

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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SC Court of Appeals

The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-001415
Case No. 2018-CP-23-05985

W. Clark Jernigan, M.D. Respondent,

v.

St. Francis Physician Services, Inc. Appellant.

RECORD ON APPEAL – VOLUME I
PAGES 1-217

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE <i>W. Clark Jernigan, M.D.,</i> Plaintiff, v. <i>St. Francis Physician Services, Inc.,</i> Defendant.	IN THE COURT OF COMMON PLEAS Case No. 2018-CP-23-5985 ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
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Plaintiff, Dr. Clark Jernigan, moved for partial summary judgment in this action. Both Dr. Jernigan and defendant, St. Francis Physician Services, Inc. ("St. Francis"), have submitted memoranda with supporting documents as well as oral arguments regarding the motion. In his motion for partial summary judgment, Dr. Jernigan asked the Court to declare three things:

1. That his employment agreement with St. Francis does not permit St. Francis to reduce the number of his Work Relative Value Units ("WRVUs") for purposes of calculating his compensation by applying payment modifiers;
2. That the compensation due Dr. Jernigan from St. Francis under his employment agreement is considered "wages" for purposes of the South Carolina Payment of Wages Act, S.C. Code § 41-10-10 *et seq.*; and
3. That St. Francis owes Dr. Jernigan any compensation that he would have otherwise received had St. Francis not applied payment modifiers to

reduce his WRVUs.

After consideration of the parties' submissions and oral argument, for the reasons set forth more fully below, the court grants Dr. Jernigan's motion and makes the requested declarations with respect to items one and two but declines to grant it with respect to item three.

STANDARD OF REVIEW

South Carolina Rule 56 allows a plaintiff to bring a motion for partial summary judgment to streamline the issues in a case. S.C. R. Civ. P. 56(d). "The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Watson v. Underwood*, 407 S.C. 443, 453, 756 S.E.2d 155, 160 (Ct. App. 2014). "Summary judgment is appropriate when there is no genuine issue of any material fact such that the moving party is entitled to judgment as a matter of law." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

Summary judgment is a particularly appropriate tool when it comes to contract cases because "the construction of a contract is a question of law for the court." *HK New Plan Exchange Property Owner I, LLC v. Coker*, 375 S.C. 18, 23, 649 S.E.2d 181, 184 (Ct. App. 2007). "Summary judgment is proper and a trial unnecessary where the intention of the parties as to the legal effect of the contract may be gathered from the four corners of the instrument itself." *Id.*; see also *Environmental Solutions International, Inc. v. J.C. Const., Inc.*, 2008 WL 9841725, at *6 (S.C. Ct. App. June 2, 2008). In addition, "[b]ecause the ambiguity of contracts and statutes are questions

of law, [this Court does] not view the evidence in any particular light.” *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 198, 821 S.E.2d 667, 669 (2018).

UNDISPUTED FACTS

Plaintiff Dr. Clark Jernigan is an orthopedic surgeon. He has been employed by St. Francis since September 1, 2006 under an employment agreement that became effective on that date and remains in effect until September 1, 2020, with slight modifications. Dr. Jernigan’s agreement is set forth in Exhibit A¹ to the affidavit he submitted in support of his motion for partial summary judgment.

The terms of Dr. Jernigan’s Employment Agreement

Dr. Jernigan’s employment agreement with St. Francis lays out, in clear language, a compensation model that entitles Dr. Jernigan to three types of compensation: base pay, productivity pay, and potential bonus. *Id.* at 23–25. He is first guaranteed an established base rate of pay. But through the productivity pay and bonus pay, he can earn more than the base rate of compensation.

The contract provides that Dr. Jernigan’s productivity pay, and to some extent his bonus pay, are determined by looking to the number of WRVUs Dr. Jernigan performs in a given period of time. *Id.* at 23-24. Those WRVU values are assigned by the federal agency known as the Centers for Medicare and Medicaid Services (“CMS”). The agreement explicitly dictates that the WRVUs used to determine Dr. Jernigan’s compensation will correspond to the WRVU “schedule published each year

¹ Unless specifically stated otherwise, all exhibit references are to the exhibits to the Jernigan Affidavit previously filed with his motion for partial summary judgment.

by CMS in the Federal Register.” Exhibit A at 26. The schedule has a column of WRVU values clearly labeled Work RVU’s that provides the WRVUs assigned for each procedure. See Exhibits C and D.

The contract also makes clear how St. Francis must use WRVUs to calculate Dr. Jernigan’s performance compensation. It states, “Any Productivity Compensation Physician receives shall be calculated ... on the basis of actual Work Relative Value Units (WRVU’s) attributable to services personally performed by Physician each month multiplied by the appropriate conversion factor and subtracting from the product thereof the monthly Base Compensation paid to Physician.” Exhibit A at 23. The conversion factor is stated in dollars. *Id.* at 32. The contract then says, “The remainder, if positive, is the amount of Productivity Compensation to be paid for such month.” *Id.* at 23. The contract also details how the WRVUs affect Dr. Jernigan’s bonus pay. Exhibit A at 24–25.

More succinctly, the number of WRVUs Dr. Jernigan performs in a month is multiplied by the amount of the conversion factor. If the result exceeds Dr. Jernigan’s base pay for the month, then Dr. Jernigan is entitled to the difference as productivity compensation. For example, if the conversion factor were \$75 and if Dr. Jernigan performed 200 WRVUs in a particular month, his productivity pay would be \$15,000 (200 multiplied by \$75). If his base pay were \$10,000 a month, he would be entitled to \$5,000 in productivity pay (\$15,000 less \$10,000).

**St. Francis’s Decision to Apply Payment Modifiers to reduce Dr.
Jernigan’s WRVUs**

For the first ten years of Dr. Jernigan's employment, St. Francis calculated his WRVU's without applying payment modifiers² to reduce them. Then, St. Francis made a unilateral decision that as of September 1, 2016, it would begin applying payment modifiers to reduce Dr. Jernigan's WRVUs.³ St. Francis's new modifier policy "require[d] all wRVUs to be modifier-adjusted inside of all ... physician compensation plans." Exhibit E.

Even though Dr. Jernigan's employment agreement makes no reference to payment modifiers, St. Francis applied its new policy to him. Beginning September 1, 2016, St. Francis applied these modifiers to reduce Dr. Jernigan's WRVUs for purposes of calculating his compensation.

CONCLUSIONS OF LAW

Does the agreement permit St. Francis to apply payment modifiers to reduce Dr. Jernigan's WRVUS?

Dr. Jernigan's motion seeks a declaration that his agreement does not permit St. Francis to apply payment modifiers to reduce his WRVU's for purposes of determining his productivity and bonus compensation. The Court finds that there are

² Payment modifiers were established in 1991. *See Final Rule Medicare Program; Fee Schedule for Physicians' Services*, 56 FR 59502-01, 1991 WL 245153 (F.R.) (issued Nov. 25, 1991) (hereinafter "CMS Fee Schedule 1991"). Since 1992, payment modifiers have been a part of how the federal government determines how much to pay providers like St. Francis for medical services under the Medicare and Medicaid programs. *Id.* ("These regulations apply to services furnished beginning January 1, 1992."). They were affecting the reimbursement St. Francis receives from the federal government before and after St. Francis employed Dr. Jernigan. These modifiers can reflect "team surgery, bilateral surgery, etc." Exhibit B at 1. Importantly, the modifiers apply to the final price the government is willing to pay. But modifiers do not affect the underlying WRVUs. Modifiers and WRVUs are separate concepts. CMS always determines the WRVUs separately from the modifiers. *See* Exhibit D.

³ Gay Aff. ¶¶ 4 and 5, submitted by St. Francis in opposition to summary judgment.

no material facts in dispute regarding this issue and grants this portion of the motion for partial summary judgment. As noted above, “Summary judgment is proper and a trial unnecessary where,” as in Dr. Jernigan’s case, “the intention of the parties as to the legal effect of the contract may be gathered from the four corners of the instrument itself.” *HK New Plan Exchange Property Owner I, LLC v. Coker*, 375 S.C. 18, 23, 649 S.E.2d 181, 184 (Ct. App. 2007); *see also Environmental Solutions International, Inc. v. J.C. Const., Inc.*, 2008 WL 9841725, at *6 (S.C. Ct. App. June 2, 2008). “Where an agreement is clear on its face and unambiguous, the court’s only function is to interpret its lawful meaning and the intent of the parties as found within the agreement.” *Miles v. Miles*, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011) (quotation omitted). Here the four corners of Dr. Jernigan’s agreement make clear that payment modifiers are not part of the formula for determining his compensation. The contract’s language is plain: “Any Productivity Compensation Physician receives shall be calculated ... on the basis of actual Work Relative Value Units (WRVU’s) attributable to services personally performed by Physician each month multiplied by the appropriate conversion factor and subtracting from the product thereof the monthly Base Compensation paid to Physician.” Exhibit A at 23. There is a similarly specific description of how bonus compensation must be calculated using actual WRVUs.

The contract’s specific compensation formula does not include the application of payment modifiers. It does not use the term “payment modifiers.” *See* Exhibit A at 23–26. The formula for his productivity compensation does not include payment

modifiers. It is as follows:

$$\text{Monthly (WRVU's x Conversion Factor) - Monthly Base Compensation} \\ = \text{Productivity Compensation, if positive}$$

Ex. A at 23.

Nor does the formula for calculation of his bonus compensation refer to payment modifiers. It is as follows:

$$(\text{Physician WRUV's} / \text{Total WRVUs of Medical Practice}) \times \text{Bonus}$$

Compensation Pool.

Ex A at 24.

St. Francis makes a number of arguments in support of its decision to apply payment modifiers but none of them overcome the clear and specific terms of Dr. Jernigan's employment agreement or show that St. Francis was entitled to apply payment modifiers to reduce Dr. Jernigan's WRVUs for purposes of determining his compensation.

St. Francis insists that the agreement gives it unlimited discretion to revise Dr. Jernigan's compensation formula based on its internal "policies." St. Francis' Memorandum in Opposition ("Opp'n") at 12-13. In support of this position, St. Francis refers to a number of provisions in the agreement that reference St. Francis policies. This argument distorts and confuses different provisions in the agreement. None of the provisions of the agreement cited by St. Francis have anything to do with Dr. Jernigan's compensation.⁴ The agreement requires St. Francis to

⁴ Exhibit A, § 2.8 pertains only to "services" to be provided by Dr. Jernigan; § 2.5 pertains only to charges, fees, and billing for his services; § 2.9 only to the requirement that his services comply with certain standards; § 1.2.6 requires that

compensate Dr. Jernigan according to the formula provided in the agreement. St. Francis is not free to adjust this formula whenever it chooses based on its own “policies.” “One party to a contract may not unilaterally alter its terms without the assent of the other party.” Am. Jur. 2d Contracts § 496. This is especially so when dealing with material terms in a contract, such as compensation. *W.E. Gilbert & Assocs. v. S.C. Nat. Bank*, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985) (“In a contract for services two essential terms are the scope of the work to be performed and the amount of compensation.”). Allowing unilateral modification would upend contract law and create vast uncertainties for employees and employers alike.

St. Francis also contends that the reference to the CMS schedule of WRVU values in note 1 on page 26 of the agreement suggests that St. Francis had discretion to reduce Dr. Jernigan’s WRVU’s by applying payment modifiers. But, in fact, the reference to the CMS annual WRVU schedule actually supports summary judgment. The language in note 1 about a CMS schedule refers clearly and specifically to WRVU’s and requires that St. Francis update the WRVU values each year as they are revised by CMS.⁵ It shows that WRVU values, not payment modifiers, determine Dr. Jernigan’s compensation. It makes no reference to payment modifiers.

St. Francis asserts that the agreement’s lack of any reference to payment

he abide by applicable codes of conduct; and § 2.13 pertains only to his performance of administrative services.

⁵ Note 1, page 26 of Exhibit A states “(WRVU’s) are updated ... each year according to the schedule published each year by CMS.”

modifiers, i.e. its “silence” as to payment modifiers, creates ambiguity as to whether they may be applied. But, as noted above, the compensation formula is clear as to how Dr. Jernigan’s compensation is to be determined. Its “silence” regarding payment modifiers does not create ambiguity but makes clear that they are not part of the formula.⁶

St. Francis asserts that its affirmative waiver defense prevents summary judgment. Opp’n at 16-17. This argument fails for two reasons. First, the affirmative waiver defense has no relevance to the meaning of the employment agreement and whether it permitted St. Francis to apply modifiers. Dr. Jernigan would be entitled to summary judgment on that point even if St. Francis’s waiver argument were valid. Second, the Agreement includes a non-waiver provision that forecloses St. Francis’s argument. Ex. A, Section 7.11, page 19 (Failure ... to demand strict performance . . . on any of the terms . . . shall not be construed as a . . . waiver or relinquishment of any rights under this Agreement, and each party may at any time demand strict and complete performance by the other party . . . of this Agreement.”). Such unambiguous, non-waiver provisions are enforceable as a matter of law, *see Nw. Nat. Ins. Co. v. R.S. Armstrong & Bros. Co.*, 627 F. Supp. 951, 954 (D.S.C. 1985), and the

⁶ The one case cited by St. Francis, at Opp’n at 14, regarding “ambiguity” is distinguishable on this basis. In *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 243, 672 S.E.2d 799, 803 (Ct. App. 2009), summary judgment was not appropriate because the contractual term at issue – “landlord/tenant claims” – was not defined and was not a term of art. Here, on the other hand, the Agreement specifically defines the compensation formula and defines WRVU.

cases cited by St. Francis (Opp'n at 16) are distinguishable because the application of a non-waiver provision was not involved.

Dr. Jernigan was not required to stop seeing patients or work for no pay in order to preserve his claim to his full compensation.

Finally, St. Francis seeks to delay summary judgment contending that the motion is premature and that additional discovery is needed. But, again, the clear and specific language of the agreement defeats this argument. The Court need not look any further to resolve the motion. Any parol evidence offered for the purpose of interpreting the terms of the contract⁷ as to the calculation of Dr. Jernigan's pay would be inadmissible. *See Columbia*, 299 S.C. at 519, 386 S.E.2d at 261 ("If a writing, on its face, appears to express the whole agreement between the parties, parol evidence cannot be admitted to add another term thereto."). Thus, it is impossible for St. Francis to meet its burden of "demonstrat[ing] a likelihood that further discovery [will] uncover additional evidence relevant to the issue" at hand. *Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659, 660 (Ct. App. 1994).⁸ There is

⁷ St. Francis also asserts a need for further discovery on its affirmative waiver defense, whether it provided the notice required under the Wages Act, and whether a bona fide dispute exists under the Wages Act. Opp'n at 9. But none of those of those issues are material to Dr. Jernigan's motion for partial summary judgment. As noted above, the affirmative waiver defense is irrelevant to the contract interpretation issue and, furthermore, is barred by the specific language of the agreement. Additionally, Dr. Jernigan is not seeking summary judgment regarding any notice issue or question about a bona fide dispute under the Wages Act.

⁸ St. Francis's argument to the contrary is curious because even St. Francis seems to recognize that the evidence it seeks is inadmissible for purposes of Dr. Jernigan's motion. Opp'n at 15 ("While parole evidence may be allowed for the

no reason for further discovery on this issue of contract interpretation. Dr. Jernigan is entitled to partial summary judgment in his favor as to his contention that his employment agreement does not permit St. Francis to reduce his WRVUs by the application of payment modifiers.

Is the compensation due Dr. Jernigan under his contract “wages” for purposes of the South Carolina Payment of Wages Act?

St. Francis asserts that its affirmative waiver defense prevents summary judgment. Opp’n at 16-17. This argument fails for two reasons. First, the affirmative waiver defense has no relevance to the meaning of the employment. The Act defines wages as “all amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount.” S.C. Code Ann. § 41-10-10(2). This broad definition covers the pay at issue here.

Does St. Francis owe Dr. Jernigan any compensation he would have otherwise received had St. Francis not applied payment modifiers to reduce his WRVUs?

Dr. Jernigan also seeks a declaration as to this point. Although Dr. Jernigan has an argument that this ruling logically flows from the Court’s ruling regarding the application of payment modifiers, the Court declines to grant this part of the

purpose of determining the intent of the parties and clearing up any ambiguity with respect to Definition/Note 1, consideration of such evidence is for the trier of fact, and is not appropriate at the summary judgment stage.”). In other words, the need for discovery cannot be a basis for denial of Dr. Jernigan’s motion. Rather, the only issue is whether the method for calculating Dr. Jernigan’s pay stated in the contract (and which St. Francis used for 10 years) is unambiguous as to payment modifiers. If it is (and it is), then no discovery can affect that conclusion.

motion at this time. It concludes that the potential for factual issues as to whether money is actually due and owing by St. Francis to Dr. Jernigan requires that, at least on the limited record before the Court at this time, this issue be left to the trier of fact.

CONCLUSION

For the foregoing reasons, this Court grants the motion for partial summary judgment as to points one and two and declares and holds that Dr. Jernigan's employment agreement does not permit St. Francis to apply payment modifiers to his actual WRVUs and that any compensation due Dr. Jernigan under the agreement qualifies as "wages" for purposes of the South Carolina Payment of Wages Act, S.C. Code § 41-10-10 *et seq.* The Court denies summary judgment as to whether St. Francis owes Dr. Jernigan any compensation that Dr. Jernigan would have otherwise received had St. Francis not applied payment modifiers.

IT IS SO ORDERED.



Greenville Common Pleas

Case Caption: W Clark Jernigan vs. St Francis Physician Services Inc

Case Number: 2018CP2305985

Type: Order/Summary Judgment

So Ordered

s/ Robin B. Stilwell 2158

Electronically signed on 2019-07-15 12:04:30 page 13 of 13

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
	)	
W. Clark Jernigan, M.D.,	)	ORDER DENYING DEFENDANT'S
	)	MOTION TO RECONSIDER,
Plaintiff,	)	ALTER, AND AMEND ORDER
	)	
vs.	)	
	)	
St. Francis Physician Services, Inc.,	)	
	)	
Defendant.	)	C. A. No.: 2018-CP-23-05985
_____	)	

This matter comes before the Court pursuant to the Defendant's Motion to Reconsider, Alter, and Amend Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment entered on or about July 15, 2019. The Defendant's Motion, dated July 25, 2019, was made pursuant to Rules 54(b) and 59(e) of the South Carolina Rules of Civil Procedure. After having had the opportunity to carefully review the Defendant's Motion, this Court elects to respectfully deny the same.

AND IT IS SO ORDERED.

ROBIN B. STILWELL

July 30, 2019
Greenville, South Carolina



Greenville Common Pleas

Case Caption: W Clark Jernigan vs. St Francis Physician Services Inc

Case Number: 2018CP2305985

Type: Order/Other

So Ordered

s/ Robin B. Stilwell 2158

Electronically signed on 2019-08-07 09:43:14 page 2 of 2

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE W. CLARK JERNIGAN, M.D., PLAINTIFF, vs. ST. FRANCIS PHYSICIAN SERVICES, INC. DEFENDANT.	IN THE COURT OF COMMON PLEAS CASE NO. 2018-CP-23-_____ SUMMONS
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TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in the above-entitled action, a copy of which is herewith served upon you, and to serve a copy of your answer upon the undersigned at their offices at 44 East Camperdown Way, Greenville, SC 29601, within thirty (30) days after service hereof upon you, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

WYCHE, P.A.

s/ Henry L. Parr, Jr.

Henry L. Parr Jr. (#4340)
44 E. Camperdown Way
Greenville, SC 29601
Telephone: 864-242-2800
Telecopier: 864-235-8900

Date: November 28, 2018

Attorney for Plaintiff

as Exhibit A, which is filed under seal due to the confidentiality provision imposed in the agreement by Physician Services.

5. Physician Services is affiliated with St. Francis Hospital, Inc. and the Bon Secours Eastside and Downtown Hospitals in Greenville, South Carolina.

6. Physician Services operates medical practices and employs physicians to provide medical care to patients. One of its medical practices is the orthopedic practice Piedmont Orthopedics, in which Dr. Jernigan and other orthopedic surgeons provide orthopedic care to their patients (the "Piedmont Orthopedics Medical Practice").

7. Dr. Jernigan is an outstanding physician, specializing in treatment of disorders of the shoulder.

8. As an employed physician of Physician Services since September 1, 2006, through the present, Dr. Jernigan has provided outstanding medical care to the patients he has treated.

9. Dr. Jernigan is board certified by the American Board of Orthopedic Surgery. He is also proficient in subspecialty areas of complex foot and ankle care and has over ten years experience as an in house orthopedic traumatologist at a level I trauma center.

10. The Employment Agreement by its terms, remains in effect through August 31, 2020, has not been terminated by either party, and continues to be in effect.

**INDUCEMENT OF DR. JERNIGAN TO BECOME EMPLOYED AND CONTINUE TO
BE EMPLOYED BY PHYSICIAN SERVICES**

11. Prior to September 2006, Piedmont Orthopedics Medical Practice was independent of Physician Services and functioned as Piedmont Orthopedics, P.A. ("POA"). Dr. Jernigan was one of the physician owners of POA.

12. POA enjoyed an outstanding reputation as a leading orthopedics practice that has provided excellent services to patients for over 70 years.

13. In 2006, Physician Services desired that Dr. Jernigan and the other physicians associated with POA discontinue their independent practice, become employed physicians of Physician Services, and continue to practice orthopedics as a part of the Physician Services system.

14. Physician Services presented a proposal to Dr. Jernigan and his colleagues (the “2006 Proposal”) that offered a number of benefits, including what Physician Services touted as a “market competitive physician compensation model.”

