'm quite sure it gets to be
7 a lot bigger, but it's a very different set of discovery
8 requests that can get made.

9 They haven't pled this, and I'm not sure what they're
10 pleading or what they're trying to plead, but if they're
11 trying to plead and the buy out provisions aren't
12 enforceable by having this new cause of action, that's
13 something we need to know.

14 THE COURT: I think at this point, I think that it's
15 probably moot considering if you all were going to file a
16 new -- they're going to have to file a new answer and
17 counterclaim.

18 You may have to file a motion to dismiss that at a
19 later date.

20 MR. ELLISON: To protect --

21 THE COURT: For purposes of, I guess, his motion to
22 amend the counterclaim...

23 MR. SHEHEEN: Your Honor, I think --

24 THE COURT: I think you get to do that anyway.

25 MR. SHEHEEN: I think I can withdraw the motions,

1 Your Honor.

2 MR. ELLISON: Okay.

3 THE COURT: Okay.

4 MR. ELLISON: That's fine.

5 THE COURT: Okay.

6 MR. SHEHEEN: I only do that because I have to file
7 an amended counterclaim. If they don't like what I file,
8 they can file a motion to strike or a motion for summary
9 judgment or whatever.

10 THE COURT: Okay. All right.

11 MR. ELLISON: Judge, I think we're done.

12 THE COURT: All right.

13 (Whereupon, the proceedings were concluded.)
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CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

I, Karen Ambroziak, Official Court Reporter for the
5th Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of Common Pleas for
Kershaw County, South Carolina, on the 16th day of April,
2012.

May 4, 2013

Karen Ambroziak

Karen Ambroziak, Court Reporter

My Commission Expires: 04/01/14

1 MR. CLEVELAND: Your Honor, we'll be working from this
2 book again.

3 MARTIN C. MCWILLIAMS, JR.,
4 being first duly sworn, testified as follows:

5 THE COURT: Your witness.

6 DIRECT EXAMINATION ON VOIR DIRE BY MR. CLEVELAND:

7 Q. Professor McWilliams, would you state where you are
8 employed, what your title is there and your position?

9 A. Yes, I am professor of law at the University of South
10 Carolina at the School of Law.

11 Q. And we will get to the details shortly but for the
12 purposes of letting the Court know where your testimony will
13 go, would you give the Court an overview of what you've been
14 asked to do in this case?

15 A. Yes. I've been asked to review the documents which are
16 the governing documents of SCENT and how that influences the
17 relationship between or among the parties in this case, both
18 from the point of view of corporate governance and the law of
19 contract.

20 Q. Would you describe for the Court what your education,
21 training and experience has been in the area of corporate
22 governance and contracts?

23 A. Yes. I graduated from law school in 1975 at the
24 University of Mississippi, which is my home state law school.
25 Because I wanted to be a law professor, I went on to Harvard

1 become in effect the directors of the corporation with the
2 powers and duties of the board of directors. The point of
3 the statute is to be able to provide an extremely flexible
4 form of corporate governance, and it expressly permits -- the
5 statute expressly permits the shareholders to operate the
6 statutory close corporation as if it were a partnership, and
7 this SCENT in its organizational documents, its articles and
8 other organizational documents, was set up to be operated as
9 if it were a partnership and in much of the correspondence
10 relating to the parties to this case and others in the
11 corporation they refer to it as a partnership and refer to
12 the shareholders as partners; very flexibly organized
13 corporation.

14 Q. Professor McWilliams, what does the law require in order
15 for it to keep its -- in order for a corporation to keep its
16 status as a Subchapter S corporation, and I'm referring now
17 to matters having to do with the classes of stock.

18 A. Yes, well, SCENT is -- has elected Subchapter S, as you
19 know under the Internal Revenue Code, and that permits it to
20 have passthrough taxation, in other words a single level of
21 tax instead of a double level like you would have in a C
22 corporation. The Treasury, in order to permit corporations
23 to elect Subchapter S, makes some demands and one of them is
24 that the corporation issue no classes of stock that are not
25 identical in terms of distributions, and by distributions I

1 mean accumulated profits of the corporation that are
2 distributed out to the shareholders like dividends. In order
3 to retain Subchapter S qualification a corporation is not
4 permitted to have any stock that is not identical in terms of
5 distributions.

6 Q. What steps, if any, did the shareholders at SCENT take
7 to ensure that SCENT complied with the requirements you just
8 described?

9 A. The most significant is that the shareholders of SCENT
10 in their -- in their articles of incorporation, which are of
11 course the seminal corporate document --

12 MR. CLEVELAND: Let me interrupt you to say that's
13 Exhibit 108, Your Honor, in your book.

14 THE COURT: Got it.

15 THE WITNESS: -- provides in section 10A, I believe it
16 is, that any -- any attempt to create a class of stock that
17 is not financially identical to the other stock is void ab
18 initio, and I see that it's up on the screen, the provision
19 that I'm referring to, authorize any securities which will
20 cause the corporation to have classes that vary other than by
21 voting rights. The reason it's phrased this way is that it's
22 possible under Subchapter S to have shares that vary as to
23 voting rights. You can have nonvoting stock or double voting
24 stock. But in terms of varying other than by voting rights
25 what that captures is the idea that you can't have stock that

1 varies in terms of economic rights. They have to be -- under
2 the Treasury regs they have to be, quote, identical, closed
3 quote.

4 Q. What did these shareholders do with respect to how this
5 company would be managed? Would you go back to the first
6 page of this exhibit?

7 A. The articles of incorporation provide with respect to
8 the management of the company that there shall be no board of
9 directors and that the shareholders, in the absence of a
10 board of directors, will manage the company. The management
11 of the company shall be by and under the control of the
12 shareholders of the corporation. You can see how it looks
13 like a partnership because the shareholders actually are
14 themselves managing and the -- a very similar provision with
15 the same effect is found in the shareholders agreements that
16 were entered into by the parties. The significance as we
17 find in the South Carolina code is that the shareholders have
18 the powers and the duties of the board of directors, so
19 everything -- so you can actually refer to the shareholders
20 of SCENT as the directors and you wouldn't be far wrong.

21 Q. Professor McWilliams, have you reviewed the 2008
22 shareholders agreement between Dr. Dyce, SCENT and Dr.
23 Puchalski?

24 A. Yes, I have.

25 Q. Were you here this morning when Mr. Sheheen made his

1 THE COURT: In other words, you think he's speculating?

2 MR. SHEHEEN: He is not only speculating, he is getting
3 far afield of his level of expertise. He's up here to
4 testify on corporate governance. He's up here to testify on
5 corporate setups and documents. He's not an expert in what's
6 in the best interest of an ENT, allergy and sleep medicine
7 and hair transplant practice and what might be in the best
8 interest. You had two shareholders who were bartering back
9 and forth about what these provisions were going to be, and I
10 object.

11 THE COURT: I know that that goes to the core of the
12 issues, but I will say this: The question particularly at
13 this point, I think, with the foundation that has been laid,
14 at this point would dictate that there be speculation because
15 the question is is that advantageous to the corporation
16 because -- and let me just -- I'm going to let you watch the
17 sausage being made and tell you where my head is, and maybe
18 that will help you, and what I'm thinking is that I don't
19 know anything about these matters except for what you all
20 have told me, but if we've got a driving force as opposed to
21 a new force, then I don't know how Professor McWilliams can
22 say whether or not it's advantageous to the corporation or
23 not because what if we were talking about Warren Buffett and
24 then my son, who just graduated two years ago with a degree
25 in finance, and he was lucky enough to go into a close

1 corporation with Warren Buffett, I would say you're daggone
2 right Warren Buffett ought to get the lion's share and give
3 him a peanut or two. So I think that, at least where the
4 foundation is at this point, I don't know that -- to say is
5 this favorable for the corporation, I think that calls for
6 speculation, at least in my head at this point. Now, if you
7 can rephrase it or talk about another document because I know
8 they're all in evidence, help me.

9 MR. CLEVELAND: If I could just respond because I am
10 trying to --

11 THE COURT: Sure.

12 MR. CLEVELAND: We've got -- the evidence is or the
13 assumption, I think it's borne out by the documents, we're
14 two equal shareholders that have equal management rights and
15 one of them proposes --

16 THE COURT: That's not -- can I stop you there because,
17 again, I just want you to see the sausage being made, I go
18 back -- I started over lunch looking at the documents, and in
19 the original articles of incorporation for statutory close
20 corporation at paragraph B it says, unless otherwise noted,
21 Robert Puchalski, president, shall be completely vested with
22 all authority to transact business of any kind, including but
23 not limited to signing leases, documents, tax returns,
24 purchasing orders, bills of sale and any and all other
25 documents instant to the operation of the business on a

1 agreement believed that Dr. Gunnlaugsson was a shareholder,
2 and of course it was Dr. Puchalski who proffered the
3 agreement to Dr. Gunnlaugsson with Dr. Gunnlaugsson's name in
4 it as a shareholder. Another piece of actually binding
5 authority in this case is Section 33-1-400, paren, 25 of the
6 South Carolina Code of Laws, which is part of Article 8,
7 Uniform Commercial Code, which regulates investment
8 securities, according to this section of the law in South
9 Carolina shares are, quote, units into which the proprietary
10 interest of a corporation are divided, closed quote. In my
11 opinion there's no doubt, this is a strongly held opinion
12 that there is no doubt that Dr. Gunnlaugsson was a
13 shareholder as of the time he completed his buy-in.

14 MR. CLEVELAND: Thank you very much. Your Honor, we
15 submit that as our proffer, and were you to want to consider
16 other arguments on that, we would most appreciate to have an
17 opportunity, but as of now we understand your ruling.

18 THE COURT: Thank you.

19 MR. CLEVELAND: Yes.

20 THE COURT: Thank you kindly. Very well. All right.
21 Very well.

22 Q. Professor McWilliams -- this is now outside the
23 proffer -- I meant to ask you before, if I may?

24 THE COURT: I'm listening. Of course.

25 Q. Do you have an opinion as to whether under the facts in

1 this case there is the ability for Dr. Dyce, if he's
2 successful, to recover attorney fees?

3 MR. SHEHEEN: Your Honor, that's a legal conclusion. It
4 should be in the pleadings. It should be contained in the
5 contract or under legal documents, and that's for you to
6 determine, not for an expert. He's not an expert in the
7 recoverability of legal fees. He's an expert in corporate
8 governance.

9 THE COURT: Thank you. Overruled. You may proceed.

10 MR. CLEVELAND: Thank you.

11 THE WITNESS: May I answer the question?

12 Q. Yes.

13 A. There are several avenues for Dr. Dyce to recovery of
14 attorney fees. One of them is the articles of incorporation
15 which provide that the -- if a shareholder becomes involved
16 in a lawsuit because of something the shareholder was doing
17 or with respect to the management of the corporation because
18 the shareholder was in effect a director of the corporation
19 that the corporation will indemnify the shareholder and
20 including attorney fees, that's one source. A second source
21 I've also found in the articles is a provision that the
22 shareholders and officers are to be indemnified to the
23 fullest extent of the law. Well, that engages section
24 33-8-510 of the South Carolina Business Corporation Act that
25 provides that officers and directors of business

1 corporations, and this applies to statutory close
2 corporations, are to be indemnified for their costs,
3 including attorney fees, when they have been involved in a
4 dispute including a court case because of their position as
5 officers or directors, and then finally there is section 8 --
6 sorry, 33-8-520 which requires mandatory, this is statutory,
7 mandatory indemnification for officers and directors who are,
8 quote, successful on the merits or otherwise, successful in a
9 lawsuit on the merits or otherwise, full stop, mandatory
10 indemnification, including attorneys fees. So in answer to
11 your question, it's my opinion that there are at least three
12 avenues for Dr. Dyce to recover attorney fees in this case.

13 MR. CLEVELAND: Thank you, Professor McWilliams. That
14 completes my examination. Would you please answer any
15 questions that counsel may have.

16 THE COURT: Cross-examination, Mr. Sheheen.

17 MR. SHEHEEN: Thank you, Your Honor.

18 THE COURT: Yes, sir.

19 CROSS-EXAMINATION BY MR. SHEHEEN:

20 Q. Professor McWilliams, you testified this is set up to be
21 operated by both directors, I believe; is that correct?

22 A. Correct.

23 Q. Were you aware that Dr. Dyce never -- has stated
24 previously, essentially, he never wanted to be involved in
25 the administration of the business?

1 MR. ELLISON: Your Honor, before you leave the bench,
2 just to be clear, the Court's suggestion was to allow Mr.
3 Sheheen to ask questions related to the motion in limine.
4 There were specific questions that were asked.

5 THE COURT: Those specific questions.

6 MR. ELLISON: I just want to make sure.

7 THE COURT: In other words, we are not going to go find
8 some more fields and plow or cut down some trees. Just those
9 very specific questions.

10 MR. ELLISON: All I wanted to confirm, Your Honor.

11 MR. SHEHEEN: I'm just going to read them off of the
12 motion in limine.

13 THE COURT: No new fields. Very well. All right.

14 (Recess held.)

15 ORVILLE DYCE,
16 being first duly sworn, testified as follows:

17 THE COURT: Your witness.

18 MR. ELLISON: Your Honor, before I start with Dr. Dyce,
19 there's no way I'm going to finish this afternoon.

20 THE COURT: Just do preliminary things. You've got 30
21 minutes. Just preliminary, and then you'll get into other
22 things.

23 MR. ELLISON: My wife will assure you I don't have eyes
24 in the back of my head. So if you'll be kind enough to just
25 give me a few minutes ahead of time so I can get to a decent

1 stopping point is all I'd ask.

2 THE COURT: You've got it.

3 DIRECT EXAMINATION BY MR. ELLISON:

4 Q. Dr. Dyce, where were you born?

5 A. I was born in Jamaica, West Indies.

6 Q. Tell me a little bit about your life in Jamaica when you
7 were little.

8 A. Well, my mother was a school teacher. We grew up in
9 a -- she moved from a seaside town, a rural seaside town in
10 Jamaica to the big city of Kingston. My dad died when I was
11 two, so it was myself and my sister, and she raised us both.
12 There wasn't a lot of opportunity in Jamaica, and so we --
13 she decided to have us move to the United States in 1980.

14 Q. And how old were you at that time?

15 A. I was ten years old.

16 Q. Where did you move to?

17 A. We moved to Long Island, New York.

18 Q. And what did your mother do when you went to New York?

19 A. Well, they wouldn't recognize her teaching degree, so
20 she basically would do odds and ends jobs and worked in a
21 temp agency, and eventually she worked at night school and
22 got her bachelor's degree and then got her master's and
23 eventually started teaching again after a number of years
24 living here.

25 Q. Could you tell the Court a little bit about what life

1 was like growing up as a Jamaican immigrant in New York?

2 A. We lived in a really poor neighborhood, it was a housing
3 project, Section 8 housing where you got subsidized rent.

4 Q. You need to speak up a little bit.

5 A. No problem. We had a subsidized living situation where
6 I think my mom at the time was making about \$10,000 a year.

7 And eventually she got up to 12, but she had to travel into
8 Manhattan for that, so the travel costs ate up a lot, and my
9 sister and I were left to ourselves a lot during the day.

10 And I got really involved in sports and academics and
11 eventually went off to college.

12 Q. Where did you go to college?

13 A. Cornell University in Upstate New York.

14 Q. And when did you graduate from Cornell?

15 A. In 1992.

16 Q. I'm sorry, 1992?

17 A. '92, yes, sir.

18 Q. And after you got out of college, did you go to medical
19 school?

20 A. I did. I went to University of Pennsylvania School of
21 Medicine.

22 Q. In Philadelphia?

23 A. In Philadelphia, Pennsylvania.

24 Q. When did you finish medical school at U Penn?

25 A. In 1997.

1 Q. And did you do a residency after that?

2 A. I did. I did an otolaryngology residency from 1997 to
3 2002.

4 Q. And where did you do the residency?

5 A. At the University of Pennsylvania, the Hospital of the
6 University of Pennsylvania.

7 Q. Is that where you met Dr. Puchalski?

8 A. It is.

9 Q. And you finished your residency in 2002, I think you
10 said?

11 A. I did.

12 Q. Is that the same year Dr. Puchalski finished?

13 A. It was the same year, yes, sir.

14 Q. And are you married?

15 A. I am married.

16 Q. And is that your wife back there over my left-hand
17 shoulder?

18 A. Yes, it is.

19 Q. Okay. How many children do you have?

20 A. We have four.

21 Q. How old are they?

22 A. Six -- you didn't tell me you were going to ask me that
23 one -- six, five, two and an eight-month old.

24 Q. She's not nodding her head no, so I think you're okay.

25 A. I think I'm close.

1 Q. Two of your four children were born after this
2 litigation started, as I understand, is that right?

3 A. Yes. She became pregnant while I was not working.

4 Q. I'm not going to go there. When were you married, Dr.
5 Dyce?

6 A. In 2005.

7 Q. And was Dr. Puchalski present at your wedding?

8 A. He was present at my wedding.

9 Q. Was he in the wedding party?

10 A. He was not.

11 Q. Now, I think you said that you finished your residency
12 in 2002, at the same time Dr. Puchalski did.

13 A. Yes, sir, I did.

14 Q. And what did you do next?

15 A. I did a fellowship in neuro laryngology at the Johns
16 Hopkins Hospital in Baltimore, Maryland.

17 Q. And when did you finish your fellowship?

18 A. In 2003.

19 Q. What did Dr. Puchalski do after you both finished your
20 residency in 2002?

21 A. He went into private practice in South Carolina.

22 Q. Did you stay in touch with one another?

23 A. Yes, we did.

24 Q. As a result of all this schooling and all this training
25 and all the money that it takes to pay for all of this did

1 you receive any board certification?

2 A. I did.

3 Q. And rather than using the technical medical term, if we
4 could just use ENT, I think that that would make it much
5 easier for the court reporter.

6 A. So I'm board certified in ENT and eventually became
7 board certified in sleep medicine.

8 Q. Are you qualified to practice other types of medicine
9 also?

10 A. I am.

11 Q. Are you licensed to practice other types of medicine?

12 A. I'm -- yes, I am.

13 Q. Are you licensed, for instance, to work in an emergency
14 room?

15 A. I could moonlight or work in an emergency room, yes,
16 sir.

17 Q. Can you work in another urgent care facility?

18 A. I could, sir.

19 Q. In broad strokes what other types of medicine are you
20 trained and licensed to practice, sir?

21 A. I would be trained in doing some primary care work and I
22 have done that in the past and fairly recently at free
23 medical clinics, taking care of a number of people that don't
24 have insurance who need general medical issues dealt with.
25 There have been some other positions that I've explored

1 including being a -- some places will hire you to be an
2 assistant surgeon, and they can bill for it and get
3 reimbursed for it for surgeons that are in solo practice, you
4 can practice with them, and also you can work for
5 institutions that are -- have their own insurance, whole set
6 of insurance rules such as the federal government, the VA
7 system, things like that that are sort of outside of the
8 purview of regular private practice.

9 Q. So is it fair to say that you are both trained and
10 licensed in a lot of things besides just ENT and sleep?

11 A. I'm licensed -- I'm trained to do a lot of things
12 besides just ENT and sleep, yes, sir.

13 Q. And you're also licensed to do this?

14 A. I'm also licensed, yes, sir.

15 Q. After you finished your fellowship at Hopkins, I may
16 have asked you this, where did you go to work?

17 A. In Winchester Virginia, Shenandoah Valley.

18 Q. And who did you go to work with?

19 A. A gentleman by the name of Robert Boucher.

20 Q. Did you stay in touch with Dr. Puchalski?

21 A. I did, sir.

22 Q. How long did you work in Winchester, Virginia?

23 A. I worked for a little over a year, I believe.

24 Q. And did you decide to move after that year?

25 A. I did.

1 Q. Can you describe to the Court what happened?

2 A. Well, the position I took in Winchester, Virginia was a
3 one year track to partnership where after the first year you
4 were eligible for a buy-in to become a partner, and so I was
5 in the process of negotiating a partnership agreement, and
6 Dr. Puchalski, as we were in touch, indicated that he had a
7 need for a new locale where he wanted a practice to be in
8 Hartsville, South Carolina, he didn't have a physician to man
9 that, and so he asked me if I would consider it.

10 Q. Did you have any concerns about coming to South Carolina
11 and working as an ENT?

12 A. I had never even considered moving to South Carolina.

13 Q. So why did you move?

14 A. When I came to visit it was a lot -- the people were
15 very friendly. It was a lot nicer than I expected from all
16 the -- you know, coming from up north, you don't necessarily
17 hear the best stories, and it was definitely a pleasant
18 surprise of where I moved, and it also allowed me an
19 opportunity to work with a friend, a coresident, and there
20 was a promise of building a really special practice, and I
21 bought into that.

22 Q. And were any representations made to you with regard to
23 the becoming a partner, shareholder? I'm using the terms
24 very loosely right now.

25 A. It was supposed to be very -- everything was supposed to

1 be even. It was supposed to be 50/50 all the way down or
2 equal shareholder status, whatever the terminology was. I
3 don't remember the exact term he used, but it was -- we were
4 supposed to split everything down the middle.

5 Q. So when did you come to South Carolina and start working
6 with what was -- was it then still called Kershaw ENT?

7 A. It was called, I believe, Kershaw ENT and Facial Plastic
8 Surgery.

9 Q. And at some point the name changed from Kershaw ENT to
10 what we've been calling SCENT; is that right?

11 A. Yes, sir.

12 Q. Now, you signed a couple of documents at the time that
13 you began working for SCENT, did you not?

14 A. Yes, sir.

15 Q. Did you sign a recruitment agreement?

16 A. Yes, I did, sir.

17 MR. ELLISON: Your Honor, that's Exhibit -- I don't have
18 a neat little book like Mr. Cleveland does, and I apologize.
19 I did this before he did the neat little book, but it's
20 Exhibit 1, I believe, is the recruitment agreement.

21 Q. Dr. Dyce, are you familiar with that document?

22 A. Yes, sir, I am.

23 Q. We'll go into that more in detail in a couple minutes.
24 Who are the parties to that document as best you remember?

25 A. It was Carolina Pines, which is an HMA, I don't know,

1 subsidiary, I guess, or -- and I think the recruitment
2 agreement is with the individual physician, if I'm not -- I
3 don't remember who signed it, but I think it's with the
4 physician. Yes, all right, Orville Dyce and HMA.

5 Q. And as far as you know this is a copy of the recruitment
6 agreement that you signed in 2004?

7 A. Yes, sir, it was.

8 Q. Did you also sign an employment agreement?

9 A. Yes, I did, sir.

10 Q. And if we could put up Exhibit 2, please. As far as you
11 know, Dr. Dyce, is this a copy of the employment agreement
12 that you signed?

13 A. As far as I know, yes, sir.

14 Q. And what's the date on that as best you recall? And I
15 know it's hard to see.

16 A. I think it was around March of 2005, I believe. I'm not
17 sure.

18 Q. How long was that employment agreement supposed to last?

19 A. It was a two-year term.

20 Q. Now, you signed both the recruitment agreement, we're
21 going to talk a little about the employment agreement in
22 particular, but you signed both an employment agreement and a
23 recruitment agreement. There's been some discussion earlier
24 with regard to the provision in the exhibits to the
25 employment agreement talking about a noncompete. Would you

1 have signed a noncompete agreement in 2005?

2 A. No, I would not.

3 Q. Can you explain to the Court why you would not have done
4 that?

5 A. Because the recruitment agreement is a two-year support
6 agreement from Hartsville HMA, and if you as an individual
7 leave the service area before the stipulated time, you have
8 to pay back the money that they've given you so far to come,
9 the recruitment money, bonuses, startup costs, monthly
10 guarantees, everything. And I don't remember the details but
11 so if I signed -- did you ask me about the restrictive
12 covenants?

13 Q. Yes.

14 A. Yes, so if I signed the restrictive covenant and things
15 didn't work out with Kershaw ENT say at month 18, because the
16 agreement was with me, I then have to pay back the money
17 completely, even though SCENT may have received the money,
18 regardless of who received the money. Do you understand? I
19 hope I explained that correctly. And so --

20 Q. I'll help you. Finish and then we'll go back.

21 A. The financial burden would have been only on me in case
22 there was a disagreement of some sort.

23 Q. All right. In rough numbers how much money did HMA
24 deliver to SCENT under the terms of the recruitment
25 agreement, rough numbers, very rough numbers?

1 A. Probably -- I'd say probably between 200 and \$300,000.

2 Q. And if I understood you correctly, if you left the
3 area --

4 A. Yes.

5 Q. -- it's your understanding that you would have had to
6 have paid back that money if you left during the term of the
7 recruitment agreement?

8 A. Yes, sir.

9 Q. And how long was the recruitment agreement?

10 A. I believe it was two years as well.

11 Q. So that matched with the employment agreement; is that
12 right?

13 A. Yes, sir.

14 Q. So let's go to the employment agreement and talk about
15 that a little bit. What were your responsibilities
16 specifically under the employment agreement; what were you
17 supposed to do?

18 A. To the best of my ability to practice ENT and allergy.

19 Q. Did it say anything about you practicing emergency care
20 or primary care?

21 A. Emergency care in the sense of trauma but not working in
22 an emergency department, but I would do consults at the
23 emergency department.