15. The “compensation model” in the 2006 Proposal was ultimately included in the Employment Agreement and required Physician Services to pay Dr. Jernigan the following three types of compensation:

- a. **Annual Base Compensation** in a specified amount payable in 26 payments during each year, with a specified amount representing payment for call coverage of the patients of the Medical Practice.
- b. **Monthly Productivity Compensation** payable no later than the first day of the month following the month in which it was earned, based on a formula specified in the Employment Agreement; and
- c. **Bonus Compensation** based on a formula specified in the Employment Agreement.

16. In addition, the compensation model agreed to by Physician Services and Dr. Jernigan required that payments received by Physician Services for services provided by Dr. Jernigan but not listed on the schedule used to calculate the Productivity Compensation—services

such as independent medical exams (“IME’s”), depositions, expert witness services, and incentive payments from the U.S. Centers for Medicare and Medicaid Services (“CMS”) intended by CMS to incent physicians in connection with certain CMS initiatives, (collectively “Flow Through Payments”)—were to be paid in full to Dr. Jernigan. To the best of Dr. Jernigan’s information, Physician Services paid him his Flow Through Payments as it had agreed to pay them until sometime after September 1, 2016 when it stopped these payments and began retaining his Flow Through Payments for itself without his consent.

**PHYSICIAN SERVICES FAILS TO PAY THE PROPER AMOUNT OF
PRODUCTIVITY COMPENSATION BEGINNING
SEPTEMBER 1, 2016**

Productivity Compensation Based on WRVU’s

17. The Employment Agreement, consistent with the 2006 Proposal, specified that Dr. Jernigan’s Productivity Compensation would be based on the amount of Work Relative Value Units (“WRVU’s”) attributable to services personally performed by Dr. Jernigan. His monthly Productivity Compensation is the amount, if positive, of the WRVU’s multiplied by a rate expressed in dollars (the “Conversion Rate”) specified in the Employment Agreement, less the amount of his Base Compensation. The applicable Conversion Rate in the Employment Agreement is stated in the agreement. Thus, Dr. Jernigan was and is entitled to receive Productivity Compensation to the extent that the dollar value of his services at Conversion Rate per WRVU is or was more than his Base Compensation each month.

18. The Employment Agreement makes clear that the number of WRVU’s applicable to Dr. Jernigan’s services are specified by the schedule published by CMS (the “WRVU Schedule”). The attached portion of the WRVU Schedule in effect when the Employment Agreement was

entered provides examples of the WRVU's associated with various orthopedic procedures. (See Exhibit B).

19. WRVU's, as defined by CMS, are separate and distinct from Payment Modifiers that CMS uses to calculate the amounts that it will pay health care providers.

20. CMS has published an explanation of the WRVU Schedule, which is attached as Exhibit C. The explanation describes the "relative value units" separately from the "various payment policy indicators needed for payment adjustment (*i.e.*, payment for an assistant at surgery, team surgery, bilateral surgery, etc.)." It also provides specific and separate definitions for Payment Modifiers such as the "Multiplier Procedure (Modifier 51)," which states the rule for adjusting payment to providers for multiple procedures, as well as similar Payment Modifiers that adjust payments in instances of "Bilateral Surgery (Modifier 50)," where there are "Co-surgeons (Modifier 62)," and where there is a "Team Surgery (Modifier 66)." It separately defines a "Work RVU" as a "Relative Value Unit (RVU) for physician work in [a specific service] as published in the Federal Register Fee Schedule for Physician Services" for that calendar year. It also separately defines other types of RVU's that are not Work RVU's. For example a "Malpractice RVU" is the "RVU for malpractice expense for the service."

21. CMS uses the WRVU's along with other types of Relative Value Units ("RVU's") as part of the process of calculating the amounts it will pay for certain services. In some instances, after CMS determines the WRVU's applicable to a service, it will reduce the amount it pays a provider, such as a hospital, by a Payment Modifier. But, even in those instances when a Payment Modifier is applied, CMS determines the WRVU's attributable to the service according to its published schedule.

22. Until September 1, 2016, to the best of Dr. Jernigan's knowledge and belief, Physician Services generally attempted in good faith to calculate Dr. Jernigan's Monthly Productivity Compensation by applying the Conversion Rate specified in the Employment Agreement to the WRVU's associated with Dr. Jernigan's services and to pay Dr. Jernigan the resulting Productivity Compensation without the application of any Payment Modifier, all as provided by the Employment Agreement.

23. Beginning September 1, 2016, however, Physician Services has failed and refused to pay Dr. Jernigan the full amount of the Productivity Compensation that he has earned and that Physician Services is obligated to pay him under the Employment Agreement.

24. Rather than multiplying Dr. Jernigan's WRVU's by the Conversion Rate specified in his employment agreement and paying him Productivity Compensation to the extent that this produces an amount in excess of Dr. Jernigan's Base Compensation as required by the Employment Agreement, Physician Services has violated by the Employment Agreement and the Act by wrongfully reducing Dr. Jernigan's Productivity Compensation in at least the following ways:

- a. Physician Services has refused to credit Dr. Jernigan with the full number of WRVU's attributable to services he personally performed. Instead, Physician Services has improperly insisted that it may reduce the number of WRVU's attributable to Dr. Jernigan by applying Payment Modifiers, even though such reductions are not permitted by or even mentioned in the Employment Agreement.
- b. Physician Services has also, without Dr. Jernigan's consent and in spite of his objections, created and applied a limit on the amount of Productivity

Compensation that it will pay Dr. Jernigan, without ever fully describing this limitation in writing to Dr. Jernigan and despite the fact that this limitation is not contained in or permitted by the Employment Agreement.

25. The Employment Agreement requires that Physician Services determine Dr. Jernigan's Productivity Compensation using his actual WRVU's as specified by the CMS schedule.

26. The Employment Agreement makes no reference to CMS Payment Modifiers.

27. Therefore, Physician Services improperly and wrongfully failed to pay Dr. Jernigan of the full Productivity Compensation due to him under the terms of the Employment Agreement, for the period beginning September 1, 2016 through the present.

**PHYSICIAN SERVICES FAILS TO PAY
THE PROPER AMOUNT OF BONUS COMPENSATION**

28. The Employment Agreement requires that Physician Services pay Dr. Jernigan Bonus Compensation according to a formula specified in detail in the Employment Agreement.

29. Until the fiscal year ending August 31, 2017, to the best of Dr. Jernigan's knowledge and belief, Physician Services generally attempted in good faith to calculate Dr. Jernigan's Bonus Compensation as required by in the Employment Agreement and to pay Dr. Jernigan the resulting Bonus Compensation as required by the Employment Agreement.

30. For the fiscal years ending August 31, 2017 and 2018, however, Physician Services has failed to pay him the full amount of the bonus due him.

**PHYSICIAN SERVICES FAILS TO PAY
THE PROPER AMOUNT OF FLOW THROUGH PAYMENT COMPENSATION**

31. At some time, unknown to Dr. Jernigan, Physician Services also stopped paying him the Flow Through Payments that he was due and retained those payments for itself.

32. Physician Services has wrongfully withheld an undetermined amount of Flow Through Payments from Dr. Jernigan.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

33. The foregoing allegations are incorporated herein by reference.

34. The Employment Agreement constitutes a valid contract between Physician Services and Dr. Jernigan, and Dr. Jernigan has performed all obligations of him required under the Employment Agreement.

35. Physician Services has breached the Employment Agreement by failing to pay Dr. Jernigan the Productivity Compensation and Bonus Compensation due him under the Employment Agreement as set forth above.

36. Physician Services has also breached its commitment to Dr. Jernigan by failing to pay him the Flow Through Payments due to him.

37. Dr. Jernigan has been injured as a result of the loss of the Productivity Compensation, Flow Through Payments and Bonus Compensation due him under the Employment Agreement.

38. Dr. Jernigan is entitled to judgment against Physician Services in the amount of the unpaid Productivity Compensation, Flow Through Payments and Bonus Compensation that Physician Services has failed to pay him.

FOR A SECOND CAUSE OF ACTION
(Violation of South Carolina Payment of Wages Payment Act, S.C. Code § 41-10-10 *et seq.*)

39. The foregoing allegations are incorporated herein by reference.

40. The Productivity Compensation, Flow Through Payments and Bonus Compensation due to Dr. Jernigan are Wages as defined in §41-10-10(2) of the Act.

41. Section 41-10-40(A) of the Act required and requires that Physician Services pay Dr. Jernigan in full the Productivity Compensation, Flow Through Payments and Bonus Compensation due him.

42. Physician Services violated §§ 41-10-40(A) and(C) by failing to pay Dr. Jernigan his Productivity Compensation, Flow Through Payments and Bonus compensation.

43. Physician Services' failure to pay Dr. Jernigan's compensation was intentional, in bad faith, and in blatant violation of the express terms of the Employment Agreement and its other commitments to him.

44. Dr. Jernigan is entitled to recover from Physician Services the full amount of the Productivity Compensation, Flow Through Payments and Bonus Compensation that Physician Services has failed to pay him

45. Dr. Jernigan is also entitled, under § 41-10-80(C) of the Act, to recover three times the full amount of his unpaid wages, plus costs and his attorneys' fees.

FOR A THIRD CAUSE OF ACTION
(Declaratory Relief)

46. The foregoing allegations are incorporated herein by reference.

47. The Employment Agreement is a binding agreement between Dr. Jernigan and Physician Services and sets forth the amount of Base Compensation, Productivity Compensation, and Bonus Compensation due to Dr. Jernigan during the term of the agreement.

48. Physician Services and Dr. Jernigan dispute the construction and application of the compensation provisions of the Employment Agreement.

49. The Employment Agreement has not been terminated nor modified and remains in effect.

50. While the Employment Agreement remains in effect, Physician Services is obligated to pay Dr. Jernigan Base Compensation, Flow Through Compensation, Productivity Compensation, and Bonus Compensation as provided in the Employment Agreement.

51. Therefore, Dr. Jernigan respectfully requests that the Court declare that Physician Services must compensate Dr. Jernigan as required by the Employment Agreement, unless and until the Employment Agreement is either modified or terminated in accordance with its terms.

52. Dr. Jernigan has the right to have these questions determined by the Court pursuant to S.C. Code Ann. § 15-53-30, S.C.R.C.P. 57, and other proper legal authority, and the Court has the power to make these determinations.

53. For the foregoing reasons, Dr. Jernigan respectfully requests the Court to declare that the Employment Agreement is a binding agreement between Dr. Jernigan and Physician Services and does not permit Physician Services to unilaterally reduce Dr. Jernigan's Base, Productivity or Bonus compensation by applying Payment Modifiers or any other device or limit not set forth in the Employment Agreement as long as the Employment Agreement as not been modified or terminated according to its terms. .

54. Additionally, Dr. Jernigan is entitled to an award of, and Physician Services is liable for, the reasonable costs and expenses of Dr. Jernigan, including reasonable attorney's fees and the expenses of this action.

WHEREFORE, Plaintiff, Dr. Jernigan prays for (a) relief as hereinabove set forth, including but not limited to (1) actual and treble damages as set forth above, plus pre-judgment interest to Plaintiff; and (2) Plaintiff's attorneys' fees, experts' fees, costs, and other litigation expenses, (b) a declaration that the Employment Agreement does not permit Physician Services unilaterally to

reduce Dr. Jernigan's compensation by applying Payment Modifiers or any other device or limit not set forth in the Employment Agreement as long as the agreement has not been modified or terminated pursuant to section 3.4 and (c) an injunction enjoining Physician Services from failing to pay Productivity Compensation, Flow Through Compensation, or Bonus Compensation as required by the Employment Agreement as long as the agreement remains in effect and such other and further relief as to the Court may appear just, equitable, and proper.

Respectfully submitted:

WYCHE, P.A.

By: s/ Henry L. Parr, Jr
Henry L. Parr, Jr. (SC Bar No. 4340)
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(864) 242-8200
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Attorney for Plaintiff

November 28, 2018

**Exhibit A to Complaint –
Employment Agreement**

See Sealed Volume

EXHIBIT B

Portion of WRVU Schedule

		2006 National Physician Fee Schedule Relative Value File																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																					
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EXHIBIT C

WRVU Schedule

NATIONAL PHYSICIAN FEE SCHEDULE RELATIVE VALUE FILE CALENDAR YEAR 2016

Contents: This file contains information on services covered by the Medicare Physician Fee Schedule (MPFS) in 2016. For more than 10,000 physician services, the file contains the associated relative value units (RVUs), a fee schedule status indicator, and various payment policy indicators needed for payment adjustment (i.e., payment of assistant at surgery, team surgery, bilateral surgery, etc.).

The Medicare physician fee schedule amounts are adjusted to reflect the variation in practice costs from area to area. A geographic practice cost index (GPCI) has been established for every Medicare payment locality for each of the three components of a procedure's relative value unit (i.e., the RVUs for work, practice expense, and malpractice). The GPICs are applied in the calculation of a fee schedule payment amount by multiplying the RVU for each component times the GPCI for that component.

For informational purposes, changes from the previous year's documentation file are in bold font to facilitate their identification.

Section 121 of the Social Security Act Amendments of 1994 required CMS to replace the existing charge-based practice expense relative value units for all Medicare Physician Fee Schedule services with new resource-based ones. The Balanced Budget Act of 1997 requires a four-year transition from the existing charge-based system to the new resource-based system beginning on January 1, 1999. In 2002 and beyond, the practice expense relative value units are based entirely on the resource-based system. Beginning with CY 2007, we will use a bottom-up methodology for direct costs, use supplementary survey data for indirect costs, and eliminate the nonphysician workpool in order to calculate the practice expense RVUs. The nonphysician workpool was a special method that has been used to calculate practice expense RVUs for services with no physician work.

Under the resource-based system, we have developed practice expense relative value units specific to the facility and non-facility settings. Generally, under the resource-based system, the facility practice expense RVUs will be used for services performed in inpatient or outpatient hospital settings, emergency rooms, skilled nursing facilities, or ambulatory surgical centers (ASCs). The non-facility practice expense relative value units will be used for services furnished in all other settings. We did not develop non-facility practice expense relative value units for some services which, either by definition or in practice, are never (or rarely) performed in a non-facility setting. For example, by definition, the initial hospital care codes (CPT codes 99221-99223) are provided only in the hospital inpatient setting. Also, many major surgical procedures with a 90-day global period are almost always performed in the hospital inpatient setting. These facility-only codes are identified by a "NA" in the "NA Indicator" field.

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The formula for 2016 physician fee schedule payment amount is as follows:

2016 Non-Facility Pricing Amount =
[(Work RVU * Work GPCI) +
(Non-Facility PE RVU * PE GPCI) +
(MP RVU * MP GPCI)] * Conversion Factor (CF)

2016 Facility Pricing Amount =
[(Work RVU * Work GPCI) +
(Facility PE RVU * PE GPCI) +
(MP RVU * MP GPCI)] * Conversion Factor

Certain therapy codes will receive a 50 percent reduction to the PE.

Section 5102(b) of the Deficit Reduction Act of 2005 requires a payment cap on the technical component (TC) of certain diagnostic imaging procedures and the TC portions of the global diagnostic imaging services. This cap is based on the Outpatient Prospective Payment System (OPPS) payment. To implement this provision, the physician fee schedule amount is compared to the OPPS payment amount and the lower amount is used in the formula below to calculate payment.

2016 OPPS Non-Facility Payment Amount =
[(Work RVU * Work GPCI) + (OPPS Non-Facility PE RVU * PE GPCI) +
(OPPS MP RVU * MP GPCI)] * Conversion Factor

2016 OPPS Facility Payment Amount =
[Work RVU * Work GPCI) + (OPPS Facility PE RVU * PE GPCI) +
(OPPS MP RVU * MP GPCI)] * Conversion Factor

We are attaching/including the 2016 locality-specific anesthesia conversion factors (CFs) and they are calculated from the 2016 national anesthesia CF whose calculation is described in the CY 2016 final physician fee schedule regulation.

The Medicare limiting charge is set by law at 115 percent of the payment amount for the service furnished by the nonparticipating physician. However, the law sets the payment amount for nonparticipating physicians at 95 percent of the payment amount for participating physicians (i.e., the fee schedule amount). Calculating 95 percent of 115 percent of an amount is equivalent to multiplying the amount by a factor of 1.0925 (or 109.25 percent). Therefore, to calculate the Medicare limiting charge for a physician service for a locality, multiply the fee schedule amount by a factor of 1.0925. The result is the Medicare limiting charge for that service for that locality to which the fee schedule amount applies.

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**NATIONAL PHYSICIAN FEE SCHEDULE RELATIVE VALUE FILE
CALENDAR YEAR 2016**

<u>DATA ELEMENT</u>	<u>LOCATION</u>	<u>COBOL PIC</u>	<u>DESCRIPTION</u>
<u>HEADER RECORD</u>			
Header Indicator	1-3	x(3)	Value "HDR".
Filler	4-4	x(1)	
Copyright Statement	5-50	x(46)	
Filler	51-150	x(100)	

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DATA RECORD

HCPCS Code	1-5	X(5)	CPT or Level 2 HCPCS number for the service. NOTE: See copyright statement on cover sheet.
Modifier	6-7	X(2)	For diagnostic tests, a blank in this field denotes the global service and the following modifiers identify the components: --26 = Professional component --TC = Technical component --For services other than those with a professional and/or technical component, a blank will appear in this field with one exception: the presence of CPT modifier -53 indicates that separate RVUs and a fee schedule amount have been established for procedures which the physician terminated before completion. This modifier is used only with colonoscopy CPT code 45378, or with G0105 and G0121. Any other codes billed with modifier -53 are subject to carrier medical review and priced by individual consideration. --53 = Discontinued Procedure - Under certain circumstances, the physician may elect to terminate a surgical or diagnostic procedure. Due to extenuating circumstances, or those that threaten the well being of the patient, it may be necessary to indicate that a surgical or diagnostic procedure was started but discontinued.
Description	8-57	X(50)	
Status Code	58-58	X(1)	Indicates whether the code is in the fee schedule and whether it is separately payable if the service is covered. See Attachment A for description of values. Only RVUs associated with status codes of "A", "R", or "T", are used for Medicare payment.
Work RVU	60-65	999.99	Relative Value Unit (RVU) for the physician work in the service as

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published in the Federal Register Fee Schedule for Physicians Services for CY 2016.

Non-Facility Practice Expense RVU	67-72	999.99	Relative Value Unit (RVU) for the resource-based practice expense for the non-facility setting, as published in the <u>Federal Register</u> Fee Schedule for Physicians Services for CY 2016.
Non-Facility NA Indicator	73-74	X(2)	An "NA" in this field indicates that this procedure is rarely or never performed in the non-facility setting.
Facility Practice Expense RVU	76-81	999.99	Relative Value Unit (RVU) for the resource-based practice expense for the facility setting, as published in the <u>Federal Register</u> Fee Schedule for Physicians Services for CY 2016.
Facility NA Indicator	82-83	X(2)	An "NA" in this field indicates that this procedure is rarely or never performed in the facility setting.
Malpractice RVU	85-89	99.99	RVU for the malpractice expense for the service as published in the <u>Federal Register</u> Fee Schedule for Physicians' Services for CY 2016.
Total Non-Facility RVUs	91-96	999.99	Sum of work, non-facility practice expense, and malpractice expense RVUs.
Total Facility RVUs	97-102	999.99	Sum of work, facility practice expense, and malpractice expense RVUs.

[Type text]

PC/TC Indicator	103-103	x(1)	See Attachment A for description of values.
Global Surgery	104-106	XXX	Provides time frames that apply to each surgical procedure. 000=Endoscopic or minor procedure with related preoperative and postoperative relative values on the day of the procedure only included in the fee schedule payment amount; evaluation and management services on the day of the procedure generally not payable. 010=Minor procedure with preoperative relative values on the day of the procedure and postoperative relative values during a 10 day postoperative period included in the fee schedule amount; evaluation and management services on the day of the procedure and during the 10-day postoperative period generally not payable. 090=Major surgery with a 1-day preoperative period and 90-day postoperative period included in the fee schedule amount. MMM=Maternity codes; usual global period does not apply. XXX=The global concept does not apply to the code. YYY=The carrier is to determine whether the global concept applies and establishes postoperative period, if appropriate, at time of pricing. ZZZ=The code is related to another service and is <u>always</u> included in the global period of the other service.
Preoperative Percentage	107-109	.99	Percentage for preoperative portion of global package.
Intraoperative Percentage	110-112	.99	Percentage for intraoperative portion of global package, including postoperative work in the hospital.
Postoperative	113-115	.99	Percentage for postoperative portion of global package that is provided

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Percentage

**Multiple Procedure
(Modifier 51)**

116-116

x(1)

in the office after discharge from the hospital.

Indicates applicable payment adjustment rule for multiple procedures:
0=No payment adjustment rules for multiple procedures apply. If procedure is reported on the same day as another procedure, base the payment on the lower of (a) the actual charge, or (b) the fee schedule amount for the procedure.

1=Standard payment adjustment rules in effect before January 1, 1995 for multiple procedures apply. In the 1995 file, this indicator only applies to codes with a status code of "D". If procedure is reported on the same day as another procedure that has an indicator of 1, 2, or 3, rank the procedures by fee schedule amount and apply the appropriate reduction to this code (100%, 50%, 25%, 25%, 25%, and by report). Base the payment on the lower of (a) the actual charge, or (b) the fee schedule amount reduced by the appropriate percentage.

2=Standard payment adjustment rules for multiple procedures apply. If procedure is reported on the same day as another procedure with an indicator of 1, 2, or 3, rank the procedures by fee schedule amount and apply the appropriate reduction to this code (100%, 50%, 50%, 50%, 50% and by report). Base the payment on the lower of (a) the actual charge, or (b) the fee schedule amount reduced by the appropriate percentage.