24 Q. I'm sorry?

25 A. But I could do consultations at emergency departments.

1 Q. And did it cover -- I think if I understood you a little
2 while ago, you do some volunteer work in clinics; is that
3 right?

4 A. Yes, I do.

5 Q. Did it cover your doing that volunteer work in clinics?

6 A. No, it did not.

7 Q. Looking at paragraph 3A of the employment agreement, if
8 you could pull that up, are you familiar with that paragraph?

9 A. Yes, I am, sir.

10 Q. Can you describe what that meant to you?

11 A. That paragraph was the promise that I would receive
12 notification that I was becoming a shareholder at the end of
13 the two-year term.

14 Q. So it's a two-year term; is that right?

15 A. Yes, sir.

16 Q. And that matches the terms of the recruitment agreement?

17 A. Yes, sir.

18 Q. And so the expectation that you had was that you were
19 going to be offered a position as an equal shareholder at the
20 end of two years?

21 A. Yes, sir.

22 Q. And you were supposed to get a notice under this
23 provision that you would be offered that; do you see that?

24 A. Yes, sir.

25 Q. Do you recall whether or not you ever got the notice?

1 A. I did get that notice, sir.

2 Q. You did get the notice?

3 A. That I was going to become a shareholder, yes, sir.

4 Q. Is it your understanding that the employment agreement
5 also incorporated the terms of the recruitment agreement?

6 A. I'm not sure what you're asking me.

7 Q. Did the documents work -- I know you're not a lawyer.
8 Were the documents supposed to work together?

9 A. They appeared to work together for me, yes, sir.

10 Q. Did you hire a lawyer to review these documents?

11 A. Yes, I did, sir.

12 Q. Who did you hire?

13 A. Mr. Bruce Armon.

14 Q. And where is he located?

15 A. He's located in Philadelphia.

16 Q. Did he review these documents for you?

17 A. Yes, he did, sir.

18 Q. And I'm not waiving any privilege, I'm not asking what
19 he advised you, but he reviewed these documents?

20 A. Yes, he did, sir.

21 Q. What was the salary that you were supposed to get under
22 the terms of the employment agreement, as best you recall?

23 A. The 2005 employment agreement?

24 Q. Yes. Under the employment agreement we're talking about
25 right now in 2005 how were you supposed to be paid?

1 A. I think I believe it was about 240 to 250 a year.

2 Q. Was that salary?

3 A. In 2005, yes, I think that was -- I believe so, I
4 believe so.

5 Q. Now, we're getting a little ahead of the story right
6 now, but I think it's important for the Court to understand.
7 How many different components were there of your pay under
8 this employment agreement?

9 A. The first employment agreement?

10 Q. Yes.

11 A. The first employment agreement.

12 Q. That was salary, right?

13 MR. SHEHEEN: Your Honor, you know, it's nonjury so
14 there can be some leeway, but I don't think he should be
15 leading him to the answer, and I'll object to the leading
16 question.

17 THE COURT: Okay.

18 Q. That's fine. What do you remember you --

19 A. I don't remember the terms of the 2005 agreement. I
20 remember the terms of the 2007 agreement.

21 Q. 2007 or 2008?

22 A. 2008 agreement, sorry.

23 Q. What were you supposed to be paid under -- not the
24 dollars but in broad strokes what categories of pay were
25 there under the 2008 agreement?

1 A. The initial employment agreement was, I believe it was
2 W-2 income, and I know I was paid some call money, but I
3 don't remember if it was in the agreement.

4 Q. Were you supposed to receive any kind of biweekly
5 distribution?

6 A. In the 2005.

7 Q. Yes.

8 A. No, I was not.

9 Q. Were you supposed to receive any kind of sweep
10 distributions at the end of a month?

11 A. No, I was not.

12 Q. Now, when did you first start receiving biweekly
13 distribution or being credited with biweekly distributions
14 and monthly sweeps?

15 A. 2007.

16 Q. Do you recall what month?

17 A. I believe it was March of 2007.

18 Q. I know you're not -- I don't think there's anybody
19 left -- well, Austin Sheheen's here, so there's one person
20 here I think is an expert in what Subchapter S corporations
21 are involved with, but what's your understanding of the way a
22 Subchapter S corporation's supposed to work?

23 A. On the most basic level is that distributions among
24 shareholders are supposed to equal or be commensurate with
25 their percentage ownership of shares or ownership of the

1 organization.

2 Q. So at the end of two years in February 2007 did your pay
3 change, not in terms of an amount but in terms of structure?

4 A. Yes, it did.

5 Q. Can you describe for the Court how it changed?

6 A. I still received W-2 income, I received income in the
7 form of pay for call, and I received -- being credited with
8 biweekly K-1 distributions and eventually monthly, sorry,
9 profits above -- above and beyond which were also K-1's.

10 Q. Was this the same way Dr. Puchalski was paid?

11 A. It was, sir.

12 Q. As far as you understood were the amounts supposed to be
13 the same?

14 A. I understood they were to be the same.

15 Q. Now, did you actually receive the biweeklies and the
16 monthly sweeps in 2007?

17 A. No, they went to Dr. Puchalski, sir.

18 Q. Why did they go to Dr. Puchalski?

19 A. To complete a buy-in.

20 Q. What was the amount of the buy-in supposed to be?

21 A. \$750,000.

22 Q. And explain to the Court how the biweeklies and the
23 monthly sweeps were supposed to work in connection with that
24 amount of money?

25 A. Well, there were K-1 distributions which occurred

1 biweekly in the form of, I think, \$21,000 which rather
2 than -- which I would get credited with and went towards my
3 buy-in every two weeks or twice a month, and then if there
4 was profit left above and beyond that, half of that was to
5 be -- go to Dr. Puchalski, the other half to me but would go
6 as credit and would actually be turned over to Dr. Puchalski.

7 Q. So you said that the total -- do you know the exact
8 numbers and the way that all this worked?

9 A. Not exactly, no.

10 Q. So in terms -- I'm asking for your broad understanding.

11 A. Yes.

12 Q. Your broad understanding, how much were you supposed to
13 pay as part of the buy-in?

14 A. 750,000.

15 Q. How much did you actually end up having deducted or
16 credit against at the end of the day toward the buy-in?

17 A. Between 1.2 and \$1.5 million.

18 Q. Can you explain to the Court the difference between the
19 \$700,000 and the 1.2 to 1.5 million, whatever it was?

20 A. I can't explain exactly why. I know I asked questions
21 about it, I believe to Bob and to Austin, and it wasn't
22 really an adequate explanation. They started throwing around
23 terms like gross-up and just additional distributions and it
24 was sort of above my head.

25 Q. Who is the practice's accountant?

1 A. Austin Sheheen and his firm, sir.

2 Q. And who is your accountant?

3 A. Austin Sheheen and his firm, sir.

4 Q. Can we go to Exhibit 5, please?

5 Dr. Dyce, are you familiar with this document?

6 A. Yes, sir.

7 Q. Can you describe what it is for the Court, please?

8 A. This was the monthly tally of the cumulative amount for
9 which I had bought in or was buying in during the period that
10 I bought in.

11 Q. Now, when did you get a copy of this document, the best
12 you recall?

13 A. I don't remember.

14 Q. Was it before or after the litigation started?

15 A. I believe this was after, but I'm not sure.

16 Q. Okay. What did you all call this within the practice,
17 what did you all call this document?

18 A. Just the buy-in sheet.

19 Q. Let's talk about the buy-in sheet a little bit just in
20 broad strokes. What do the pay period distribution amounts
21 represent to you?

22 A. Those represent how much I was credited with having
23 bought in with money I was to receive from the practice which
24 went back to Dr. Puchalski.

25 Q. And these were the biweeklies?

1 A. The biweeklies, yes, sir.

2 Q. What's this column over here where it says 2007 SCENT
3 sweeps?

4 A. Those are the additional K-1 profits above and beyond
5 the K-1s which were credited to me towards my buy-in, as I
6 understand it.

7 Q. And according to your understanding, when did you
8 complete the buy-in?

9 A. February of 2008, I believe.

10 Q. And what do these two paragraphs on the bottom of this
11 exhibit represent to you?

12 A. That was the amount reported to me in those different
13 accounts from the company.

14 Q. And did you have to also pay an amount of money toward
15 that amount, the \$161,000?

16 A. No, I did not.

17 Q. But as far as you knew you were finished paying for the
18 buy-in by February 2008; is that right?

19 A. I was.

20 Q. Now, were you issued a stock certificate in February
21 2007?

22 A. No, I was not.

23 Q. Do you remember whether you were issued a stock
24 certificate in January 2008?

25 A. I do not believe I was.

1 Q. Can we pull up a copy of Exhibit 8, please?

2 Dr. Dyce, can you tell the Court what this is?

3 A. I was told it was a stock certificate.

4 Q. And how many shares were you credited with buying?

5 A. 50,000 shares of common stock.

6 Q. And what's the date on the stock certificate?

7 A. The 16th day of July 2008.

8 Q. Now, back in January 2008, and I'm getting a little bit
9 ahead of the story but I'd like to do it now, in January 2008
10 was there another physician employee working for SCENT?

11 A. Yes, January 2008?

12 Q. Yes.

13 A. Yes, there were I believe possibly two but at least one
14 other physician, yes.

15 Q. And who were the other physicians working for SCENT at
16 that time?

17 A. Dr. Gunnlaugsson and maybe Dr. Vidrine. I don't quite
18 remember when he started.

19 Q. Are you familiar with Plaintiff's Exhibit 11?

20 A. Yes, I am.

21 Q. And what is this document, could you describe it for the
22 Court?

23 A. This was a document similar to the one I received
24 letting Dr. Gunnlaugsson know of our intent to have him be an
25 equal shareholder in the practice.

1 Q. And I am getting a little ahead of the story, and Mr.
2 Sheheen could object to me leading you a little bit, and I'm
3 sure he will if he feels it's appropriate, did Dr.

4 Gunnlaugsson's contract largely track your contract, when I
5 say -- did his 2007 employment agreement, 2006 employment
6 agreement, largely track your 2005 employment agreement?

7 A. I was told it did.

8 Q. And who signed this letter in January 2008?

9 A. Dr. Puchalski and myself.

10 Q. So and this letter, could you read -- publish the first
11 paragraph for the Court?

12 A. Pursuant to our contract signed June 1st, 2006 this
13 letter is written notification that it is the intent of South
14 Carolina ENT Allergy and Sleep Medicine to offer you full and
15 equal partnership in the practice by the 1st of June 2008.
16 We offer this enthusiastically and without reservation.

17 Q. So you signed this letter in January of 2008; is that
18 right?

19 A. Yes, sir.

20 Q. Your pay had changed in February 2007; is that right?

21 A. Yes, sir.

22 Q. Had you signed other documents in the summer of 2007
23 related to your status as a shareholder in SCENT?

24 A. Yes, I did, sir.

25 Q. And we'll get to those in a minute. You signed this

1 letter in January 2008. Did you sign other documents in the
2 summer of 2008 relating to your shareholder status?

3 A. 2008?

4 Q. Yes.

5 A. I believe I did again as well, sir.

6 Q. And the stock certificate wasn't issued until July 2008;
7 is that right?

8 A. Yes, sir.

9 Q. Okay. Now, did you sign a new employment agreement in
10 February 2007, as best you can recall?

11 A. I believe I signed a -- I thought it was a combined
12 shareholder employment agreement but --

13 Q. That was in February? I know it's hard with the dates.
14 In February 2007?

15 A. Oh, in February of 2007, no, there was nothing else
16 signed in February of 2007.

17 Q. But your pay changed.

18 A. But my pay changed, yes.

19 Q. So then we get to the summer of 2007.

20 A. Yes.

21 Q. Okay. And I think that's what you were talking about.
22 Did you sign another series of documents relating to your
23 shareholders status in the summer of 2007?

24 A. I believe I did.

25 Q. Can we pull up Exhibit 3, please?

1 Dr. Dyce, are you familiar with this document?

2 A. Yes, sir, I am.

3 Q. Can you identify it for the Court, please?

4 A. It was my initial shareholder agreement signed on August
5 31st, 2007.

6 Q. And let's go to Section 2 on page 2 -- I'm sorry,
7 Section 5.

8 How was the company supposed to be managed as far as you
9 understood?

10 A. By the will of the shareholders, sir.

11 Q. Did you involve yourself in the day-to-day management of
12 SCENT?

13 A. I did not.

14 Q. Who handled the day-to-day management?

15 A. Dr. Puchalski.

16 Q. And I can pull up the page, but as far as you can
17 recall, if one were to look at page 5, did you and Dr.
18 Puchalski sign this document?

19 A. I believe we both did, sir.

20 Q. Let's pull up Exhibit 4.

21 Dr. Dyce, can you identify this document, please?

22 A. This was a stock purchase agreement.

23 Q. And let's blow up the, let's see, first paragraph. Who
24 are the signatories to this?

25 A. I believe Dr. Puchalski and myself.

1 Q. Let's go to page 9. When was this document signed, Dr.
2 Dyce?

3 A. August 31st, 2007.

4 Q. And let's go to Exhibit 6. Can you identify this
5 document for the Court, please?

6 A. This was a bill of sale for 50,000 shares in South
7 Carolina ENT.

8 Q. And does it contain both your signature and Dr.
9 Puchalski's signature?

10 A. Yes, sir, I believe so.

11 Q. And --

12 A. No, I believe it only contains Dr. Puchalski's
13 signature.

14 Q. Who is selling this -- was the company selling you the
15 shares or was Dr. Puchalski selling you the shares?

16 A. I believe it was Dr. Puchalski.

17 Q. And what's the date on this document?

18 A. Some day in August of 2007.

19 Q. And were you eventually issued 50,000 shares?

20 A. I believe so, but I'm not sure what it -- yes, I believe
21 so.

22 Q. That was the stock certificate we looked at earlier.

23 A. Yes.

24 Q. When were the shares actually issued?

25 A. Well, I got the stock -- I believe the shares were

1 issued much sooner than that, but I got the stock certificate
2 in 2008.

3 Q. Now, did you engage a lawyer to help you look over these
4 documents?

5 A. I did not.

6 MR. ELLISON: Your Honor with two minutes to go that's a
7 good stopping point.

8 THE COURT: That is an excellent stopping point. Very
9 well. Dr. Dyce, if you would just be mindful not to discuss
10 your testimony with anyone since you're on the stand.

11 Doesn't mean you can't talk about anything else because you
12 can, but if you would be so kind not to discuss your
13 testimony while you are on the stand.

14 THE WITNESS: Yes, ma'am.

15 THE COURT: And, counsel, I would propose to begin in
16 the morning at 9:30.

17 (Trial of the case adjourned at 5:00 p.m.)

18 (Trial of the case resumed on 11/20/13 at 9:30 a.m.)

19 THE COURT: Dr. Dyce, if you will come on back around
20 because you've already been sworn, and we will continue with
21 the direct examination. Mr. Ellison, you may continue.

22 MR. ELLISON: Thank you, Your Honor.

23 BY MR. ELLISON:

24 Q. Dr. Dyce, I want to get us back to where we were
25 yesterday afternoon when we concluded, so I want to go fairly

1 quickly through some of the things we talked about at the end
2 of yesterday afternoon. Do you remember that in the summer
3 of 2007 that you executed a series of documents that we
4 talked about yesterday?

5 A. Yes, I did.

6 Q. One of them was a stock purchase agreement, was it not?

7 A. Yes, sir.

8 Q. Another was a shareholders agreement, was it not?

9 A. Yes.

10 Q. And Dr. Puchalski also executed a bill of sale?

11 A. Yes.

12 Q. And at that time since February of 2007 you have been
13 credited for receiving money in four different forms; do you
14 remember talking about that?

15 A. Yes.

16 Q. And you were receiving a base salary.

17 MR. SHEHEEN: Your Honor, I'm going to object to
18 leading.

19 MR. ELLISON: We're going to go back through 20 minutes
20 of --

21 MR. SHEHEEN: If it was already asked I don't think we
22 need to go back through it because it was asked already.

23 MR. ELLISON: Your Honor, I can't set the stage, I can't
24 go back without doing this.

25 THE COURT: If there's an objection to leading we're

1 going to have to take 20 minutes.

2 MR. ELLISON: I'm going to have to repeat 15, 20 minutes
3 of questions.

4 MR. SHEHEEN: You can ask him how he was paid if you
5 want to.

6 MR. ELLISON: Vince, we'll go back through it.

7 THE COURT: I get 20 minutes to spend with you guys.

8 MR. ELLISON: There you go.

9 THE COURT: Go right ahead.

10 Q. Dr. Dyce how were you being paid in the summer of 2007
11 or being credited?

12 A. I was getting a salary in the form of W-2 income, I was
13 getting credited with biweekly K-1 distributions, and I was
14 getting credited with profit above and beyond the biweekly
15 distributions, which were also called sweeps, I was also
16 getting reimbursed for call, taking call.

17 Q. So four different components; is that right?

18 A. I believe so, yes, sir.

19 MR. ELLISON: Then to go back through it again, Your
20 Honor.

21 THE COURT: Okay.

22 Q. You talked about the base salary.

23 A. Yes, sir.

24 Q. And this is I believe Exhibit 9 -- Exhibit 5, I'm sorry,
25 which was produced from SCENT's records, and what did you

1 call these yesterday?

2 A. The buy-in sheets.

3 Q. What are these first two columns again?

4 A. Those are the dates that I was credited with them and
5 the amount that I was credited with on each of those dates.

6 Q. And you say with them, what is them?

7 A. Them being the K-1 biweekly distributions.

8 Q. Was this actually reported on your income tax return?

9 A. It was not.

10 Q. And then the column, third column over here, what's
11 that?

12 A. Those are the -- my portion of the profits above and
13 beyond the biweekly distributions which were also K-1s.

14 Q. I think you used the term monthly sweeps at one point?

15 A. Monthly sweeps, yes.

16 Q. Does this represent the monthly sweeps?

17 A. That's what I was told, yes, sir.

18 Q. Was that reported on your tax return?

19 A. No, it was not, sir.

20 Q. And were the -- to go back over it, according to your
21 2005 employment agreement were you supposed to receive these
22 biweekly distributions?

23 A. Not according to the 2005 agreement.

24 Q. And according to the 2005 agreement were you supposed to
25 receive credit for the sweeps?

1 A. No, I wasn't, sir.

2 Q. And as best you recall what's the first document that
3 contains an actual noncompete in it?

4 A. The 2007 -- one of the 2007 agreements, I don't remember
5 which one.

6 Q. Could it be the stock purchase agreement?

7 A. It may be.

8 Q. Let's go back to it. I believe it's Exhibit 4. This is
9 the stock purchase agreement. This is paragraph 14. If you
10 could blow that up, please. Is that the first time that you
11 ever saw an actual noncompete?

12 A. Yes, sir.

13 Q. And that's paragraph 14 of the stock purchase agreement,
14 is that right?

15 A. It looks like it, sir.

16 Q. And the original employment agreement that you signed
17 back in 2005 anticipated that a noncompete would be possibly
18 included if you ever became a shareholder; is that right?

19 MR. SHEHEEN: Your Honor, again, I'm giving a lot of
20 leeway but --

21 MR. ELLISON: We'll go back. I'll go right back. We'll
22 repeat. Let's go back to the 2005 agreement.

23 THE COURT: Okay.

24 MR. ELLISON: Unless Your Honor -- I mean, whatever you
25 want.

1 THE COURT: Well, let me tell you, I would sustain the
2 objection, and let me articulate why. Potentially there can
3 be some ambiguity, and I think it is important for me to hear
4 from the witnesses what was their position, what was their
5 understanding in the event -- in the event that the older
6 agreements become important and I have to make a
7 determination what were these people's intentions, and so
8 when you lead him through that and you ask him questions like
9 was this the first time that there was ever a noncompete and
10 yet there's language in earlier documentation that can
11 intimate that, I think it becomes important what was his
12 intention. It makes it a lot easier and clearer when you do
13 it, but I think that I have to let them do it.

14 MR. ELLISON: I am perfectly happy with him doing it.
15 Q. Let's go back to the 2005 employment agreement. This is
16 Exhibit 2, I think. Exhibit 2. Let's go to the exhibit to
17 Exhibit 2 which talks about compensation and let's blow up
18 this paragraph right here (indicating). Dr. Dyce, remember
19 we talked about the recruitment agreement yesterday?

20 A. Yes, sir.

21 Q. And who signed the recruitment agreement?

22 A. I signed the recruitment agreement along with I believe
23 the CEO from Carolina Pines.

24 Q. And would you have signed a noncompete in 2005?

25 A. I would not have signed a noncompete in 2005.

1 Q. Why would you not have signed a noncompete in 2005?

2 A. Because in the recruitment agreement it stipulates that
3 if I do not fulfill the terms of the agreement, the hospital
4 or HMA has the ability to come back and ask me for any moneys
5 that have been spent or contributed to the promotion of me in
6 that community on my behalf, whether it's advertising,
7 whether it's salary, whether it's anything else, and possibly
8 could have come back and asked me for that if Bob had
9 terminated me or if I hadn't stayed the requisite period of
10 time.

11 Q. And how much money were you potentially liable for under
12 the recruitment agreement?

13 A. Potentially as much as close to \$300,000.

14 Q. Now, here's the paragraph that is in the original
15 employment agreement. Take a look at the second sentence and
16 tell the Court what your understanding of that sentence was.

17 A. The parties specifically acknowledge that shareholders
18 and physician employees of the corporation also execute
19 restricted covenants --

20 THE COURT: Slow down a little bit. I know you're
21 reading but --

22 MR. ELLISON: She's not that fast.

23 THE WITNESS: I'm going to read it first, and then I'll
24 tell you what I was thinking.

25 The parties specifically acknowledge that shareholders

1 and physician employees of the corporation also execute
2 restrictive covenants with Kershaw ENT prohibiting
3 shareholders from competing against the corporation during
4 the term of their participation as a working shareholder and
5 for a period of one year after -- thereafter in the
6 corporation service area.

7 Q. Let's read the following sentence also.

8 A. The terms and conditions of the restrictive covenant are
9 set forth in a separate agreement to be executed upon the
10 transfer of shares of stock in the corporation.

11 Q. What did those two sentences mean to you?

12 A. What it meant to me was that it was setting the tone
13 that eventually there might be a restrictive covenant but at
14 that time there was none.

15 Q. And when would there might be a potential restrictive
16 covenant in your view?

17 A. The minute I became a shareholder.

18 Q. And when did the employment agreement anticipate that
19 you become a shareholder?

20 A. In two years or slightly before.

21 Q. And when would that have been?

22 A. That would have been in February -- February, March of
23 2007.

24 Q. And when did you sign the stock purchase agreement with
25 Dr. Puchalski?

1 A. I believe it was July or August of 2007, I believe.

2 Q. Now, at the time who was your accountant?

3 A. Since moving to South Carolina it's been Mr. Austin
4 Sheheen.

5 Q. It's not now, is it?

6 A. It is not now.

7 Q. But in 2005 through 2007 who was your accountant?

8 A. Austin Sheheen.

9 Q. And was he also the accountant for SCENT?

10 A. He was the accountant for SCENT.

11 Q. What did Bob tell you about whether you were a
12 shareholder in 2007?

13 A. He told me I was a shareholder in February or March of
14 2007.

15 Q. February or March 2007?

16 A. Oh, sorry.

17 MR. SHEHEEN: Your Honor, again, I'm giving leeway to
18 leading but suggesting the answer contradicting the witness
19 when he gives an answer is not appropriate.

20 THE COURT: So it's leading, not hearsay.

21 MR. SHEHEEN: Well, there is hearsay, hearsay and it's
22 leading.

23 THE COURT: Sustained.

24 MR. SHEHEEN: Thank you.

25 MR. ELLISON: First off, it's an admission by a party.

1 Q. When did Dr. Puchalski at the time tell you that you
2 were a shareholder?

3 THE COURT: Admission by a party --

4 MR. ELLISON: It's an admission by Dr. Puchalski as to
5 when Dr. Dyce became a shareholder.

6 THE COURT: I'm sorry. I thought you were talking about
7 Dr. Sheheen.

8 MR. ELLISON: No, I'm talking about Dr. Puchalski.

9 THE COURT: I'm sorry. I understood that you were
10 asking with regards to Mr. Sheheen. I'm sorry.

11 MR. SHEHEEN: I heard that as well. I think he
12 misspoke.

13 Q. When did Dr. Puchalski tell you that you were a
14 shareholder at that time?

15 A. I don't remember when Dr. Puchalski told me I was a
16 shareholder, but I do recall that in our contract I was a
17 shareholder at the end of the two-year term when I started
18 buying in.

19 Q. And when was that?

20 A. The two-year term, well, whenever we negotiated the
21 contract, the initial employment agreement.

22 Q. Did Dr. Puchalski acknowledge that you were a
23 shareholder in February 2007?

24 A. He did.

25 Q. How did he acknowledge that?

1 A. By us negotiating and signing a shareholder agreement in
2 2007.

3 Q. Now, your 2007 tax return prepared by Mr. Sheheen --

4 A. Yes, they were.

5 Q. -- did they show that you were a shareholder?

6 A. I don't recall what they showed.

7 Q. Did they show that you received any K-1 distributions?

8 A. I don't believe they did.

9 Q. And what was happening according to your tax return --
10 did the tax return in any way reflect the biweeklies or the
11 monthly distributions?

12 A. I don't believe it did.

13 Q. Did Dr. Puchalski subsequently take a position that you
14 became a shareholder at a later date?

15 A. He later did, yes, sir.

16 Q. When did he say you became a shareholder?

17 A. I think he tried to say later in the summer of 2008,
18 summer of 2008.

19 Q. And is that the date of the stock purchase agreement?

20 A. I believe there are two stock purchase agreements, and I
21 believe there was a second one signed in 2008.

22 Q. And when was the stock certificate actually issued?

23 A. I believe it was 2008.

24 Q. Did Dr. Puchalski also take the position that you had
25 become a shareholder at a different earlier date?

1 A. Yes, he did.

2 Q. And when was that?

3 A. There are a number of different dates that he said I was
4 a shareholder. A few of them -- one was obviously in
5 February or March of 2007, the summer of 2007, the early part
6 of 2008, and then the middle of 2008, depending on which
7 document you choose to look at that he prepared.

8 Q. So let's run through these different dates for a couple
9 of minutes and talk about what different things happened, if
10 anything, at the various dates. What happened in February of
11 2007?

12 A. In February of 2007 I began getting credited with these
13 biweekly distributions, and my pay changed with the credit
14 and the K-1 distributions.

15 Q. Let's pull up the buy-in sheet, please.

16 What happened in August 2007?

17 A. In the interim we had been negotiating a shareholder
18 agreement that -- we finally found one that was acceptable in
19 August of 2007, and we both executed the agreement in August,
20 but we'd been negotiating it from much earlier.

21 Q. And those are the documents that we talked about a few
22 minutes ago?

23 A. Those are some of the documents, yes.

24 Q. What happened in February 2008?

25 MR. SHEHEEN: If I could interrupt, Your Honor, it

1 appears that Dr. Dyce is reading off a piece of paper or
2 looking at some notes or something.

3 THE COURT: You want to see the notes?

4 MR. SHEHEEN: I want to see the notes, have a copy of
5 the notes.

6 THE COURT: Sure, absolutely. I think he talked about
7 it yesterday -- no, I'm sorry, that was the other witness.

8 MR. ELLISON: He can see them.

9 THE COURT: You may see them, come.

10 MR. SHEHEEN: If I may approach.

11 THE COURT: Yes, you may.

12 THE WITNESS: It's Psalm 27. It says, the Lord is my
13 light and my salvation. Whom shall I fear.

14 MR. SHEHEEN: Thank you very much.

15 THE WITNESS: I can read the rest of it.

16 MR. SHEHEEN: You're welcome to.

17 THE WITNESS: The Lord is the stronghold of my life of
18 whom shall I be afraid. When the wicked advance against me
19 to devour me, it is my enemies and my foes who will stumble
20 and fall. Though an army besiege me, my heart will not fear.
21 Though war break out against me, even then will I be
22 confident. I'm sorry, I didn't mean to --

23 MR. ELLISON: That's fine, Dr. Dyce. Your cheat sheet
24 is Psalm 27.

25 THE WITNESS: Psalm 27, yes, sir.

1 MR. ELLISON: Thank you. Let's get back to it.

2 Q. We talked about February -- I think you talked about
3 February 2007, talked about the summer of 2007. Now let's
4 talk about February-March 2008. What changed then?

5 A. I'm sorry. Just give me a minute.

6 Q. Do you need a moment? Are you okay?

7 THE COURT: Let me see if I can take -- let me tell you
8 where I am because I think that's where you were was in
9 February, we talked about you worked on the agreement and you
10 got the agreement in 2007. You said you negotiated an
11 agreement and you finally signed it in summer of 2007, August
12 of 2007, and then the next question that Mr. Ellison asked
13 was what happened, if anything -- he didn't say if anything,
14 I did -- but what happened in February of 2008, if anything,
15 other than my children having their birthdays.

16 THE WITNESS: In February of 2008 Bob informed me that I
17 completed the buy-in, and I began actually getting K-1 checks
18 in hand.

19 THE COURT: February of 2008.

20 THE WITNESS: '08, yes, please, yes, thank you.

21 THE COURT: Then that's where it picks up.

22 MR. ELLISON: Judge, I'm fine.

23 Q. And in January 2008 had you sent a letter with Dr.
24 Puchalski to Dr. Gunnlaugsson? We'll talk more about him in
25 a few minutes.

1 A. I did. I sent a letter to Dr. Gunnlaugsson representing
2 myself as a shareholder, along with an equal shareholder with
3 Bob, offering him partnership, shareholder -- equal
4 shareholder status into the practice.

5 Q. One second.

6 Dr. Dyce, I think this is Plaintiff's Exhibit 11 -- I'm
7 sorry 128. They changed the numbers on me, Judge. I'm
8 having fun with that.

9 Is this a copy of the letter that you talked about a
10 moment ago?

11 A. Yes, sir, it is.

12 Q. Is that a letter that we discussed yesterday in some
13 detail?

14 A. Yes, it was -- it is.

15 Q. All right. So let's go forward now instead of
16 backwards. In July or the summer of 2008 what changed,
17 potentially, with respect to you being a shareholder?

18 A. In the summer of 2008 I began receiving Dr.
19 Gunnlaugsson's --

20 Q. Summer of 2008, is that right? I'm sorry, you're right,
21 you're right.

22 A. Yes, summer of 2008 I believe I began receiving Dr.
23 Gunnlaugsson's share of the buy-in, where he was buying in,
24 buying our shares from myself and Dr. Puchalski.

25 Q. Do you remember what month that was?

1 A. I want to think it's around May-June.

2 Q. What else happened in the summer of 2008 with respect to
3 the question about whether you were a shareholder?

4 A. I believe Bob issued another series of documents which
5 mimicked the previous ones from 2007 for a stock purchase
6 agreement, and also during that time we, Chad, myself and Bob
7 -- well, Bob met with Ed White to come up with a new
8 shareholder agreement, and Bob presented it to myself and to
9 Chad to negotiate and also came up with a new employment
10 agreement, two separate documents, and presented it to myself
11 and Chad to agree upon.

12 Q. I'll get to that in a minute, Dr. Dyce, but I want to
13 talk about management of the company for a few minutes.

14 A. Yes.

15 Q. And yesterday in his opening Mr. Sheheen was talking
16 about how Dr. Puchalski completely ran the practice. Were
17 there weekly meetings of the practice?

18 A. There were weekly meetings.

19 Q. When were those weekly meetings?

20 A. In the mornings, usually typically 5:00 or 6:00 in the
21 morning.

22 Q. And where were the meetings?

23 A. Always in Camden.

24 Q. Is that where Dr. Puchalski lived?

25 A. It was about three to five minutes from his house.

1 Q. And how far was it from your house?

2 A. About 45 minutes.

3 Q. So you had these weekly meetings, and what was discussed
4 at these weekly meetings?

5 A. Any practice-related issues and any decisions that
6 needed to be made, any changes to the way -- Bob would advise
7 us on any changes to the way we needed to bill for things,
8 just general day-to-day practice things that we needed to be
9 updated on.

10 Q. And were these weekly meetings taking place during the
11 period of February 2007 onward?

12 A. Yes, they were.

13 Q. Were there also biweekly meetings?

14 A. There were monthly meetings.

15 Q. When were the monthly meetings?

16 A. Typically on Thursdays.

17 Q. And when were they held?

18 A. Typically on Thursday.

19 Q. What day of the week were those meetings?

20 A. Typically on Thursdays.

21 Q. What time were those meetings?

22 A. Those were I believe from, I think it's around 12 or 1
23 to whatever time they got finished, 5:00 or 6:00.

24 Q. What was discussed at these meetings?

25 A. Those were the directors meetings.

1 Q. I'm sorry? I couldn't hear you.

2 A. Those were the directors meetings, and each director of
3 each department in the practice would give a report on what
4 was ongoing with their department.

5 Q. Were there also discussions of productivity at these
6 meetings?

7 A. After -- not at the directors meeting. After, following
8 the directors meeting there was a physician meeting, and at
9 the physicians meeting there was a discussion of productivity
10 and just general things that were going on with the practice.

11 Q. And were reports generated for the productivity
12 meetings?

13 A. Yes, they were.

14 Q. Who generated the reports?

15 A. Dr. Puchalski and I think he had a number of people
16 working with him, Keiley Taylor, Theresa Williams, I don't
17 know who specifically, Austin if we had to be -- Austin, Mr.
18 Austin Sheheen's office if we needed to be updated on things,
19 so just anyone Bob thought needed to update us.

20 Q. Now, so you had these reports generated. Were you
21 allowed to keep copies of the reports?

22 A. I don't believe so. I don't believe so.

23 Q. So who had access to the information basically that was
24 in these reports?

25 A. Dr. Puchalski, Austin I guess, Theresa Williams who was

1 the office manager. Probably different parts of the
2 reports -- like if it was a billing, probably the billing
3 person had access to the information, the director of
4 billing. Different people had different access to different
5 portions of the meeting.

6 Q. But did you have access?

7 A. I thought I did until I started asking for some of them.

8 Q. And when was that?

9 A. In -- when did I start asking for a lot more documents?

10 Q. Yes.

11 A. In the spring of 2010.

12 Q. We'll get to that. All right. Mr. Sheheen talked about
13 the insurance contracts.

14 A. Yes, sir.

15 Q. Who negotiated the insurance contracts?

16 A. What insurance contracts?

17 Q. With, I don't want to mess the -- not the malpractice
18 insurance, with payors, third-party payors. I hope I did
19 that right, Your Honor.

20 A. Well, the different insurance contracts with third-party
21 payers were negotiated through the help of various
22 consultants with Dr. Puchalski sort of finding the
23 consultants that we needed to use to negotiate with the
24 different insurance companies.

25 Q. Did you have any role in the hiring of the consultants?

1 A. No. He just told us that we would -- he just told us
2 who he'd use and what we'd need and if we needed a show of
3 force to show up, to come to the meetings or do whatever else
4 to support what was going on.

5 Q. And contracts with hospitals, who negotiated those?

6 A. Dr. Puchalski again negotiated a lot of the contracts
7 with the hospitals, but he would have us be present at
8 different points as sort of a show of force to the hospital
9 that, hey, we're committed to your hospital and that we're
10 willing to do whatever it takes to have you be successful.

11 Q. And so did you participate in these meetings?

12 A. Yes, we did.

13 Q. Did you participate in the meetings with the insurance
14 consultants?

15 A. One or two but not a lot.

16 Q. So with apologies to the Court, I want to go back in
17 time just a little bit but not repeating testimony. Let's go
18 back to the spring of 2006. Did SCENT hire another doctor at
19 that time?

20 A. SCENT did hire another physician around then.

21 Q. And who was that?

22 A. That was Dr. Gunnlaugsson.

23 Q. Could you pull up Exhibit 290, please?

24 And why did SCENT hire Dr. Gunnlaugsson?

25 A. We had a need for a physician who was -- who had an

1 interest or who was a plastic surgeon because the previous
2 physician that had been working at SCENT left somewhat
3 abruptly.

4 Q. Who was that, by the way?

5 A. That was Dr. John Westine.

6 Q. So SCENT was looking to hire a plastic surgeon, and is
7 that why Dr. Gunnlaugsson was hired?

8 A. That -- to be a plastic surgeon who was also willing to
9 do ENT and cover the Columbia office, which was where the
10 bulk of our cosmetics and plastics was done.

11 Q. Ms. Baker has put up on the screen Exhibit 290 which is
12 a copy of the employment contract that Dr. Gunnlaugsson
13 signed. Do you remember that contract?

14 A. I don't know that I actually ever saw the contract.

15 Q. Okay. Then let's take it off the screen. How long was
16 the contract supposed to be for?

17 A. Bob told me that the contract was exactly like my
18 initial two-year employment agreement.

19 Q. So it was supposed to be -- so yours was a two-year
20 employment agreement, and so how long was Dr. Gunnlaugsson's
21 supposed to be?

22 A. The same period of time, two years.

23 Q. Now let's look at paragraph 1A. Is paragraph 1A
24 consistent with what Dr. Puchalski told you?

25 A. Yes, it is.

1 Q. Let's go to paragraph 3, if you can blow this up,
2 please.

3 Is that language consistent -- this is from Dr.
4 Gunnlaugsson's contract. Is this language consistent with
5 your original contract as well?

6 A. Without seeing them side to side, it looks very similar
7 to the language that was in my contract.

8 Q. So what would two years have been from Dr.
9 Gunnlaugsson's contract?

10 A. 2008.

11 Q. Approximately what month?

12 A. I think that said June, so the end of May I would guess.

13 Q. Going forward in time then, let's go to February 2008.
14 What happens in February 2008 with respect to your pay?

15 A. In February of 2008 I start to receive, rather than
16 getting only credited with the K-1s I started to receive
17 those in hand.

18 Q. I'm sorry?

19 A. I start to receive the actual checks in hand for my
20 K-1s, both the biweekly sweep -- the biweekly distributions
21 and what we term the sweeps, the profit above, above the
22 regular distributions.

23 Q. This is Plaintiff's Exhibit 189. Dr. Dyce, have you
24 seen this document before?

25 A. I believe I have.

1 Q. Can you identify it for me, please?

2 A. It appears to be the buy-in sheet for Dr. Gunnlaugsson
3 when he was -- when he bought in as a shareholder.

4 Q. Ms. Baker is good, but she's not that good yet with the
5 program. Do these two columns largely reflect -- are those
6 similar to the columns on your buy-in sheet?

7 A. Very similar, yes, sir.

8 Q. Okay. So what do you think this represents?

9 A. It looks like it represents the months -- sorry, the
10 date that the biweekly distributions were credited to Dr.
11 Gunnlaugsson from the period 2008 to 2009 when he bought in
12 as a shareholder.

13 Q. Did you have access to this sheet prior to the
14 institution of this lawsuit?

15 A. No; I did not have access to this sheet.

16 Q. And this column here starts June 11, 2008. Do you see
17 that?

18 A. June 11th, yes, sir.

19 Q. What does that represent to you?

20 A. That I guess is the date Dr. Gunnlaugsson started buying
21 in.

22 Q. And who received credit for the \$21,000 biweeklies
23 beginning in June 2008?

24 A. It was to be credited to the existing shareholders,
25 myself and Dr. Puchalski.

1 Q. And this is in June 2008, is that right?

2 A. Yes, sir.

3 Q. So we have -- according to the buy-in sheet there was a
4 payment of \$21,000 in June 11th, payment two weeks later,
5 roughly, \$21,000; payment two weeks later, roughly, \$21,000,
6 do you see that?

7 A. Yes, sir.

8 Q. Are you aware that for purposes of this litigation Dr.
9 Puchalski's taking the position that you did not become a
10 shareholder until July 2008?

11 A. Yes, sir.

12 Q. So in July 2008 a series -- well, what happened in July
13 2008 from a document standpoint?

14 A. In or around July of 2008 there was I believe a new
15 series of documents executed which mimicked -- which mimicked
16 the previous ones. I think there was a new shareholder
17 agreement and an employment agreement, I want to say a stock
18 purchase agreement, but I can't remember offhand, and I
19 believe there was also an issuance of a certificate of stock
20 shares.

21 Q. So let's pull up, I believe it's Exhibit 10.

22 While Ms. Baker's doing that, did you ask Dr. Puchalski
23 why you were doing a new set of documents that largely
24 mimicked the previous documents?

25 A. I remember us having sort of a brief discussion --

1 actually, yes, I did, I did, I remember us having -- I don't
2 remember if it was a discussion by phone or where it came up
3 but why we needed documents beyond -- basically I wanted to
4 know why Chad couldn't just -- Dr. Gunnlaugsson couldn't
5 simply sign the documents that were in existence.

6 THE COURT: You all have got to wait just a second
7 because I've got to get documents. I've been relying on the
8 notebook, but this is no longer --

9 MR. ELLISON: We're out of the notebook, Judge.

10 THE COURT: That's okay. I just need to get them.

11 MR. ELLISON: I understand.

12 THE COURT: I don't want to proceed until I've got the
13 documents, so are they in the box?

14 MR. ELLISON: This one's in the book.

15 THE COURT: And you just told me Plaintiff's Exhibit 10
16 is what you just said, right?

17 MR. ELLISON: Yes, Your Honor.

18 THE COURT: I'm sorry.

19 MR. ELLISON: We will get to some that are not in the
20 book. That was Mr. Cleveland's book.

21 THE COURT: It was just because it comes after 128 and
22 so --

23 MR. ELLISON: I will stipulate --

24 THE COURT: -- being from Dillon, this should be easy
25 for me, but it's not, it's math.

1 MR. ELLISON: Despite his college degree, which I highly
2 approve of, I will stipulate that Mr. Cleveland does have
3 difficulty counting on occasion.

4 THE COURT: There's only one lawyer that I know that
5 does math.

6 MR. ELLISON: I'm not it, and I went to the same college
7 Mr. Cleveland went to.

8 THE COURT: Got it. Ready to go.

9 Q. Plaintiff's Exhibit 10. Do you recognize this document,
10 Dr. Dyce?

11 A. I do.

12 Q. What is it?

13 A. It was the 2008 employment agreement, I believe.

14 Q. Okay. Now, looking down at the photo -- do you
15 recognize that now?

16 A. I've now come to know what those mean, yes.

17 Q. What does it mean?

18 A. Typically it refers to the number of revisions of the
19 document.

20 Q. Do you know who prepared this document?

21 A. Mr. Ed White.

22 Q. And this is document 6002029.1.

23 A. Yes.

24 Q. And what do you think the 1 represents?

25 MR. SHEHEEN: Your Honor, I object. Calls for

1 speculation unless he actually knows.

2 MR. ELLISON: He can say what he thinks.

3 MR. SHEHEEN: That's what speculation is.

4 THE COURT: Give me just a little bit of foundation and
5 it very well may be because Dr. Puchalski told me or White
6 told me.

7 MR. ELLISON: Sure.

8 Q. Who prepared the documents?

9 A. Dr. Puchalski and Ed White.

10 Q. Who gave you this document?

11 A. Dr. Puchalski.

12 Q. And who did he say prepared it?

13 A. Ed White.

14 Q. So with that, whose footer do you think that is?

15 A. Ed White's.

16 Q. Thank you.

17 A. Now, you had asked me a question before, before we had
18 to take a pause, about did I ask questions about the
19 document.

20 Q. Yes.

21 A. I very briefly did and was assured by Ed White and Dr.
22 Puchalski that this was the way to go for the practice and at
23 the time I trusted them.

24 Q. Okay. And did you also sign a shareholders agreement at
25 the time?

1 A. I did.

2 Q. And we'll get there in a couple minutes. According to
3 these documents how many different components of pay were you
4 supposed to receive?

5 A. I don't know the number, but I can list the ones I can
6 remember. We were supposed to get W-2 income. We were
7 supposed to get biweekly distributions. We were supposed to
8 get distributions or sweeps above and beyond the regular
9 profits, and we were also supposed to get variable
10 compensation which was I believe essentially call pay and was
11 supposed to be equal.

12 Q. Had you been receiving these things since February or
13 receiving actually the cash or credit for all these four
14 categories since February 2007?

15 A. I had been.

16 Q. And were these four categories called for in your
17 original employment agreement?

18 A. No, they were not.

19 Q. Now, as you heard a lot yesterday, there will be a lot
20 of things about documents speaking for themselves and all
21 this sort of thing, so I don't want to go through all of the
22 individual components of this contract. We'd be here too
23 long. Do you remember whether there was a provision for
24 termination for cause?

25 A. For cause in one of the documents, yes.

1 Q. In the employment agreement?

2 A. In the employment agreement, yes.

3 Q. Do you recall whether there was a notice provision?

4 A. There was a notice provision.

5 Q. Could we put up Section 2.3? Let's look at section

6 2.3A. Do you recall seeing this provision?

7 A. Yes, I do.

8 Q. Can you read for the Court what section 2.3A says?

9 THE COURT: I can read it. I got it.

10 MR. ELLISON: Okay. Then never mind.

11 THE COURT: Already read it.

12 MR. ELLISON: Great.

13 THE COURT: He did too.

14 Q. Now, are you aware that Dr. Puchalski is taking the
15 position in this lawsuit that he terminated you for cause?

16 A. Yes, I'm aware of that.

17 Q. Did he ever give you the 30-days written notice and the
18 opportunity to cure?

19 A. No, he did not.

20 Q. As far as you know is this the operative employment
21 agreement involved in this lawsuit?

22 A. As far as I know, yes, sir.

23 Q. Was there also a provision in the contract that allowed
24 for termination without cause?

25 A. Yes, sir.

1 Q. And did this document also include a noncompete?

2 A. The employment agreement I believe did but I have to
3 look to be certain.

4 Q. Okay. Were the provisions of the noncompete in the 2008
5 documents the same as the provisions of the noncompete in the
6 2007 documents?

7 A. I don't think so. I'd have to look at the wording but I
8 don't think so.

9 Q. But if you looked at the wording you could see what
10 differences are there?

11 A. Yes.

12 Q. So I don't want to go through all that.

13 Was there also a provision in the contract that called
14 for the practice to provide you with malpractice insurance?

15 A. I believe there was, yes.

16 Q. And as best you recall, if the contract was terminated
17 for cause, did you receive any severance pay?

18 A. I believe I still received something. I don't remember
19 the exact wording.

20 Q. You received something since the contract --

21 A. No, if I was terminated for cause, I think there was
22 still something to be paid out, but I'm not sure, I'd have to
23 look at the for cause --

24 Q. Have you looked at the formula in detail?

25 A. No, I haven't.

1 Q. Now, let's look at Exhibit No. 7.

2 MR. SHEHEEN: I'm sorry, did you say 7?

3 MR. ELLISON: Yes.

4 Q. Have you seen this document before?

5 A. Yes, I do believe I have.

6 Q. Identify it for the Court, please.

7 A. It appears to be a shareholder agreement.

8 Q. And as far as you know is this a copy of the
9 shareholders agreement that was signed in the summer of 2008?

10 A. There was one signed in 2008. I'd have to confirm it
11 with looking at the date, but yes, looks like -- very much
12 like it could be.

13 Q. Okay. This ones got a footer too. Do you see that
14 footer?

15 A. Yes, sir.

16 Q. And, Judge, I'll wait for you.

17 THE COURT: Thank you. The filing date that I have on
18 my exhibit is obliterated just from having been copied. I
19 can read June something, but I cannot read the date. Could
20 you provide me with that date?

21 MR. ELLISON: Your Honor, the shareholder -- the
22 employment agreement is dated July 16th, 2008.

23 THE COURT: I was actually looking at --

24 MR. ELLISON: I understand, and the shareholder
25 agreement is also dated July 16th, 2008.

1 THE COURT: Great. That's very helpful. Thank you.

2 MR. ELLISON: I'm sorry. The employment agreement is
3 dated in June, I'm sorry, Mr. Cleveland corrected me, the
4 employment agreement is dated, excuse me, June 1st, 2008.

5 THE COURT: June 1st, 2008.

6 MR. ELLISON: Right, and the shareholder agreement is
7 dated July 16th, 2008.

8 THE COURT: Got it. Thank you.

9 Q. Okay. Can you publish for the Court as best you can the
10 footer on this document?

11 A. 59 -- it says document No. 598, I believe that's 9, 6 or
12 a 1, 73.10.

13 Q. Did you see versions 1 through nine of this document?

14 A. I don't believe I did, sir.

15 Q. To the best of your knowledge who prepared this
16 document?

17 A. Mr. Ed White.

18 Q. And what law firm is he with?

19 A. Nelson Mullins.

20 Q. There was testimony yesterday regarding SCENT being a
21 statutory close corporation. You don't know exactly what
22 that is, do you?

23 A. No idea.

24 Q. Can you explain to the Court what your basic
25 understanding of a statutory close corporation is?

1 A. If that's the same as an S Corp.

2 Q. It's not.

3 A. Then no, I can't.

4 Q. It's not. You explained to the Court yesterday what --
5 what's your understanding of an S Corp.?

6 A. My understanding of an S Corp. is that it's a
7 corporation where you're taxed at the individual level, not
8 the corporate level, and the amount of distribution or profit
9 that an individual owner of that corporation is entitled to
10 has to be -- they have to get the percentage of the profits
11 commensurate with the percentage of ownership in the
12 corporation.

13 Q. Were you supposed to be an equal shareholder throughout
14 the entire time period with Dr. Puchalski?

15 MR. SHEHEEN: Your Honor -- go ahead and finish the
16 question, but when you say the entire time period, I'm not
17 sure what you mean.

18 MR. ELLISON: The problem is we don't know the beginning
19 date, so I'll re-characterize.

20 MR. SHEHEEN: We know when he went to work if you're
21 referring from the day he went to work forward, then I want
22 to know that. If you're referring to another specific day, I
23 want to know that.

24 MR. ELLISON: I'll rephrase, Judge.

25 THE COURT: Okay.

1 Q. From the time that you think you became a shareholder
2 until the time that -- was it your understanding that you
3 were supposed to be an equal shareholder with Dr. Puchalski?

4 A. When I became a shareholder --

5 Q. From that point forward.

6 A. -- I became an equal shareholder with Bob Puchalski.

7 Q. So if you were 50/50 shareholders, how much of the
8 profits were you supposed to receive?

9 A. 50 percent.

10 Q. Now, we talked about day-to-day management and that sort
11 of thing. Was there -- to the best of your knowledge was
12 there a requirement that a majority of the shareholders had
13 to approve the malpractice coverage that the company got?