3=Special rules for multiple endoscopic procedures apply if procedure is billed with another endoscopy in the same family (i.e., another endoscopy that has the same base procedure). The base procedure for each code with this indicator is identified in the Endobase field of this file. Apply the multiple endoscopy rules to a family before ranking the family with the other procedures performed on the same day (for example, if multiple endoscopies in the same family are reported on the same day as endoscopies in another family or on the same day as a non-endoscopic procedure). If an endoscopic procedure is reported with

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only its base procedure, do not pay separately for the base procedure. Payment for the base procedure is included in the payment for the other endoscopy.

4=Subject to 25% reduction of the TC diagnostic imaging (effective for services January 1, 2006 through June 30, 2010). Subject to 50% reduction of the TC diagnostic imaging (effective for services July 1, 2010 and after). Subject to 25% reduction of the PC of diagnostic imaging (effective for services January 1, 2012 and after).

5=Subject to 50% of the practice expense component for certain therapy services.

6=Subject to 25% reduction of the second highest and subsequent procedures to the TC of diagnostic cardiovascular services, effective for services January 1, 2013, and thereafter.

7=Subject to 20% reduction of the second highest and subsequent procedures to the TC of diagnostic ophthalmology services, effective for services January 1, 2013, and thereafter.

9=Concept does not apply.

Indicates services subject to payment adjustment.

**Bilateral Surgery
(Modifier 50)**

117-117

x(1)

[Type text]

0=150% payment adjustment for bilateral procedures does not apply. If procedure is reported with modifier -50 or with modifiers RT and LT, base the payment for the two sides on the lower of: (a) the total actual charge for both sides and (b) 100% of the fee schedule amount for a single code. Example: The fee schedule amount for code XXXXX is \$125. The physician reports code XXXXX-LT with an actual charge of \$100 and XXXXX-RT with an actual charge of \$100. Payment should be based on the fee schedule amount (\$125) since it is lower than the total actual charges for the left and right sides (\$200). The bilateral adjustment is inappropriate for codes in this category (a) because of physiology or anatomy, or (b) because the code description specifically states that it is a unilateral procedure and there is an existing code for the bilateral procedure.

1=150% payment adjustment for bilateral procedures applies. If the code is billed with the bilateral modifier or is reported twice on the same day by any other means (e.g., with RT and LT modifiers, or with a 2 in the units field), base the payment for these codes when reported as bilateral procedures on the lower of: (a) the total actual charge for both sides or (b) 150% of the fee schedule amount for a single code. If the code is reported as a bilateral procedure and is reported with other procedure codes on the same day, apply the bilateral adjustment before applying any multiple procedure rules.

2=150% payment adjustment does not apply. RVUs are already based on the procedure being performed as a bilateral procedure. If the procedure is reported with modifier -50 or is reported twice on the same day by any other means (e.g., with RT and LT modifiers or with a 2 in the units field), base the payment for both sides on the lower of (a) the total actual charge by the physician for both sides, or (b) 100% of the fee schedule for a single code. Example: The fee schedule amount for code YYYYY is \$125. The physician reports code YYYYY-LT with an actual charge of \$100 and YYYYY-RT with an actual charge of \$100. Payment should be based on the fee schedule amount (\$125) since it is

[Type text]

lower than the total actual charges for the left and right sides (\$200). The RVUs are based on a bilateral procedure because (a) the code descriptor specifically states that the procedure is bilateral, (b) the code descriptor states that the procedure may be performed either unilaterally or bilaterally, or (c) the procedure is usually performed as a bilateral procedure.

3=The usual payment adjustment for bilateral procedures does not apply. If the procedure is reported with modifier -50 or is reported for both sides on the same day by any other means (e.g., with RT and LT modifiers or with a 2 in the units field), base the payment for each side or organ or site of a paired organ on the lower of (a) the actual charge for each side or (b) 100% of the fee schedule amount for each side. If the procedure is reported as a bilateral procedure and with other procedure codes on the same day, determine the fee schedule amount for a bilateral procedure before applying any multiple procedure rules. Services in this category are generally radiology procedures or other diagnostic tests which are not subject to the special payment rules for other bilateral surgeries.

9=Concept does not apply.

Assistant at Surgery

118-118

x(1)

Indicates services where an assistant at surgery is never paid for per Medicare Claims Manual.

0=Payment restriction for assistants at surgery applies to this procedure unless supporting documentation is submitted to establish medical necessity.

1=Statutory payment restriction for assistants at surgery applies to this procedure. Assistant at surgery may not be paid.

2=Payment restriction for assistants at surgery does not apply to this procedure. Assistant at surgery may be paid.

[Type text]

			9=Concept does not apply.
Co-surgeons (Modifier 62)	119-119	x(1)	Indicates services for which two surgeons, each in a different specialty, may be paid. 0=Co-surgeons not permitted for this procedure. 1=Co-surgeons could be paid, though supporting documentation is required to establish the medical necessity of two surgeons for the procedure. 2=Co-surgeons permitted and no documentation required if the two-specialty requirement is met. 9=Concept does not apply.
Team Surgery (Modifier 66)	120-120	x(1)	Indicates services for which team surgeons may be paid. 0=Team surgeons not permitted for this procedure. 1=Team surgeons could be paid, though supporting documentation required to establish medical necessity of a team; pay by report. 2=Team surgeons permitted; pay by report. 9=Concept does not apply.
Filler	121-127	x(1)	
Endoscopic Base Code	128-132	X(5)	Code which identifies an endoscopic base code for each code with a multiple surgery indicator of 3.
Conversion Factor	133-140	999.9999	This is the multiplier that transforms relative values into payment

[Type text]

amounts. This conversion factor reflects the MEI update adjustment.
For 2002 and beyond, there is a single conversion factor for all services.

**Physician Supervision of
Diagnostic Procedures**

142-143

X(2)

This field is for use in post payment review.

01 = Procedure must be performed under the general supervision of a physician.

02 = Procedure must be performed under the direct supervision of a physician.

03 = Procedure must be performed under the personal supervision of physician.

04 = Physician supervision policy does not apply when procedure is furnished by a qualified, independent psychologist or a clinical psychologist; otherwise must be performed under the general supervision of a physician.

05 = Physician supervision policy does not apply when procedure is furnished by a qualified audiologist; otherwise must be performed under the general supervision of a physician.

06 = Procedure must be performed by a physician or a physical Therapist (PT) who is certified by the American Board of Physical Therapy Specialties (ABPTS) as a qualified electrophysiological clinical specialist and is permitted to provide the procedure under State law.

21 = Procedure may be performed by a technician with certification under general supervision of a physician; otherwise must be performed under direct supervision of a physician.

22 = May be performed by a technician with on-line real-time contact with physician.

66 = May be performed by a physician or by a physical therapist with ABPTS certification and certification in this specific procedure.

6A= Supervision standards for level 66 apply; in addition, the PT with ABPTS certification may supervise another PT, but only the PT with ABPTS certification may bill.

77 = Procedure must be performed by a PT with ABPTS certification or by a PT without certification under direct supervision of a physician, or

[Type text]

by a technician with certification under general supervision of a physician.

7A = Supervision standards for level 77 apply; in addition, the PT with ABPTS certification may supervise another PT, but only the PT with ABPTS certification may bill.

09 = Concept does not apply.

Calculation Flag	144-144	X(1)	As of July 1, 2014 the value for the Calculation Flag for all HCPCS is "0".
Diagnostic Imaging Family Indicator	146-147	X(2)	This field identifies the applicable diagnostic service family for that HCPCS codes with a multiple procedure indicator of '4'. <i>For services effective January 1, 2011 and after, family indicators 01 – 11 will not be populated.</i> The values are: 01=Ultrasound (Chest/Abdomen/Pelvis-Non-Obstetrical) 02=CT and CTA (Chest/Thorax/Abd/Pelvis) 03=CT and CTA (Head/Brain/Orbit/Maxillofacial/Neck) 04=MRI and MRA (Chest/Abd/Pelvis) 05=MRI and MRA (Head/Brain/Neck) 06=MRI and MRA (Spine) 07=CT (Spine) 08=MRI and MRA (Lower Extremities) 09=CT and CTA (Lower Extremities) 10=MR and MRI (Upper Extremities and Joints) 11=CT and CTA (Upper Extremities) 88 = Subject to the reduction of the TC diagnostic imaging (effective for services January 1, 2011 and after). 99=Concept does not apply
Non-Facility Practice Expense Used for OPPTS	152-157	999.99	The OPPTS Payment Amount calculated using these values is compared to the Medicare Physician Fee Schedule to determine applicability of the

[Type text]

Payment Amount

OPPS Imaging Cap mandated by Section 5102(b) of the Deficit Reduction Act of 2005.

Facility Practice Expense Used for OPPS Payment Amount	159-164	999.99
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The OPPS Payment Amount calculated using these values is compared to the Medicare Physician Fee Schedule to determine applicability of the OPPS Imaging Cap mandated by Section 5102(b) of the Deficit Reduction Act of 2005.

Malpractice Used for OPPS Payment Amount	1	999.99
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The OPPS Payment Amount calculated using these values is compared to the Medicare Physician Fee Schedule to determine applicability of the OPPS Imaging Cap mandated by Section 5102(b) of the Deficit Reduction Act of 2005.

[Type text]

ATTACHMENT A

- STATUS CODE A = Active Code. These codes are paid separately under the physician fee schedule, if covered. There will be RVUs for codes with this status. The presence of an "A" indicator does not mean that Medicare has made a national coverage determination regarding the service; carriers remain responsible for coverage decisions in the absence of a national Medicare policy.
- B = Bundled Code. Payment for covered services are always bundled into payment for other services not specified. If RVUs are shown, they are not used for Medicare payment. If these services are covered, payment for them is subsumed by the payment for the services to which they are incident. (An example is a telephone call from a hospital nurse regarding care of a patient).
- C = Carriers price the code. Carriers will establish RVUs and payment amounts for these services, generally on an individual case basis following review of documentation such as an operative report.
- D = Deleted Codes. These codes are deleted effective with the beginning of the applicable year. These codes will not appear on the 2006 file as the grace period for deleted codes is no longer applicable.
- E = Excluded from Physician Fee Schedule by regulation. These codes are for items and/or services that CMS chose to exclude from the fee schedule payment by regulation. No RVUs are shown, and no payment may be made under the fee schedule for these codes. Payment for them, when covered, generally continues under reasonable charge procedures.
- F = Deleted/Discontinued Codes. (Code not subject to a 90 day grace period). These codes will not appear on the 2006 file as the grace period for deleted codes is no longer applicable.
- G = Not valid for Medicare purposes. Medicare uses another code for reporting of, and payment for, these services. (Code subject to a 90 day grace period.) These codes will not appear on the 2006 file as the grace period for deleted codes is no longer applicable.
- H = Deleted Modifier. This code had an associated TC and/or 26 modifier in the previous year. For the current year, the TC or 26 component shown for the code has been deleted, and the deleted component is shown with a status code of "H". These codes will not appear on the 2006 file as the grace period for deleted codes is no longer applicable.
- I = Not valid for Medicare purposes. Medicare uses another code for

[Type text]

reporting of, and payment for, these services. (Code NOT subject to a 90 day grace period.)

- J = Anesthesia Services. There are no RVUs and no payment amounts for these codes. The intent of this value is to facilitate the identification of anesthesia services.
- M = Measurement codes. Used for reporting purposes only.
- N = Non-covered Services. These services are not covered by Medicare.
- P = Bundled/Excluded Codes. There are no RVUs and no payment amounts for these services. No separate payment should be made for them under the fee schedule.
--If the item or service is covered as incident to a physician service and is provided on the same day as a physician service, payment for it is bundled into the payment for the physician service to which it is incident. (An example is an elastic bandage furnished by a physician incident to physician service.)
--If the item or service is covered as other than incident to a physician service, it is excluded from the fee schedule (i.e., colostomy supplies) and should be paid under the other payment provision of the Act.
- R = Restricted Coverage. Special coverage instructions apply. If covered, the service is carrier priced. (NOTE: The majority of codes to which this indicator will be assigned are the alpha-numeric dental codes, which begin with "D". We are assigning the indicator to a limited number of CPT codes which represent services that are covered only in unusual circumstances.)
- T = Injections. There are RVUS and payment amounts for these services, but they are only paid if there are no other services payable under the physician fee schedule billed on the same date by the same provider. If any other services payable under the physician fee schedule are billed on the same date by the same provider, these services are bundled into the physician services for which payment is made. (NOTE: This is a change from the previous definition, which states that injection services are bundled into any other services billed on the same date.)
- X = Statutory Exclusion. These codes represent an item or service that is not in the statutory definition of "physician services" for fee schedule payment purposes. No RVUS or payment amounts are shown for these codes, and no payment may be made under the physician fee schedule. (Examples are ambulance services and clinical diagnostic laboratory services.)
- Q = Therapy functional information code (used for required reporting purposes only).**

[Type text]

PC/TC INDICATOR

- 0 = Physician Service Codes--Identifies codes that describe physician services. Examples include visits, consultations, and surgical procedures. The concept of PC/TC does not apply since physician services cannot be split into professional and technical components. Modifiers 26 and TC cannot be used with these codes. The RVUS include values for physician work, practice expense and malpractice expense. There are some codes with no work RVUs.
- 1 = Diagnostic Tests for Radiology Services--Identifies codes that describe diagnostic tests. Examples are pulmonary function tests or therapeutic radiology procedures, e.g., radiation therapy. These codes have both a professional and technical component. Modifiers 26 and TC can be used with these codes. The total RVUs for codes reported with a 26 modifier include values for physician work, practice expense, and malpractice expense. The total RVUs for codes reported with a TC modifier include values for practice expense and malpractice expense only. The total RVUs for codes reported without a modifier include values for physician work, practice expense, and malpractice expense.
- 2 = Professional Component Only Codes--This indicator identifies stand-alone codes that describe the physician work portion of selected diagnostic tests for which there is an associated code that describes the technical component of the diagnostic test only and another associated code that describes the global test. An example of a professional component only code is CPT code **93010--Electrocardiogram; Interpretation and Report**. Modifiers 26 and TC cannot be used with these codes. The total RVUs for professional component only codes include values for physician work, practice expense, and malpractice expense.
- 3 = Technical Component Only Codes--This indicator identifies stand-alone codes that describe the technical component (i.e., staff and equipment costs) of selected diagnostic tests for which there is an associated code that describes the professional component of the diagnostic test only. An example of a technical component only code is CPT code **93005--Electrocardiogram; Tracing Only, without interpretation and report**. It also identifies codes that are covered only as diagnostic tests and therefore do not have a related professional code. Modifiers 26 and TC cannot be used with these codes. The total RVUs for technical component only codes include values for practice expense and malpractice expense only.
- 4 = Global Test Only Codes--This indicator identifies stand-alone codes that describe selected diagnostic tests for which there are associated codes that describe (a) the professional component

[Type text]

of the test only, and (b) the technical component of the test only. Modifiers 26 and TC cannot be used with these codes. The total RVUs for global procedure only codes include values for physician work, practice expense, and malpractice expense. The total RVUs for global procedure only codes equals the sum of the total RVUs for the professional and technical components only codes combined.

- 5 = Incident To Codes--This indicator identifies codes that describe services covered incident to a physician's service when they are provided by auxiliary personnel employed by the physician and working under his or her direct personal supervision. Payment may not be made by carriers for these services when they are provided to hospital inpatients or patients in a hospital outpatient department. Modifiers 26 and TC cannot be used with these codes.
- 6 = Laboratory Physician Interpretation Codes--This indicator identifies clinical laboratory codes for which separate payment for interpretations by laboratory physicians may be made. Actual performance of the tests is paid for under the lab fee schedule. Modifier TC cannot be used with these codes. The total RVUs for laboratory physician interpretation codes include values for physician work, practice expense, and malpractice expense.
- 7 = Physical therapy service, for which payment may not be made--Payment may not be made if the service is provided to either a patient in a hospital outpatient department or to an inpatient of the hospital by an independently practicing physical or occupational therapist.

[Type text]

8 = Physician interpretation codes: This indicator identifies the professional component of clinical laboratory codes for which separate payment may be made only if the physician interprets an abnormal smear for hospital inpatient. This applies to CPT codes 88141, 85060 and HCPCS code P3001-26. No TC billing is recognized because payment for the underlying clinical laboratory test is made to the hospital, generally through the PPS rate.

No payment is recognized for CPT codes 88141, 85060 or HCPCS code P3001-26 furnished to hospital outpatients or non-hospital patients. The physician interpretation is paid through the clinical laboratory fee schedule payment for the clinical laboratory test.

9 = Not Applicable--Concept of a professional/technical component does not apply

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

W. CLARK JERNIGAN, M.D.,

Plaintiff,

vs.

ST. FRANCIS PHYSICIAN SERVICES, INC.

Defendant.

IN THE COURT OF COMMON PLEAS

Case No. 2018-CP-23- 5985

**DEFENDANT ST. FRANCIS
PHYSICIAN SERVICES, INC.'S
ANSWER AND AFFIRMATIVE
DEFENSES**

Defendant St. Francis Physician Services, Inc. ("Defendant" or "SFPS"), by and through undersigned counsel, hereby answers Plaintiff W. Clark Jernigan, M.D.'s ("Plaintiff") Complaint as follows:

GENERAL DENIAL

Each and every allegation of the Complaint not hereinafter specifically admitted is denied and strict proof thereof is demanded.

FOR A FIRST DEFENSE

Defendant answers the numbered paragraphs set forth in Plaintiff's Complaint as follows:

1. Defendant lacks sufficient knowledge or information to admit or deny the allegations of Paragraph 1 regarding Plaintiff's residency status and therefore denies the same.
2. Admitted.
3. Admitted.
4. Defendant admits only so much of the allegations of Paragraph 4 of the Complaint as alleges, or as may be construed to allege, that Plaintiff and Defendant entered into an Employment Agreement on or about July 9, 2006, (the "Employment Agreement"), as amended,

which Employment Agreement speaks for itself as to its content. All remaining allegations of Paragraph 4 not specifically admitted herein are denied.

5. Admitted.

6. Admitted.

7. Defendant admits only so much of the allegations of Paragraph 7 of the Complaint as alleges, or as may be construed to allege, that Plaintiff is a board certified orthopedic surgeon who treats disorders of the shoulder, among other things, and the quality of which services he has provided and provides speaks for itself. All remaining allegations of Paragraph 7 not specifically admitted herein are denied.

8. Defendant admits only so much of the allegations of Paragraph 8 of the Complaint as alleges, or as may be construed to allege, that Plaintiff was an employed physician of Defendant since September 1, 2006 through the present and the quality of which services he has provided and provides speaks for itself. All remaining allegations of Paragraph 8 not specifically admitted herein are denied.

9. Defendant admits only so much of the allegations of Paragraph 9 of the Complaint as alleges, or as may be construed to allege, that Plaintiff is a board certified orthopedic surgeon who provides services in the subspecialty areas of complex foot and ankle care, among other things. Defendant lacks knowledge or information to form a belief as to the truth of the allegations in Paragraph 9 concerning Plaintiff's experience. All remaining allegations of Paragraph 9 not specifically admitted herein are denied.

10. The allegations of Paragraph 10 call for a legal conclusion to which no response is required. By way of further response, the Employment Agreement speaks for itself as to its content. All remaining allegations of Paragraph 10 not specifically admitted herein are denied.

11. Admitted.

12. Admitted.

13. Admitted.

14. Defendant admits only so much of the allegations of Paragraph 14 of the Complaint as alleges, or as may be construed to allege, that Defendant presented a proposal to Plaintiff in 2006 to become an employed physician, the contents of which speak for itself. All remaining allegations of Paragraph 14 not specifically admitted herein are denied.

15. Defendant admits only so much of the allegations of Paragraph 15 of the Complaint as alleges, or as may be construed to allege, that Defendant presented a proposal to Plaintiff in 2006 to become an employed physician, the contents of which speak for itself. All remaining allegations of Paragraph 15 not specifically admitted herein are denied.

16. Defendant admits only so much of the allegations of Paragraph 16 of the Complaint as alleges, or as may be construed to allege, that Defendant presented a proposal to Plaintiff in 2006 to become an employed physician, the contents of which speak for itself. All remaining allegations of Paragraph 16 not specifically admitted herein are denied.

17. Defendant admits only so much of Paragraph 17 as alleges, or as may be construed to allege, that the parties entered into an Employment Agreement, which speaks for itself as to its content. The remaining allegations of Paragraph 17 not specifically admitted herein are denied.

18. Defendant admits only so much of Paragraph 18 as alleges, or as may be construed to allege, that the parties entered into an Employment Agreement, which speaks for itself as to its content. Defendant admits that Exhibit B is a writing published by CMS, the content of which writing speaks for itself. The remaining allegations of Paragraph 18 not specifically admitted herein are denied.

19. The allegations of Paragraph 19 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations of Paragraph 19 are denied.

20. Defendant admits only so much of Paragraph 20 as alleges, or as may be construed to allege, that Exhibit C is a writing published by CMS, the content of which writing speaks for itself. The remaining allegations of Paragraph 20 not specifically admitted herein are denied.

21. The allegations of Paragraph 21 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

22. Defendant admits only so much of Paragraph 22 as alleges, or as may be construed to allege, that it has paid Plaintiff under the Employment Agreement, the content of which speaks for itself. The remaining allegations of Paragraph 22 not specifically admitted herein are denied.

23. Denied.

24. Denied.

25. Denied.

26. Defendant admits only so much of Paragraph 26 as alleges, or as may be construed to allege, that the parties entered into an Employment Agreement, the content of which speaks for itself. The remaining allegations of Paragraph 26 not specifically admitted herein are denied.

27. Denied.

28. Defendant admits only so much of Paragraph 28 as alleges, or as may be construed to allege, that the parties entered into an Employment Agreement, the content of which speaks for itself. The remaining allegations of Paragraph 28 not specifically admitted herein are denied.

29. Defendant admits only so much of Paragraph 29 as alleges, or as may be construed to allege, that it has paid Plaintiff under the Employment Agreement, the content of which speaks for itself. The remaining allegations of Paragraph 29 not specifically admitted herein are denied.

30. Denied.

31. Denied.

32. Denied.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

33. Defendant hereby expressly incorporates by reference its responses to the allegations of Paragraphs 1-32 of the Complaint as if set forth verbatim herein.

34. The allegations of Paragraph 34 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

35. Denied.

36. Denied.

37. Denied.

38. Denied.

FOR A SECOND CAUSE OF ACTION
(Violation of the S.C. Payment of Wages Act, S.C. Code § 41-101-10, et seq.)

39. Defendant hereby expressly incorporates by reference its responses to the allegations of Paragraphs 1-38 of the Complaint as if set forth verbatim herein.

40. The allegations of Paragraph 40 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations of Paragraph 40 are denied.

41. The allegations of Paragraph 41 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations of Paragraph 41 are denied.

42. Denied.

43. Denied.

44. Denied.

45. Denied.

FOR A THIRD CAUSE OF ACTION
(Declaratory Relief)

46. Defendant hereby expressly incorporates by reference its responses to the allegations of Paragraphs 1-45 of the Complaint as if set forth verbatim herein.

47. The allegations of Paragraph 47 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied. By way of further response, the content of the Employment Agreement speaks for itself.

48. Admitted.

49. The allegations of Paragraph 49 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

50. The allegations of Paragraph 50 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

51. Denied.

52. The allegations of Paragraph 52 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

53. Denied.

54. Denied.

55. Defendant denies the relief sought in Plaintiff's WHEREFORE clause and demands strict proof of Plaintiff's entitlement thereto. By way of further response, Defendant expressly denies that Defendant is liable for Plaintiff's alleged injuries and denies that Plaintiff is entitled to any relief whatsoever.

SECOND AFFIRMATIVE DEFENSE
(Rule 12(b)(6))

55. Plaintiff's Complaint fails to state a claim upon which relief may be granted and must be dismissed.

THIRD AFFIRMATIVE DEFENSE
(Equitable Defenses)

56. Plaintiff's claims are barred in whole or in part by the equitable principles of waiver, laches, estoppel, and acquiescence.

FOURTH AFFIRMATIVE DEFENSE
(No Bad Faith)

57. At no time did Defendant act with actual malice, intent, bad faith, oppression, gross or willful wrong, insult, indignity, or reckless or wanton disregard of Plaintiff's rights.

FIFTH AFFIRMATIVE DEFENSE
(South Carolina Payment of Wages Act—No Wages Due)

58. The compensation Plaintiff seeks does not constitute wages due as defined by the South Carolina Payment of Wages Act.

SIXTH AFFIRMATIVE DEFENSE
(South Carolina Payment of Wages Act—Requisite Notice Provided)

59. Defendant provided the appropriate notice for any changes in alleged wages due as required by the South Carolina Payment of Wages Act.

SEVENTH AFFIRMATIVE DEFENSE
(South Carolina Payment of Wages Act—Bona Fide Dispute)

60. A bona fide dispute exists as to whether wages are owed to Plaintiff and Defendant did not act unreasonably or in bad faith, therefore Plaintiff has no entitlement to treble damages or attorney's fees.

EIGHTH AFFIRMATIVE DEFENSE
(Reservation of Rights)

61. Defendant reserves the right to amend its answer and assert and rely upon any further and additional defenses that may be revealed through the course of discovery.

WHEREFORE, having fully answered Plaintiff's Complaint, Defendant prays that it be dismissed, that this Court award Defendant's costs and attorneys' fees incurred in defending the Complaint, and that this Court grant such further relief as it deems just and proper.

s/Nikole Setzler Mergo

Matthew Roberts, SC Bar No. 8856
Nikole Setzler Mergo, SC Bar No. 68010
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Attorneys for Defendant

January 28, 2019
Columbia, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE W. Clark Jernigan, M.D., Plaintiff, v. St. Francis Physician Services, Inc., Defendant.	IN THE COURT OF COMMON PLEAS Case No. 2018-CP-23-5985 PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT
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Plaintiff Dr. Clark Jernigan is an orthopedic surgeon. He has been employed by Defendants, St. Francis Physician Services, Inc. (“St. Francis”) since September 1, 2006. St. Francis forced this lawsuit by refusing to pay Dr. Jernigan according to the terms of his employment agreement.

Dr. Jernigan moves for partial summary judgment because there are no issues of material fact regarding the meaning of the compensation provisions of his employment agreement. *See* S.C. R. Civ. P. 56(a), (d). Granting the motion will resolve the most significant issues in dispute here.

Dr. Jernigan asks that this Court hold that (a) Dr. Jernigan’s employment agreement does not permit St. Francis to reduce his compensation by the application of “payment modifiers,” (b) that Dr. Jernigan’s compensation qualifies as “wages” for the purposes of the South Carolina Wage Act, S.C. Code § 41-10-10(2), and (c) that St. Francis owes Dr. Jernigan all the compensation that he would otherwise have received had St. Francis not improperly reduced his compensation by the application of payment modifiers.

[Signature on following page]

Respectfully submitted,

WYCHE, P.A.

s/Henry L. Parr, Jr.

Henry L. Parr, Jr. (SC Bar No. 4340)

44 East Camperdown Way

Greenville, South Carolina 29602

(864) 242-8200

hparr@wyche.com

Attorney for Plaintiff

Dated: April 10, 2018

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE <i>W. Clark Jernigan, M.D.,</i> Plaintiff, v. <i>St. Francis Physician Services, Inc.,</i> Defendant.	IN THE COURT OF COMMON PLEAS CASE NO. 2018-CP-23-5985 Affidavit of W. Clark Jernigan, M.D. in support of Motion for Partial Summary Judgment
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W. Clark Jernigan, M.D. being duly sworn, says as follows:

1. I am the plaintiff in the above matter and submit this affidavit in support of my motion for partial summary judgment. Except as expressly indicated otherwise, this affidavit is based on my personal knowledge. I am at least eighteen years of age, of sound mind, capable of making this affidavit, and fully competent to testify to the matters stated. All attachments to the complaint and this affidavit are true and correct copies of the original documents.

2. I have 37 years of experience in orthopedics, including my five year residency.

3. In 2006, I signed an employment agreement with Defendant St. Francis Physician Services ("St. Francis"). Exhibit A to this affidavit is a copy of that employment agreement with St. Francis including all subsequent amendments. It has not been terminated and remains in effect.

4. Exhibit 4.1.1 of the Employment Agreement, as modified by the First Amendment to the employment agreement effective September 1, 2008, provides that

St. Francis agreed to pay me Productivity Compensation at the rate of [REDACTED] for each Work Relative Value Unit ("WRVU") attributable to services personally performed by me to the extent that this amount exceeds any Base Compensation that I had already received. Exhibit A, at 23–24, 32.

5. Exhibit 4.1.1 of the Employment Agreement also states that the amount of my bonus is determined, in part, based on the WRVUs generated by services personally performed by me and by the other orthopedists in my group. Exhibit A at 23–25.

6. Exhibit 4.1.1 of the Employment Agreement, as modified by the First Amendment to my Employment Agreement, also states that the amount of WRVUs attributable to my services would be calculated based on the WRVU values assigned by the U.S. Centers for Medicare and Medicaid Services known as "CMS" Center as published each year in the Federal Register. Exhibit A at 26.

7. CMS assigns WRVUs to procedures as a way of measuring "the relative time and effort (work) that a physician will expend with each procedure." *Id.*

8. CMS uses the published WRVU schedule to determine what it will pay hospitals for physician services. The WRVU values assigned by CMS are merely one factor in CMS's payment determination. As noted in the CMS publication, attached as Exhibit B at 6–7, to this affidavit, CMS defines a WRVU as "Relative Value Unit (RVU) for the physician work in the service as published in the Federal Register Fee Schedule for Physician Services...."

9. The sample Fee Schedule attached as Exhibit C to this affidavit shows a sample of how CMS assigns Work RVU values to various orthopedic procedures. Exhibit D to this affidavit is a similar schedule for 2016. The Work RVU values are included in the column marked "Work RVU."

10. My employment agreement requires St. Francis to calculate my Productivity Compensation by using the WRVU values on the CMS fee schedule for the appropriate year.

11. From 2006 until September 1, 2016, to the best of my knowledge, St. Francis calculated my productivity compensation by using the appropriate WRVU values and paying me accordingly. Beginning September 1, 2016, however, St. Francis has been applying payment adjustment modifiers to reduce the WRVUs credited to me for purposes of my compensation. Attached as Exhibits E and F are two documents produced by St. Francis in this case, which show that St. Francis made this change.

12. Nothing in my Employment Agreement refers to CMS payment adjustment modifiers or permits St. Francis to apply them to reduce my WRVUs for purposes of my compensation.

13. The federal government began using payment modifiers long before 2006. It uses them to adjust the amounts it pays under Medicare and Medicaid. For the first ten years of my employment agreement, however, St. Francis did not apply these modifiers to affect my productivity compensation. But in 2016, St. Francis

unilaterally decided to apply those modifiers to reduce the amount St. Francis pays me.

14. When St. Francis proposed the Employment Agreement to me in 2006, it provided information about WRVUs and an example of how my compensation would be determined using WRVUs. The relevant portions of this are Exhibit G to this affidavit. It demonstrates that my compensation would not be reduced by CMS payment modifiers. The compensation summary calculated my compensation prior to my bonus by using my total unmodified WRVUs for 2005 and multiplying them by [REDACTED] (which was the initial proposed rate). Exhibit G at 12. St. Francis even included a portion of the CMS fee schedule to show where I could find the WRVU values for a procedure. *Id.* at 19–21. There was no suggestion that the WRVU value on the CMS publication would be reduced by application of CMS payment modifiers.

15. The column entitled Work RVU on attached Exhibits C and D and on comparable CMS publications for later years provides the Work RVU values that St. Francis should use for purposes of determining my compensation, without reference to any payment modifiers.

16. I never agreed to modify my employment agreement to permit St. Francis to reduce my WRVUs by the application of CMS payment modifiers. St. Francis did propose a new employment contract, but we never reached a final agreement on a new contract. The employment agreement attached as Exhibit A to this affidavit remains in effect.

17. Attached as Exhibit B is a copy of a portion of a document titled "National Physician Fee Schedule Relative Value File Calendar Year 2016."

18. Attached as Exhibit C is a copy of a portion of a document titled "National Physician Fee Schedule Relative Value File" for the year 2006.

19. Attached as Exhibit D is a copy of a portion of a document titled "National Physician Fee Schedule Relative Value File Calendar Year 2016."

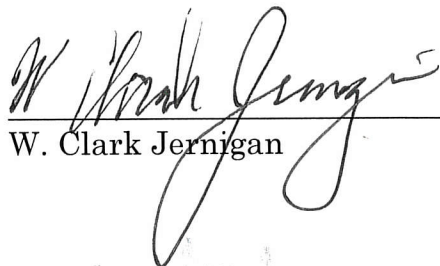
20. Attached as Exhibit E to this affidavit is a copy of a document that Defendant produced in discovery in this case. It is a memorandum to Bon Secours Medical Group Physicians dated April 14, 2016. It is bates labeled SFPS0000381.

21. Attached as Exhibit F to this affidavit is a copy of a document that Defendant produced in discovery in this case. It is the Clinical Operations Group Minutes dated July 7, 2016. It is bates labeled SFPS0000265-66.

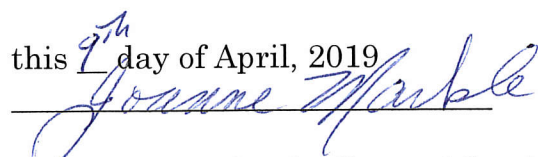
22. Attached as Exhibit G is a copy of a portion of a May 9, 2006 letter and attachments from Nancy Graebner of St. Francis.

23. Attached as Exhibit H is a true and correct copy of St. Francis's Response to Plaintiff's Second Set of Interrogatories.

FURTHER AFFIANT SAYETH NOT.


W. Clark Jernigan

SWORN BEFORE ME

this 9th day of April, 2019


Notary Public for the State of South Carolina

My Commission Expires: Jan 10, 2028



Exhibit A to Affidavit of W. Clark Jernigan, M.D.
in Support of Motion for Partial Summary Judgment –
Employment Agreement

See Sealed Volume

EXHIBIT B

Portion of National
Physician Fee Schedule
Relative Value File
Calendar Year 2016

NATIONAL PHYSICIAN FEE SCHEDULE RELATIVE VALUE FILE CALENDAR YEAR 2016

Contents: This file contains information on services covered by the Medicare Physician Fee Schedule (MPFS) in 2016. For more than 10,000 physician services, the file contains the associated relative value units (RVUs), a fee schedule status indicator, and various payment policy indicators needed for payment adjustment (i.e., payment of assistant at surgery, team surgery, bilateral surgery, etc.).

The Medicare physician fee schedule amounts are adjusted to reflect the variation in practice costs from area to area. A geographic practice cost index (GPCI) has been established for every Medicare payment locality for each of the three components of a procedure's relative value unit (i.e., the RVUs for work, practice expense, and malpractice). The GPCIs are applied in the calculation of a fee schedule payment amount by multiplying the RVU for each component times the GPCI for that component.

For informational purposes, changes from the previous year's documentation file are in bold font to facilitate their identification.

Section 121 of the Social Security Act Amendments of 1994 required CMS to replace the existing charge-based practice expense relative value units for all Medicare Physician Fee Schedule services with new resource-based ones. The Balanced Budget Act of 1997 requires a four-year transition from the existing charge-based system to the new resource-based system beginning on January 1, 1999. In 2002 and beyond, the practice expense relative value units are based entirely on the resource-based system. Beginning with CY 2007, we will use a bottom-up methodology for direct costs, use supplementary survey data for indirect costs, and eliminate the nonphysician workpool in order to calculate the practice expense RVUs. The nonphysician workpool was a special method that has been used to calculate practice expense RVUs for services with no physician work.

Under the resource-based system, we have developed practice expense relative value units specific to the facility and non-facility settings. Generally, under the resource-based system, the facility practice expense RVUs will be used for services performed in inpatient or outpatient hospital settings, emergency rooms, skilled nursing facilities, or ambulatory surgical centers (ASCs). The non-facility practice expense relative value units will be used for services furnished in all other settings. We did not develop non-facility practice expense relative value units for some services which, either by definition or in practice, are never (or rarely) performed in a non-facility setting. For example, by definition, the initial hospital care codes (CPT codes 99221-99223) are provided only in the hospital inpatient setting. Also, many major surgical procedures with a 90-day global period are almost always performed in the hospital inpatient setting. These facility-only codes are identified by a "NA" in the "NA Indicator" field.

The formula for 2016 physician fee schedule payment amount is as follows:

$$\begin{aligned} \text{2016 Non-Facility Pricing Amount} = & \\ & [(\text{Work RVU} * \text{Work GPCI}) + \\ & (\text{Non-Facility PE RVU} * \text{PE GPCI}) + \\ & (\text{MP RVU} * \text{MP GPCI})] * \text{Conversion Factor (CF)} \end{aligned}$$

$$\begin{aligned} \text{2016 Facility Pricing Amount} = & \\ & [(\text{Work RVU} * \text{Work GPCI}) + \\ & (\text{Facility PE RVU} * \text{PE GPCI}) + \\ & (\text{MP RVU} * \text{MP GPCI})] * \text{Conversion Factor} \end{aligned}$$

Certain therapy codes will receive a 50 percent reduction to the PE.

Section 5102(b) of the Deficit Reduction Act of 2005 requires a payment cap on the technical component (TC) of certain diagnostic imaging procedures and the TC portions of the global diagnostic imaging services. This cap is based on the Outpatient Prospective Payment System (OPPS) payment. To implement this provision, the physician fee schedule amount is compared to the OPPS payment amount and the lower amount is used in the formula below to calculate payment.

$$\begin{aligned} \text{2016 OPPS Non-Facility Payment Amount} = & \\ & [(\text{Work RVU} * \text{Work GPCI}) + (\text{OPPS Non-Facility PE RVU} * \text{PE GPCI}) + \\ & (\text{OPPS MP RVU} * \text{MP GPCI})] * \text{Conversion Factor} \end{aligned}$$

$$\begin{aligned} \text{2016 OPPS Facility Payment Amount} = & \\ & [(\text{Work RVU} * \text{Work GPCI}) + (\text{OPPS Facility PE RVU} * \text{PE GPCI}) + \\ & (\text{OPPS MP RVU} * \text{MP GPCI})] * \text{Conversion Factor} \end{aligned}$$

We are attaching/including the 2016 locality-specific anesthesia conversion factors (CFs) and they are calculated from the 2016 national anesthesia CF whose calculation is described in the CY 2016 final physician fee schedule regulation.

The Medicare limiting charge is set by law at 115 percent of the payment amount for the service furnished by the nonparticipating physician. However, the law sets the payment amount for nonparticipating physicians at 95 percent of the payment amount for participating physicians (i.e., the fee schedule amount). Calculating 95 percent of 115 percent of an amount is equivalent to multiplying the amount by a factor of 1.0925 (or 109.25 percent). Therefore, to calculate the Medicare limiting charge for a physician service for a locality, multiply the fee schedule amount by a factor of 1.0925. The result is the Medicare limiting charge for that service for that locality to which the fee schedule amount applies.

- File Organization:** The file contains one record for each unique combination of procedure code and modifier and is sorted in the above listed code sequence.
- Initial Source:** November 2016 Federal Register publication of the Fee Schedule for Physicians' Services for CY 2016.
- Data Set Name:** RVU16B.ZIP will contain five files:
 (1) RVUPUF16 (in Word (.doc) format) contains the file's record layout and file documentation;
 (2) The RVUs and policy indicators associated with the physician fee schedule in ASCII text (.txt), EXCEL (.xls) and comma delimited format (.csv);
 (3) GPCI16 (in Excel (.xls), ASCII text (.prn) and comma delimited (.csv) formats) provides each Geographic Practice Cost Index (GPCI) component for each carrier/locality for 2016; and
 (4) 16LOCCO (in Excel (.xls), ASCII text (.prn) and comma delimited (.csv) formats) contains the locality/county crosswalk.
 (5) ANES2016 (in Excel (.xls), ASCII text (.TXT) and comma delimited (.csv) formats) contains the 2016 Anesthesia conversion factors.
 (6) OPPSCAP (in Excel (.xls), and comma delimited (.csv) formats) contains the payment amounts after the application of the OPPS based payment caps, except for carrier priced codes. For carrier priced codes, the field only contains the OPPS based payment caps. Carrier prices cannot exceed the OPPS based payment caps.
- Length of Record:** 200 Characters
- Update Schedule:** This file will be updated on a periodic schedule to incorporate mid-year changes. Updated 2016 files will be available on April 1, July 1 and October 1. The following naming convention will be used to identify each:
 RVU16A: January 2016 release
 RVU16AR: January 2016 release – Correction Notice (If Required)
 RVU16B: April 2016 release
 RVU16C: July 2016 release
 RVU16D: October 2016 release

NOTE:

- CPT codes and descriptions only are copyright 2016 American Medical Association. All rights reserved. Applicable FARS/DFARS apply.

- All dental codes copyright 2015/16American Dental Association, all rights reserved.

**NATIONAL PHYSICIAN FEE SCHEDULE RELATIVE VALUE FILE
CALENDAR YEAR 2016**

<u>DATA ELEMENT</u>	<u>LOCATION</u>	<u>COBOL PIC</u>	<u>DESCRIPTION</u>
<u>HEADER RECORD</u>			
Header Indicator	1-3	x(3)	Value "HDR".
Filler	4-4	x(1)	
Copyright Statement	5-50	x(46)	
Filler	51-150	x(100)	

DATA RECORD

HCPCS Code	1-5	X(5)	CPT or Level 2 HCPCS number for the service. NOTE: See copyright statement on cover sheet.
Modifier	6-7	X(2)	For diagnostic tests, a blank in this field denotes the global service and the following modifiers identify the components: --26 = Professional component --TC = Technical component --For services other than those with a professional and/or technical component, a blank will appear in this field with one exception: the presence of CPT modifier -53 indicates that separate RVUs and a fee schedule amount have been established for procedures which the physician terminated before completion. This modifier is used only with colonoscopy CPT code 45378, or with G0105 and G0121. Any other codes billed with modifier -53 are subject to carrier medical review and priced by individual consideration. --53 = Discontinued Procedure - Under certain circumstances, the physician may elect to terminate a surgical or diagnostic procedure. Due to extenuating circumstances, or those that threaten the well being of the patient, it may be necessary to indicate that a surgical or diagnostic procedure was started but discontinued.
Description	8-57	X(50)	
Status Code	58-58	X(1)	Indicates whether the code is in the fee schedule and whether it is separately payable if the service is covered. See Attachment A for description of values. Only RVUs associated with status codes of "A", "R", or "T", are used for Medicare payment.
Work RVU	60-65	999.99	Relative Value Unit (RVU) for the physician work in the service as

			published in the <u>Federal Register</u> Fee Schedule for Physicians Services for CY 2016.
Non-Facility Practice Expense RVU	67-72	999.99	Relative Value Unit (RVU) for the resource-based practice expense for the non-facility setting, as published in the <u>Federal Register</u> Fee Schedule for Physicians Services for CY 2016.
Non-Facility NA Indicator	73-74	X(2)	An "NA" in this field indicates that this procedure is rarely or never performed in the non-facility setting.
Facility Practice Expense RVU	76-81	999.99	Relative Value Unit (RVU) for the resource-based practice expense for the facility setting, as published in the <u>Federal Register</u> Fee Schedule for Physicians Services for CY 2016.
Facility NA Indicator	82-83	X(2)	An "NA" in this field indicates that this procedure is rarely or never performed in the facility setting.
Malpractice RVU	85-89	99.99	RVU for the malpractice expense for the service as published in the <u>Federal Register</u> Fee Schedule for Physicians' Services for CY 2016.
Total Non-Facility RVUs	91-96	999.99	Sum of work, non-facility practice expense, and malpractice expense RVUs.
Total Facility RVUs	97-102	999.99	Sum of work, facility practice expense, and malpractice expense RVUs.