14 A. I think, I don't know, I'd have to look at the
15 malpractice section, but I think anything paying over \$10,000
16 we had to approve.

17 Q. Were there some special protections in this document for
18 Dr. Puchalski?

19 A. Yes, there were.

20 Q. And let's look at section 3.9 on page 7.

21 Do you recall seeing this in the shareholder agreement?

22 A. Yes, I do.

23 Q. Were these provisions contained by -- were some of the
24 provisions contained in the 2007 shareholder agreement?

25 A. No, they were not.

1 Q. Were some of them contained?

2 A. I'd have to review the 2007.

3 Q. Okay. That's fine. But the documents would be what
4 they are.

5 A. Yes.

6 Q. If Dr. Puchalski were removed for cause, was he subject
7 to the deduct?

8 A. He was not.

9 Q. Were you subject to a deduction?

10 A. I was.

11 Q. That only applied if you were dismissed for cause, is
12 that right?

13 A. For cause, yes, sir, my understanding.

14 Q. Did you ever get the 30-day notice required in the
15 employment agreement for dismissal with cause?

16 A. I was never dismissed for cause.

17 Q. Were there certain things in the shareholder agreement
18 that required supermajorities?

19 A. Yes, there were.

20 Q. Page 4, Section 3.3.1.

21 That's a copy of Section 3.3.1, Your Honor, of the
22 shareholders agreement. It is on page 4.

23 THE COURT: Okay.

24 Q. Dr. Dyce, are you familiar in broad strokes with Section
25 3.3.1?

1 A. Yes, I am, sir.

2 Q. Can you describe your understanding of this to the
3 Court?

4 A. The understanding is that we required more -- the
5 shareholders had to agree in the majority to certain changes
6 to the way the practice was set up, run or to set up a new
7 site or to merge or consolidate with another practice or
8 joint venture with any other institutions.

9 Q. And were there certain provisions in the contract that
10 required unanimity?

11 A. There were.

12 Q. Let's look at Section 3.3.2 of the contract.

13 THE COURT: Counsel, I've got to stop you.

14 MR. ELLISON: Yes.

15 THE COURT: Because -- and that was a very good example
16 of my concern, and I don't know -- and I need you to tell me
17 what we're doing.

18 MR. ELLISON: Okay.

19 THE COURT: Because your witness just -- here was the
20 question, here was the answer, and here's my concern. Your
21 question was were there certain circumstances for which there
22 was a supermajority that was required. He said yes. You
23 said give me some examples, and he said well, there were
24 certain times like, and I think opening another office, or
25 whatever he just said, where a majority was required. That's

1 not what the agreement says. So here's my concern because
2 here's what we're doing -- what is happening is that you're
3 referring to documents, you're going to sections of the
4 documents, you're then asking the witness what do you think
5 about this and what he's telling me is not what's in the
6 document.

7 MR. ELLISON: I can do it differently, Judge.

8 THE COURT: I don't know what to do with that, and let
9 me tell you why: If the document is an ambiguous document,
10 then what he thinks is important. Nobody's even talked about
11 the fact that anybody thinks that these agreements are
12 ambiguous, so when he says that to me, when he says, well,
13 you know, there were times when you've got to have a
14 majority. Well, that's not what this document says. You've
15 got to have 67 percent vote, so I don't know -- as I'm taking
16 notes, I don't know where you're going, I don't know what
17 your theory is and I don't know what to do with -- see what
18 I'm saying?

19 MR. ELLISON: I do.

20 THE COURT: Because I can read the document.

21 MR. ELLISON: I understand.

22 THE COURT: And in all candor, and I think Dr. Dyce has
23 done an excellent job of talking about the fact that I
24 basically -- this was good for the practice, I signed the
25 agreement, so I don't know what to do with this testimony

1 because I don't know if it is Dr. Dyce's position that the
2 agreement is in fact ambiguous and therefore what he believed
3 because it's ambiguous then comes into play because I'm
4 looking at 67 percent, and now you're moving on to something
5 else, and I'm like whoa, what am I supposed to do with this
6 testimony?

7 MR. ELLISON: What I'm trying to do, and I'll do it
8 differently, Judge is walk through the document through the
9 witness if he recalls that there were provisions for it, and
10 I won't ask him what they mean, I'll just ask him if he
11 recalls it, and if they're in there, I'll point it out to the
12 Court.

13 THE COURT: Why?

14 MR. ELLISON: Because there are certain provisions of
15 the document that are far more important in the context of
16 what all happened than others, and I think it's a lot easier
17 for the Court if you see these provisions if we highlight
18 them for you and that he --

19 THE COURT: I don't disagree with that at all, but
20 here's what's happening: What's happening is that you're
21 trying to highlight different events and then you're going to
22 the document and what Dr. Dyce is either memory or belief of
23 what's in the document is not what's in the document, so I
24 don't know if it's more appropriate to ask him the story, you
25 know, what happened because -- and maybe I should ask this

1 question: Is it the position -- I'm going to ask two
2 questions. First question, is it the position of the
3 plaintiff that the 2008 documents are the controlling
4 documents?

5 MR. ELLISON: 2008, yes.

6 THE COURT: And that would be employment agreement.

7 MR. ELLISON: Yes.

8 THE COURT: Shareholders agreement.

9 MR. ELLISON: Yes.

10 THE COURT: And amendments to the articles of
11 incorporation.

12 MR. ELLISON: Which I don't even intend on asking about.

13 THE COURT: Well, I've been looking at them because, as
14 you know, they're controlling, so they are important.

15 MR. ELLISON: Right, and there are contradictions
16 between the articles and the shareholders agreement.

17 THE COURT: Tell me then.

18 MR. ELLISON: I'm not going to do this through him.

19 THE COURT: I understand. While I may agree with you,
20 what is the plaintiff's position about the alleged, we'll say,
21 at this point, inconsistencies?

22 MR. ELLISON: The articles control.

23 THE COURT: Very well, and you'll handle that somewhere
24 else.

25 MR. ELLISON: That's going to be handled in argument.

1 THE COURT: I understand. Now, very well. Here's what
2 I don't want to have happen to Dr. Dyce because just in terms
3 of fairness to his testimony, I think that in that it's not
4 the position, as I understand it, it's not the position of
5 the plaintiff that the document is ambiguous, the 2008
6 document is ambiguous and it is controlling, I don't want him
7 to be put in a position of testifying differently than the
8 document if that makes sense.

9 MR. ELLISON: Judge, I'm fine with that. I might be
10 about to get in trouble with you about this one provision I
11 want to ask him about.

12 THE COURT: Mr. Ellison, I'm going to tell you what
13 you're not going to do and what's not going to happen is you
14 aren't going to get in trouble with me.

15 MR. ELLISON: Judge, I've gotten into trouble with you
16 plenty of times. I won't remind you of the specifics, Your
17 Honor, but I remember.

18 THE COURT: All right. Let's do it.

19 MR. ELLISON: Let me try.

20 Q. Dr. Dyce, do you remember whether there was a provision
21 in the contract, in the shareholders agreement regarding
22 loans?

23 A. There was.

24 Q. Okay. What is your recollection of what that provision
25 says?

1 A. Loans from the share -- from a shareholder to the
2 corporation required a unanimous vote.

3 Q. And was there a restriction on the amount of money that
4 the -- as far as you can recall, on the amount of money that
5 the managing shareholder can incur in terms of debt without
6 some kind of a --

7 A. \$10,000.

8 Q. Okay. I won't go into the document on those. They say
9 what they say.

10 THE COURT: Now I want you to tell me where to go,
11 though.

12 MR. ELLISON: That's why I was doing it, Judge. I'll be
13 happy to. That's why I was doing it.

14 Q. Okay. Dr. Dyce, let's look at Section 3.15 on page 10.

15 THE COURT: 3.15.

16 MR. ELLISON: Yes.

17 THE COURT: It's not the shareholders agreement. This
18 is something else. Is this in the employment agreement?

19 MR. ELLISON: No, it's in the shareholder agreement.

20 MR. SHEHEEN: Your Honor, it's 3.15.

21 MR. ELLISON: Sorry, 3.15.

22 THE COURT: All right, 3.15, expenditures, right.

23 MR. ELLISON: Yes, ma'am.

24 Q. Dr. Dyce, is this the provision that you were talking
25 about?

1 A. Yes, it was.

2 THE COURT: Let me look at it, guys.

3 MR. ELLISON: Sure.

4 THE COURT: Got it.

5 MR. ELLISON: Judge, you stop me anytime I'm doing what
6 you didn't want me to do, but your last question is why I'm
7 doing it.

8 THE COURT: I know it, but, again, unfortunately, what
9 he testified to and what this says are different.

10 MR. ELLISON: Judge, I'm just trying to walk you through
11 it.

12 THE COURT: I understand.

13 Q. Okay. Do you see in this provision, Dr. Dyce, that it
14 says that the managing shareholder could not incur
15 disbursements of cash or assets of more than \$10,000 without
16 consultation and agreement by a majority of the shareholders,
17 do you see that?

18 A. Yes, sir.

19 Q. Were there also provisions in the document regarding
20 Subchapter S election and status?

21 A. There were, sir.

22 Q. Looking at Article 5, is this what you remember in broad
23 strokes?

24 THE COURT: Now we're at Section 5?

25 MR. ELLISON: Article 5, page 15.

1 THE COURT: Okay.

2 Q. And it goes on for about two pages or so.

3 A. I believe that's what I remember, sir.

4 Q. Let's go to Exhibit 9. Dr. Dyce, I think you testified
5 a few minutes ago --

6 Plaintiff's 9, Judge.

7 Have you seen this document before, Dr. Dyce?

8 A. Yes, I have.

9 Q. Can you identify it, please?

10 A. It's a stock purchase agreement dated 2008.

11 Q. Did you ask why you were being asked to sign a new stock
12 purchase agreement in 2008 when you had already signed one in
13 2008 -- 2007?

14 A. I don't remember asking why, sir.

15 Q. How many shares were you supposed to buy, according to
16 the 2007 agreement as best you remember?

17 A. I had already purchased 50,000 shares.

18 Q. How many shares of stock were you supposed to purchase
19 under this stock purchase agreement as best you remember?

20 A. I assumed it was just an agreement already covering the
21 50,000 shares that I'd already purchased.

22 Q. Okay. Do you see paragraph 1?

23 A. Yes.

24 Q. When was the stock certificate actually issued?

25 A. In the summer of 2008, I believe.

1 Q. And how many shares was the certificate for?

2 A. 50,000 shares.

3 THE COURT: Gosh, I hate to be obstreperous, but I don't
4 have 9 in my book.

5 MR. CLEVELAND: It's not in there, Your Honor. I was
6 just checking, and I apologize for that. It should be.

7 THE COURT: I'm so relieved because I'm thinking, okay,
8 where's 9. I can't find 9. Can I have one?

9 MR. CLEVELAND: You sure can.

10 THE COURT: That would be great.

11 MR. SHEHEEN: Is it in the big book?

12 MR. CLEVELAND: Yes, it's in the big book.

13 THE COURT: Can I have just a moment now to look at that
14 language?

15 MR. ELLISON: Absolutely, Your Honor.

16 THE COURT: And can I ask that you ask that question
17 again because I was really looking for the document. I want
18 you to ask him because I want to hear his answer. Did you
19 ask why I am signing another stock purchase agreement in 2008
20 when I have signed one in 2007? Ask that again.

21 Q. Dr. Dyce --

22 A. Yes, sir.

23 Q. -- did you ask Mr. White or Dr. Puchalski why you were
24 signing another stock purchase agreement for the same 50,000
25 shares in 2008 that you had signed a stock purchase agreement

1 for in 2007?

2 A. No, I didn't. At the time I trusted them. I didn't
3 think they were doing anything nefarious.

4 Q. Okay. Now, during this time period of the summer of
5 2008 did Dr. Gunnlaugsson also sign an employment agreement?

6 A. Yes, I believe that's when he signed it, yes, sir.

7 Q. Your Honor, this is Defendant's 9.

8 THE COURT: Okay.

9 MR. SHEHEEN: Your Honor, I'm just lost. Where are we
10 at?

11 MR. ELLISON: Defendant's 9, your Exhibit 9, Dr.
12 Gunnlaugsson's employment agreement.

13 MR. SHEHEEN: Thanks. Okay.

14 MR. CLEVELAND: This is in the plaintiff's book at 290.

15 THE COURT: I thought it was. Okay. Got it.

16 MR. CLEVELAND: This is June 1st, 2006.

17 THE COURT: He's talking for 2008.

18 MR. ELLISON: 2008, not 2006.

19 MR. CLEVELAND: I'm sorry.

20 MR. ELLISON: I'm going to ask one question on this,
21 Judge.

22 THE COURT: Wait a minute now until I get there.

23 Q. Dr. Dyce, I think you testified a few moments ago before
24 we engaged in a case of document confusion that it was your
25 recollection that Dr. Gunnlaugsson also signed an employment

1 agreement in the summer of 2008?

2 A. Yes, sir.

3 Q. We're looking at Defendant's 8.

4 A. Defendant's 9.

5 Q. I'm sorry, Defendant's 9. The document confusion still
6 reigns. Defendant's 9. To the best of your knowledge is
7 this a copy of Dr. Gunnlaugsson's employment agreement?

8 A. I don't know if I've ever seen Dr. Gunnlaugsson's
9 employment -- but I'll assume it is.

10 Q. Don't assume. If you don't know, you don't know.
11 That's fine. That was my only question on the document
12 anyway.

13 Okay. Now, I want to change strokes a little bit, but
14 I'm going forward in time, Your Honor. I want to try to keep
15 it chronological as much as I can.

16 THE COURT: That's fine. Sure.

17 MR. ELLISON: Let's look at Exhibit 17. This is
18 Plaintiff's 17?

19 THE COURT: 17?

20 MR. ELLISON: 17.

21 THE COURT: Okay.

22 Q. Dr. Dyce, have you seen this document before?

23 A. Only since we started this process of litigation.

24 Q. What is your understanding of this document as to what
25 it is?

1 A. It's just our articles of incorporation.

2 Q. For what company?

3 A. For SCENT Land Holdings, LLC.

4 MR. ELLISON: Okay. And, Judge, it's kind of hard to
5 see, but it contains a date stamp September 5, 2008 up in the
6 upper left hand.

7 Q. Dr. Dyce, as far as you know, when was SCENT Land
8 actually formed? If you don't know, you don't know.

9 A. I don't know the date that SCENT Land was formed.

10 Q. That's okay. Why was SCENT Land formed?

11 A. SCENT Land Holdings was supposed to be a company that
12 handled the real estate that South Carolina ENT or SCENT
13 used.

14 Q. Who were the members supposed to be?

15 A. The members were supposed to be the wives of the
16 shareholders.

17 Q. In 2008 -- scratch that.

18 Did Dr. Puchalski offer you an explanation as to why the
19 wives were supposed to be members?

20 A. His explanation was that it would provide for potential
21 protection against liabilities having to do with SCENT --
22 protection against liabilities having to do with SCENT.

23 Q. Let's go to Exhibit 286. I don't think this is in the
24 book, Your Honor.

25 THE COURT: Okay.

1 MR. ELLISON: I can give you a copy, though.

2 THE COURT: Thank you.

3 MR. ELLISON: And I'll give my copy to the witness. We
4 won't be long on this.

5 Q. Dr. Dyce, can you identify Plaintiff's Exhibit 286?

6 A. This was an early version of what was supposed to be the
7 operating agreement of SCENT Land Holdings.

8 Q. And the document purports to have been dated in August
9 2008?

10 A. Yes, sir.

11 Q. And that's about the same time that the articles of
12 organization for SCENT Land were filed; is that right?

13 A. Yes, sir.

14 Q. The members were supposed to be the wives of the
15 shareholders.

16 A. Yes.

17 Q. Who were supposed to be the signatories to this
18 document?

19 A. The members and the managers.

20 Q. And who were the members supposed to be according to
21 this document?

22 A. Amy Puchalski and Jamie Curley.

23 Q. And who were the managers supposed to be?

24 A. Robert Puchalski and Orville Dyce.

25 Q. To the best of your knowledge was this document ever

1 signed?

2 A. No, it was not.

3 Q. Let's look at Section 4.2 on page 17. Dr. Dyce, this
4 document -- this paragraph deals with required capital
5 contributions. What kind of vote was required under the
6 terms of this document to have a mandatory capital
7 contribution? Does it say it required interest?

8 Let's do it this way --

9 MR. SHEHEEN: Your Honor, we're getting into leading him
10 down where he wants him to go. It of course does say
11 whatever it says, so I don't know --

12 THE WITNESS: I don't see a requirement.

13 Q. What's the second sentence?

14 MR. SHEHEEN: Your Honor, I object to him leading.

15 Q. That's fine. We'll do it this way. Read the second
16 sentence.

17 A. A required interest shall determine and notify each
18 member of the need for capital contributions pursuant to this
19 Section 4.2 when appropriate.

20 Q. Okay. And let's go back, since you've now got my copy,
21 looking on page 4, can you read the next to last paragraph,
22 please?

23 A. Required interest means 100 percent of all members.

24 Q. And to the best of your knowledge was this document ever
25 signed?

1 A. It was not.

2 MR. ELLISON: Now we're getting ahead of the story, Your
3 Honor. I was trying to go -- I can't go completely
4 chronological.

5 Q. Did you have a discussion -- to the best of your
6 knowledge was there a written operating agreement for this
7 company signed before September 2009?

8 A. There was not.

9 Q. Did you ever have a -- did you have a discussion with
10 Dr. Puchalski about the absence of a written operating
11 agreement in the summer of 2009?

12 A. We had a number of discussions over the years and one
13 was in the summer of 2009.

14 Q. Can you describe your discussion with Dr. Puchalski in
15 the summer of 2009 about there not being a written operating
16 agreement?

17 A. Well --

18 THE COURT: I need to stop you. You said for this
19 company. You mean SCENT Land Holdings.

20 MR. ELLISON: Talking about SCENT Land.

21 THE COURT: I just wanted to be sure.

22 THE WITNESS: Well, we were on the phone -- I was in his
23 office. We were on the phone with the attorney handling, and
24 it wasn't Nelson Mullins I don't think, handling the SCENT --
25 the land holdings agreement, and we were negotiating back and

1 forth with the attorney about what should and shouldn't be in
2 the contract, and the attorney made some reference that there
3 be special provisions for Bob Puchalski, and my comment was
4 something to the effect of, listen, there are already special
5 provisions in the shareholder agreement for him. I've
6 purchased just as much in the land holdings, like there's no
7 reason for a new special agreement, and I remember Bob
8 becoming livid after that, after the attorney hung up, and he
9 said, fine, well, I'll just -- your name's not on it anyway.
10 I'll just say you never ever bought in.

11 Q. Was there ever further discussion about whether -- in
12 the absence of a written operating agreement what would
13 happen?

14 A. I don't believe so. I don't remember another discussion
15 about that.

16 Q. Did you become concerned about that comment from Dr.
17 Puchalski?

18 A. That and a number of other things began to concern --

19 Q. I want to go back, okay -- okay, go ahead.

20 A. In the context of some other things that had been going
21 on I became really concerned because when I thought about it,
22 my name wasn't on -- he could say that about anything, my
23 name's not on it, so I'm going to say you didn't have it or
24 you didn't own it.

25 Q. So I want to go back -- Judge, I apologize -- but,

1 again, for context purposes let's go back to June 2009, okay?

2 Did you get your draft tax return in June 2009?

3 A. Draft tax --

4 Q. From Austin Sheheen?

5 A. I believe I did, I believe I did.

6 Q. And what was your -- did you also get a letter from
7 Austin Sheheen at that time?

8 A. I don't remember.

9 Q. What was your reaction to getting a copy of the draft
10 tax return?

11 A. I think, if this is the one I'm recalling, I remember
12 the initial draft we got from Austin, I think Jamie and I
13 were in disbelief because it again stated that we received a
14 lot more than we actually did.

15 Q. How much more, just order of magnitude?

16 A. It was a couple hundred thousand dollars more.

17 Q. Did you try to talk to Austin Sheheen about it?

18 A. We did, a number of times.

19 Q. I'm sorry?

20 A. We did, a number of times.

21 Q. Were you able to discuss this with Mr. Sheheen?

22 A. Initially, yes.

23 Q. And you say initially. Why do you say initially?

24 A. Because towards the end a lot of the e-mails and
25 requests, he kept referring those questions to Bob and

1 Theresa.

2 Q. I'm sorry?

3 A. A lot of the things I began to request from Austin he
4 started -- I guess he started realizing that this was not
5 going on a good path because --

6 MR. SHEHEEN: Your Honor, I'd object to him speculating.

7 THE COURT: Sustained.

8 THE WITNESS: -- and started referring a lot of my --
9 would not answer my questions directly. So simple questions
10 I would have for him, like what was the final amount of my
11 buy-in, he wouldn't answer; where is this money going,
12 wouldn't answer, and so started referring those questions,
13 you need to talk to Bob and Theresa about that.

14 Q. So and that happened in roughly June of 2009?

15 A. Towards the middle and end of 2009 after I started
16 having a lot of questions.

17 Q. And you had that conversation, so to speak, with Dr.
18 Puchalski about the SCENT Land operating agreement in August
19 2009?

20 A. In or around August of 2009, yes.

21 Q. And did you decide to do anything?

22 A. Yes. At that point I realized that the conversation,
23 the brief conversations I'd had with Ed he seemed more
24 concerned with protecting Dr. Puchalski. Dr. Puchalski was
25 all about protecting Dr. Puchalski. I wasn't sure what the

1 accountant was telling me or not, and at that point I decided
2 to start tape-recording conversations with these individuals
3 so they couldn't come back later and say that's not what I
4 said.

5 Q. Now, we'll get more into the tape in just a second, but
6 you're aware that -- you were terminated by SCENT in March
7 2010.

8 A. Yes.

9 Q. Were you terminated for cause or without cause?

10 A. Without cause.

11 Q. And later on the claim in this lawsuit is that you were
12 terminated for cause.

13 A. Yes, I know that.

14 Q. Is this the kind of thing you were concerned about that
15 led you to start tape-recording the conversations?

16 A. Yes, it was, and in the subsequent discussion with Dr.
17 Puchalski he had actually threatened to, as he terms it,
18 separate me from the practice, and this was in as early as
19 August or September of 2009 because I -- unless I agreed with
20 him on certain topics.

21 Q. So now we're talking today about a termination for cause
22 but in March 2010 it was a termination without cause?

23 A. Yes, sir.

24 MR. ELLISON: Your Honor, this is definitely not in the
25 book. It's Plaintiff's 289. I'd like to play two minutes of

1 the tape, and what you're going to hear -- and you've got the
2 transcript also. You're going to hear Dr. Dyce ask a
3 question to which Ed White responds.

4 THE COURT: Hold on one second, one second.

5 (Brief pause.)

6 THE COURT: Let me ask you, now, before I hear this --
7 I'll hear your objection in a second. Let me just clarify.
8 Is this a recording of a telephone conversation?

9 MR. ELLISON: No, a meeting.

10 THE COURT: This is a recording of a meeting.

11 MR. ELLISON: Yes, Your Honor.

12 THE COURT: And Dr. Dyce --

13 MR. ELLISON: He made it.

14 THE COURT: -- is a member of this meeting.

15 MR. ELLISON: Yes. He asked the question.

16 THE COURT: He is a participant in this meeting.

17 MR. ELLISON: That's right.

18 THE COURT: Yes, sir.

19 MR. SHEHEEN: Your Honor, I just want to make sure for
20 the record that we're not waiving attorney-client privilege.
21 This was the attorney for the corporation. They were meeting
22 with -- with Dr. Dyce, and we are preserving the privilege
23 with Nelson Mullins. They represented SCENT. But in this
24 particular situation it was Dr. Dyce and this attorney
25 talking, so I'm not objecting to you hearing that, but I want

1 to make sure that there's no claim, or I will object, that
2 this somehow waives the attorney-client privilege.

3 THE COURT: Of course it waives the attorney-client
4 privilege.

5 MR. SHEHEEN: Well then I object.

6 MR. ELLISON: Mr. Sheheen claims, and we disagree with
7 this claim, that Ed White represents SCENT, not Dr.
8 Puchalski. Representing SCENT, he's a member. This is a
9 SCENT meeting. How can there possibly be attorney-client
10 privilege on this?

11 THE COURT: What SCENT?

12 MR. ELLISON: South Carolina ENT, the practice.

13 THE COURT: Not the holding company.

14 MR. ELLISON: The holding company of the practice -- the
15 operating company of the practice. This is not SCENT Land.

16 THE COURT: Not SCENT Land Holding.

17 MR. ELLISON: Not SCENT Land.

18 THE COURT: This is a meeting. Tell me who are the
19 participants in the meeting.

20 MR. ELLISON: At this point in the meeting Dr. Puchalski
21 is there, Dr. Dyce is there and Ed White is there.

22 THE COURT: And when was this meeting?

23 MR. ELLISON: March 10, 2010.

24 THE COURT: March 10, 2010. Now, your question as I
25 understand, as you posed the question is if Dr. Dyce is a

1 member of -- is a shareholder.