PC/TC Indicator	103-103	x(1)	See Attachment A for description of values.
Global Surgery	104-106	XXX	Provides time frames that apply to each surgical procedure. 000=Endoscopic or minor procedure with related preoperative and postoperative relative values on the day of the procedure only included in the fee schedule payment amount; evaluation and management services on the day of the procedure generally not payable. 010=Minor procedure with preoperative relative values on the day of the procedure and postoperative relative values during a 10 day postoperative period included in the fee schedule amount; evaluation and management services on the day of the procedure and during the 10-day postoperative period generally not payable. 090=Major surgery with a 1-day preoperative period and 90-day postoperative period included in the fee schedule amount. MMM=Maternity codes; usual global period does not apply. XXX=The global concept does not apply to the code. YYY=The carrier is to determine whether the global concept applies and establishes postoperative period, if appropriate, at time of pricing. ZZZ=The code is related to another service and is <u>always</u> included in the global period of the other service.
Preoperative Percentage	107-109	.99	Percentage for preoperative portion of global package.
Intraoperative Percentage	110-112	.99	Percentage for intraoperative portion of global package, including postoperative work in the hospital.
Postoperative	113-115	.99	Percentage for postoperative portion of global package that is provided

Percentage**Multiple Procedure
(Modifier 51)****116-116**

x(1)

in the office after discharge from the hospital.

Indicates applicable payment adjustment rule for multiple procedures: 0=No payment adjustment rules for multiple procedures apply. If procedure is reported on the same day as another procedure, base the payment on the lower of (a) the actual charge, or (b) the fee schedule amount for the procedure.

1=Standard payment adjustment rules in effect before January 1, 1995 for multiple procedures apply. In the 1995 file, this indicator only applies to codes with a status code of "D". If procedure is reported on the same day as another procedure that has an indicator of 1, 2, or 3, rank the procedures by fee schedule amount and apply the appropriate reduction to this code (100%, 50%, 25%, 25%, 25%, and by report). Base the payment on the lower of (a) the actual charge, or (b) the fee schedule amount reduced by the appropriate percentage.

2=Standard payment adjustment rules for multiple procedures apply. If procedure is reported on the same day as another procedure with an indicator of 1, 2, or 3, rank the procedures by fee schedule amount and apply the appropriate reduction to this code (100%, 50%, 50%, 50%, 50% and by report). Base the payment on the lower of (a) the actual charge, or (b) the fee schedule amount reduced by the appropriate percentage.

3=Special rules for multiple endoscopic procedures apply if procedure is billed with another endoscopy in the same family (i.e., another endoscopy that has the same base procedure). The base procedure for each code with this indicator is identified in the Endobase field of this file. Apply the multiple endoscopy rules to a family before ranking the family with the other procedures performed on the same day (for example, if multiple endoscopies in the same family are reported on the same day as endoscopies in another family or on the same day as a non-endoscopic procedure). If an endoscopic procedure is reported with

only its base procedure, do not pay separately for the base procedure. Payment for the base procedure is included in the payment for the other endoscopy.

4=Subject to 25% reduction of the TC diagnostic imaging (effective for services January 1, 2006 through June 30, 2010). Subject to 50% reduction of the TC diagnostic imaging (effective for services July 1, 2010 and after). Subject to 25% reduction of the PC of diagnostic imaging (effective for services January 1, 2012 and after).

5=Subject to 50% of the practice expense component for certain therapy services.

6=Subject to 25% reduction of the second highest and subsequent procedures to the TC of diagnostic cardiovascular services, effective for services January 1, 2013, and thereafter.

7=Subject to 20% reduction of the second highest and subsequent procedures to the TC of diagnostic ophthalmology services, effective for services January 1, 2013, and thereafter.

9=Concept does not apply.

Indicates services subject to payment adjustment.

Bilateral Surgery (Modifier 50)	117-117	x(1)
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0=150% payment adjustment for bilateral procedures does not apply. If procedure is reported with modifier -50 or with modifiers RT and LT, base the payment for the two sides on the lower of: (a) the total actual charge for both sides and (b) 100% of the fee schedule amount for a single code. Example: The fee schedule amount for code XXXXX is \$125. The physician reports code XXXXX-LT with an actual charge of \$100 and XXXXX-RT with an actual charge of \$100. Payment should be based on the fee schedule amount (\$125) since it is lower than the total actual charges for the left and right sides (\$200). The bilateral adjustment is inappropriate for codes in this category (a) because of physiology or anatomy, or (b) because the code description specifically states that it is a unilateral procedure and there is an existing code for the bilateral procedure.

1=150% payment adjustment for bilateral procedures applies. If the code is billed with the bilateral modifier or is reported twice on the same day by any other means (e.g., with RT and LT modifiers, or with a 2 in the units field), base the payment for these codes when reported as bilateral procedures on the lower of: (a) the total actual charge for both sides or (b) 150% of the fee schedule amount for a single code. If the code is reported as a bilateral procedure and is reported with other procedure codes on the same day, apply the bilateral adjustment before applying any multiple procedure rules.

2=150% payment adjustment does not apply. RVUs are already based on the procedure being performed as a bilateral procedure. If the procedure is reported with modifier -50 or is reported twice on the same day by any other means (e.g., with RT and LT modifiers or with a 2 in the units field), base the payment for both sides on the lower of (a) the total actual charge by the physician for both sides, or (b) 100% of the fee schedule for a single code. Example: The fee schedule amount for code YYYYY is \$125. The physician reports code YYYYY-LT with an actual charge of \$100 and YYYYY-RT with an actual charge of \$100. Payment should be based on the fee schedule amount (\$125) since it is

lower than the total actual charges for the left and right sides (\$200). The RVUs are based on a bilateral procedure because (a) the code descriptor specifically states that the procedure is bilateral, (b) the code descriptor states that the procedure may be performed either unilaterally or bilaterally, or (c) the procedure is usually performed as a bilateral procedure.

3=The usual payment adjustment for bilateral procedures does not apply. If the procedure is reported with modifier -50 or is reported for both sides on the same day by any other means (e.g., with RT and LT modifiers or with a 2 in the units field), base the payment for each side or organ or site of a paired organ on the lower of (a) the actual charge for each side or (b) 100% of the fee schedule amount for each side. If the procedure is reported as a bilateral procedure and with other procedure codes on the same day, determine the fee schedule amount for a bilateral procedure before applying any multiple procedure rules. Services in this category are generally radiology procedures or other diagnostic tests which are not subject to the special payment rules for other bilateral surgeries.

9=Concept does not apply.

Assistant at Surgery	118-118	x(1)	Indicates services where an assistant at surgery is never paid for per Medicare Claims Manual. 0=Payment restriction for assistants at surgery applies to this procedure unless supporting documentation is submitted to establish medical necessity. 1=Statutory payment restriction for assistants at surgery applies to this procedure. Assistant at surgery may not be paid. 2=Payment restriction for assistants at surgery does not apply to this procedure. Assistant at surgery may be paid.
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			9=Concept does not apply.
Co-surgeons (Modifier 62)	119-119	x(1)	Indicates services for which two surgeons, each in a different specialty, may be paid. 0=Co-surgeons not permitted for this procedure. 1=Co-surgeons could be paid, though supporting documentation is required to establish the medical necessity of two surgeons for the procedure. 2=Co-surgeons permitted and no documentation required if the two-specialty requirement is met. 9=Concept does not apply.
Team Surgery (Modifier 66)	120-120	x(1)	Indicates services for which team surgeons may be paid. 0=Team surgeons not permitted for this procedure.1=Team surgeons could be paid, though supporting documentation required to establish medical necessity of a team; pay by report. 2=Team surgeons permitted; pay by report. 9=Concept does not apply.
Filler	121-127	x(1)	
Endoscopic Base Code	128-132	X(5)	Code which identifies an endoscopic base code for each code with a multiple surgery indicator of 3.
Conversion Factor	133-140	999.9999	This is the multiplier that transforms relative values into payment

**Physician Supervision of
Diagnostic Procedures**

142-143

X(2)

amounts. This conversion factor reflects the MEI update adjustment. For 2002 and beyond, there is a single conversion factor for all services.

This field is for use in post payment review.

01 = Procedure must be performed under the general supervision of a physician.

02 = Procedure must be performed under the direct supervision of a physician.

03 = Procedure must be performed under the personal supervision of physician.

04 = Physician supervision policy does not apply when procedure is furnished by a qualified, independent psychologist or a clinical psychologist; otherwise must be performed under the general supervision of a physician.

05 = Physician supervision policy does not apply when procedure is furnished by a qualified audiologist; otherwise must be performed under the general supervision of a physician.

06 = Procedure must be performed by a physician or a physical Therapist (PT) who is certified by the American Board of Physical Therapy Specialties (ABPTS) as a qualified electrophysiological clinical specialist and is permitted to provide the procedure under State law.

21 = Procedure may be performed by a technician with certification under general supervision of a physician; otherwise must be performed under direct supervision of a physician.

22 = May be performed by a technician with on-line real-time contact with physician.

66 = May be performed by a physician or by a physical therapist with ABPTS certification and certification in this specific procedure.

6A= Supervision standards for level 66 apply; in addition, the PT with ABPTS certification may supervise another PT, but only the PT with ABPTS certification may bill.

77 = Procedure must be performed by a PT with ABPTS certification or by a PT without certification under direct supervision of a physician, or

			by a technician with certification under general supervision of a physician. 7A = Supervision standards for level 77 apply; in addition, the PT with ABPTS certification may supervise another PT, but only the PT with ABPTS certification may bill. 09 = Concept does not apply.
Calculation Flag	144-144	X(1)	As of July 1, 2014 the value for the Calculation Flag for all HCPCS is "0".
Diagnostic Imaging Family Indicator	146-147	X(2)	This field identifies the applicable diagnostic service family for that HCPCS codes with a multiple procedure indicator of '4'. <i>For services effective January 1, 2011 and after, family indicators 01 – 11 will not be populated.</i> The values are: 01=Ultrasound (Chest/Abdomen/Pelvis-Non-Obstetrical) 02=CT and CTA (Chest/Thorax/Abd/Pelvis) 03=CT and CTA (Head/Brain/Orbit/Maxillofacial/Neck) 04=MRI and MRA (Chest/Abd/Pelvis) 05=MRI and MRA (Head/Brain/Neck) 06=MRI and MRA (Spine) 07=CT (Spine) 08=MRI and MRA (Lower Extremities) 09=CT and CTA (Lower Extremities) 10=MR and MRI (Upper Extremities and Joints) 11=CT and CTA (Upper Extremities) 88 = Subject to the reduction of the TC diagnostic imaging (effective for services January 1, 2011 and after). 99=Concept does not apply
Non-Facility Practice Expense Used for OPPS	152-157	999.99	The OPPS Payment Amount calculated using these values is compared to the Medicare Physician Fee Schedule to determine applicability of the

Payment Amount

OPPS Imaging Cap mandated by Section 5102(b) of the Deficit Reduction Act of 2005.

**Facility Practice Expense
Used for OPPS Payment
Amount** **159-164** **999.99**

The OPPS Payment Amount calculated using these values is compared to the Medicare Physician Fee Schedule to determine applicability of the OPPS Imaging Cap mandated by Section 5102(b) of the Deficit Reduction Act of 2005.

**Malpractice Used for OPPS
Payment Amount** **1** **999.99**

The OPPS Payment Amount calculated using these values is compared to the Medicare Physician Fee Schedule to determine applicability of the OPPS Imaging Cap mandated by Section 5102(b) of the Deficit Reduction Act of 2005.

ATTACHMENT A

- STATUS CODE A = Active Code. These codes are paid separately under the physician fee schedule, if covered. There will be RVUs for codes with this status. The presence of an "A" indicator does not mean that Medicare has made a national coverage determination regarding the service; carriers remain responsible for coverage decisions in the absence of a national Medicare policy.
- B = Bundled Code. Payment for covered services are always bundled into payment for other services not specified. If RVUs are shown, they are not used for Medicare payment. If these services are covered, payment for them is subsumed by the payment for the services to which they are incident. (An example is a telephone call from a hospital nurse regarding care of a patient).
- C = Carriers price the code. Carriers will establish RVUs and payment amounts for these services, generally on an individual case basis following review of documentation such as an operative report.
- D = Deleted Codes. These codes are deleted effective with the beginning of the applicable year. These codes will not appear on the 2006 file as the grace period for deleted codes is no longer applicable.
- E = Excluded from Physician Fee Schedule by regulation. These codes are for items and/or services that CMS chose to exclude from the fee schedule payment by regulation. No RVUs are shown, and no payment may be made under the fee schedule for these codes. Payment for them, when covered, generally continues under reasonable charge procedures.
- F = Deleted/Discontinued Codes. (Code not subject to a 90 day grace period). These codes will not appear on the 2006 file as the grace period for deleted codes is no longer applicable.
- G = Not valid for Medicare purposes. Medicare uses another code for reporting of, and payment for, these services. (Code subject to a 90 day grace period.) These codes will not appear on the 2006 file as the grace period for deleted codes is no longer applicable.
- H = Deleted Modifier. This code had an associated TC and/or 26 modifier in the previous year. For the current year, the TC or 26 component shown for the code has been deleted, and the deleted component is shown with a status code of "H". These codes will not appear on the 2006 file as the grace period for deleted codes is no longer applicable.
- I = Not valid for Medicare purposes. Medicare uses another code for

reporting of, and payment for, these services. (Code NOT subject to a 90 day grace period.)

- J = Anesthesia Services. There are no RVUs and no payment amounts for these codes. The intent of this value is to facilitate the identification of anesthesia services.
- M = Measurement codes. Used for reporting purposes only.
- N = Non-covered Services. These services are not covered by Medicare.
- P = Bundled/Excluded Codes. There are no RVUs and no payment amounts for these services. No separate payment should be made for them under the fee schedule.
 --If the item or service is covered as incident to a physician service and is provided on the same day as a physician service, payment for it is bundled into the payment for the physician service to which it is incident. (An example is an elastic bandage furnished by a physician incident to physician service.)
 --If the item or service is covered as other than incident to a physician service, it is excluded from the fee schedule (i.e., colostomy supplies) and should be paid under the other payment provision of the Act.
- R = Restricted Coverage. Special coverage instructions apply. If covered, the service is carrier priced. (NOTE: The majority of codes to which this indicator will be assigned are the alpha-numeric dental codes, which begin with "D". We are assigning the indicator to a limited number of CPT codes which represent services that are covered only in unusual circumstances.)
- T = Injections. There are RVUS and payment amounts for these services, but they are only paid if there are no other services payable under the physician fee schedule billed on the same date by the same provider. If any other services payable under the physician fee schedule are billed on the same date by the same provider, these services are bundled into the physician services for which payment is made. (NOTE: This is a change from the previous definition, which states that injection services are bundled into any other services billed on the same date.)
- X = Statutory Exclusion. These codes represent an item or service that is not in the statutory definition of "physician services" for fee schedule payment purposes. No RVUS or payment amounts are shown for these codes, and no payment may be made under the physician fee schedule. (Examples are ambulance services and clinical diagnostic laboratory services.)
- Q = Therapy functional information code (used for required reporting purposes only).**

PC/TC INDICATOR

- 0 = Physician Service Codes--Identifies codes that describe physician services. Examples include visits, consultations, and surgical procedures. The concept of PC/TC does not apply since physician services cannot be split into professional and technical components. Modifiers 26 and TC cannot be used with these codes. The RVUS include values for physician work, practice expense and malpractice expense. There are some codes with no work RVUs.
- 1 = Diagnostic Tests for Radiology Services--Identifies codes that describe diagnostic tests. Examples are pulmonary function tests or therapeutic radiology procedures, e.g., radiation therapy. These codes have both a professional and technical component. Modifiers 26 and TC can be used with these codes. The total RVUs for codes reported with a 26 modifier include values for physician work, practice expense, and malpractice expense. The total RVUs for codes reported with a TC modifier include values for practice expense and malpractice expense only. The total RVUs for codes reported without a modifier include values for physician work, practice expense, and malpractice expense.
- 2 = Professional Component Only Codes--This indicator identifies stand-alone codes that describe the physician work portion of selected diagnostic tests for which there is an associated code that describes the technical component of the diagnostic test only and another associated code that describes the global test. An example of a professional component only code is CPT code **93010--Electrocardiogram; Interpretation and Report**. Modifiers 26 and TC cannot be used with these codes. The total RVUs for professional component only codes include values for physician work, practice expense, and malpractice expense.
- 3 = Technical Component Only Codes--This indicator identifies stand- alone codes that describe the technical component (i.e., staff and equipment costs) of selected diagnostic tests for which there is an associated code that describes the professional component of the diagnostic test only. An example of a technical component only code is CPT code **93005--Electrocardiogram; Tracing Only, without interpretation and report**. It also identifies codes that are covered only as diagnostic tests and therefore do not have a related professional code. Modifiers 26 and TC cannot be used with these codes. The total RVUs for technical component only codes include values for practice expense and malpractice expense only.
- 4 = Global Test Only Codes--This indicator identifies stand-alone codes that describe selected diagnostic tests for which there are associated codes that describe (a) the professional component

of the test only, and (b) the technical component of the test only. Modifiers 26 and TC cannot be used with these codes. The total RVUs for global procedure only codes include values for physician work, practice expense, and malpractice expense. The total RVUs for global procedure only codes equals the sum of the total RVUs for the professional and technical components only codes combined.

- 5 = Incident To Codes--This indicator identifies codes that describe services covered incident to a physician's service when they are provided by auxiliary personnel employed by the physician and working under his or her direct personal supervision. Payment may not be made by carriers for these services when they are provided to hospital inpatients or patients in a hospital outpatient department. Modifiers 26 and TC cannot be used with these codes.
- 6 = Laboratory Physician Interpretation Codes--This indicator identifies clinical laboratory codes for which separate payment for interpretations by laboratory physicians may be made. Actual performance of the tests is paid for under the lab fee schedule. Modifier TC cannot be used with these codes. The total RVUs for laboratory physician interpretation codes include values for physician work, practice expense, and malpractice expense.
- 7 = Physical therapy service, for which payment may not be made--Payment may not be made if the service is provided to either a patient in a hospital outpatient department or to an inpatient of the hospital by an independently practicing physical or occupational therapist.

- 8 = Physician interpretation codes: This indicator identifies the professional component of clinical laboratory codes for which separate payment may be made only if the physician interprets an abnormal smear for hospital inpatient. This applies to CPT codes 88141, 85060 and HCPCS code P3001-26. No TC billing is recognized because payment for the underlying clinical laboratory test is made to the hospital, generally through the PPS rate.

No payment is recognized for CPT codes 88141, 85060 or HCPCS code P3001-26 furnished to hospital outpatients or non-hospital patients. The physician interpretation is paid through the clinical laboratory fee schedule payment for the clinical laboratory test.

- 9 = Not Applicable--Concept of a professional/technical component does not apply

EXHIBIT C

Portion of National Physician
Fee Schedule Relative Value
File Calendar Year 2006

2006 National Physician Fee Schedule Relative Value File																													
CPT codes and descriptions only are copyright 2005 American Medical Association. All Rights Reserved. Applicable FARS/DFARS Apply.																													
Dental codes (D codes) are copyright 2002 American Dental Association. All Rights Reserved.																													
REVISED August 2006																													
HCPCS	MOD	DESCRIPTION	CODE	PAYMENT	RVU	PE RVU	NON-FAC	NA	INDICATOR	PE RVU	INDICATOR	RVU	TOTAL	TOTAL	IND	DAYS	OP	OP	OP	PROC	SURG	SURG	SURG	SURG	BASE	CONV	DIAGNOSTIC	CALCULATED	Family
27740		Repair of leg epiphyses	A		9.29	8.01	NA			8.01		1.62	18.92	18.92	0	090	0.10	0.69	0.21	2	1	2	0	0		37.8975	09	0	99
27742		Repair of leg epiphyses	A		10.28	5.58				5.58		1.79	17.65	17.65	0	090	0.10	0.69	0.21	2	1	2	1	0		37.8975	09	0	99
27745		Reinforce tibia	A		10.05	8.19	NA			8.19		1.75	19.99	19.99	0	090	0.10	0.69	0.21	2	1	2	1	0		37.8975	09	0	99
27750		Treatment of tibia fracture	A		3.19	4.77				3.86		0.55	8.51	7.60	0	090	0.10	0.69	0.21	2	1	1	0	0		37.8975	09	0	99
27752		Treatment of tibia fracture	A		5.83	6.67				5.69		1.01	13.51	12.53	0	090	0.10	0.69	0.21	2	1	1	0	0		37.8975	09	0	99
27756		Treatment of tibia fracture	A		6.77	6.48	NA			6.48		1.17	14.42	14.42	0	090	0.10	0.69	0.21	2	1	2	1	0		37.8975	09	0	99
27758		Treatment of tibia fracture	A		11.65	9.21	NA			9.21		2.03	22.89	22.89	0	090	0.10	0.69	0.21	2	1	2	1	0		37.8975	09	0	99
27759		Treatment of tibia fracture	A		13.74	10.34	NA			10.34		2.38	26.46	26.46	0	090	0.10	0.69	0.21	2	1	2	2	0		37.8975	09	0	99
27760		Treatment of ankle fracture	A		3.01	4.69				3.60		0.48	8.18	7.09	0	090	0.10	0.69	0.21	2	1	1	0	0		37.8975	09	0	99
27762		Treatment of ankle fracture	A		5.24	6.35				5.29		0.85	12.44	11.38	0	090	0.10	0.69	0.21	2	1	1	0	0		37.8975	09	0	99
27766		Treatment of ankle fracture	A		8.35	7.24	NA			7.24		1.44	17.03	17.03	0	090	0.10	0.69	0.21	2	1	1	1	0		37.8975	09	0	99
27780		Treatment of fibula fracture	A		2.65	4.19				3.22		0.41	7.25	6.28	0	090	0.10	0.69	0.21	2	1	1	0	0		37.8975	09	0	99
27781		Treatment of fibula fracture	A		4.39	5.51				4.65		0.73	10.63	9.77	0	090	0.10	0.69	0.21	2	1	1	0	0		37.8975	09	0	99
27784		Treatment of fibula fracture	A		7.10	6.49	NA			6.49		1.23	14.82	14.82	0	090	0.10	0.69	0.21	2	1	1	1	0		37.8975	09	0	99
27786		Treatment of ankle fracture	A		2.84	4.47				3.34		0.46	7.77	6.64	0	090	0.10	0.69	0.21	2	1	1	0	0		37.8975	09	0	99
27788		Treatment of ankle fracture	A		4.44	5.66				4.66		0.74	10.84	9.84	0	090	0.10	0.69	0.21	2	1	1	0	0		37.8975	09	0	99
27792		Treatment of ankle fracture	A		7.65	6.98	NA			6.98		1.32	15.95	15.95	0	090	0.10	0.69	0.21	2	1	1	1	0		37.8975	09	0	99
27808		Treatment of ankle fracture	A		2.83	4.81				3.71		0.46	8.10	7.00	0	090	0.10	0.69	0.21	2	1	1	0	0		37.8975	09	0	99
27810		Treatment of ankle fracture	A		5.12	6.26				5.16		0.82	12.20	11.10	0	090	0.10	0.69	0.21	2	1	1	0	0		37.8975	09	0	99
27814		Treatment of ankle fracture	A		10.66	8.58	NA			8.58		1.85	21.09	21.09	0	090	0.10	0.69	0.21	2	1	2	1	0		37.8975	09	0	99
27816		Treatment of ankle fracture	A		2.89	4.39				3.42		0.43	7.71	6.74	0	090	0.10	0.69	0.21	2	1	1	0	0		37.8975	09	0	99
27818		Treatment of ankle fracture	A		5.49	6.39				5.18		0.82	12.70	11.49	0	090	0.10	0.69	0.21	2	1	1	0	0		37.8975	09	0	99
27822		Treatment of ankle fracture	A		10.98	10.68	NA			10.68		1.91	23.57	23.57	0	090	0.10	0.69	0.21	2	1	2	1	0		37.8975	09	0	99
27823		Treatment of ankle fracture	A		12.98	11.50	NA			11.50		2.25	26.73	26.73	0	090	0.10	0.69	0.21	2	1	2	1	0		37.8975	09	0	99

EXHIBIT D

Portion of National Physician Fee
Schedule Relative Value File
Calendar Year 2016

Exhibit E to Affidavit of W. Clark Jernigan, M.D.
in Support of Motion for Partial Summary Judgment –

**Memorandum to Bon Secours Medical
Group Physicians dated April 14, 2016**

See Sealed Volume

Exhibit F to Affidavit of W. Clark Jernigan, M.D.
in Support of Motion for Partial Summary Judgment –

**Clinical Operations Group Minutes
dated July 7, 2016**

See Sealed Volume

Exhibit G to Affidavit of W. Clark Jernigan, M.D.
in Support of Motion for Partial Summary Judgment –
**May 9, 2006 Letter and Attachments from
Nancy Graebner of St. Francis**

See Sealed Volume

Exhibit H to Affidavit of W. Clark Jernigan, M.D.
in Support of Motion for Partial Summary Judgment –

**St. Francis Response to
Plaintiff's Second Set of Interrogatories**

See Sealed Volume

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

W. CLARK JERNIGAN, M.D.,

Plaintiff,

vs.

ST. FRANCIS PHYSICIAN SERVICES,
INC.,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No. 2018-CP-23-5985

**DEFENDANT’S MEMORANDUM IN
OPPOSITION TO PLAINTIFF’S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

Defendant St. Francis Physician Services, Inc. (“Defendant” or “SFPS”), respectfully submits this Memorandum in Opposition to Plaintiff’s Motion for Partial Summary Judgment (the “Summary Judgment Motion”). For the reasons discussed hereinbelow, Plaintiff’s Summary Judgment Motion should be denied.

I. INTRODUCTION

Plaintiff has filed a premature motion that is both procedurally inappropriate, given the early stage of these proceedings, and substantively deficient, inasmuch as multiple genuine issues of fact exist which preclude a finding in Plaintiff’s favor. Plaintiff’s interpretation of his employment agreement (the “Employment Agreement”) ignores both the general realities of the complex and ever-changing healthcare industry in which Defendant compensates him, as well as the specific flexibility written into the Employment Agreement itself, the latter of which expressly permits the system-wide policy changes about which he now complains. Defendant had the contractual right to apply payment modifiers to the wRVUs associated with Plaintiff’s productivity

compensation. At the least, the Employment Agreement is ambiguous in that regard, but indisputably does not prohibit such a change, as Plaintiff suggests. In addition, genuine issues of fact exist as to the timing of Plaintiff's knowledge of Defendant's implementation of the relevant policy, implied acceptance thereof, and waiver and/or estoppel of Plaintiff's claims. Finally, no additional wages were "due" to Plaintiff under the South Carolina Payment of Wages Act (the "Wage Payment Act" or the "Act"), and Defendant provided more than sufficient advance written notice of the change per the Act, rendering his Wage Payment Act claim a nullity. As such, Plaintiff's Summary Judgment Motion should be denied *in toto*.

Importantly, Plaintiff's Employment Agreement cannot be read in a vacuum. Health care providers must monitor changes and trends in the industry, including *inter alia*, as to how certain medical procedures are to be coded and how payors, like Medicare, Medicaid and private insurance companies, will pay for these procedures. Because of the complexity of the industry, medical groups like Defendant are constantly evaluating industry practices and developing new policies and changing existing policies to improve their clinical and financial performance. Plaintiff's Employment Agreement contains numerous examples whereby Plaintiff agrees to comply with Defendant's policies and procedures. Health care providers require that flexibility to operate their complex businesses without disruption. Because Defendant has built that concept into the Employment Agreement, the policy change at issue in the Summary Judgment Motion does not support Plaintiff's allegations. Notably, Defendant routinely adopts new policies and changes existing policies without such changes giving rise to a complaint of breach of contract such as the instant claim Plaintiff has raised.

For these reasons and the reasons discussed more fully below, Defendant respectfully requests that the Court deny the Summary Judgment Motion.¹

II. BACKGROUND

A. Relevant Factual Background.

Plaintiff is an orthopedic surgeon employed by Defendant. (Complaint, ¶ 6.) Plaintiff signed the Employment Agreement, which includes various provisions about Plaintiff's compensation, as well as Plaintiff's obligation to abide by all of Defendant's policies and procedures. (Complaint, Ex. A.)

Defendant regularly makes policy changes to which physicians employed by Defendant are subject and to which physicians are not required to consent. (Affidavit of Bill Gay ("Gay Aff."), attached hereto as **Exhibit A**, ¶ 3.) In 2016, after evaluating the market on industry practices, Defendant made such a policy change, providing for application of payment modifiers to work relative value units ("wRVUs")² attributable to services performed by physicians, effective September 1, 2016 (the "Modifier Policy"). (*Id.*, ¶ 4.) Defendant made the business decision to modify its policies for a variety of reasons, including, without limitation, based on industry practices, and because certain physician compensation surveys, such as MGMA, use modifier adjusted wRVUs. (*Id.* ¶ 5.) In addition, implementation of the Modifier Policy further integrated

¹ For context, and to fully understand the implications of the instant Motion for Summary Judgment, it is important to note that Plaintiff's Counsel represents five other physicians employed by Defendant. Plaintiff's overbroad discovery requests, whereby he seeks discovery as to those other physicians, could be construed as an effort to obtain "free discovery" prior to filing an analogous complaint on behalf of one or more of those employed physicians. Similarly, given the very premature nature of the Summary Judgment Motion, it could be construed as an effort to speed up a ruling on the terms of the employment agreements prior to the expiration of the applicable statutes of limitation as to those other physicians' claims.

² wRVUs are a factor included in calculation of Plaintiff's productivity compensation. (Complaint, Ex. A.)

how physicians' productivity is measured to the manner in which payors such as Medicare, Medicaid and private insurance companies pay for the professional physician services. (*Id.* ¶ 6.)

Defendant informed Plaintiff, among other physicians, of the Modifier Policy and its implications, well in advance of the effective date of the Modifier Policy. (*Id.*, ¶¶ 8–10.) More specifically, upon information and belief, Dr. Thomas Baumgarten, a physician who held the administrative role of Plaintiff's dyad leader, conveyed various information about the Modifier Policy to Plaintiff. (*Id.* ¶ 8.) In addition, meetings were held during which the Modifier Policy was discussed. (*Id.*, ¶ 9.)

Since implementation of the Modifier Policy, Plaintiff has remained employed with Defendant, and has accepted compensation from Defendant subject to the Modifier Policy. (*Id.*, ¶ 11.) Prior to mid-2017, when Plaintiff retained counsel who communicated with Defendant regarding Plaintiff's Employment Agreement, Plaintiff did not raise an objection to or contest the Modifier Policy. (*Id.*, ¶ 12.)

B. Procedural Background and the Summary Judgment Motion.

Plaintiff filed this lawsuit on November 28, 2018, generally claiming that Defendant has failed to pay Plaintiff productivity compensation, bonus compensation, and "flow through payments" allegedly owed to him under the Employment Agreement. In his Complaint, Plaintiff alleges three causes of action: (1) breach of contract; (2) violation of the Wage Payment Act; and (3) declaratory relief. (Complaint, ¶¶ 33–54.) With respect to the Modifier Policy, Plaintiff alleges that Defendant "violated" the Employment Agreement and the Wage Payment Act by "reducing" the number of wRVUs attributable to Plaintiff by applying payment modifiers, "even though such reductions are not permitted by or even mentioned in the Employment Agreement." (*Id.* ¶ 24.)

As explained more fully in Defendant's Memorandum in Opposition to Plaintiff's motion to compel, which Plaintiff filed on February 28, 2019 (the "Motion to Compel"), the written discovery process has been ongoing since February 2019. However, to date, no depositions have been taken, and Plaintiff is awaiting Defendant's written discovery responses.

Plaintiff filed the Summary Judgment Motion on April 10, 2019. According to the Summary Judgment Motion, Plaintiff has moved "for partial summary judgment because there are no issues of material fact regarding the meaning of the compensation provisions of his employment agreement." (Summary Judgment Motion, p. 1.) Plaintiff further requests the Court hold that: (a) Plaintiff's Employment Agreement "does not permit [Defendant] to reduce his compensation by the application of 'payment modifiers'; (b) that [Plaintiff's] compensation qualifies as 'wages' for the purposes of the [Wage Payment Act]; and (c) that [Defendant] owes [Plaintiff] all the compensation that he would otherwise have received had [Defendant] not improperly reduced his compensation by the application of payment modifiers." (*Id.*) While Plaintiff does not specify which portions of the Complaint or which causes of actions on which he is moving for partial summary judgment, Defendant presumes that Plaintiff seeks summary judgment on the portions of his breach of contract and Wage Payment Act claims related to Defendant's application of payment modifiers pursuant to the Modifier Policy.³

III. LEGAL STANDARD

Summary judgment is not appropriate unless the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is "no genuine

³ Based on the Summary Judgment Motion and the allegations in Plaintiff's Complaint, the Summary Judgment Motion concerns only Plaintiff's productivity compensation, and does not concern the bonus compensation and "flow through payments" allegedly owed to him under the Agreement.

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP; *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Montgomery v. CSX Transp., Inc.*, 376 S.C. 37, 656 S.E.2d 20 (2007). Indeed, summary judgment is inappropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Gadson v. Hembree*, 364 S.C. 316, 613 S.E.2d 533 (2005).

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005) (citations omitted). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. *Id.*

In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002). Moreover, because summary judgment is a “drastic remedy,” it “should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues.” *Id.*

IV. ARGUMENT

A. Summary Judgment is Premature because Defendant Has Not Had a Full and Fair Opportunity to Conduct Discovery.

As a threshold matter, Plaintiff’s Summary Judgment Motion is premature and should be denied because Defendant has not had a “full and fair opportunity” to conduct discovery. *See*

Baughman v. AT&T, 306 S.C. 101, 410 S.E.2d 537 (1991) (“[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.”); *see also Gary v. Askew*, 423 S.C. 47, 49, 813 S.E.2d 717, 718 (2018) (“Because the record contains minimal evidence about the nature of the collision and the parties have not had an opportunity to conduct significant discovery, we find summary judgment is premature.”).

The South Carolina Supreme Court has made clear that summary judgment is inappropriate where further inquiry into the issues of fact is required, or where the opposing party was not dilatory in seeking discovery and demonstrates a likelihood that further discovery will uncover additional relevant evidence. *See, e.g., Pallares v. Seinar*, 407 S.C. 359, 373, 756 S.E.2d 128, 135 (2014) (reversing the trial court’s grant of summary judgment because summary judgment was premature where development of the record was required regarding a question of material fact); *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001) (reversing the trial court’s decision granting summary judgment, holding that the opposing party should have been permitted to complete discovery, which was ongoing at the time of the summary judgment hearing, prior to summary judgment); *Baughman*, 306 S.C. at 112–14, 410 S.E.2d at 544 (holding that, although three years had elapsed between the filing of the action and summary judgment, the trial court erred in granting summary judgment prematurely).

1. The Discovery Process is Still in Its Initial Stages.

Since February 2019 when Defendant initially responded to Plaintiff’s overbroad discovery requests, Defendant has been diligently reviewing thousands of electronic documents, responding to Plaintiff’s counsel’s numerous and continued complaints about purported discovery deficiencies, and preparing for a hearing on the Motion to Compel. Suffice it to say that prior to Defendant filing the Summary Judgment Motion on April 10, Defendant had no reason to believe

that the parties were close to concluding the discovery process, including because neither party has taken any depositions in the case. As of today, Plaintiff's outstanding Motion to Compel, which is scheduled to be heard on the same day as the Summary Judgment Motion, reveals that—even in Plaintiff's view—discovery of relevant evidence is not yet complete.

Beyond issuing written discovery requests to Plaintiff, which are due to Defendant on June 24, Defendant has not yet had the opportunity to conduct any discovery of its own. Given the above-referenced history of ongoing discovery in this case for the past four months (*i.e.* Plaintiff's frenzied pursuit of discovery responses from Defendant and Defendant's attempts to respond to Plaintiff's purported concerns about deficiencies), Defendant has certainly not been dilatory in seeking discovery. *See Baughman*, 306 S.C. at 114, 410 S.E.2d at 544 (attributing any delay on the part of the non-moving party to the fact that “from the beginning, discovery was dominated by [the opposing party's] demands and [the non-moving party's] efforts to respond”). In any event, it is not unreasonable, only six months into the instant case, that Defendant has not yet completed depositions and secured a qualified expert witness(es). Following the hearing on the Summary Judgment Motion, Defendant anticipates moving forward with seeking discovery as set forth below.

2. *Defendant's Discovery Will Uncover Additional Relevant Evidence.*

Defendant has hardly had the opportunity to begin its own discovery, much less “complete” discovery of relevant evidence. *See Baughman*, 306 S.C. at 112, 410 S.E.2d at 543. Importantly, there are genuine issues of material fact that preclude summary judgment and require further development of the record. *See Pallares*, 407 S.C. at 373, 756 S.E.2d at 135.

In order to address those issues of fact and in support of its defenses to Plaintiff's claims, Defendant anticipates uncovering additional relevant evidence from, at a minimum, the following sources: (1) Plaintiff's responses to Defendant's written discovery requests (due on June 24); (2) Plaintiff's deposition; and (3) Deposition of Dr. Baumgarten. In addition, Defendant may retain and depose an expert witness in the integration of payment modifiers and wRVUs. Defendant will pursue evidence relevant to the Summary Judgment Motion, including, without limitation, as follows:

Relevant Evidence Sought	Source(s)
Evidence showing that the Employment Agreement's reference to CMS schedules supports application of the Modifier Policy	Potential deposition of an expert in the integration of payment modifiers and wRVUs, and the related application of the Modifier Policy ⁴ ;
Evidence related to the existence of a genuine issue of material fact regarding the intent of the parties to the Employment Agreement and the application of the Modifier Policy thereunder	Deposition of Plaintiff
Evidence related to the existence of a genuine issue of material fact supporting Defendant's affirmative defenses of waiver, estoppel, and acquiescence	Plaintiff's written discovery responses; Deposition of Plaintiff; Deposition of Dr. Thomas Baumgarten
Evidence showing that Defendant provided requisite notice pursuant to the Wage Payment Act	Plaintiff's written discovery responses; Deposition of Plaintiff; Deposition of Dr. Thomas Baumgarten
Evidence showing the existence of a bona fide dispute under the Wage Payment Act	Deposition of an expert in the integration of payment modifiers and wRVUs, and the related use of the Modifier Policy; Deposition of Plaintiff

⁴ See *Schmidt*, 357 S.C. at 327, 592 S.E.2d at 335 (reversing the trial court's grant of summary judgment where additional discovery, especially in the form of expert testimony, was required to determine genuine issues of material fact).

(See Affidavit of Nikole Setzler Mergo, Esq., attached hereto as **Exhibit B.**)⁵ This evidence cannot be fully presented to the Court by way of affidavit in opposition to the Summary Judgment Motion, and requires that Defendant have the opportunity to conduct discovery prior to the Court issuing a summary judgment ruling.

South Carolina law mandates that Defendant have a “full and fair” opportunity to pursue the above-referenced discovery. See *Baughman*, 306 S.C. at 112, 410 S.E.2d at 543. Accordingly, Plaintiff’s Summary Judgment Motion is premature and must be denied.⁶

B. Plaintiff is Not Entitled to Partial Summary Judgment on His Breach of Contract Claim.

In the Summary Judgment Motion, Plaintiff requests the Court hold that the Employment Agreement “does not permit [Defendant] to reduce his compensation by the application of ‘payment modifiers,’” and contends that “there are no issues of material fact regarding the meaning of the compensation provisions of [Plaintiff’s] [E]mployment [A]greement.” (Summary Judgment Motion, p. 1.) Presumably, Plaintiff’s arguments seek partial summary judgment on Plaintiff’s breach of contract cause of action. (See Complaint, ¶ 35.) For the reasons discussed below, summary judgment should be denied as to these issues.

⁵ Pursuant to Rule 56(f), SCRCP, the Court “may refuse the application for [summary] judgment” upon the non-moving party’s submission of an affidavit stating the reasons “he cannot . . . present by affidavit facts essential to justify his opposition” to the summary judgment motion.” According to the Court of Appeals, the non-moving party’s attorney is in the best position to file an affidavit pursuant to Rule 56(f), especially where the affidavit addresses the involvement of an expert witness. See *Schmidt v. Courtney*, 357 S.C. 310, 321, 592 S.E.2d 326, 332 (Ct. App. 2003).

⁶ In the alternative to denial of the Summary Judgment Motion due to its prematurity, Defendant respectfully requests that the Court order a continuance of the Summary Judgment Motion in order to allow the parties to continue discovery, including by conducting appropriate depositions. See Rule 56(f), SCRCP (“Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition . . . the court . . . may order a continuance to permit . . . depositions to be taken or discovery to be had . . .”).

1. *On Its Face, the Employment Agreement Permits, Rather than Prohibits, Defendant's Application of the Modifier Policy.*

- a. The plain and unambiguous language of the Employment Agreement does not prohibit application of the Modifier Policy, as Plaintiff argues.

In order for the Court to rule, as a matter of law, that the Employment Agreement “does not permit” Defendant’s application of the Modifier Policy, as Plaintiff argues, it would be necessary for the Court to hold that the plain and unambiguous language of the Employment Agreement prohibits the application of the Modifier Policy. *See Lyles v. BMI, Inc.*, 292 S.C. 153, 157, 355 S.E.2d 282, 284 (Ct. App. 1987) (finding that a question of law to be resolved by the court exists where there is an issue as to the construction of a written agreement that can be determined by a consideration of the plain and unambiguous language of the contract); *Passailaigue v. Kuznik*, No. 2015-000044, 2016 WL 3511875, at *4 (S.C. Ct. App. June 22, 2016) (holding that no issues of material fact existed, and summary judgment was appropriate, where the plain language of an agreement determined the agreement’s effect).

However, there is *no* language in the Employment Agreement that expressly prohibits Defendant’s application of the Modifier Policy. Plaintiff does not, and cannot, point to any such language. The silence that results on this issue, at the least, creates an ambiguity.

Further to that point, in support of his argument for summary judgment, Plaintiff references CMS publications, as well as other documents provided to Plaintiff by Defendant in 2006. (Jernigan Aff., ¶¶ 8–9, 14–15.) By resorting to these documents in an attempt to persuade the Court that the Employment Agreement does not permit the application of the Modifier Policy, Plaintiff essentially concedes that the Employment Agreement is *silent* as to Plaintiff’s desired construction of the Agreement, and thus raises a genuine issue of material fact. *See Columbia East Assocs. v. Bi-Lo, Inc.*, 299 S.C. 515, 520–21, 386 S.E.2d 259, 262 (Ct. App. 1989) (stating that

when an agreement is silent on an issue, ambiguity arises). In other words, Plaintiff's Affidavit confirms for the Court that a ruling based on Plaintiff's argument requires examination beyond the four corners of the Employment Agreement, and therefore precludes summary judgment. *See Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009) (holding that summary judgment is improper when the intent of the parties cannot be gathered from the four corners of the instrument.”).⁷

b. Defendant implemented the Modifier Policy in accordance with the terms of the Employment Agreement.