2 MR. ELLISON: Whether he is or he isn't, there's no
3 privilege. If he's not, there's clearly no privilege. This
4 is Ed White talking to Dr. Dyce.

5 THE COURT: All right. Now, let me say this, here's the
6 problem, the problem is that the attorney-client privilege
7 does not belong to the individual shareholders. It belongs
8 to the corporation and --

9 MR. SHEHEEN: Your Honor, this has been addressed
10 previously.

11 MR. ELLISON: He can't possibly -- there's no way that
12 this is privileged, Judge. If he's a member of a statutory
13 close, he's entitled to it because he's a 50 -- according to
14 them he's a 50 percent member of a statutory close
15 corporation, so Mr. White is talking to him as a member. If
16 he's not a member, then it's not subject to privilege because
17 he's talking to him, who's not a matter. There's no way this
18 is subject to privilege.

19 THE COURT: Let me tell you what I understand: If he is
20 not a member of this entity, you are correct, there is then a
21 participant in a meeting who is not a member; there is no
22 attorney-client privilege. If he is a member, then the
23 attorney-client privilege does apply because it doesn't
24 belong to him individually, it belongs -- it, the privilege,
25 belongs to the corporation. He cannot waive it. The

1 corporation has to waive the privilege. He can't waive it.
2 So we're going to have to pause here and figure that one out
3 before I hear anything because the privilege belongs to the
4 corporation. It does not belong to the individuals. It, the
5 attorney-client privilege, belongs to the corporation.
6 Everybody with me on that? So if he is not a member, then
7 there is no attorney-client privilege because they brought
8 somebody into a meeting that isn't a member and so it doesn't
9 apply. But if in fact he is a member on that occasion, then
10 the attorney-client privilege does attach if -- if -- there's
11 information which is exchanged for the purpose of giving
12 information for the purpose of receiving advice, then the
13 attorney-client privilege does attach and it doesn't belong
14 to either one of these gentlemen. It belongs to the
15 corporate entity.

16 MR. ELLISON: In the conversation -- it's not a
17 conversation. Dr. Dyce asks Mr. White, what does this mean,
18 and Mr. White responds. That's the only thing we're playing.

19 THE COURT: Well, doesn't matter. Hold on one second.
20 What is the position of the corporation?

21 MR. SHEHEEN: Your Honor, the corporation has not waived
22 the privilege. In fact, this issue's been litigated in this
23 case when the plaintiff sought records from Nelson Mullins.
24 We had a hearing, I think it was in front of Judge Lee, and
25 that request was denied. The privilege was protected because

1 Nelson Mullins was the attorney for SCENT and SCENT Land. I
2 also want to clarify that this meeting is a SCENT meeting,
3 not a SCENT Land meeting.

4 THE COURT: I got that. That I got.

5 MR. SHEHEEN: And that's why -- and I have to -- you
6 understand why I'm asserting it, because I have to protect
7 the privilege to make sure that we protect the record.

8 MR. ELLISON: Judge, we're not saying that they've
9 waived it. Whether they have or they haven't, we're not
10 saying that. Mr. Sheheen said, so long as I preserve my
11 right not to waive it, go ahead and play it. That's all we
12 want to do.

13 MR. SHEHEEN: Your Honor, it sounds like what he's
14 trying to play is where Dr. Dyce is in a SCENT meeting, and
15 I'm afraid that this is in this context of this meeting that
16 there is legal advice being given, and if there is then --
17 relating to SCENT, then I have to object to it.

18 THE COURT: I think you do too.

19 MR. SHEHEEN: Yes, I think I do too, so I object.

20 THE COURT: So what is the corporate position of SCENT
21 vis-à-vis Dr. Dyce's -- his being there. In other words, if
22 there's someone present that is not there for the purpose of
23 giving information and receiving attorney-client privileged
24 information or advice, then there's no attorney-client
25 privilege. It happens all the time. In other words, we

1 injected someone who is not a member of this entity and
2 someone who would destroy the attorney-client privilege, or
3 is it the position of SCENT that the presence of Dr. Dyce
4 does not destroy the attorney-client privilege?

5 MR. SHEHEEN: At the time, and I'm having a little
6 difficulty with the context of exactly --

7 THE COURT: Doesn't matter about today, it matters at
8 the time.

9 MR. SHEHEEN: At the time I believe that what Mr.
10 Ellison's describing that Dr. Dyce was still a shareholder of
11 SCENT. I believe this was right before he was separated, I
12 believe that's what he described.

13 THE COURT: That's what I'm after.

14 MR. SHEHEEN: I think he was, this is a meeting where he
15 was not -- he was separated during this meeting.

16 MR. ELLISON: That's impossible, Judge. We don't think
17 he ever has been. And, secondly, even if he was, he had to
18 be given 60 days notice on his employment agreement, and this
19 is the meeting where they give the notice, and what we're
20 doing is playing the tape.

21 THE COURT: Can't do it.

22 MR. ELLISON: Can't do it?

23 THE COURT: Let me tell you why. Let me be clear.
24 Because the attorney-client privilege belongs not to the
25 doctor, either doctor, it belongs to the corporation. It is

1 the corporation's attorney-client privilege. It is not a
2 privilege that belongs to the individual shareholders. It,
3 the privilege, belongs to the corporation, so in order for
4 there to be a waiver, the waiver has to be waived by the
5 corporation, not by the -- they can't waive it. It has to be
6 waived by the corporation. How about that? Are we in a
7 sticky wicket or what?

8 MR. ELLISON: Well, it's even stickier, Your Honor
9 because they've produced lots of communications from Mr.
10 White to Dr. Dyce.

11 THE WITNESS: Including the tape of the meeting. They
12 gave us the tape of the meeting.

13 MR. ELLISON: They produced this -- they didn't produce
14 this tape.

15 THE WITNESS: Yes they did.

16 MR. ELLISON: Not the one we're playing. Doesn't
17 matter. But the point is they produced tons of e-mail from
18 Mr. White to Dr. Dyce.

19 THE COURT: Okay.

20 MR. ELLISON: Is that all subject to privilege too? Are
21 we now in a position where any communication from Ed White is
22 now privileged if it went to Dr. Dyce or if it went to Bruce
23 Armon?

24 THE COURT: It depends. Don't you love that question?
25 It depends. Your position is yes. Your position is yes.

1 Their position is no. How about that? Let me tell you why,
2 because as I understand your argument, your argument is he's
3 still -- he is still a shareholder --

4 MR. ELLISON: That's right.

5 THE COURT: -- in this entity.

6 MR. ELLISON: Right.

7 THE COURT: Therefore, the communications from Ed White,
8 representing the corporation, to a shareholder in the
9 corporation, the attorney-client privilege attaches and can
10 only be waived by the corporation. It is their position that
11 he has been separated from the corporation, and therefore
12 there is no attorney -- that would be a waiver of the
13 attorney-client privilege.

14 MR. ELLISON: If that's right, Your Honor, they've
15 waived it all over the place because they've produced tons of
16 e-mail.

17 THE COURT: Your position is it hasn't been waived.

18 MR. ELLISON: We think it's gone. We don't think you
19 even get there on this tape. We think it's completely gone,
20 but we don't have to get there on this tape. If you follow
21 the logic of what you just said, all of this communication
22 that Mr. White has had with Dr. Dyce over this entire period,
23 we can't talk about it? I mean, that is -- and they've
24 waived it all over the place because they produced e-mail
25 after e-mail after e-mail.

1 THE COURT: To -- who did they produce it to?

2 MR. ELLISON: Us.

3 THE COURT: So it's your position attorney-client
4 privilege hasn't been waived.

5 MR. ELLISON: Yes, our position it has been waived, but
6 for purposes of this tape you don't have to get there.

7 THE COURT: Why.

8 MR. ELLISON: Why?

9 THE COURT: Yes.

10 MR. ELLISON: Because this is not an attorney -- he is a
11 member of the company.

12 THE COURT: Right.

13 MR. ELLISON: Who is being terminated.

14 THE COURT: Right.

15 MR. ELLISON: There is no seeking of legal advice here,
16 none, zero. The meeting started with other staff members in
17 attendance. They excused the other members in attendance in
18 order to fire him without cause.

19 THE COURT: Let me ask you this question --

20 MR. ELLISON: And it is set up as a negotiation. We're
21 firing you but, gee, you can negotiate with us.

22 THE COURT: I understand. But here's the problem,
23 here's the problem, the problem is, and let me go through
24 this -- this is fascinating because we must begin with the
25 tenet, if you will, that the attorney-client privilege

1 belongs to the corporation. It does not belong to the
2 members, to the shareholders, it belongs to the corporation.
3 First of all, you have to embrace that or none of this will
4 make any sense, okay. This is not a partnership. That is a
5 corporation. It's a close corporation, but it is a
6 corporation. Because it is a corporation the attorney-client
7 privilege belongs to the corporation. It doesn't belong to
8 anyone other than the corporation. Hold on to that with me
9 for a moment, all right? Now, as we know, if there are
10 communications that are made between a lawyer and third
11 parties, those are not covered by the attorney-client
12 privilege except maybe under certain circumstances, but
13 typically, normally, when you bring third parties into a
14 conversation, there is no attorney-client privilege, and you
15 can even have communications with the client that are not
16 attorney-client privileged because it is not a communication
17 for which the communication is given to obtain legal advice.
18 That is what creates the attorney-client privilege. The
19 problem here is that you've got a corporation, and as I
20 understand your position Dr. Dyce is still a member of the
21 corporation and so he -- unless there are one of the, not
22 exceptions, unless he takes the position that this was not an
23 attorney-client communication, then it's then -- well, I
24 guess you can take that -- I guess that would be the way you
25 would have to take the position. Yes, he is a member, but we

1 do not believe that he is seeking or being given attorney --
2 or advice. If information is given to the lawyer, it isn't
3 meant for the purpose of receiving advice, and he hasn't
4 asked for that, and that is not what he has received. See
5 what I'm saying? Because, again, he can't waive the
6 attorney-client privilege for the corporation, and it's your
7 position that at that point he is a shareholder, so it's got
8 to be your position that the information that he has given is
9 not given for the purpose of receiving advice and he does not
10 receive advice.

11 MR. ELLISON: What's going to complicate this particular
12 one even more, and I didn't follow all that, Judge, I
13 apologize, is the only thing that Dr. Dyce says on the tape
14 is, what does this mean.

15 THE WITNESS: I'm sorry. Can I run to the restroom?

16 THE COURT: Absolutely. We will take a short break for
17 everybody to take a comfort break.

18 (Recess held.)

19 MR. SHEHEEN: Your Honor, if I could address the issue
20 that we left.

21 THE COURT: Yes.

22 MR. SHEHEEN: The parties are willing to stipulate, but
23 you have to accept the stipulation for us to be comfortable
24 moving forward with it, that an authorized agent of SCENT was
25 asked a question and gave a nonlegal response, and we're

1 willing to stipulate that and we're willing for this to be
2 played but with an understanding and a stipulation that the
3 playing of this or this stipulation does not waive any
4 attorney-client privilege as we've raised it.

5 THE COURT: The problem is, here's the problem -- and
6 I'm not going to be your problem -- your problem is that if
7 it is a communication that matters to you that it remain
8 attorney-client privileged, then let's think a minute, what
9 happens to it? Well, do we seal the record to preserve the
10 attorney-client -- that's typically what I would do, I would
11 seal the record in order to preserve the attorney-client
12 privilege because otherwise there's no way to do that.
13 Otherwise Ms. Mott will have it. It will be part of this
14 record. In the event that there is an appeal, it will go
15 to -- potentially, potentially, the transcript will be
16 reproduced, it will be in the transcript, unless the
17 transcript is sealed, and if it's not sealed and it's
18 produced in the transcript, while you can say I preserve the
19 attorney-client privilege, it really is a mockery because it
20 can't be because it's in a transcript which is then out
21 there, so I don't know how it wouldn't be considered to be
22 waived. So, you know, while, it's fine with me, I think that
23 it is important that, counsel, that you understand what
24 you're asking because given our process and given the
25 procedure, unless of course I seal this part of the record,

1 which absolutely Ms. Mott is able to do and would do, there
2 is no way to preserve the attorney-client privilege and then
3 what do you do when you go up on appeal, assuming that should
4 happen, but, you know, I must always assume that there is a
5 record and this record is one that must be a record which is
6 ready to go up on appeal, I mean, that's part of my job, so
7 what happens with that?

8 MR. SHEHEEN: Your Honor, if you think sealing the
9 record solves the problem, then I don't have a problem with
10 that.

11 MR. ELLISON: Sealing the record with regard to just the
12 portion where we play the tape?

13 THE COURT: Yes, sir.

14 MR. ELLISON: Fine.

15 THE COURT: All right.

16 MR. SHEHEEN: We also are going to have patient records,
17 financial records, we're going to ask be sealed probably by
18 agreement as we move forward.

19 THE COURT: I understand. Now, I want you all to take a
20 breath and think in the event of an appeal what -- I want you
21 to do this now -- in the event of an appeal tell me what is
22 your agreement because otherwise the winner may go, nanny
23 nanny boo boo, you can't have it unsealed, and then you've
24 got a problem. So the question I want you to contemplate at
25 this point, only because I think it's fair that one of you

1 doesn't call time on the other one. Why? Because I've seen
2 this stuff happen. So tell me what would be the agreement in
3 the event of an appeal? Do you concur that by court order
4 for the purposes of an appeal that it, if needed, that it can
5 be become part of the transcript by consent order?

6 MR. SHEHEEN: We would ask the appellate court to keep
7 it under seal on the appellate level.

8 THE COURT: Guess what I don't have any control of even
9 a little itty bit.

10 MR. SHEHEEN: Both of us would agree that we would
11 request that.

12 THE COURT: Yes.

13 MR. ELLISON: Let me hear that again just to be sure. I
14 think I agree with you. I just want to hear it.

15 THE COURT: Yes, sure.

16 MR. SHEHEEN: It could be a part of the record on appeal
17 if necessary, but we would both agree to request the
18 appellate court seal it.

19 THE COURT: But that it could be unsealed in the event
20 that that portion of the transcript is needed for the
21 purposes of the appeal.

22 MR. ELLISON: Yes, yes.

23 MR. SHEHEEN: Yes, and then we would ask the appellate
24 court to seal it so it continues.

25 THE COURT: Okay. And then they'll do whatever they do.

1 MR. ELLISON: Rather than it be, Judge, it be completely
2 out of context, completely, after the last 20 minutes, can I
3 go back and set the stage again, or do you just want us to
4 play the tape?

5 THE COURT: We are talking March 2010.

6 MR. ELLISON: Right.

7 THE COURT: We are talking about a meeting that was
8 held, and at this meeting is when the letter that I have seen
9 was presented.

10 MR. SHEHEEN: I'm sorry, Judge, if I might make a
11 suggestion, we would request that the whole recording be
12 played, not just a little bit.

13 MR. ELLISON: It's a terrible tape. You really can't
14 hear anything.

15 MR. SHEHEEN: Just to put it in context.

16 THE COURT: I understand. Now, does the sealing begin
17 at this moment?

18 MR. SHEHEEN: Sure.

19 MR. ELLISON: Do you want us to play the whole thing?
20 We just want to play two and a half minutes.

21 THE COURT: If he wants you to play it all, play it all.

22 MR. ELLISON: It's awful but okay.

23 (Audio recording played.)

24 THE COURT: All right. Okay.

25 Q. So, Dr. Dyce, at the meeting on March 10, 2010 you were

1 told that you were terminated with or without cause?

2 A. Without cause.

3 Q. And what does -- in your mind what does the 60-day
4 period refer to?

5 A. The without cause contract, as I recall, in the --
6 sorry, the without cause clause in the contract requires a
7 60-day notice.

8 Q. And you're aware that today Dr. Puchalski is claiming
9 that he terminated you with cause?

10 A. I am.

11 Q. But he never gave you the 30-day right to cure required
12 by the contract?

13 A. No, he did not.

14 Q. And going back, again, to the summer of 2009, why did
15 you start making these tapes?

16 A. Because he threatened that, as my name -- if I didn't
17 agree with him on these contracts, as my name wasn't on say
18 the -- on the titles for the buildings and SCENT Land, he
19 would just say I never bought in and there would be no proof
20 of it.

21 Q. And at that point was an operating agreement signed
22 shortly thereafter for SCENT Land?

23 A. It was.

24 MR. ELLISON: We're looking at, I believe it's
25 Plaintiff's Exhibit 16, Your Honor.

1 THE COURT: Okay.

2 Q. Can you identify that document for the Court, Dr. Dyce?

3 A. This appears to be the SCENT, the final -- the original
4 operating agreement.

5 Q. It was signed September 30th, 2009?

6 A. Yes, sir.

7 Q. And what was your understanding with regard to what was
8 required in order to be a shareholder or, excuse me, a member
9 in SCENT Land?

10 A. To be a member you had to be married to a shareholder.

11 Q. And did the document contain a provision establishing
12 dates that membership was deemed to be effective?

13 A. Yes. This was one of the original points of contention.

14 Q. Let's look at Section 5.1F.

15 MR. SHEHEEN: Your Honor, just for clarification, the
16 hand markings and things on there are from --

17 MR. ELLISON: I don't know where they came from.

18 MR. SHEHEEN: They're not originally --

19 MR. ELLISON: No, they are not.

20 Q. Section 5.1F, can you publish that paragraph for the
21 record, Dr. Dyce?

22 A. For purposes of establishing dates of joining the
23 company for the initial members or manager, Amy and Robert
24 Puchalski's relative date is July 2004 and Jamie Curley and
25 Orville Dyce's relative date is July 2007.

1 Q. And does the July 2007 date correspond to the date of
2 the first set of employer agreement, shareholder agreement
3 and stock purchase agreement?

4 A. I believe it does.

5 Q. And does the July 2004 date essentially correspond to
6 the date that SCENT itself was incorporated as Kershaw ENT?

7 A. I believe so.

8 MR. ELLISON: Let's go forward again. Judge, from here
9 on out I'm going to try to keep this as chronological as I
10 can.

11 MR. SHEHEEN: Your Honor, just going to object for the
12 record because SCENT was founded in 2002, not 2004.

13 MR. ELLISON: Kershaw ENT was incorporated in 2004 and
14 the record reflects that because copies of the articles were
15 filed.

16 MR. SHEHEEN: They speak for themselves, Judge.

17 THE COURT: Okay. Go ahead.

18 Q. So in order to go forward let's go back just a little
19 bit. The beginning of summer of 2008, were you -- was that
20 the end of the two-year period for Dr. Gunnlaugsson?

21 A. Yes, I believe it was.

22 Q. And did you start receiving his -- half of his
23 biweeklies?

24 A. Yes, I did.

25 Q. So now let's go forward to June 2009, and you talked

1 about the problems with your tax return.

2 A. Yes.

3 Q. Were there other issues that started to arise in June
4 2009?

5 A. Yes. Bob started talking about needing some special
6 provisions for himself and a new shareholder agreement.

7 Q. Was Dr. Gunnlaugsson saying anything about -- had Dr.
8 Gunnlaugsson completed his buy-in as far as you knew?

9 A. As far as I knew.

10 Q. And was Dr. Gunnlaugsson making any demands on the
11 practice?

12 A. No, not really. He was just excited that he was a
13 shareholder.

14 Q. Did Dr. Gunnlaugsson, as far as you remember, did Dr.
15 Gunnlaugsson's pay change in June or so of 2009?

16 A. I don't know if his pay changed. I know I stopped
17 receiving his -- I believe -- I'm not sure, I'm not sure.

18 Q. Did you stop receiving --

19 A. I don't remember when I stopped receiving his buy-in.

20 MR. ELLISON: Pull up Exhibit 292, please. This is
21 Exhibit 292, Your Honor.

22 THE COURT: Okay.

23 Q. Was a new shareholders agreement, a draft new
24 shareholders agreement supplied to you and to Dr.
25 Gunnlaugsson in June 2009?

1 A. I believe Bob presented us with something which I
2 believe was a shareholder agreement, but it's a while back.
3 I can't remember exactly what it was.

4 Q. Let me get a hard copy.

5 A. Okay.

6 MR. ELLISON: It's not in the book, Judge. Your Honor,
7 I've handed Dr. Dyce a copy of Exhibit 292.

8 THE COURT: I have 192, but I'm having trouble locating
9 292.

10 MR. ELLISON: It's not in there.

11 THE COURT: Okay.

12 Q. Are you ready?

13 A. Sure.

14 Q. Dr. Dyce, can you identify what's been tendered as
15 Plaintiff's Exhibit 292?

16 A. It states it is an amended and restated shareholders
17 agreement by and among South Carolina ENT Allergy and Sleep
18 Medicine, P.A. and its shareholders.

19 Q. To the best of your knowledge is this a copy of the
20 document that you and Dr. Gunnlaugsson were presented in the
21 summer of 2009?

22 A. I can't tell for sure. It wasn't distributed to us. I
23 don't know.

24 Q. You don't know?

25 A. I don't know.

1 Q. Look at the footer on the bottom of the left-hand page.

2 A. Yes.

3 Q. Is this a clean copy or a black line copy, by the way?

4 A. It looks like it's a clean copy.

5 Q. And the footer on the bottom of the page, what does that
6 say?

7 A. It says 105989473.12.

8 Q. .12?

9 A. Yes.

10 Q. And the shareholder agreement we looked at from June of
11 2008 was an earlier version of this, as best you know?

12 A. As best I know, yes, sir.

13 Q. Let's go forward a little bit. Tell me what else was
14 going on in the summer of 2009.

15 A. In the summer of 2009 --

16 Q. With respect to the practice.

17 A. -- I believe we also were admitting another -- Macy
18 Vidrine, another physician, who was supposed to become a
19 shareholder at some point.

20 Q. Was Chad asking for his shares?

21 A. Yes, he was, towards the late summer of 2009.

22 Q. Was there a problem that you and Dr. Puchalski had with
23 respect to a \$50,000 check in that summer?

24 A. The first meeting after Dr. Puchalski told me he wasn't
25 going to tell anyone that I bought into the land, the first

1 meeting after that, he handed me a check with \$50,000 and
2 said it was a K-1 distribution but accept it if I agreed to
3 be separated from the practice or if I turned it over and
4 agree to sign the new shareholder agreement, then I could
5 continue to be a part of the practice.

6 Q. So what happened to the check?

7 A. He said it was to purchase more shares for me so it went
8 back to Dr. Puchalski.

9 Q. Did you endorse the check?

10 A. I did.

11 Q. What did you do, what happened with the check then?

12 A. It ended up showing up on my taxes as income to me and I
13 was asked to pay taxes on it.

14 Q. Did you ever get the money?

15 A. No, I did not.

16 Q. Do you have any idea who did get the money?

17 A. You'd have to ask Dr. Puchalski and Austin Sheheen.

18 Q. But he kept the check?

19 A. He kept the check.

20 Q. Let's go to November 2009. Were there any discussions
21 going on regarding purchasing any stock in November 2009?

22 A. There was a hospital that I worked for, Carolina Pines,
23 we all sort of covered call, and they were offering
24 physicians or any licensed practitioners that they could
25 purchase shares in the hospital itself, it was an HMA

1 hospital, and we discussed purchasing shares both as
2 individuals and as -- both as individuals and as a practice.

3 Q. And was there any discussion of the bank of Puchalski
4 during this time period?

5 A. We discussed obtaining a loan, and in the past when
6 we --

7 Q. I'm sorry. When you say we, who was going to obtain the
8 loan?

9 A. We, the shareholders, myself, Vidrine, Puchalski -- the
10 shareholders, myself, Gunnlaugsson, Puchalski, I don't know
11 if Vidrine was or not yet.

12 Q. Who was going to be the purchaser? This is important.
13 Who was going to be the purchaser?

14 A. Dr. Puchalski was going to handle it.

15 Q. But do you know who the purchaser was going to be?

16 A. Oh, SCENT.

17 Q. The practice?

18 A. South Carolina ENT, the practice, yes.

19 Q. And what was the purchase price going to be?

20 A. We were willing to invest -- obtain a loan for \$500,000
21 to invest in the hospital as a practice.

22 Q. And where was the loan going to come from?

23 A. We all assumed it was going to come from a bank which we
24 had always used.

25 Q. I'm sorry?

1 A. We all assumed it was going to come from a bank.

2 Q. Why did you assume it was going to come from a bank?

3 A. Because we had never not had a loan from a bank.

4 Q. If the loan was from a bank, what did you think the
5 interest rate was going to be in the range of?

6 A. At the time interest rates were really row, between 3
7 and 6 percent.

8 Q. Did you authorize SCENT to borrow money to purchase
9 these shares?

10 A. I authorized SCENT to borrow money to purchase these
11 shares.

12 Q. From where?

13 A. From a bank.

14 Q. Did you authorize that the money would be obtained from
15 anybody else other than a bank?

16 A. No.

17 MR. ELLISON: Judge, I promise I was going to try to
18 stay chronological, but I'm going to break that promise for a
19 moment.

20 Q. Let's go to the end of March 2010, Exhibit 21. This is
21 a document produced by SCENT, and did you see this document
22 before this litigation started?