Completely contrary to Plaintiff's argument, the provisions of the Employment Agreement, on their face, support Defendant's application of the Modifier Policy. First, the Employment Agreement has multiple provisions requiring Plaintiff to comply with Defendant's policies.

First, the Employment Agreement reiterates throughout its entirety that the terms of the Employment Agreement, Plaintiff's employment, and the parties' related coding of patient services are subject to, and must correspond with, the parties' compliance with Defendant's policies, bylaws, rules, and regulations (Section 2.8), Defendant's billing practices (Section 2.5), and all statutes, regulations, and rules pertaining to payors, including Medicare, and Defendant's coding compliance plan (Sections 2.9 and p. 26, Definition/Note). (Employment Agreement, pp. 10–11; *see also id.* p. 26, Definition/Note 6, Section 1.2.6, Section 2.4.3, Section 2.13.3, Section 2.13.4, Section 2.13.5.) In short, by executing the Employment Agreement, Plaintiff agreed to comply with, and be subject to, Defendant's applicable policies and procedures.

Defendant implemented the Modifier Policy as a business decision, including, without limitation, in accordance with a review of the industry and, importantly, its policies and practices.

⁷ *See also, infra*, Section B.2 for a discussion of additional issues of fact raised by potential ambiguity within the Agreement.

(Gay Aff., ¶¶ 4–6.) Plaintiff was informed of the policy change. (*Id.*, ¶¶ 8–10.) As such, Defendant’s application of the payment modifiers occurred as a result of the very type of policy change referenced in, and permitted by, the Employment Agreement. Plaintiff (and his compensation) were thereby subject to the implications of the Modifier Policy.

Second, the Employment Agreement provides Defendant the ability to make changes to Plaintiff’s compensation by updating wRVUs valuation each year in accordance with the updated CMS schedule published in the Federal Register. (Employment Agreement, p. 26, Definition/Note 1.) Defendant’s application of the Modifier Policy to Plaintiff’s wRVUs was thus permissible under the terms of the Employment Agreement.

Therefore, Plaintiff’s argument regarding the terms of the Employment Agreement fails, and summary judgment on Plaintiff’s breach of contract claim should be denied, because the plain and unambiguous language of the Employment Agreement does not, as a matter of law, prohibit the application of the Modifier Policy.

2. *In the Alternative, a Genuine Issue of Material Fact Regarding the Employment Agreement’s Reference to CMS Schedules Precludes Summary Judgment.*

Notwithstanding Plaintiff’s argument about whether the terms of the Employment Agreement “permit” Defendant’s application of the modifier policy, which is meritless, summary judgment should also be denied because a genuine issue of material fact exists as to whether the parties intended to allow for the use of payment modifiers by referencing the CMS schedules within the Employment Agreement.

a. The existence of ambiguity in the Employment Agreement will create a question of fact.

Plaintiff is not entitled to summary judgment if “there is an issue as to the construction of a written contract and the contract is ambiguous because the intent of the parties cannot be gathered

from the four covers of the instrument.” *Pee Dee Stores, Inc.*, 381 S.C. at 241, 672 S.E.2d at 802 (Ct. App. 2009). Once the court decides that the language is ambiguous, evidence may be admitted to show the intent of the parties. *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) (citation omitted).

However, construction of an ambiguous contract is a question of fact to be decided by the trier of fact. *Id.* (citing *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 325 S.C. 231, 234, 482 S.E.2d 554, 555 (1997)); *see also S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001) (holding that a contract is ambiguous when its terms are reasonably susceptible to more than one interpretation and that once the court decides that the language is ambiguous, the determination of the parties' intent is then a question of fact).

b. The Employment Agreement's reference to CMS schedules gives rise to ambiguity creating a question of fact.

The Employment Agreement references the schedules published each year by CMS. (Employment Agreement, p. 26, Definition/Note 1.) The CMS schedules mentioned in the Employment Agreement—like the ones attached to Plaintiff's Affidavit—reference the use of payment modifiers. (*See, e.g., Jernigan Aff., Ex. B.*)

Plaintiff alleges in the Complaint that CMS defines payment modifiers separately from wRVUs, yet references only wRVUs in the Employment Agreement. (Complaint, ¶¶ 19–20, 25.)⁸ Plaintiff suggests that because the Employment Agreement does not *specifically* use the term “payment modifiers,” Defendant breached the Employment Agreement by applying the Modifier Policy. (*See id.*) Defendant, on the other hand, views the Employment Agreement's reference to CMS schedules as incorporating the schedules' reference to the use of payment modifiers. Under

⁸ Plaintiff does not mention these allegations in the Summary Judgment Motion, likely because he is aware that they create a genuine issue of material fact.

Defendant's interpretation of Definition/Note 1, it is allowed to apply the Modifier Policy to Plaintiff's compensation pursuant to the Employment Agreement because the CMS schedules contemplate the use of payment modifiers, and because Definition/Note 1 provides Defendant the ability to update Plaintiff's wRVUs. Plaintiff's attachment of the CMS schedules additionally confirms the existence of a genuine issue of material fact.

The intent of the parties with respect to the Employment Agreement's reference to CMS schedules is therefore disputed, and it is unclear from the face of the Employment Agreement. While parole evidence may be allowed for the purpose of determining the intent of the parties and clearing up any ambiguity with respect to Definition/Note 1, consideration of such evidence is for the trier of fact, and is not appropriate at the summary judgment stage. Accordingly, the ambiguity created by the Employment Agreement's reference to CMS schedules creates a genuine issue of material fact as to whether, based on the language included therein, the parties intended the Employment Agreement to allow for the use of payment modifiers and thus whether Defendant breached the Employment Agreement by applying the Modifier Policy.

C. Defendant's Affirmative Defenses of Waiver, Estoppel, and Acquiescence Likewise Raise Genuine Issues of Material Fact.

In response to Plaintiff's breach of contract claim, Defendant asserted equitable affirmative defenses, including waiver, estoppel, and acquiescence. (Answer, ¶ 56.) The Court should deny the Summary Judgment Motion as to Plaintiff's breach of contract claim because Plaintiff waived his rights, is estopped from now asserting his claim, and/or acquiesced in Defendant's implementation of the Modifier Policy.

Plaintiff was aware of Defendant's Modifier Policy many weeks prior to its implementation and, given the many communications, more than likely months prior. (*See, e.g.*, Gay Aff. ¶ 10.) Defendant also informed Plaintiff, among others, of the implications of the

Modifier Policy. (*Id.*, ¶ 8–9.) Nevertheless, following the Modifier Policy’s effective date of September 1, 2016 and until he retained counsel, Plaintiff continued working and accepting compensation from Defendant without objecting to the change to his compensation resulting from the implementation of the Modifier Policy. (*Id.*, ¶ 11.)⁹ Although Plaintiff’s counsel began communicating with Defendant in or around May 2017, such communications involved discussions about revisions to Plaintiff’s Employment Agreement—not about Defendant’s application of the Modifier Policy.

Plaintiff’s continued acceptance of compensation from Defendant and failure to object to implementation of the Modifier Policy is evident of Defendant’s implied consent to the policy change and its effect on his compensation. As such, Plaintiff’s breach of contract claim is now barred by the doctrines of waiver, estoppel, and/or acquiescence. *Cf. Facelli v. Southeast Marketing Co.*, 284 S.C. 449, 452 327 S.E.2d 338, 339 (1985) (holding that an employee continuing to work and accept compensation following a change to his commission multiplier constituted implied consent to the change in compensation, and estopped plaintiff from seeking damages pursuant to the change); *Mathews v. City of Greenwood*, 305 S.C. 267, 271, 407 S.E.2d 668, 669–70 (S.C. Ct. App. 1991) (holding that an employee who initially protested a new policy which purportedly changed his compensation, but remained employed following the change, had no viable breach of contract claim).

In his Affidavit, Plaintiff states that he “never agreed to modify” the Employment Agreement. (Jernigan Aff., ¶ 16.) Plaintiff’s Complaint further makes clear that Plaintiff takes the position that he did not consent to any change in his compensation. As such, genuine issues

⁹ As explained above, if Defendant is permitted to conduct discovery, such discovery would uncover additional relevant evidence.

of material fact exist regarding whether Defendant consented to either implementation of the Modifier Policy or its effects on his compensation. *See Estes v. Roper Temp. Servs., Inc.*, 304 S.C. 120, 122, 403 S.E.2d 157, 158 (Ct. App. 1991) (reversing grant of summary judgment on a breach of contract claim centering on the employer's unilateral alteration of plaintiff's salary, holding that there was a genuine issue of material fact as to whether, for purposes of an estoppel defense, the employee consented to the change in salary by continuing to work and receive compensation following the change).

Therefore, in light of the genuine issues of material fact that exist in connection with Defendant's affirmative defenses, the Summary Judgment Motion must be denied. *See Estate of Weekley By Denney v. Weekley*, No. 2015-001721, 2017 WL 4616847, at *1 (S.C. Ct. App. May 17, 2017) (holding that the circuit court erred in granting summary judgment where genuine issues of material fact existed regarding appellants' affirmative defenses); *Lyles v. BMI, Inc.*, 292 S.C. 153, 159, 355 S.E.2d 282, 285 (Ct. App. 1987) (holding that there were triable issues of fact as to whether an implied waiver of rights occurred).

D. Defendant Does Not Owe Plaintiff Wages as a Result of Application of the Modifier Policy.

In the Summary Judgment Motion, Plaintiff requests that the Court hold that Plaintiff's "compensation qualifies as 'wages' for purposes of the [Wage Payment Act]" and that Defendant "owes [Plaintiff] all the compensation that he would otherwise have received had [Defendant] not improperly reduced his compensation by the application of payment modifiers." (Summary Judgment Motion, p. 1.) To the extent Plaintiff seeks summary judgment on his Wage Payment Act claim, or, in the alternative, judgment on his breach of contract claim, summary judgment should be denied because Defendant does not owe Plaintiff any compensation as a result of application of the Modifier Policy.

1. As a Matter of Law, Wages Are Not “Due” to Plaintiff.

For purposes of the Wage Payment Act, “wages” means “all amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount . . . **which are due to an employee under any . . . employment contract.**” S.C. Code Ann. § 41-10-10 (emphasis added). As explained, Plaintiff is not contractually entitled to any compensation not paid to him as a result of application of the Modifier Policy. For the same reasons that Defendant did not breach the Employment Agreement in connection with its application of the Modifier Policy, the compensation that Plaintiff would have received had Plaintiff not applied the Modifier Policy to Plaintiff’s compensation never became wages “due” to Plaintiff under the Wage Payment Act or otherwise.

A South Carolina Court of Appeals case supports denial of Plaintiff’s motion for summary judgment on his Wage Payment Act claim. *See Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013). In *Baugh*, the court of appeals held that two cardiologists’ employment agreements controlled whether they were due compensation pursuant to the cardiologists’ Wage Payment Act claim. *Id.* at 29, 738 S.E.2d at 495. The cardiologists sought payment from their former practice under the Wage Payment Act for amounts allegedly owed for their defined share of accounts receivable, unpaid draws, and director’s fees. *Id.* The court of appeals found, however, that pursuant to the specific provisions of their employment agreements, the items claimed by the cardiologists were not “due” to them under the employment agreements and therefore were not “wages” for purposes of the Wage Payment Act. *Id.*

Similar to the cardiologists in *Baugh*, Plaintiff is currently asserting a claim to compensation to which he is not entitled under the Employment Agreement. Therefore, Plaintiff

is not entitled to summary judgment on either his Wage Payment Act claim or his breach of contract claim because the compensation Plaintiff seeks is not “wages due” to Plaintiff. In the alternative, if the Court finds there is a genuine issue of material fact as to whether the Employment Agreement permitted Defendant’s application of the Modifier Policy, summary judgment must also be denied.

2. *Even if the Productivity Compensation at Issue Constitutes “Wages” Due to Plaintiff, There is No Wage Payment Act Violation Because Defendant Provided the Requisite Statutory Notice of Change in Wages.*

Assuming, *arguendo*, that any compensation not paid to Plaintiff as a result of Defendant’s application of the Modifier Policy constitutes wages due under the Wage Payment Act, which it does not, Defendant did not violate the Wage Payment Act because Defendant provided Plaintiff the requisite statutory notice of implementation of the Modifier Policy.

The Wage Payment Act requires that employers provide seven days written notice prior to changing an employee’s wages. S.C. Code Ann. § 41-10-30(A). Providing proper notice, pursuant to section 41-10-30, of a change in wages precludes a Wage Payment Act claim. *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 637, 620 S.E.2d 65, 69 (2005) (holding that the employer did not violate the Wage Payment Act where it informed employees of a change in an incentive policy at least seven days before the reduction became effective).

Defendant provided Plaintiff adequate notice of Defendant’s plan to implement the Modifier Policy and explained the reasons for its implementation. (Gay Aff. ¶¶ 8–10.) In fact, *inter alia*, the documents attached to Plaintiff’s affidavit—a written memorandum explaining the upcoming implementation of the Modifier Policy and July 2016 meeting minutes from a meeting wherein the Modifier Policy was discussed—document the Modifier Policy change and encapsulate the communication provided to Plaintiff. (Jernigan Aff., Exs. E & F); *see Davis*, 365

S.C. at 636, 620 S.E.2d at 68–69 (relying on meetings held wherein the employer explained the incentive policy change and answered questions about the policy change in holding that the employer properly notified the employee of the change in policy under the Wage Payment Act).

Therefore, because Plaintiff was notified of the implementation of the Modifier Policy more than seven days prior to its effective date, September 1, 2016, Defendant did not violate the Wage Payment Act, as a matter of law. At a minimum, summary judgment for Plaintiff is inappropriate because a genuine issue of material facts exists as to whether Defendant provided the requisite statutory notice.¹⁰

V. CONCLUSION

For the reasons discussed hereinabove, and viewing the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to Defendant, Plaintiff cannot establish that he is entitled to partial summary judgment as a matter of law, and there are genuine issues of material fact that preclude summary judgment. Accordingly, Defendant respectfully requests that Plaintiff's Summary Judgment Motion be denied in its entirety, or in the alternative, continued until the further discovery is conducted in this matter.

¹⁰ Even if Defendant violated the Wage Payment Act, which it expressly denies, Defendant would not be liable for treble damages under the Wage Payment Act due to the existence of a bona fide dispute about wages due to Plaintiff. *See Rice v. Multimedia, Inc.*, 318 S.C. 95, 98, 456 S.E.2d 381, 383 (1995) (“The imposition of treble damages in those cases where there is a bona fide dispute would be unjust and harsh.”).

Respectfully submitted,

s/ Nikole Setzler Mergo

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*Attorneys for Defendant St. Francis Physician
Services, Inc.*

June 14, 2019
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

W. CLARK JERNIGAN, M.D.,

Plaintiff,

vs.

ST. FRANCIS PHYSICIAN SERVICES,
INC.,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No. 2018-CP-23-5985

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendant's Memorandum in Opposition to Plaintiff's Partial Motion for Summary Judgment has been served upon the following counsel of record via the South Carolina E-Filing Portal, on the 14th day of June, 2019, to the following counsel of record:

Henry L. Parr, Jr., Esquire
James E. Cox, Jr., Esquire
200 East Camperdown Way
Greenville, South Carolina 29602

hparr@wyche.com

jcox@wyche.com

s/ Nikole Setzler Mergo

Nikole Setzler Mergo, SC Bar No. 68010

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EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

W. CLARK JERNIGAN, M.D.,

Plaintiff,

vs.

ST. FRANCIS PHYSICIAN SERVICES,
INC.,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No. 2018-CP-23-5985

AFFIDAVIT OF BILL GAY

PERSONALLY APPEARED BEFORE ME, Bill Gay, who, being duly sworn, deposes and states the following:

1. I hold the position of CFO for St. Francis Physician Services, Inc. ("Defendant"), the defendant in this action. All of the information contained in this Affidavit is based on my personal knowledge as Defendant's CFO. I am over eighteen years of age and fully competent to testify to the matters stated herein.

2. I submit this affidavit on behalf of Defendant in opposition to Plaintiff W. Clark Jernigan, M.D.'s ("Plaintiff") Partial Motion for Summary Judgment.

3. Defendant regularly implements policy changes to which physicians employed by Defendant are subject, and to which physicians are not required to consent.

4. In 2016, after evaluating industry practices, Defendant implemented a policy providing for application of payment modifiers to work relative value units ("wRVUs") attributable to services performed by physicians, effective September 1, 2016 (the "Modifier Policy").

5. Defendant made the business decision to modify its policies for a variety of reasons, including, without limitation, based on industry practices, and because certain physician compensation surveys, including, without limitation, MGMA, use modifier adjusted wRVUs.

6. Implementation of the Modifier Policy further integrated how physicians' productivity is measured to the manner in which payors such as Medicare, Medicaid and private insurance companies pay for the professional physician services.

7. Defendant implemented the Modifier Policy as a business decision, in accordance with industry practices and Defendant's policies and practices.

8. Upon information and belief, Dr. Thomas Baumgarten, a physician who held the administrative role of Plaintiff's dyad leader, conveyed various information about the Modifier Policy to Plaintiff, including the reasons for its implementation.

9. Meetings were held during which the Modifier Policy was discussed.

10. Upon information and belief, Plaintiff was aware of the Modifier Policy for, at the least, many weeks prior to its implementation and, given the many communications, more than likely months prior.

11. Since implementation of the Modifier Policy, Plaintiff has remained employed with Defendant, and has accepted compensation from Defendant subject to the Modifier Policy.

12. Upon information and belief, prior to mid-2017, when Plaintiff retained counsel who communicated with Defendant regarding Plaintiff's Employment Agreement, Plaintiff did not individually raise an objection to or contest the Modifier Policy.

[SIGNATURE PAGE FOLLOWS]

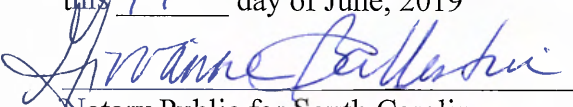
FURTHER AFFIANT SAYETH NOT.



Bill Gay

SWORN and subscribed to before me

this 14th day of June, 2019



(L.S.)
Notary Public for South Carolina

My commission expires: 9-17-2020

EXHIBIT B

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

W. CLARK JERNIGAN, M.D.,

Plaintiff,

vs.

ST. FRANCIS PHYSICIAN SERVICES,
INC.,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No. 2018-CP-23-5985

**AFFIDAVIT OF NIKOLE SETZLER
MERGO, ESQ.**

PERSONALLY APPEARED BEFORE ME, Nikole Setzler Mergo, who, being duly sworn, deposes and states the following:

1. I am an attorney and member at Nexsen Pruet, LLC, and am counsel of record for Defendant St. Francis Physician Services, Inc. (“Defendant”) in the above-referenced case.

2. All of the information contained in this Affidavit is based on my personal knowledge obtained as counsel for Defendant. I am competent to testify to the matters stated herein.

3. I submit this Affidavit in opposition to Plaintiff’s Partial Motion for Summary Judgment, filed on April 10, 2019 (the “Summary Judgment Motion”).

4. To date, no depositions have been taken in the above-referenced case. However, Defendant plans to take depositions, including, without limitation, of Plaintiff and Thomas E. Baumgarten, M.D. I anticipate that Plaintiff’s deposition will reveal, without limitation, the following: (1) evidence regarding the intent of the parties to Plaintiff’s employment agreement and the application of the relevant modifier policy thereunder; (2) evidence supporting Defendant’s affirmative defenses of waiver, estoppel, and acquiescence; (3) evidence showing that Defendant provided requisite notice of implementation of the relevant modifier policy to Plaintiff pursuant to

the South Carolina Payment of Wages Act; and (4) evidence showing the existence of a bona fide dispute regarding Plaintiff's claim asserted under the South Carolina Payment of Wages Act. I anticipate that Dr. Baumgarten's deposition will reveal: (1) evidence supporting Defendant's affirmative defenses of waiver, estoppel, and acquiescence; and (2) evidence showing that Defendant provided requisite notice of implementation of the relevant modifier policy to Plaintiff pursuant to the South Carolina Payment of Wages Act.

5. Defendant may retain an expert in the integration of payment modifiers and work relative value units ("wRVUs"). Defendant is considering potential experts. In the event Defendant retains an expert, Defendant may rely upon the expert's testimony to support Defendant's argument that Plaintiff's employment agreement supports application of the relevant modifier policy at issue in the Summary Judgment Motion.

6. Defendant has issued written discovery requests to Plaintiff, but has not yet received Plaintiff's responses. Defendant's receipt and review of Plaintiff's discovery responses are critical to Defendant's opposition to the Summary Judgment Motion. I believe that Plaintiff's written discovery responses will provide Defendant additional relevant evidence supporting Defendant's opposition to the Summary Judgment Motion, including, without limitation: (1) evidence supporting Defendant's affirmative defenses of waiver, estoppel, and acquiescence; (2) evidence showing that Defendant provided Plaintiff at least seven days advance written notice of its policy change regarding application of payment modifiers. Defendant anticipates receiving Plaintiff's written discovery responses on or before June 24, 2019.

7. The evidence which Defendant anticipates obtaining from the above-referenced sources cannot be obtained via affidavit prior to the hearing on the Summary Judgment Motion.

8. I believe that for Defendant to fully support its opposition to the Summary Judgment Motion, Defendant must have the opportunity to complete the above-referenced discovery.

[SIGNATURE PAGE FOLLOWS]

FURTHER AFFIANT SAYETH NOT.