23 A. No, I did not.

24 Q. Can you publish to the Court the first resolution, the
25 next to last paragraph on this page?

1 A. Can you blow it up a little?

2 Q. Wait a second so you can see it. Can you read that into
3 the record, please?

4 A. Further resolved that attached here to as Exhibit B is a
5 true, accurate and complete copy of the security agreement
6 between SCENT and Robert Puchalski executed effective
7 November 1st, 2009 in the amount of 496,800 which replaces
8 any other security agreements between the parties issued on
9 or about November 1st, 2009 in the amount of \$500,000.

10 Q. Do you recall what the interest rate was on the earlier
11 note that had been executed by SCENT in favor of Robert
12 Puchalski?

13 A. I believe --

14 Q. Excuse me, in favor of Amy Puchalski.

15 A. I believe it was a 10-percent interest rate.

16 Q. What kind of rate was obtainable from the banks at that
17 point as far as you knew?

18 MR. SHEHEEN: I object, calls for speculation.

19 THE WITNESS: Well, I looked into it.

20 THE COURT: Hold on a second.

21 MR. SHEHEEN: Then he ought to lay the foundation and he
22 ought to ask the question.

23 MR. ELLISON: Just trying to save a little time.

24 THE COURT: I understand.

25 Q. Dr. Dyce, did you look into what kind of interest rates

1 were available for these type of loans in November 2009?

2 A. Yes, I did.

3 Q. What rates would have been obtainable?

4 MR. SHEHEEN: What steps did he take?

5 Q. How did you look into it?

6 A. I had a friend who was a banker and dealt with loans and
7 I just asked him.

8 Q. Was it these types of loans that you inquired about?

9 A. I just asked him a general, I said from a practice
10 standpoint, I didn't divulge any of the information, I said
11 but what kind of loans do they typically range from and he
12 said --

13 MR. SHEHEEN: Your Honor, I'll object. It's hearsay
14 obviously.

15 THE COURT: Sustained.

16 MR. ELLISON: That's fine, Your Honor.

17 Q. 10 percent loan. Did you authorize this loan?

18 A. I did not.

19 Q. And what happened to the monthly sweeps at the end of
20 2009?

21 A. Unilaterally Bob decided to stop distributing these
22 distributions to the shareholders.

23 Q. And when did this occur?

24 A. I believe around October of 2009.

25 Q. And were there issues starting to be raised with regard

1 to Dr. Puchalski's personal expenses in this time period?

2 A. There were. There were a number of issues.

3 Q. Can you describe to the Court some of the issues that
4 were being raised?

5 A. Well, in our discussion Dr. Puchalski and I -- he told
6 me that he wanted to do a number of things including moving
7 to Charlotte. He wanted the practice to pay for such things
8 as his country club membership here, a hotel if he needed to
9 come down and stay and take call, pay for automobile expense,
10 pay for -- have an extra stipend or bonus, I don't remember
11 what he called it, and he incorporated a number of those
12 things into a contract, a new shareholder --

13 Q. I'm not there yet.

14 A. Okay.

15 Q. I'm not quite there yet.

16 A. Okay.

17 Q. But there were some problems that the practice had had
18 with regard to some personal expenses that he tried to
19 expense to the corporation?

20 A. Yes, there were.

21 Q. And did you start asking questions about these personal
22 expenses?

23 A. I did.

24 Q. What kind of answers did you get?

25 A. Well, in discussions with Mr. Austin Sheheen he let

1 us -- us being myself and I think Jamie was with me at at
2 least one of these, that there were a number of personal
3 expenses to Bob that seemed -- that he told Bob were not
4 practice expenses and needed to be counted as distributions
5 to him, but Bob or whoever his agent was at the time would
6 say, put it under the practice, and some of those expenses
7 included things like -- we had a holiday -- it's all sort of
8 running together, but I remember like trips to the Bahamas,
9 and it's all jumbled, but trips to the Bahamas, special gifts
10 for his kids, trips to New York, clothing for his wife, or
11 clothing for a woman, then there was the -- when we'd have
12 office events, you know, we'd buy a number of things for the
13 staff, including alcohol, but they were these really
14 expensive bottles of wine which always seemed to end up with
15 Bob at the end of the day that no one would drink. We had an
16 event where there was a band at a lake. He always got paid
17 for using his -- he has a lake property and a house at
18 Kiawah, and somehow the band apparently, even though we were
19 supposed to be using it for the lake, ended up getting paid
20 to go out to his Kiawah house to play there. There were a
21 number of little perks that seemed to be swinging his way.
22 Even though I was supposed to be an equal shareholder, I
23 didn't get these.

24 Q. At that point in time did you have access to the books
25 and records of SCENT?

1 A. I thought I did. I thought I did.

2 Q. When you say you thought you did, what do you mean?

3 A. Well, in early 2010 I really started asking to look at
4 the books and ledgers, and that's when things sort of broke
5 down.

6 Q. Now, let's go back to December 2009.

7 A. Yes.

8 Q. You were talking a few minutes ago that eventually some
9 of these things get incorporated into new draft documents.

10 A. Yes.

11 Q. Did you hire a lawyer in December 2009?

12 A. Absolutely.

13 Q. Why?

14 A. Because whenever I spoke to Ed, he seemed -- Ed White,
15 the attorney for the practice, he seemed intent on telling me
16 how forward thinking Dr. Puchalski was, how he deserved all
17 these perks, how you have to protect the rights of Dr.
18 Puchalski, and I tried to remind Ed that I was a 50 percent
19 shareholder in the practice, essentially an equal owner, and
20 it didn't matter. Ed seemed to be the perfect advocate for
21 Dr. Puchalski, plus he had -- he would meet with Ed
22 regularly. And then later on, in trying to get information
23 out of Austin, who was actually my personal accountant in
24 addition to the practice accountant, a number of -- the
25 questions just would go unanswered or answered inadequately,

1 such as how much did I eventually pay to buy in. They would
2 just refer the questions back and forth. No one would answer
3 them. When I asked Theresa for documents, no one was giving
4 them to me. So I decided I needed help, I needed some
5 external help of someone that could not advocate for me but
6 tell me what my legal rights were to these documents, since I
7 was being denied a number of them.

8 Q. So in January 2010 did your lawyer, Mr. Armon, receive
9 copies of draft documents?

10 A. Yes, he did.

11 Q. Let's look at Exhibit 12. Can you identify that for the
12 Court, please?

13 A. It looks like an e-mail from Ed White to Bruce Armon on
14 January 13th, 2010, where Ed intimates there's an attached
15 document, red-line version of the employment and shareholders
16 agreement.

17 Q. Okay. So is that approximately the time you received
18 the draft documents that you referred to a little while ago?

19 A. I believe so.

20 Q. What was your reaction when you received them?

21 A. Well, the first time I saw these documents I was blown
22 away and shocked and just -- this happened again when I saw
23 it, I just assumed he was -- I was shocked, I was betrayed,
24 shocked, it was just unbelievable.

25 Q. Why did you have that reaction in broad terms?

1 A. Because it's not what I signed on to. I mean, when we
2 had the discussions in 2005, we talked about an equal
3 partnership, a partnership where I wasn't an employee, like I
4 wasn't -- I didn't have to entrust my security to anyone, and
5 over the series of the different agreements, slowly but
6 surely he was trying to erode my position as a shareholder,
7 as an equal shareholder in the practice, and it was -- the
8 summation of which was these series of documents which were
9 unbelievable.

10 Q. Let's put up the black line, please, of the shareholders
11 agreement, first page first. Dr. Dyce, can you identify this
12 document?

13 A. It's entitled shareholder agreement by and among South
14 Carolina ENT Allergy and Sleep Medicine, P.A. and its
15 shareholders dated -- and it's not dated but theres a 2010 on
16 it.

17 Q. Is this a copy of the black-line version of the
18 shareholders agreement that was attached to the e-mail from
19 Mr. White to Mr. Armon?

20 A. It could be. I believe it is. I'm only looking at the
21 first page.

22 Q. Let's look at the footer on the bottom of the first
23 page. It goes, same number that we've seen before, from
24 version 10 to version 35. Do you see that?

25 A. Yes, sir.

1 Q. Have you asked to see versions 11 through 34?

2 A. Yes, I have.

3 Q. Have you ever been provided with them?

4 A. To date, no.

5 MR. ELLISON: Let's go to Section 3.4.3 of the
6 black-line, and this is in the book, Your Honor. Go through
7 pages 8 and 9.

8 Q. Now, previously who was supposed to manage under the
9 version 10, the existing shareholders agreement, who was
10 supposed to manage the company?

11 A. The day-to-day running of the company was supposed to be
12 performed by Dr. Puchalski, but the shareholders together
13 were supposed to manage the company.

14 Q. You recall, was there a board of directors?

15 A. There was no board of directors.

16 Q. Looking at Section 3.4.3, was a board of directors
17 proposed here?

18 A. There was a board of directors proposed.

19 Q. And did the chairmen have veto powers over lots of
20 things under this draft?

21 A. Just about everything I can imagine.

22 Q. We won't go through every one of them, but let's talk
23 about Section 3.4.5, and while Ms. Baker's calling it up on
24 the screen, under the prior documents who made the
25 determinations as to what the shareholders were paid on

1 salary?

2 A. The -- we agreed on that as a group, the shareholders
3 did, yes.

4 Q. Under Section 3.4.5 as proposed, who was going to have,
5 in the black lining, the ability --

6 Your Honor, this is on about the eighth line, the line
7 that begins, work description.

8 -- who was going to have the sole authority to set all
9 salaries?

10 A. The chairman and CEO, one and the same.

11 Q. That was supposed to be who?

12 A. Dr. Puchalski.

13 Q. Under the old agreement how was -- how were vacations
14 handled?

15 A. I believe that we got together as shareholders and
16 determined when vacations were, I believe.

17 Q. I'm sorry, the doctors collectively?

18 A. I believe we got together as shareholders and as
19 physicians to determine how vacations were handled.

20 Q. Under the new proposed document who was going to make
21 that determination?

22 A. Dr. Puchalski.

23 Q. Let's look at Section 3.2. Is this the provision that
24 changed the management from the shareholders to a board of
25 directors with the chairman having veto power?

1 A. I believe it was among the provisions, yes.

2 Q. Was there a provision in here that allowed Dr. Puchalski
3 to move out of SCENT's practice area?

4 A. Yes, there was.

5 Q. And I think you said earlier he had expressed the desire
6 earlier to move to Charlotte?

7 A. To Charlotte, yes, sir.

8 Q. As far as you know, where is Dr. Puchalski living now?

9 A. I don't know for sure, but I've heard he's moved to
10 Charlotte.

11 Q. And let's look at the special founding shareholder's
12 protections. Was there a provision in the proposed Exhibit C
13 under Romanette 2, I'm sorry, ii -- I'm not good at that --
14 was there a provision for a severance payment?

15 A. Yes.

16 Q. And what was your understanding as to what that
17 provision would have provided for?

18 A. Well, based on what I believe to be the numbers that
19 year, the provision would have provided for, if Dr. Puchalski
20 received a vote of, I believe it was no confidence, from the
21 other shareholders, he was still entitled to three times
22 whatever his salary was, which would amount to in the range
23 of \$6 million.

24 Q. This says -- does that say salary?

25 A. Oh, total compensation.

1 Q. So it would have included salary, bonuses, call pay,
2 biweeklies and distributions?

3 A. Yes, sir.

4 Q. And in very rough -- you haven't looked at the exact
5 numbers?

6 A. No.

7 Q. Okay. In rough numbers how much money did Dr. Puchalski
8 take home as far as a total compensation package in 2009 as
9 far as you understand?

10 A. I understand it was around \$2 million.

11 Q. So doing basic math, which nobody other than the doctors
12 are any good at in this courtroom, how much would that
13 severance payment have been?

14 A. Upwards of \$6 million.

15 Q. I'm sorry?

16 A. Upwards of \$6 million.

17 Q. Did Dr. Puchalski -- and this is in the black-line. Was
18 this new?

19 A. Very new.

20 Q. And Dr. Puchalski -- this was in addition and over the
21 shareholder buyout that if he left he would be entitled to,
22 is that right?

23 A. That's what I assumed.

24 Q. I'm sorry?

25 A. That's what I assumed.

1 Q. Okay. So would he have been subject to the noncompete?

2 A. He would not have been.

3 Q. He wasn't subject to the noncompete in the 2008
4 agreement as well; is that correct?

5 A. Yes. No, he was not.

6 Q. He was not, but was he subject to a noncompete in 2007,
7 as far as you knew, or you don't know?

8 A. I don't remember.

9 Q. Okay. And talking about some of the other changes, who
10 was going -- now, was sleep becoming an issue with SCENT?

11 A. As a group we had decided to start a separate company
12 for sleep services.

13 Q. Do you know why you were starting a separate company for
14 sleep services?

15 A. What I was told was it would allow us to do two things:
16 Own and manage independent sleep labs and also provide an
17 independent company that could manage other people's sleep
18 labs for them if they had them up and running.

19 Q. Let's go to the next page, please.

20 Was there a provision, Dr. Dyce, that Dr. Puchalski's
21 buyout for the shares, that there would under no
22 circumstances be a deduction?

23 A. Yes, there was.

24 Q. And going to the next paragraph, please, was there also
25 a provision for an additional bonus to be paid of at least

1 \$125,000 a year?

2 A. Yes, there was.

3 Q. And this was to go to Dr. Puchalski?

4 A. Yes.

5 Q. Was there a corresponding provision in that part of the
6 document that talked about special provisions for you?

7 A. There was a part that said special provisions for me.

8 Q. But did it include a \$125,000 bonus?

9 A. It did not, it just reiterated the --

10 Q. Let's go to the next subparagraph.

11 Okay. Talks about a car stipend of \$1,000. Was that
12 the kind of thing that had raised questions in December 2009?

13 A. Yes, it was.

14 Q. But now it's being incorporated into this --

15 MR. SHEHEEN: Your Honor, I'm going to object to
16 leading. I'm giving great leeway, but now Mr. Ellison's
17 testifying and he's saying yes and no.

18 THE COURT: Sustained.

19 Q. Is there also a provision about him paying membership
20 dues to Springdale?

21 A. Yes, there is.

22 Q. Was there also a provision for paying Dr. Puchalski's
23 membership dues to the Camden Country Club?

24 A. Yes, there was.

25 Q. What was your reaction to all this?

1 A. I thought it was a ridiculous contract.

2 Q. Were you offered the opportunity to negotiate this
3 document?

4 A. Negotiate as far as signing it as is, per Dr. Puchalski,
5 in that fashion negotiate but not negotiate in the form of
6 changing anything in it.

7 Q. Did you or Mr. Armon suggest that any changes be made to
8 the document?

9 A. We actually suggested sitting down and coming up with a
10 workable agreement.

11 Q. And what was the reaction to that?

12 A. We were rebuffed.

13 Q. I'm sorry?

14 A. We were rebuffed.

15 Q. So this was basically a take-it-or-leave-it proposition?

16 MR. SHEHEEN: Object to the leading question.

17 THE COURT: Sustained.

18 Q. Were you given the opportunity to negotiate this
19 practically at all?

20 A. No.

21 Q. Did you continue to ask for access to records at this
22 point in time?

23 A. I did.

24 Q. Were you given them?

25 A. No, not the ones I needed.

1 Q. Now, I want to focus on the time period again of
2 January-February of 2010. Did you have access to the
3 bookkeeping records of SCENT in this time period?

4 A. I'm sorry, what dates?

5 Q. January-February 2010.

6 A. No, I did not.

7 Q. All right. Did you have access in the period of
8 January-February 2010 to the human resources of SCENT?

9 A. What does that mean?

10 Q. Personnel.

11 A. I could speak to them, yes.

12 Q. You could see them?

13 A. I could see them, speak to them, talk to them.

14 Q. Did you have access to the personnel files, not to the
15 people.

16 A. Oh, not to the personnel files, no.

17 Q. Now, SCENT, like most medical practices, did SCENT have
18 a billing system?

19 A. SCENT had a billing department and a billing system I
20 think incorporated into the EMR system, I think.

21 Q. The EMR system, is that a practice management system?

22 A. Two different things. I believe they were combined one
23 and the same, but EMR first is just the records. Practice
24 management is sort of the billing, scheduling and everything
25 else surrounding.

1 Q. Did you have access to those records?

2 A. Well, I could go in the computer and put things in.

3 Q. But could you look at records?

4 A. I could pull a patient's name up.

5 Q. Could you pull anything else up?

6 A. Potentially, but I don't know -- I don't know. I don't
7 know that I -- I don't think -- I couldn't pull up the
8 billing information.

9 Q. And we talked a little while ago about the productivity
10 records that you were presented copies of at the practice
11 meetings.

12 A. Yes.

13 Q. Did you have access to those?

14 A. Just at the meetings they were shown to us.

15 Q. Were you allowed to retain copies?

16 A. No, we had to give them back.

17 Q. Now, did Dr. Puchalski or Dr. Dyce ever ask you to make
18 an inquiry of Dr. Gunnlaugsson during this period of time?

19 A. Did Dr. Puchalski or Dr. Dyce ask me --

20 Q. I'm sorry. It's getting a little late. We're going to
21 need a lunch break in a few minutes. Did Dr. Puchalski or Ed
22 White ever ask you to ask Dr. Gunnlaugsson anything during
23 this time period?

24 A. Yes, they did.

25 Q. What did they ask you to ask Dr. Gunnlaugsson?

1 A. Well, they -- and I'm not sure how it came up, but they
2 kept trying to convince me or say that he was leaving and --

3 Q. He being Dr. Gunnlaugsson?

4 A. Dr. Gunnlaugsson -- and asked me to go and talk to him
5 about whether his intentions were to leave or not, and I'm
6 not sure where that came up, but I remember Dr. Puchalski in
7 December saying something to Dr. Gunnlaugsson to the
8 effect -- in a meeting to the effect of, oh, you'll be taken
9 care of if you ever leave, and it's kind of an unusual
10 comment.

11 Q. Now, there's been an accusation made in the
12 counterclaims -- did you ever give anybody copies of any
13 insurance contracts?

14 A. No, I haven't.

15 Q. Did you ever give copies of any forms to anybody?

16 A. No, I haven't.

17 Q. We also talked about a malpractice insurance coverage
18 issue.

19 A. Yes.

20 Q. Under the terms of -- tell me about these -- were there
21 discussions about the malpractice coverage for SCENT in the
22 time period of January-February 2010?

23 A. Yes, there were discussions about switching malpractice
24 carriers, and the pitch to the physicians was that it was
25 going to be cheaper, but in discussions with Dr. Puchalski,

1 and this is -- what he stated was that he wanted to choose a
2 carrier that was -- would not force you to settle, with a
3 team that would not force you to settle a suit and
4 essentially -- unless a doctor agreed to settle it because he
5 had been involved in a lawsuit where -- and he'd never told
6 me the details of how it happened, but it appears that he had
7 to settle.

8 MR. SHEHEEN: Your Honor, I'm going to object to hearsay
9 and irrelevant.

10 MR. ELLISON: It's very relevant.

11 THE COURT: There is an objection and the objection is?

12 MR. SHEHEEN: Twofold, one is hearsay, one is hearsay
13 because he said he didn't tell me this or something and the
14 other one, it's just not relevant. He's now talking about a
15 claim, a legal malpractice claim that occurred sometime in
16 the past not related to this case.

17 THE COURT: All right. And, first of all, with whom was
18 the conversation?

19 Q. Who did you talk to about this?

20 A. Dr. Puchalski.

21 THE COURT: Okay.

22 MR. SHEHEEN: I'll withdraw any hearsay objection as it
23 would obviously be an admission, but I still have a relevance
24 objection.

25 THE COURT: And for what time period?

1 MR. ELLISON: We're talking the time period of
2 January-February 2010. We're talking about two things.
3 We're talking about the discussions with regard to the
4 malpractice coverage where they accuse Dr. Dyce of getting in
5 the way of the malpractice coverage, and he's telling you
6 what was going on with regard to the malpractice coverage, so
7 it's relevant that way.

8 THE COURT: I understand.

9 MR. ELLISON: And it's also relevant with respect to the
10 allegations of increased mysterious telephone calls and text
11 messages that went on between Dr. Dyce and Dr. Gunnlaugsson.

12 THE COURT: Okay. So overruled.

13 MR. ELLISON: Thank you.

14 Q. So --

15 A. What was your question? I'm sorry, I forgot.

16 Q. I asked you to describe the discussions with regard to
17 the malpractice insurance coverage, and you were talking
18 about a claim that had been made against Dr. Puchalski and
19 his wanting to have coverage that granted him the authority
20 to say yea or nay to a settlement. That's what you were
21 talking about.

22 A. Exactly. So he wanted that and he stated that
23 explicitly.

24 Q. Did you have a problem with that?

25 A. I didn't in theory have a problem with it, but you've

1 got to understand the time. It was a time when Dr. Puchalski
2 and Theresa Williams were giving me a barrage of documents,
3 and each document seemed to be a way for Dr. Puchalski to
4 potentially finagle or get more money out of the practice,
5 and they kept throwing them at me to sign. One of them was
6 the employment agreement, one of them was the shareholder
7 agreement, but there was also a SCENT foundation agreement
8 that he wanted to start which we're going to have to
9 contribute to. He also wanted to start to set up a penalty
10 where if a physician wore scrubs -- remind you he wore more
11 scrubs than anyone else, but we would have to pay into this
12 fund, and in e-mails it's clear no one would be policing it
13 except maybe Dr. Puchalski. So there are all these little
14 things where you're getting nickled and dimed, and the
15 insurance contract was another one. So when I explored it
16 for myself and I called the JUA/PCF to request a quote, the
17 quote was nothing like what Dr. Puchalski sent me in an
18 e-mail, it was actually much lower, and the person who I was
19 speaking to on the phone --

20 MR. SHEHEEN: Your Honor, I would object as hearsay.
21 I'm going to object to whatever someone at the JUA or whoever
22 said.

23 MR. ELLISON: It's not being offered for the truth of
24 the matter. It's offered for why he wasn't going along with
25 this proposed change in malpractice coverage. He can testify

1 to that.

2 THE COURT: He can testify to why he chose not to go
3 along with it, but the question is whether or not he can
4 testify regarding the conversation with somebody from JUA.

5 MR. ELLISON: Not being offered for the truth of the
6 matter therein.

7 THE COURT: Maybe, it may be, I'm not going to allow the
8 hearsay of the conversation, but he certainly can testify why
9 he chose not to -- he can certainly testify why he chose not
10 to as a result of the conversation or whatever.

11 THE WITNESS: Basically, the information from JUA
12 contradicted the information I was given coming from
13 administration.

14 Q. Was that one of the things that you were talking about
15 with Dr. Gunnlaugsson during this time period?

16 A. That was among them, yes.

17 Q. Had there been a problem with a patient in December
18 2010?

19 A. Around -- there were a number of --

20 Q. I'm sorry, 2009, not 2010.

21 A. There were a number of issues going on with myself and
22 Dr. Gunnlaugsson. One, for much of the summer of 2009 Dr.
23 Puchalski was gone and we took a lot more call, and Dr.
24 Gunnlaugsson, on a number of occasions I would call him and
25 he would help me by coming over to Carolina Pines to help me

1 fix mandible fractures and facial fractures and the like
2 because that was his specialty. Glad to do it. During this
3 period we got closer, and he was a shareholder, we were -- we
4 were friends. And even though we were at opposite ends of
5 the market, he helped me a lot. So there was another patient
6 who I did a laryngectomy on, which is where you take out the
7 larynx because of cancer.

8 MR. SHEHEEN: Your Honor, I'm going to object to him
9 asserting that Dr. Gunnlaugsson is a shareholder as he's done
10 on several occasions.

11 MR. ELLISON: Your Honor, he's just interrupting the
12 train of thought. We know what the Court has ruled. Whether
13 Dr. Dyce thought he was a shareholder or not, under the
14 Court's ruling, isn't important. All he's trying to do is
15 interrupt -- all Mr. Sheheen is trying to do is interrupt the
16 train of thought. The Court's issued it's ruling, and we'll
17 deal with that later. This isn't going to matter to the
18 Court's ruling that was issued yesterday.

19 MR. SHEHEEN: Your Honor, I'm pretty sure I have not
20 contributed to nefarious approaches to counsel on the other
21 side. I certainly have not objected --

22 THE COURT: Let me stop you by saying something to both
23 of you. There is a case called Ismael versus Bethea, or
24 Bethea versus Ismael, that says that when there is an issue
25 which is tried by consent that the issue can be submitted, so

1 if you don't object, then there can be, on the basis of that
2 case, there can be a consent to try that issue. I have
3 ruled, and so I'm taking -- I would take it that you don't
4 consent to try that issue.

5 MR. SHEHEEN: Absolutely.

6 THE COURT: And that that would be a basis and a
7 reasonable basis to make that objection. So I'm going to
8 sustain the objection insofar as the comments would be to
9 re-assert that the doctor was a shareholder because he's
10 testified under oath he was not a shareholder. The point
11 being, though, that they have developed a friendship so from
12 developing a friendship --

13 THE WITNESS: Can I then refer to him as a person who
14 bought shares from me? I'm joking.

15 Q. Dr. Dyce, in order to make this a little simpler, why
16 don't you call him the person who thought he was a
17 shareholder?

18 A. I'll call him Dr. Gunnlaugsson.

19 THE COURT: It would be easier for me if you call him
20 Dr. Chad.

21 THE WITNESS: So during that period he was, when Bob was
22 largely away, he was helping me a lot --

23 Q. He being?

24 A. Dr. Gunnlaugsson.

25 Q. Thank you.

1 A. -- with the, with sort of helping me pick up the slack
2 on the trauma because it's his expertise. We also studied
3 for the sleep boards during that time, which was in I think
4 middle of November, so we were -- we discussed things a lot
5 because we were sort of going through the same process.
6 Sometime around there, I think right before Christmas, we
7 also -- I had a gentleman who had a laryngectomy who was in
8 the hospital over the holidays, and we have sort of a rule --
9 it wasn't sort of, it was a rule that if you had a critical
10 patient the PA's alone weren't allowed to round on them. You
11 had to have a physician round on them. Well, it turns out
12 with this patient only the PA rounded them over the holidays.
13 So I saw them after getting back from Christmas, and this is
14 someone who Chad had -- Dr. Gunnlaugsson helped me with, and
15 I went to discharge the patient, and I found out that his
16 entire neck was open, splayed, just infected, never noted in
17 any of the notes, no problems, and this was when Dr.
18 Puchalski was on call. So I then called Dr. Gunnlaugsson
19 again, and we coordinate doing a series of pectoralis muscle
20 flaps to try to close this area. This whole period is also
21 when Dr. Gunnlaugsson, knowing he was supposed to have been a
22 shareholder from only a year's buy-in or from before kept
23 saying to me, you know, when are my shares coming, when are
24 my shares coming.

25 MR. SHEHEEN: Your Honor, I would object.

1 THE COURT: Sustained.

2 MR. ELLISON: Your Honor, for purposes of the record,
3 the witness is not being allowed to testify as to what was
4 being said. This has nothing to do with whether Dr.
5 Gunnlaugsson was actually a shareholder or not. That was the
6 subject of litigation. We are not re-trying that issue.

7 THE COURT: I understand.

8 MR. ELLISON: And to say well, we can't talk about what
9 we talked about.

10 THE COURT: It's hearsay. The conversations with the
11 doctor are hearsay. There's an objection. There's an
12 objection.

13 MR. ELLISON: It's not being offered for the truth of
14 the matter therein at all, whether he was a shareholder or
15 not is not relevant for what is being discussed.

16 THE COURT: I agree it's not relevant. I agree it isn't
17 relevant. So we're talking about the patient.

18 MR. ELLISON: He was, and then he was going forward, and
19 that's when Mr. Sheheen stands up.

20 THE COURT: Right. Okay.

21 THE WITNESS: I'm not sure what I can say.

22 THE COURT: He'll ask you another question.

23 Q. What else were you talking about with Dr. Gunnlaugsson?

24 A. We also talked about general practice issues, where we
25 were going, that kind of thing, I don't remember all the

1 details but we talked a lot.

2 Q. Did you and Dr. Gunnlaugsson talk about leaving the
3 practice?

4 A. No.

5 Q. Was there ever any suggestion made that you should leave
6 the practice together?

7 A. No.

8 Q. Was there any discussion about your going into practice
9 together?

10 A. No, there was not.

11 Q. At that point in time were you considering leaving
12 SCENT?

13 A. No.

14 Q. But you were asking for information?

15 A. I was asking for information.

16 Q. And was there a whole lot of e-mail that goes back and
17 forth between the parties dealing with information?

18 A. There was.

19 Q. And I'm only going to go through some of it, but at the
20 end of the day you ended up filing a lawsuit on March 15,
21 2010.

22 A. Yes.

23 Q. Is that correct?

24 A. Yes, sir.

25 Q. What did you ask for in the lawsuit?

1 A. I asked for a simple accounting of the practice.

2 Q. And what else did you ask for?

3 A. I asked for a number of documents including, I think,
4 the ledgers, and I'd have to look back at the original
5 lawsuit. It's a while back.

6 Q. So there's a lot of e-mail, but did you seek damages
7 against Dr. Puchalski or SCENT in March 2010?

8 A. I did not.

9 Q. All you asked for was the accounting and access to books
10 and records.

11 A. Yes.

12 Q. Now, I'm not going to go through all of it, but I do
13 want to point out a couple of things. Now, some records were
14 provided to you; is that right?

15 A. In varying formats, yes.

16 Q. Did you have a conversation with Tammy Szymanski in
17 February of 2010 about obtaining access to books and records?

18 A. I don't remember.

19 Q. I'm sorry?

20 A. I don't remember.

21 Q. You don't remember a conversation with Tammy Szymanski?

22 MR. SHEHEEN: Your Honor, he's answered.

23 THE WITNESS: I remember --

24 THE COURT: There's an objection.

25 MR. SHEHEEN: He's answered the question and then he's

1 being led and that's inappropriate.

2 THE COURT: Sustained.

3 THE WITNESS: I remember a conversation.

4 THE COURT: Hold on. The objection's been sustained.

5 Ask him another question.

6 Q. Did you have a conversation with Tammy Szymanski about
7 getting copies of records?

8 A. I remember conversations with Theresa and a number of
9 other SCENT employees. I don't remember -- and Bob but I
10 don't remember who they specifically were because Bob had a
11 number of people who had access to the records including
12 Tammy Szymanski, Keiley Taylor, Austin Sheheen, Barbara
13 Myers, Bob Puchalski, only one was a shareholder, some were
14 not members of the practice, and so I asked a number of
15 people, so I don't remember if Tammy was one of them, but I
16 did ask a number of people for records.

17 MR. ELLISON: Judge, we're going to be out of Mr.
18 Cleveland's book a little bit. Exhibit 29?

19 THE COURT: Do you all know what this exhibit is?

20 MR. SHEHEEN: Exhibit 29; is that correct?

21 THE COURT: Yes.

22 MR. SHEHEEN: Yes, Your Honor.

23 THE COURT: Is this in evidence?

24 MR. ELLISON: It's in evidence. It's just not in Mr.
25 Cleveland's book.

1 THE COURT: I understand.

2 Q. Dr. Dyce, are you familiar with that?

3 A. Yes, sir, I am.

4 Q. Can you tell the Court what that is?

5 A. This was a letter dated, sorry an e-mail dated February
6 26, 2010 where we requested a series of documents from Ed
7 White prior to -- which we wanted to review prior to moving
8 forward on any major purchases the practice had.

9 Q. Were you provided with the documents?

10 A. No, we were not.

11 Q. Let's look at Exhibit 27. Dr. Dyce, can you identify
12 that document, please?

13 A. This was an e-mail from Dr. Puchalski.

14 Q. On the bottom first, let's do the first one.

15 A. What do you mean on the bottom?

16 Q. That's --

17 A. Oh, it's an e-mail string between myself and Dr.
18 Puchalski where I'm asking Bob and questioning why he refuses
19 to give me the appropriate documents to make an informed
20 financial decision where I reference that Mr. Austin Sheheen
21 isn't returning my calls.

22 Q. Hold on. That's this paragraph right here?

23 A. Yes.

24 Q. Okay. Keep going.

25 A. And I mention that Ed seemed less concerned about the

1 medical practice or myself and more concerned with him, being
2 Bob Puchalski.

3 Q. Were there discussions during this time period about a
4 possible loan to SCENT Land?

5 A. Yes, we had to -- SCENT Land was -- we had purchased
6 some property in Lugoff, and we were going to proceed with
7 building -- with a building, and we needed a loan, to secure
8 a loan. I was told we needed to secure a loan to do so.

9 Q. And were you provided with access to this information?

10 A. No, I wasn't.

11 Q. Let's look at the next to last paragraph of your e-mail.
12 Could you publish that to the Court, please?

13 A. Until I have the opportunity to review the records of
14 both the medical practice and land holding company, I can't
15 approve any transactions affecting the practice. Jamie feels
16 the same as it relates to SCENT Land Holdings. Given that
17 you have unfettered access to these documents, I am sure you
18 can understand that it is reasonable for me to have the same
19 access that you and some members of our staff have.

20 Q. Okay. And looking at the top of the page, what was Dr.
21 Puchalski's response?

22 A. Just a wow.

23 Q. Did you get the documents?

24 A. No.

25 Q. Was there some discussion about a confidentiality

1 agreement in February 2010?

2 A. I believe it began in February 2010 where a series of
3 preconditions started popping up, one of which was a
4 confidentiality agreement.

5 Q. Can you describe for the Court what your understanding
6 of the confidentiality agreement was?

7 A. The confidentiality agreement, if I remember correctly,
8 just says that I wouldn't provide copies of practice
9 documents to non-practice -- I don't remember the exact
10 wording. I'd have to look at it. I don't want to say
11 something wrong.

12 Q. Some documents were offered; is that right?

13 A. Some were offered.

14 Q. But you filed a lawsuit because you weren't -- why did
15 you file the lawsuit?

16 A. We weren't getting them, and they were in a peculiar
17 format. Even among some of the documents that were offered
18 they were just loose paper copies jumbled and what I found
19 out is critical pages were missing from those documents
20 showing various things.

21 Q. Plaintiff's Exhibit 31. During this time period were
22 Dr. Puchalski and Theresa Williams scheduling closings?

23 A. They were, or they said they were. I don't know if they
24 actually were or not.

25 Q. And you were asking to see copies of documents?

1 A. I was.

2 Q. Did you tell them in advance of these scheduled closings
3 that there were documents you wanted to see?

4 A. Yes, I did.

5 Q. Let's look at Exhibit 31. Can you identify this,
6 please? I know it's not in color. It makes it a little
7 hard.

8 A. This appears to be an e-mail string between myself and
9 Dr. Puchalski, cc's to Jamie Dyce and Bruce Armon and Ed
10 White.

11 Q. And what were you asking for?

12 A. Just the opportunity to -- we were asking for the
13 proposed and executed lease agreement between the practice
14 and the company.

15 Q. One at a time. Okay. You asked to see a copy of the
16 lease agreement before going to closing. Was one offered to
17 you?

18 A. Not at that time.

19 Q. Okay.

20 MR. SHEHEEN: This is the e-mail that has like his
21 question, then Chad's. I think you ought to explain that to
22 the Court because it's confusing.

23 MR. ELLISON: Your Honor, this is hard to do because
24 it's not in color, but as Dr. Dyce said and Mr. Sheheen is
25 right in pointing out, this is a string and what the doctors

1 did is they used different colors on here so, for instance,
2 neither Jamie nor I have been furnished with a proposed or
3 executed lease of the building between the practice and the
4 company, please provide a copy to me. That was the first
5 e-mail from Dr. Dyce. The response from Dr. Puchalski starts
6 here, we will have a lease once the building is complete. I
7 can't tell you exactly what that -- without the colors, but
8 that's essentially what it is, and you've got to get it from
9 context, and I don't want to spend 20 minutes going through
10 this if that's okay.

11 MR. SHEHEEN: Thank you.

12 MR. ELLISON: And then there's another response -- which
13 I'm not going to do -- there's another response here from Dr.
14 Dyce below. So, again, it's a string.

15 Q. So the first thing you asked for is a copy of the lease.
16 What was the second thing you asked for?

17 A. An explanation of the construction budget/contract.

18 Q. Were you furnished with a copy?

19 A. Of the -- eventually I was furnished with a copy of the
20 construction contract.

21 Q. Were you furnished with a copy of the budget?

22 A. I don't recall. I actually don't recall.

23 Q. Did you ask questions in -- what did you do in Item 3?

24 A. There were a number of distributions that did not seem
25 to make sense, so I was trying to make sense of these, like

1 where the money was going.

2 Q. Now are you a manager of SCENT Land?

3 A. Jamie's a member, and I think by the agreement Puchalski
4 was the manager.

5 Q. But the conversation's going on between you and Dr.
6 Puchalski?

7 A. Yes.

8 Q. I mean, is that right?

9 A. Yes, because SCENT has to fund SCENT Land.

10 Q. And was there a discussion also with regard to
11 promissory notes? Did you ever get the explanation to that
12 one?

13 A. Not an adequate explanation.

14 Q. And we can go through these one at a time, but to save a
15 little bit of time, was there a discussion in Item 6 about
16 your providing a personal guarantee?

17 A. Yes, there is.

18 Q. Okay. And were you willing to provide a personal
19 guarantee at that time?

20 A. I was not.

21 Q. Did you ever say you would never provide a personal
22 guarantee?

23 A. No, I never said that.

24 Q. Did you indicate that you would provide the guarantee
25 after you got the information you were asking for?

1 A. And had a chance to review them with the adequate
2 people, yes.

3 Q. So with that in mind, Plaintiff's Exhibit 34, Dr. Dyce,
4 March 3rd turns into a big day on all sorts of reasons. Look
5 at the e-mail that was sent on March 3rd. Can you identify
6 that for the Court, please?

7 A. It's an e-mail between Dr. Puchalski and myself with a
8 cc to Jamie Dyce, Amy Puchalski and Bruce Armon and Theresa
9 Williams.

10 Q. Now, there are six items that are listed here.

11 A. Yes, sir.

12 Q. Are these examples of the kinds of information that you
13 were asking to see that you weren't being provided with?

14 A. Yes, it was.

15 Q. So you were asking to see what was item one?

16 A. Copies of bank statements and canceled checks since
17 January 1st, 2008.

18 Q. What was item two?

19 A. Electronic copy, preferably in Excel format, of the
20 check register exported from the accounting system since
21 January 1st, 2008 to present.

22 Q. What was item three?

23 A. Electronic copy of the general ledger for each year by
24 year since inception through present.

25 Q. Item four?

1 A. Copies of all credit card statements held in the name of
2 the practice or practice employees that were paid from SCENT
3 accounts since inception through present.

4 Q. And item five?

5 A. Complete copy of SCENT IRS Form 1120-S for tax years
6 2004 to 2008.

7 Q. What was item six?

8 A. Access to all supporting documentation on file at or at
9 a location controlled by SCENT related to disbursements made
10 since inception through present, invoices, check stubs, etc.

11 Q. And the text on either bracket?

12 A. It says Theresa, am I to understand Jamie is to come to
13 closing, in ten minutes review all of the following items
14 which were mentioned before while there and then sign for the
15 loan.

16 Q. This is the kind of information you were asking to see;
17 is that right?

18 A. Yes, sir.

19 Q. Now there's controversy, and I'm sure when Mr. Sheheen
20 and Mr. Wright ask you questions there will be more
21 controversy, about taking -- getting copies of documents and
22 taking them off site. Without going through all the e-mail,
23 why did you want to have copies and take them off site?

24 A. It's pretty simple. The people who were on site who
25 would have been entrusted to review the documents with me

1 were already telling me everything was okay, and that would
2 be Austin Sheheen and I believe it was Barbara Myers from the
3 office, Theresa Williams and Bob Puchalski. I'm neither an
4 accountant nor an attorney to know what's okay and what's
5 not, so I needed completely independent, objective eyes
6 looking at them, and if they told me I was wrong, I was
7 wrong.

8 Q. So what did you want to have happen with the documents
9 when you went off site?

10 A. I just wanted a true accountant, honest, objective
11 accountant to look at them and look at them from a legal as
12 well as an accounting perspective and from a tax perspective.

13 Q. And --

14 A. And to make sure that distributions were being made as
15 they were supposed to be.

16 Q. Now, you never ended up attending this -- any of these
17 proposed closings; is that right?

18 A. We actually did attend one of them with baby in tow, and
19 for all the documents we asked I think we got a three-page
20 sheet in total.

21 Q. You didn't get any of the rest of them?

22 A. No.

23 Q. All right. Did you ever have any discussions with Ed
24 White about obtaining access to documents?

25 A. Yes. There were two discussions -- well, there were a

1 number of discussions. One was in discussing, when there was
2 a meeting with myself, Dr. Puchalski and Chad Gunnlaugsson --
3 sorry, no, Gunnlaugsson was not in the meeting. Ed mentioned
4 in that meeting that shareholders have a right to the
5 documents but non-shareholders don't, but later in a meeting
6 with Ed I walked in and among the first thing he said to me
7 is, you do not have unfettered access to these documents.
8 This was before I even sat down, and I hadn't even said hello
9 to Ed yet, and that was the first thing he blurted out, so
10 that was sort of the extent of our discussions. Bruce had a
11 number of discussions saying the documents should be released
12 to Dr. Dyce, and those were in the e-mail.

13 Q. And you eventually got most of this information; is that
14 right?

15 A. I believe I got most of them.

16 MR. ELLISON: Judge, I don't know how long you want to
17 go because I'm not close to done. Let me just do a couple
18 more minutes to get to a good stopping point.

19 THE COURT: Okay. Sure.

20 Q. Dr. Dyce, you're aware that SCENT and Dr. Puchalski have
21 accused you of conspiring with Dr. Gunnlaugsson, are you not?

22 A. I am.

23 Q. About how much money did you make, round numbers, in
24 2009?

25 A. I believe it was around 1.7 million.

1 Q. And 2010's a truncated year, so let's go to 2011, how
2 much money did you make in 2011, round numbers?

3 A. I think about 6 to 800.

4 Q. Okay.

5 A. Somewhere in that range.

6 Q. And how much money in round numbers did you make in
7 2012?

8 A. Around 800.

9 Q. So you went, by conspiring with Dr. Gunnlaugsson, from
10 making 1.7 to making around \$800,000 a year?

11 A. Yes, sir.

12 Q. Now, they also say that you provided confidential
13 information to Dr. Gunnlaugsson. Did you ever provide any
14 confidential information to Dr. Gunnlaugsson?

15 A. No, I did not, sir.

16 Q. Did you ever -- they called it harmful e-mails. I'm not
17 sure what they mean, but they say you shared harmful e-mails
18 with Dr. Gunnlaugsson. Did you ever do that?

19 A. No.

20 Q. Did you ever share the drafts of the 2010 employment
21 agreement and shareholder agreement with Dr. Gunnlaugsson
22 prior to the commencement of this litigation?

23 A. No.

24 Q. And did you ever, to the best of your knowledge, share
25 any confidential information with Dr. Gunnlaugsson?

1 A. I did not.

2 Q. Did you engage in a coordinated legal strategy with Dr.
3 Gunnlaugsson against SCENT prior to the filing of
4 counterclaims by SCENT in this litigation?

5 A. No.

6 Q. Did you ever give Dr. Gunnlaugsson copies of insurance
7 contracts?

8 A. I did not.

9 MR. ELLISON: Judge, that's a good place to stop.

10 THE COURT: Sounds good to me.

11 MR. ELLISON: I've got probably another 40 minutes.

12 THE COURT: That's absolutely fine. We will take an
13 hour for lunch. I'll see you right back about 2:00.

14 And I must admonish you, Dr. Dyce, you must not discuss
15 your testimony during lunch. You can talk about anything
16 else, just not your testimony.

17 THE WITNESS: Yes, ma'am.

18 THE COURT: Thank you.

19 (Lunch recess held.)

20 Q. Dr. Dyce, I want to go back to where we were at the end
21 of the questioning before lunch. This is Exhibit 34.

22 Your Honor, I'm not going to hand up another copy right
23 now since you've seen it, and I'm not to go through all of
24 it.

25 These are things, Dr. Dyce, you said you were asking

1 for?

2 A. Yes, they were.

3 Q. And we went through an e-mail right before that that
4 listed a number of things that you were also asking for, is
5 that right?

6 A. Yes, yes, yes, we did.

7 Q. If you had gotten these things here, if you had gotten
8 the other things that you were asking for in that other
9 e-mail, the lease, the construction budget, all that sort of
10 stuff and if they had all checked out with regard to how
11 moneys had been handled, was it your expectation that you
12 would have signed a guarantee on the SCENT Land loan?

13 A. I would have.

14 Q. Were you required to do so as far as you know?

15 A. Required to do what?

16 Q. Sign a guarantee.

17 A. I believe I was.

18 Q. By who?

19 A. The contract, the agreement.

20 Q. I'm sorry?

21 A. One of the 2008 agreements, I believe.

22 Q. We're talking about SCENT Land here. We're not talking
23 about SCENT.

24 MR. SHEHEEN: Your Honor, I think he's answered the
25 question, and counsel's leading him to a different

1 conclusion, but he's already answered the question.

2 THE WITNESS: Could you repeat the question?

3 MR. ELLISON: I'll do it a different way.

4 Q. Was there anything in the SCENT Land agreement to your
5 knowledge that required you to sign a guarantee that you
6 remember?

7 A. I don't remember.

8 Q. And now I am repeating. If you had gotten these
9 documents and if they'd all checked out, your expectation is
10 that you would have signed the guarantee.

11 A. I would have signed, yes.

12 Q. Were you looking to leave SCENT in early March 2010?

13 A. I was not.

14 Q. Now, March 3rd is a big day, and there are a lot of
15 documents that are dated that day. So -- Judge, at the risk
16 of some confusion, because there's a lot -- what's the date,
17 the date on that last e-mail, what was that, do you remember?

18 A. I don't remember.

19 MR. ELLISON: Let's go back to it, Ms. Baker.

20 Q. What's the date on that e-mail?

21 A. March 3rd, 2010.

22 MR. ELLISON: Okay. Let's go to the next exhibit. And,
23 Your Honor I believe that this is Exhibit 19.

24 Q. We've seen this before. Dr. Dyce, what's the date of
25 this agreement?

1 A. It says the 3rd day of March.

2 Q. Have you seen this document before?

3 A. Is that the termination consent? I can't quite read it
4 from here.

5 Q. I'll hand you a copy. I understand. It's hard to read.

6 A. Okay. Yes, I have seen this document before.

7 Q. Can you tell the Court what you think it is?

8 A. It's the document dated March 3rd where Dr. Puchalski
9 attempts to terminate me as a shareholder.

10 Q. And on the second page of the document do you see an
11 acknowledgment?

12 A. Acknowledgment of receipt, yes, I do.

13 Q. And who signed that as best you can tell?

14 A. Theresa Williams, Tammy Szymanski, Keiley Taylor, and
15 there's a notary who I can't read.

16 Q. Okay. And --

17 A. And Robert Puchalski.

18 Q. Okay. And according to this document was there a
19 meeting held on March 3rd, 2010?

20 A. Sorry, as I'm skimming it I'm not seeing.

21 Q. What's the date of the resolution.

22 A. March 3rd, 2010.

23 Q. And looking at the top of page 2 --

24 A. Yes.

25 MR. ELLISON: Ms. Baker, could you blow that up, please?

1 Q. What does it say on the top of page 2?

2 A. Further resolved, the company shall honor its
3 obligations to the other shareholder to purchase his shares
4 in accordance with the shareholders agreement and to
5 otherwise honor its other obligations under the shareholders
6 agreement.

7 Q. And as you recall, without blowing it up, do you recall
8 whether this said that you were being terminated with cause
9 or without cause?

10 A. Without cause.

11 Q. And were you present at this meeting?

12 A. Not at a March 3rd meeting, no, I wasn't.

13 Q. Was there also a compliance meeting held on March 3rd,
14 2010?

15 A. I have a report of a compliance meeting but I don't
16 quite recall the meeting itself.

17 Q. Do you recall any compliance meetings being held?

18 A. I remember meeting with Theresa Williams once to discuss
19 a compliance issue, and I think it was around March, the
20 beginning of March.

21 MR. ELLISON: Your Honor, this is Exhibit 294. They do
22 not agree to this one.

23 THE COURT: All right. Then you want to have him --

24 MR. ELLISON: I'm going to have him authenticate it and
25 introduce it.

1 THE COURT: Just go ahead and have him do that.

2 MR. ELLISON: Thank you.

3 Q. Dr. Dyce, I've handed you documents that have been
4 labeled for identification Plaintiff's Exhibit 294.

5 A. Yes.

6 Q. If you can look at both pages of this document, is that
7 your signature on the second page?

8 A. That is my signature on the second page.

9 Q. Okay. And there are two dates on the document. Do you
10 see that?

11 A. Yes, I do.

12 Q. What are the dates?

13 A. March 2nd, 2010 and March 3rd, 2010.

14 Q. And what's the date of the document?

15 A. March 3rd, 2010.

16 Q. Does this document -- have you seen this document
17 before?

18 A. I have.

19 Q. And does this document to the best of your knowledge
20 accurately reflect the minutes of a meeting you had regarding
21 compliance with Ms. Williams?

22 A. No, it did not.

23 Q. What was wrong with it?

24 A. Basically, in the meeting as I can recall, we discussed
25 an issue involving Dr. Puchalski making disparaging remarks

1 about her -- disparaging remarks to a female audiology
2 student, belittling her with some female names, and she felt
3 that this required further action, and she reported it to me
4 and --

5 Q. She being?

6 A. She being the female student and her -- her instructor
7 at the school, the audiology school, she reported to them
8 too, and I was supposed to investigate as a compliance
9 officer. And as such, while I had to meet with Theresa
10 Williams, where we discussed the event, and we were supposed
11 to come up with a plan of action, but instead this gets
12 produced where she says no action to be taken, it doesn't
13 count, not because it didn't happen, because she's not an
14 employee and compliance only refers to employees.

15 Q. And that's your signature on the second page?

16 A. Yes.

17 MR. ELLISON: Your Honor, we'd like to introduce this
18 Exhibit as Plaintiff's Exhibit 294. The defendants have not
19 stipulated to the introduction of this one?

20 MR. SHEHEEN: Beg the Court's indulgence.

21 Your Honor, we don't have any problem with this
22 document. I'd just note, I think the reason we withheld it
23 is it said there was a document attached in the second line.
24 Nobody's been able to determine where that document is, so I
25 just point that out, but we don't have any problem with it

1 coming into evidence. We of course don't agree with the
2 attributions that have been given to it.

3 THE COURT: Okay.

4 MR. ELLISON: For purposes of the record, the document
5 was produced by Mr. Sheheen's office. I understand you all
6 haven't been able to find it. We certainly never had it.

7 THE COURT: Okay. So it's in evidence without
8 objection.

9 Q. Now, there's been a little bit of talk, Dr. Dyce, about
10 being the compliance officer for SCENT.

11 A. Yes.

12 Q. There's going to be a lot more, I think. What was your
13 understanding of what you were supposed to do as compliance
14 officer?

15 A. Well, just a little background -- well, what my
16 understanding was, to accept any complaints, anonymous or
17 otherwise, and investigate them with regards to sexual
18 harassment or any workplace related claims or complaints,
19 primarily.

20 Q. Were you responsible, as compliance officer, for
21 ensuring SCENT's compliance with billing requirements?

22 A. No, I wasn't.

23 Q. Did you have access to the billing records for SCENT?

24 A. No, I didn't.

25 Q. Were you supposed to do anything else as compliance

1 officer other than to investigate the allegations of sexual
2 harassment or other things in the workplace?

3 A. That was my understanding, just nothing having -- just
4 the aforementioned with sexual harassment and workplace
5 issues.

6 Q. This was, as far as you know -- you don't know the dates
7 correct, but as far as you know you only had one meeting with
8 Ms. Williams in order to discuss these things?

9 A. I only had one meeting, yes, sir.

10 Q. And so on March 3rd, 2010, was there talk of a closing
11 happening on that day?

12 A. I believe there was, yes. Yes, there was.

13 Q. And that's the same date as the consent that was signed
14 terminating you?

15 A. Yes.

16 Q. And were you aware of it at that time?

17 A. I was not.

18 Q. Now, prior to March 10th, a week later, had you ever
19 given any thought to leaving the practice?

20 A. No, I hadn't.

21 Q. Had you interviewed anywhere?

22 A. No, I hadn't.

23 Q. Had you had any communications or conversations with Dr.
24 Gunnlaugsson about your leaving the practice?

25 A. No, because he was still a --

1 Q. Had you had any conversation?

2 A. No, I did not.

3 Q. So we get to March 10, 2010. Do you recall what
4 happened on that date?

5 A. I showed up for a meeting, and I was handed the consent
6 with an explanation from Bob and Ed White saying that I was
7 being terminated for cause.

8 Q. And that's the meeting --

9 A. Without cause, sorry.

10 Q. You were being terminated without cause?

11 A. Without cause.

12 Q. And that's the meeting that we talked about earlier?

13 A. Yes.

14 Q. And how long did you have to work after that date?

15 A. 60 days from that date.

16 Q. Now, Dr. Dyce, you had been making a fair amount of
17 money.

18 A. Yes.

19 Q. Why didn't you -- why didn't you fight to stay in the
20 practice?

21 A. There were a couple issues. One was I at the time,
22 minus what was going on around me, I actually do believe I
23 helped to build this practice. I built it a lot from where
24 it was, when I first joined to where it was. I believe it
25 was a good practice. We provided a lot of good to a lot of

1 patients, and I didn't want to see it hurt, and I thought the
2 actions Dr. Puchalski was taking were actually harming the
3 practice, and I didn't want to compound that, and I thought
4 that at some point we could reach an agreement where the
5 practice was not harmed.

6 Q. But in order to reach that agreement you needed the
7 records; is that right?

8 A. I needed the records.

9 MR. SHEHEEN: Object to the leading question.

10 THE COURT: Yes, sustained.

11 Q. What did you need in order to reach an agreement?

12 A. I needed an accounting of the practice. I needed to
13 know that distributions were being done -- were being
14 performed properly. I needed to know that there was some
15 accountability at all levels of shareholders, at all levels
16 of employees for what was going on in the practice.

17 Q. So after Mr. White and Dr. Puchalski handed you this
18 notice on March 10, 2010, what did you do on that day?

19 A. I continued to fulfill the obligations of my contract.

20 Q. Did you stay in the building on that day? What did you
21 do?

22 A. That day I left the building.

23 Q. Now, Exhibits 173 and 174, please.

24 The following day -- this is 173, Your Honor.

25 Are you familiar with this document?

1 A. I'd have to see what is attached, the notice.

2 Q. I'm sorry?

3 A. I believe I am, but I'd have to see what the notice said
4 to refresh my memory.

5 Q. It purports to be a notice of a special meeting?

6 A. Oh, yes, I do remember that document now. Yes, I do.

7 Q. As best you recall what was the attachment to that
8 document?

9 A. I don't remember the attachment.

10 Q. Let's go to 174. This is Exhibit 174.

11 A. Yes.

12 Q. Have you seen this document before?

13 A. I believe I did, yes.

14 Q. Can you identify it for the Court?

15 A. It was a notice of a special meeting of the members of
16 SCENT Land Holdings issued by Dr. Puchalski.

17 Q. What's the date on this document?

18 A. March 11th, 2010.

19 Q. As best you recall do you think this was the attachment
20 to the March 11th e-mail we just looked at?

21 A. It may have been.

22 Q. And the document talks about -- what does it talk about
23 in paragraph 2?

24 A. It says, there is a mechanic's lien on the building and
25 a situation that exists where the contractor and his

1 subcontractors have not been paid for their work and have
2 communicated to the company that they are in a negative cash
3 flow position as a result of their work on the building.

4 Q. What does paragraph 4 say?

5 A. A capital call and other steps to finance and complete
6 the building.

7 Q. Does the document purport to call a special meeting by
8 telephone?

9 A. Yes, it does.

10 Q. When was that meeting scheduled for?

11 A. For March 12th, 2010.

12 Q. And to the best of your knowledge did that meeting occur
13 on March 12, 2010?

14 A. A telephone meeting occurred for the SCENT Land
15 Holdings, I believe it was March 12th, 2010.

16 Q. And did Dr. Puchalski and Amy Puchalski purport to issue
17 a mandatory capital call at that meeting?

18 A. They did.

19 Q. Do you recall how much that was for?

20 A. I believe it was for two individual separate
21 contributions of \$170,000 apiece.

22 MR. ELLISON: And, Your Honor, going back to Exhibit 16.

23 Q. We talked about this earlier, Dr. Dyce, what's this
24 document?

25 A. This is the proposed but never signed operating

1 agreement.

2 Q. Is this the proposed one or the signed one?

3 A. It says September 30th, 2008, is that what it says?

4 Q. 2009.

5 A. Okay. So that would have been the signed one.

6 Q. And have you looked in this document for any authority
7 for a required capital call?

8 A. I have.

9 Q. Were you able to find any provision requiring capital
10 calls?

11 A. There is no provision that allows a mandatory capital
12 call.

13 Q. So let's go to March 15th, 2010. That's the date that
14 this lawsuit was filed.

15 A. Yes.

16 Q. What did you ask for in the original lawsuit?

17 A. Simply an accounting.

18 Q. Did you ask for copies of information?

19 A. I did, I asked for a series of financial records from
20 the practice.

21 Q. Did you make a claim for damages against SCENT or Dr.
22 Puchalski?

23 A. I did not.

24 Q. Why not throw the kitchen sink at him?

25 A. Because I didn't know that he was doing anything wrong.

1 I didn't have access to the documents to determine if there
2 was something being done improperly or not, and I didn't want
3 to disrupt the workings of the practice until -- just on a
4 whim.

5 Q. Let's go to March 23rd, 2010, about two weeks later,
6 Exhibit 20. Blow this one up a little bit.

7 MR. SHEHEEN: I'm sorry, what exhibit?

8 MR. ELLISON: 20.

9 MR. SHEHEEN: Thank you.

10 Q. Things are happening quickly. Dr. Dyce, this was a
11 document that was produced in discovery that purports to be a
12 written consent in lieu of a meeting on March 23rd, 2010.
13 Have you seen this document since this litigation got
14 started?

15 A. I don't recall seeing that document before.

16 Q. Look at the second paragraph where it says, resolved.
17 Can you publish that to the Court, please?

18 A. Resolved that Dr. Puchalski as the president shall be
19 completely vested with all authority to transact business of
20 any kind on behalf of the corporation including but not
21 limited to authorizing and executing any and all loan
22 documents, leases, contracts, tax returns, purchasing orders,
23 bills of sale and any and all other documents incident to the
24 operation of the corporation's business on a day-to-day
25 basis.

1 Q. Did you see this document in March 2010?

2 A. I did not.

3 Q. What's your understanding, does this document in your
4 understanding conflict with the terms of the shareholders
5 agreement?

6 A. They do.

7 Q. But you had no knowledge --

8 A. I had no knowledge of that document.

9 Q. So on March 25th, 2010, Exhibit 38, are you familiar
10 with this document?

11 A. Yes, I am.

12 Q. Can you identify it for the Court, please?

13 MR. ELLISON: Excuse me. Judge, do you have a copy of
14 this? I can give you one it's pretty short or you can look
15 at it up on the screen.

16 THE COURT: I can look at it on the screen.

17 MR. ELLISON: Thank you, Your Honor.

18 Q. Dr. Dyce, can you identify this document, please?

19 A. This was an e-mail from myself to Dr. Puchalski raising
20 some more concerns about my status as a shareholder and an
21 employee and also requesting documents again and we --
22 talking about deactivating a credit card. At the time I went
23 to three and possibly four locations, so I drove more than
24 anyone else in the practice, but I had the same gas allowance
25 of \$100 that everyone else did, and I went to fill up my car,

1 and the credit card that I kept in the car, the glove box,
2 was un -- not -- had been deactivated, and so I had to go
3 back and ask someone for help because I had to drive from
4 Cheraw back, and I was just frustrated and annoyed, and so I
5 sent an e-mail.

6 Q. Let's publish, if you would Dr. Dyce, what you wrote in
7 the longer paragraph where it begins, I remain. Publish that
8 to the Court.

9 A. I remain willing to consider mediation and dismiss the
10 existing lawsuits without prejudice so long as you provide me
11 with the information to which I'm entitled without
12 precondition and rescind your effort to have me terminated
13 from SCENT.

14 Q. So at the time were you willing to go back to SCENT if
15 he gave you the information?

16 A. Despite everything, yes.

17 Q. I can't help but note the title, bramble bushes and holy
18 rushes. What was that all about?

19 A. I have no idea. I don't remember what I was thinking.

20 Q. All right. Let's go to Exhibit 40. Was there
21 correspondence between your lawyers and SCENT's lawyers or
22 Dr. Puchalski's lawyers or whoever's lawyers they pretended
23 to be --

24 MR. SHEHEEN: Objection, Your Honor.

25 THE COURT: Sustained.

1 Q. -- with regard to producing information?

2 A. There was.

3 Q. Was there an agreement reached in early -- eventually
4 was there an agreement reached with regard to producing
5 information?

6 A. Eventually there was.

7 Q. And was that a result of negotiation among the lawyers?

8 A. I believe it was.

9 MR. ELLISON: Your Honor, this is I think Plaintiff's
10 Exhibit 15.

11 Q. Dr. Dyce, can you identify this document?

12 A. This was a proposed confidentiality agreement to be
13 signed by me.

14 Q. And let's go to the second page -- third page then. Is
15 that your signature?

16 A. That is.

17 Q. Okay. So after the lawyers got involved and -- I'm
18 sorry, let's go back to the first page. What's the date of
19 this document?

20 A. I believe it's May -- May 2010.

21 Q. So in May 2010 eventually a confidentiality agreement
22 got signed, did it not?

23 A. Yes, it did.

24 Q. And that was after the lawyers were involved?

25 A. Yes, sir.

1 Q. And after that, that's when the information started
2 trickling in, is that right? Sorry?

3 A. Incompletely, yes, some information.

4 Q. And is there still information that you haven't gotten?

5 A. Yes, there is.

6 Q. And we've talked about that already.

7 A. Yes.

8 Q. So during this time period from March 10, 2010 until
9 early May 2010 were you still working at the practice?

10 A. I was.

11 Q. Did you have any conversations with Dr. Gunnlaugsson
12 about opening up a separate practice?

13 A. No, I did not.

14 Q. Did you have any conversation with Dr. Gunnlaugsson
15 about SCENT's insurance contracts?

16 A. No, I did not.

17 Q. So what happened on April 23rd, 2010?

18 A. I don't remember.

19 Q. It's hard with the date. What did Dr. Gunnlaugsson
20 eventually do?

21 A. Oh, he eventually filed suit and opened his own
22 practice.

23 Q. Do you recall when that was?

24 A. I'm guessing, from what you just said, April 23rd.

25 Q. Don't guess. Mr. Sheheen will get very upset if you did

1 that.

2 A. No, I don't. I'm sorry. I don't recall when that was.

3 Q. Do you recall what month that was? Don't guess?

4 A. No.

5 Q. Okay. How did you find out that Dr. Gunnlaugsson had
6 opened up this separate practice?

7 A. He called me after.

8 Q. Okay.

9 A. That he had opened up his second -- opened up his
10 practice?

11 Q. Yes, I'm sorry. Yes.

12 A. That was later.

13 Q. How did you find out about the lawsuit that Dr.
14 Gunnlaugsson filed?

15 A. He called me after he filed the lawsuit.

16 Q. And what did he tell you?

17 A. He told me he filed a lawsuit.

18 MR. SHEHEEN: Your Honor, I'm going to object.

19 THE COURT: Sustained.

20 Q. Okay. Were you surprised?

21 A. No, I wasn't.

22 Q. Had you had any prior indication that a lawsuit was
23 going to be filed by Dr. Gunnlaugsson?

24 A. No, I did not.

25 Q. Did you have any indication that Dr. Gunnlaugsson was

1 going to open up a separate practice?

2 A. No, I did not.

3 Q. You said you weren't surprised. Why weren't you
4 surprised?

5 A. Well, towards the end of 2009 and beyond Bob would make
6 little comments in the meetings to Chad as I mentioned before
7 like oh, if you ever decide to leave, we'll take care of you,
8 and they weren't, Chad and Bob at the time weren't on the
9 best of terms and Chad had, was very insistent about
10 receiving his shares and being recognized as a shareholder,
11 and I don't remember the exchanges, but there were some
12 exchanges between Ed White and eventually Chad's attorney, I
13 don't know that I saw them, and that soured their
14 relationship even more. And Chad had always assumed that I
15 was close to Bob because we were residents together and we
16 were friends and we were the first two shareholders in the
17 practice. And so then him seeing me get terminated in the
18 manner which I did for doing nothing wrong except refusing to
19 sign a shareholder agreement was essentially -- or if I was
20 in his shoes would have essentially been the writing on the
21 wall, like, wait, I don't even have as good a relationship as
22 that guy and he got screwed, so what am I going to do. And
23 he could wait for it to happen or he could do something, so
24 I'm actually not surprised.

25 Q. Let's pull up the termination for cause. Dr. Dyce, this

1 is Plaintiff's Exhibit 162.

2 A. Yes.

3 Q. Had you seen this document prior to the litigation
4 getting filed?

5 A. Prior to March --

6 Q. Clearly you couldn't have seen it prior to March. When
7 did you first see this document?

8 A. At the unemployment hearing.

9 Q. When was the unemployment hearing, as best you remember?

10 A. Sometime in the summer of 2010.

11 Q. We'll get there in a few minutes, but you've seen this
12 document since then?

13 A. Yes, I have.

14 Q. Can you publish -- what's the date on this document?

15 A. 5/8/2010 if I'm reading that correctly.

16 Q. And you had been terminated without cause on March 10,
17 2010, do you remember that, obviously?

18 A. Yes.

19 Q. When did the 60 day period run for termination without
20 cause?

21 A. To May 9th, 2010.

22 Q. So Dr. Puchalski -- do you recognize this handwriting?

23 A. No, not really.

24 Q. It says -- can you publish the last handwritten
25 paragraph for the Court?

1 A. That Dr. Dyce is hereby terminated for cause effective
2 immediately.

3 Q. And this is a day before the termination without cause
4 was supposed to run.

5 A. Yes.

6 Q. The 60-day period --

7 A. The 60 day period, yes.

8 Q. -- was supposed to run.

9 So prior to May 8th, 2010 had you looked for another
10 job?

11 A. I had not.

12 Q. And in the meantime had Dr. Puchalski purported, tried
13 to or claimed that he had dissociated your wife from SCENT
14 Land?

15 A. Stated he did.

16 Q. Now, prior to leaving SCENT on May 8th, 2010 what kind
17 of medicine were you practicing with SCENT?

18 A. Ear, nose and throat, allergy, sleep medicine.

19 Q. And were there other areas of medicine that you were
20 qualified to practice in?

21 A. There were.

22 Q. And could you list just a few of those for the Court,
23 please?

24 A. As mentioned previously, I could moonlight at an urgent
25 care center, I could moonlight or I could work at an

1 emergency department, I could work in low-income or free
2 clinics, I could work as an assistant surgeon and not -- none
3 of those would necessarily be ENT only or sleep or allergy
4 related.

5 Q. Okay. Now, I think you said that you were aware that a
6 lawsuit had been filed by Dr. Gunnlaugsson against SCENT?

7 A. Yes.

8 Q. Were you aware that there was an argument in that case
9 about the effectiveness of Dr. Gunnlaugsson's noncompete?

10 A. I was aware of that.

11 Q. And are you aware of how the Court handled that in June
12 2010?

13 A. I am not.

14 Q. Now, as of May 9th, 2010 when you left SCENT, did you
15 have malpractice insurance?

16 A. I don't know when it expired, but it was paid by SCENT,
17 so I assume they turned it off. I didn't have active
18 malpractice at that time.

19 Q. Okay. Were you working as a physician in any capacity
20 after you left SCENT for until say the middle of August?

21 A. No, I was not.

22 Q. What were you doing?

23 A. I was -- I spent a lot of time with family. I went
24 around looking for the best available position for my family
25 and myself. I applied for unemployment and I was still

1 requesting documents from the practice.

2 Q. Dr. Dyce, where did you interview prior to July 1st or
3 so 2010?

4 A. I don't remember the dates I interviewed but the places
5 I interviewed were in Toccoa, Georgia, Worcester,
6 Massachusetts, St. Louis, Missouri, South Bend, Indiana, I
7 think Petersburg, Virginia and in I think Maryland.

8 Q. During this time period did you have income coming in?

9 A. I did not.

10 Q. Were you expecting to receive your payment for your
11 shares under the shareholder agreement?

12 A. I was. I was expecting to receive the shares so that I
13 could do a thorough search for a new position.

14 Q. But that money never came?

15 A. That money never came.

16 Q. And now backing up a little bit, in 2009 had you signed
17 a call coverage agreement with Hartsville Hospital?

18 A. Yes, I did.

19 Q. Okay. Or --

20 A. Yes.

21 Q. Okay. Did you apply for a leave of absence -- and that
22 would have been in connection with your duties with SCENT; is
23 that correct?

24 A. Yes, it was.

25 Q. Did you apply for a leave of absence?

1 A. Yes, I did.

2 Q. When did you apply for the leave of absence, as best you
3 recall?

4 A. I don't remember when I applied for it, but it was from
5 June until October, and I applied because if you do not have
6 malpractice insurance, you cannot be on staff at a hospital.

7 Q. So were you working during this time period?

8 A. I was not.

9 Q. During this time period did Dr. Puchalski make you a
10 series of offers for you to come back to SCENT?

11 A. Yes, he did.

12 Q. Was it always as an at-will employee?

13 A. It was always as an at-will employee.

14 Q. Did he ever offer to allow you to come back as a
15 shareholder?

16 A. No, he did not.

17 Q. And during this time period were you still trying to get
18 information from SCENT?

19 A. I was trying to get information.

20 Q. Was the information forthcoming?

21 A. No, it was not.

22 Q. Now, you talked about --

23 And, Your Honor, for the record, a lot of the e-mail
24 traffic on this, I'm trying to go more quickly, is in the
25 records that have been stipulated to.

1 As late as August 2010 was Dr. Puchalski still offering
2 to let you come back into SCENT as an at-will employee?

3 A. I believed he was.

4 Q. Did he say specifically he wasn't willing to let you
5 come back in as an equal shareholder?

6 A. At the time he was using attorney Gus Dixon, who is from
7 Nelson Mullins, and we had worked out a very fair agreement
8 that would allow us to resolve our issues and have some
9 accountability until those issues were resolved, and it was
10 unacceptable to him, so he said only as an at-will.

11 Q. Now, you said you applied for unemployment benefits. Do
12 you remember when that was?

13 A. I don't remember the exact date.

14 Q. Do you recall roughly when that was?

15 A. I believe it might have been June.

16 Q. Okay. And was there an unemployment hearing held?

17 A. Yes. Dr. Puchalski contested the unemployment benefits.

18 Q. Exhibit 77 please. And who attended the hearing, Dr.
19 Dyce?

20 A. Dr. Puchalski and his attorney, Gus Dixon.

21 Q. And I'm showing the Court a copy of Plaintiff's Exhibit
22 177. Do you recognize that?

23 A. Yes, I do.

24 Q. What is that?

25 A. That's a finding in my favor that I was terminated

1 without cause by the appeal tribunal of the South Carolina
2 Department of Employment and Workforce.

3 Q. And what's the date of the hearing?

4 A. August 17th, 2010.

5 Q. And what were the grounds that Dr. Puchalski and SCENT
6 contested your unemployment claim?

7 A. One, that I was -- I believe they said I was terminated
8 for cause, and the other was that I had an offer of
9 employment on the table.

10 Q. And is this the first time that you found out that
11 SCENT, Dr. Puchalski, were claiming that you had been
12 terminated for cause?

13 A. It was the first time.

14 Q. Had you ever been given the 30-day notice that you were
15 entitled to under the shareholder agreement to cure the
16 cause?

17 A. No, sir.

18 Q. Now, around this time did you start looking for a job
19 locally?

20 A. I did.

21 Q. Where did you look?

22 A. I explored a number of opportunities in and around the
23 Pee Dee area, Hartsville, Charleston. I don't think I really
24 did anything in Columbia.

25 Q. Now, as late as August 2010 had you filed any claim for

1 damages against SCENT?

2 A. I had not.

3 Q. As far as you know, when was the first claim for damages
4 made and by who?

5 A. As I can recall, the first claim for damages was against
6 me by SCENT and Dr. Puchalski in the fall of 2010.

7 Q. So prior to that time had you made any claim for damages
8 against SCENT or Dr. Puchalski?

9 A. I had not.

10 Q. And when did you first make a claim for damages?

11 A. I believe it was around September of 2011.

12 Q. One moment.

13 So, Dr. Dyce, did you ever receive the payment that you
14 were due, that you think you were due under the shareholders
15 agreement?

16 A. I received no payments from SCENT.

17 Q. When do you think that was due?

18 A. By the very latest, 60 days after my leaving the
19 practice.

20 Q. And have you incurred substantial legal fees in an
21 effort to enforce those rights under the governing documents?

22 A. I have.

23 Q. Dr. Dyce, I'm not asking you for numbers, but in broad
24 strokes, what are you asking for the Court to give you?

25 A. A number of things. One, my --

1 Q. When I say you, I'm including your wife as well.

2 A. Yes. Okay. Well, our portion of SCENT Land Holdings
3 that we're due. Our portion -- my portion of the -- as an
4 equal shareholder to Dr. Puchalski, the same distributions
5 that he received while I was -- up until May 9th, actually
6 until present, from then until present that he was getting I
7 should have received. I mentioned distributions to present
8 and then my -- my buyout as per the formula, as well as legal
9 fees, particularly those of Nelson Mullins and those that
10 have been incurred just to enforce an agreement that we had
11 that was already slanted towards Dr. Puchalski.

12 Q. Dr. Dyce, does the name Somnus mean anything to you?

13 A. Yes, it does.

14 Q. What's that?

15 A. That was a company that was formed to manage our sleep
16 services as well as to manage sleep services for other folks
17 that had a sleep lab. If they needed management, we could
18 offer our services to those as well.

19 Q. At the time Somnus was formed who were supposed to be
20 the members?

21 A. I believe myself and Dr. Puchalski.

22 Q. Let's look at Plaintiff's Exhibit 89. Do you recognize
23 this, Dr. Dyce?

24 A. This appears to be the articles of organization for
25 Somnus, LLC.

1 Q. And according to the date stamp up there, what date was
2 it filed?

3 A. April 1st, 2009.

4 Q. And you and Dr. Puchalski were supposed to be equal?

5 A. We were equal.

6 Q. Let's go to 88. Do you recognize that document, Dr.
7 Dyce?

8 A. It appears to be the operating agreement for Somnus,
9 LLC.

10 Q. Let's go to Exhibit A -- I'm sorry, and the date of that
11 document?

12 A. March 25th, 2009.

13 Q. Let's go to the signature pages of the exhibit rather,
14 last page. And so who are supposed to be the members of
15 Somnus?

16 A. Orville Dyce and Robert Puchalski.

17 Q. And this is the page right before that. Do you recall
18 signing that document?

19 A. I do recall signing that document.

20 Q. Now, again like SCENT, money was supposed to be 50/50?

21 A. Yes, it was.

22 Q. So when you talk about moneys due you, if Dr. Puchalski
23 got any money that you didn't get your share of from Somnus,
24 are you asking for that as well?

25 A. Yes.