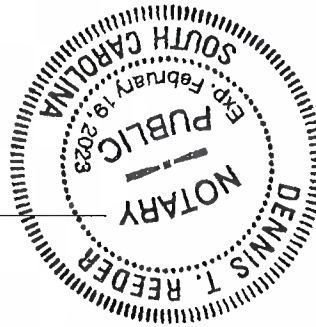
Nikole Setzler Mergo
Nikole Setzler Mergo

SWORN and subscribed to before me

this 13 day of June, 2019

Dennis T. Reeder (L.S.)
Notary Public for South Carolina

My commission expires: 2/19/23



STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE <i>W. Clark Jernigan, M.D.,</i> Plaintiff, v. <i>St. Francis Physician Services, Inc.,</i> Defendant.	IN THE COURT OF COMMON PLEAS Case No. 2018-CP-23-5985 PLAINTIFF’S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT
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SUMMARY

Plaintiff Dr. Clark Jernigan is an orthopedic surgeon. He has been employed by Defendant St. Francis Physician Services, Inc. (“St. Francis”) since September 1, 2006 under an employment agreement that became effective on that date and remains in effect today, with slight modifications. The employment agreement includes three types of pay: base compensation, productivity compensation, and potential bonus. According to the contract, St. Francis agreed to pay Dr. Jernigan productivity compensation in the amount of ■■■ for each Work Relative Value Unit (“WRVU”) that he performed to the extent that amount exceeded his base compensation.¹ The number of WRVUs Dr. Jernigan performs also affects his bonus compensation.

For the first ten years, to the best of Dr. Jernigan’s knowledge, St. Francis

¹ For the first two years the rate was ■■■ per value unit. *See* Exhibit A to Jernigan Aff. at 24. On September 1, 2008, the rate was adjusted to ■■■ per value unit. *See id.* at 32. The dollar amount is confidential according to the employment contract.

paid according to the contract. But in September 2016, St. Francis, for the first time and without Dr. Jernigan's consent, began adding "payment modifiers" to the formula used to calculate his productivity compensation, reducing his compensation. Because the contract does not permit St. Francis to apply payment modifiers to reduce the WRVUs, St. Francis has breached the contract.

Dr. Jernigan moves for partial summary judgment because there are no issues of material fact regarding the meaning of key compensation provisions of his employment agreement and the applicability of the South Carolina Wages Act. S.C. Code § 41-10-10(2). *See* S.C. R. Civ. P. 56(a), (d). Granting the motion will resolve significant issues in dispute here. In particular, Dr. Jernigan seeks a declaration that (a) St. Francis is not permitted to apply payment modifiers to reduce WRVUs, (b) that any compensation due him under his employment agreement is "wages" under the South Carolina Wages Act, and (c) that St. Francis owes Dr. Jernigan any compensation that Dr. Jernigan would have otherwise received had St. Francis not applied payment modifiers.

BACKGROUND

Dr. Jernigan has over 30 years of experience. Jernigan Aff. ¶ 2. In 2006, he and St. Francis negotiated an employment agreement where St. Francis would pay Dr. Jernigan to provide medical care to patients. *Id.* ¶ 3. The two parties signed the agreement on September 1, 2006 and modified it slightly over the years. Exhibit A.² The contract is in force until 2020. *Id.* at 31.

² All exhibit references are to the exhibits to the Jernigan Affidavit previously filed with Plaintiff's motion for partial summary judgment.

A. The Employment Agreement's Terms Regarding Dr. Jernigan's Compensation.

The employment agreement lays out, in clear language, a compensation model that entitles Dr. Jernigan to three types of compensation: base pay, productivity pay, and potential bonus. *Id.* at 23–25. He is first guaranteed an established base rate of pay. But through the productivity pay and bonus pay, he can earn more than the base rate of compensation.

The contract provides that Dr. Jernigan's productivity pay, and to some extent his bonus pay, are determined by looking to the number of WRVUs Dr. Jernigan performs in a given period of time. *Id.* at 23-24. Those numbers are assigned by the federal agency Centers for Medicare and Medicaid Services ("CMS"). *See* 42 CFR § 414.22(a) ("Physician work RVUs are established using a relative value scale in which the value of physician work for a particular service is rated relative to the value of work for other physician services."); *see, e.g.*, Exhibit C (listing examples of WRVUs assigned to procedures in column titled "WORK RVU"), published at *Medicare Program; Revisions to Payment Policies Under the Physician Fee Schedule for Calendar Year 2006 and Certain Provisions Related to the Competitive Acquisition Program of Outpatient Drugs and Biologicals Under Part B*, 70 FR 70116-01, addendum B (2005 WL 3090352). The agreement explicitly dictates that the WRVUs used to determine Dr. Jernigan's compensation will correspond to the WRVU "schedule published each year by CMS in the Federal Register." Exhibit A at 26. There is no ambiguity about this definition.

The contract also makes clear how St. Francis must use WRVUs to calculate

Dr. Jernigan's performance compensation. It states, "Any Productivity Compensation Physician receives shall be calculated ... on the basis of actual Work Relative Value Units (WRVU's) attributable to services personally performed by Physician each month multiplied by the appropriate conversion factor and subtracting from the product thereof the monthly Base Compensation paid to Physician." *Id.* at 23. The conversion factor is [REDACTED]. *Id.* at 32. The contract then says "The remainder, if positive, is the amount of Productivity Compensation to be paid for such month." *Id.* at 23. The contract also details how the WRVUs affect Dr. Jernigan's bonus pay. Exhibit A at 24–25.

More succinctly, the number of WRVUs Dr. Jernigan performs in a month is multiplied by [REDACTED]. If the result exceeds Dr. Jernigan's base pay for the month, then Dr. Jernigan is entitled to the difference as productivity compensation. For example, say Dr. Jernigan performed 200 WRVUs in a particular month. That means his productivity pay would be [REDACTED] (200 multiplied by [REDACTED]). Assume also that his base pay is \$10,000 a month. In this situation, he would be entitled to [REDACTED] in productivity pay ([REDACTED] less \$10,000).

B. St. Francis's Unilateral Change to Productivity Pay Calculations.

For a decade, St. Francis, to the best of Dr. Jernigan's knowledge, paid Dr. Jernigan productivity pay and bonus pay according to the contractual formula. *See Jernigan Aff.* ¶ 11. That abruptly changed in 2016. That year, St. Francis unilaterally "adopted and targeted for implementation" a "modifier policy" and began reducing physician compensation based on the payment modifiers that for

many years had applied to reimbursement to St. Francis from the federal government. Exhibit E. St. Francis's new modifier policy "require[d] all wRVUs to be modifier-adjusted inside of all ... physician compensation plans." *Id.* The policy went into effect on September 1. *Id.*; see also Exhibit F (stating the policy would go into effect on September 1, 2016). In light of this new policy and its conflict with Dr. Jernigan's long standing employment agreement, St. Francis attempted to negotiate a new contract, but the parties did not reach a new agreement. Jernigan Aff. ¶ 16. Thus, Dr. Jernigan's employment agreement remains in effect and, despite whatever "policy" St. Francis might wish to impose on its employed physicians, Dr. Jernigan's employment agreement requires St. Francis to compensate him at the rate of [REDACTED] for each WRVU he personally produces. See Jernigan Aff ¶ 16.

Payment modifiers have been around for decades—long before Dr. Jernigan entered his contract. See *Final Rule Medicare Program; Fee Schedule for Physicians' Services*, 56 FR 59502-01, 1991 WL 245153 (F.R.) (issued Nov. 25, 1991) (hereinafter "CMS Fee Schedule 1991"). Since 1992, modifiers have been a part of how the federal government determines how much to pay providers like St. Francis for medical services under the Medicare and Medicaid programs. *Id.* ("These regulations apply to services furnished beginning January 1, 1992."). They were affecting the reimbursement St. Francis receives from the federal government before and after St. Francis employed Dr. Jernigan. These modifiers can reflect "team surgery, bilateral surgery, etc." Exhibit B at 1. Importantly, the modifiers

apply to the final price the government is willing to pay. But modifiers do not affect the underlying WRVUs. Modifiers and WRVUs are separate concepts. CMS always determines the WRVUs separately from the modifiers. *See* Exhibit D. Indeed, in its original rule establishing both WRVUs and payment modifiers, CMS said that modifiers were “Adjustments to Fee Schedule Payments,” meaning they are not adjustments to the underlying WRVUs. CMS Fee Schedule 1991, at §§ II.H; *see also id.* § II.H.3 (“Only modifiers for which we will establish a national payment policy will affect *payment*.” (emphasis added)).

From September 1, 2006 through September 1, 2016, St. Francis did not use these payment modifiers in calculating Dr. Jernigan’s pay, even though the modifiers existed and affected the government’s payments to St. Francis. Jernigan Affidavit ¶¶ 11, 13. Moreover, payment modifiers are not mentioned in the employment agreement. Jernigan Affidavit ¶ 12; *see* Exhibit A. Indeed the example of productivity payment St. Francis provided Dr. Jernigan in 2006, before he signed his contract, shows that Dr. Jernigan’s pay was not going to be reduced by payment modifiers. Jernigan Aff. ¶ 14. It calculates his proposed compensation by multiplying his WRVUs by the conversion factor, without applying any modifiers. *See* Jernigan Aff. ¶ 14 and Exhibit G.

But beginning September 1, 2016, rather than multiplying Dr. Jernigan’s WRVUs by ■■■■, St. Francis wrongfully reduced Dr. Jernigan’s compensation by applying payment modifiers. Jernigan Aff. ¶ 11. For example, in 2018, the modifier policy reduced Dr. Jernigan’s productivity pay by over \$■■■■. *See* Exhibit H, St.

Francis Answer to Interrogatory 26 (“During fiscal year 2018, application of the modifier policy ... resulted in 414.22 fewer wRVUs credited to Dr. Jernigan.”). Likewise in 2017, the modifier policy cost Dr. Jernigan over \$[REDACTED]; *id.* (“During fiscal year 2017, application of the modifier policy ... resulted in 390.74 fewer wRVUs credited to Dr. Jernigan.”).

STANDARD OF REVIEW

South Carolina Rule 56 allows a plaintiff to bring a motion for partial summary judgment to streamline the issues in a case. S.C. R. Civ. P. 56(d). “The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder.” *Watson v. Underwood*, 407 S.C. 443, 453, 756 S.E.2d 155, 160 (Ct. App. 2014). “Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

Summary judgment is a particularly appropriate tool when it comes to contract cases because “the construction of a contract is a question of law for the court.” *HK New Plan Exchange Property Owner I, LLC v. Coker*, 375 S.C. 18, 23, 649 S.E.2d 181, 184 (Ct. App. 2007). “Summary judgment is proper and a trial unnecessary where,” as in Dr. Jernigan’s case, “the intention of the parties as to the legal effect of the contract may be gathered from the four corners of the instrument itself.” *Id.*; see also *Environmental Solutions International, Inc. v. J.C. Const., Inc.*, 2008 WL 9841725, at *6 (S.C. Ct. App. June 2, 2008). In addition, “because the ambiguity of contracts and statutes are questions of law, [this Court does] not view

the evidence in any particular light.” *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 198, 821 S.E.2d 667, 669 (2018). And if the opposing party wishes to conduct more discovery on a particular issue, it must “demonstrate a likelihood that further discovery [will] uncover additional evidence relevant to the issue” at hand. *Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659, 660 (Ct. App. 1994).

ARGUMENT

This Court should declare that St. Francis cannot reduce Dr. Jernigan’s compensation by applying payment modifiers to his WRVUs. The contract explicitly defines how Dr. Jernigan’s productivity compensation is calculated: the number of WRVUs multiplied by ■■■. It also explicitly explains how his WRVUs are used to determine his bonus compensation. The contract does not permit St. Francis to apply payment modifiers to reduce the WRVUs for either type of compensation. Indeed, the contract does not even mention modifiers. And the parties’ course of dealing confirms what the text says. For the first ten years of the contract, St. Francis did not apply payment modifiers, even though these modifiers existed and affected the government’s payments to St. Francis. This Court should not permit one party to a contract to change the material terms of that contract unilaterally. Instead, this Court should declare that St. Francis cannot apply payment modifiers and that Dr. Jernigan is due any wages that have been withheld because of St. Francis’s application of modifiers. Because there is no dispute over facts that might affect the outcome of this issue, Dr. Jernigan is entitled to partial summary

judgment.

I. Blackletter Contract Law Requires St. Francis to Pay Dr. Jernigan According to the Contract and Not Apply Payment Modifiers in Calculating His Compensation.

The contract must be enforced as written. St. Francis, thus, cannot apply payment modifiers in calculating Dr. Jernigan's compensation. "Where an agreement is clear on its face and unambiguous, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." *Miles v. Miles*, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011) (quotation omitted). Here, the employment contract's language is plain: "Any Productivity Compensation Physician receives shall be calculated ... on the basis of actual Work Relative WRVUs (WRVU's) attributable to services personally performed by Physician each month multiplied by the appropriate conversion factor and subtracting from the product thereof the monthly Base Compensation paid to Physician." Exhibit A at 23.

The contract provides that Dr. Jernigan's productivity compensation is computed by multiplying ■■■ by the number of WRVUs Dr. Jernigan performs in a month. Dr. Jernigan is entitled to that amount of money less his base compensation. But it is undisputed that St. Francis has not been following that formula since September 1, 2016. As St. Francis has admitted, despite the language of Dr. Jernigan's contract, it now follows a policy of applying payment modifiers to reduce WRVUs as St. Francis sees fit. But the contract's specific compensation formula does not include the application of payment modifiers. It does not use the term "payment modifiers." See Exhibit A at 23–26.

In response, St. Francis makes the astonishing argument that it has unlimited discretion to change Dr. Jernigan's compensation at its whim simply based on its internal "policies." St. Francis' Memorandum in Opposition ("Opp'n") at 12-13. This argument distorts and confuses different provisions in the agreement. None of the provisions of the agreement cited by St. Francis have anything to do with Dr. Jernigan's compensation.³ Nor does the reference to the CMS schedule of WRVU values in note 1 on page 26 of the agreement suggest that St. Francis had discretion to reduce Dr. Jernigan's WRVU's by applying payment modifiers.

In fact, the reference to the CMS annual WRVU schedule actually supports summary judgment. The language in note 1 about a CMS schedule refers clearly and specifically to WRVU's and requires that St. Francis update the WRVU values each year as they are revised by CMS.⁴ It shows that WRVU values, not payment modifiers, determine Dr. Jernigan's compensation. It makes no reference to payment modifiers.

St. Francis's interpretation is not plausible because the agreement explicitly defines the formula for productivity compensation without including payment modifiers in the formula:

³ See Exhibit A, § 2.8 pertains only to "services" to be provided by Dr. Jernigan; § 2.5 pertains only to charges, fees, and billing for his services; § 2.9 only to the requirement that his services comply with certain standards; § 1.2.6 requires that he abide by applicable codes of conduct; and § 2.13 pertains only to his performance of administrative services.

⁴ Note 1, page 26 of Exhibit A states "(WRVU's) are updated ... each year according to the schedule published each year by CMS."

Monthly (WRVU's x Conversion Factor) – Monthly Base Compensation
 = Productivity Compensation, if positive

Ex. A at 23. Thus, contrary to St. Francis's novel argument, the Agreement's "silence" regarding payment modifiers does not create ambiguity. Rather, every single term in the formula for calculating productivity compensation is defined, as is the formula itself, and none of the definitions include payment modifiers.⁵

The language of the Agreement itself is sufficient to entitle Dr. Jernigan to summary judgment. But there is further confirmation. *First*, the example St. Francis prepared back in 2006 during the negotiations confirms that the parties did not intend for modifiers to be used. Jernigan Aff. ¶ 14; Exhibits B & G. Indeed, CMS, the source for St. Francis's modifiers, recognizes that WRVUs and modifiers are two separate concepts. Exhibit B.⁶ By pegging Dr. Jernigan's productivity compensation to WRVUs without mentioning modifiers, the parties agreed that Dr. Jernigan's productivity compensation would be determined by looking to WRVUs alone. St. Francis is thus breaching the contract each time it applies a modifier to reduce the WRVUs Dr. Jernigan has performed.

⁵ The one case cited by St. Francis, at Opp'n at 14, regarding "ambiguity" is distinguishable on this basis. In *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 243, 672 S.E.2d 799, 803 (Ct. App. 2009), summary judgment was not appropriate because the contractual term at issue – "landlord/tenant claims" – was not defined and was not a term of art. Here, on the other hand, the Agreement specifically defines the productivity compensation formula and defines wRVU.

⁶ CMS provides "relative value units" "for more than 10,000 physician services." Exhibit B at 1. CMS separately lays out various payment modifiers that can apply to some procedures. It refers to them as "payment policy indicators needed for payment adjustment (i.e. payment of assistant at surgery, team surgery, bilateral surgery, etc." For example, a "multiple procedure" payment modifier can apply if multiple procedures are performed. Exhibit B at 9.

Second, the parties' undisputed course of dealing confirms what the plain language of the contract says. Restatement (Second) of Contracts § 223 (1981) ("A course of dealing between the parties gives meaning to or supplements or qualifies their agreement."). For the first ten years of the contract, St. Francis determined Dr. Jernigan's compensation without regard to payment modifiers. And the payment modifiers were introduced by the federal government fifteen years before St. Francis entered the contract with Dr. Jernigan. *See, e.g.*, CMS Fee Schedule 1991. So the amount the government was paying St. Francis was affected by the modifiers for the first ten years of the contract.

But it wasn't until 2016 that St. Francis decided to start applying payment modifiers in calculating Dr. Jernigan's productivity compensation. And, perhaps recognizing that doing so violated the terms of the employment agreement, offered to renegotiate Dr. Jernigan's contract. Jernigan Aff. ¶ 16. These additional pieces of evidence confirm that when the parties negotiated the employment agreement they did not intend for St. Francis to apply modifiers to reduce Dr. Jernigan's WRVUs.

The Court should thus hold St. Francis liable for breaching the employment agreement. "One party to a contract may not unilaterally alter its terms without the assent of the other party." Am. Jur. 2d Contracts § 496. This is especially so when dealing with material terms in a contract, such as compensation. *W.E. Gilbert & Assocs. v. S.C. Nat. Bank*, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985) ("In a contract for services two essential terms are the scope of the work to be performed and the amount of compensation."). Allowing unilateral modification

would upend contract law and create vast uncertainties for employees and employers alike. The Court should thus hold that the contract means what it says: Dr. Jernigan's compensation must be determined without regard to modifiers.

II. Even St. Francis Acknowledges, Additional Discovery Is Not Necessary or Appropriate to Resolve An Issue of Contractual Interpretation of an Unambiguous Contract.

Contrary to St. Francis's argument in opposition, no further discovery is necessary or even appropriate for resolution of this motion. That is because any parol evidence on the subject of this motion – the terms of the contract for calculating Dr. Jernigan's productivity pay – would be inadmissible. *See Columbia*, 299 S.C. at 520, 386 S.E.2d at 26 (“If a writing, on its face, appears to express the whole agreement between the parties, parol evidence cannot be admitted to add another term thereto.”). Thus, it is impossible for St. Francis to meet its burden of “demonstrat[ing] a likelihood that further discovery [will] uncover additional evidence relevant to the issue” at hand. *Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659, 660 (Ct. App. 1994).

St. Francis's argument to the contrary is curious because even St. Francis seems to recognize that the evidence it seeks is inadmissible for purposes of Dr. Jernigan's motion. Opp'n at 15 (“While parole evidence may be allowed for the purpose of determining the intent of the parties and clearing up any ambiguity with respect to Definition/Note 1, consideration of such evidence is for the trier of fact, and is not appropriate at the summary judgment stage.”). In other words, the need for discovery cannot be a basis for denial of Dr. Jernigan's motion. Rather, the only issue is whether the method for calculating Dr. Jernigan's productivity pay stated

in the contract (and which St. Francis used for 10 years) is unambiguous. If it is (and it is), then no discovery can affect that conclusion.⁷

St. Francis also asserts a need for further discovery on its affirmative waiver defense, whether it provided the notice required under the Wages Act and whether a bona fide dispute exists under the Wages act. Opp'n at 9. But none of those of those issues are material to Dr. Jernigan's motion for partial summary judgment. The affirmative waiver defense, is irrelevant to the contract interpretation issue and, furthermore is barred by the specific language of the agreement. See section III, *infra*. And Dr. Jernigan is not seeking summary judgment regarding any notice issue or question about a bona fide dispute under the Wages Act. See section IV, *infra*.

III. St. Francis's Affirmative Defenses Do Not Preclude Summary Judgment.

St. Francis's argument that the existence of its waiver affirmative defense provides an independent basis on which to deny Dr. Jernigan's motion fares no better. Opp'n at 16-17. First, the wavier affirmative defense has no relevance to the meaning of the employment agreement and whether it permitted St. Francis to apply modifiers. Dr. Jernigan would be entitled to summary judgment on that point, even if St. Francis's waiver argument were valid.

Second, the Agreement includes a non-waiver provision that plainly forecloses St. Francis's argument. Ex. A, Section 7.11, page 19 (Failure ... to

⁷ The case law cited by St. Francis only further demonstrates this point. All of the cases cited by St. Francis in which summary judgment was held to be premature, see Opp'n at 7-9, were torts cases in which, of course, the parole evidence rule did not apply.

demand strict performance . . . on any of the terms . . . shall not be construed as a . . . waiver or relinquishment of any rights under this Agreement, and each party may at any time demand strict and complete performance by the other party . . . of this Agreement.”). Such unambiguous, non-waiver provisions are enforceable as a matter of law, *see Nw. Nat. Ins. Co. v. R.S. Armstrong & Bros. Co.*, 627 F. Supp. 951, 954 (D.S.C. 1985), and the cases cited by St. Francis (Opp’n at 16) are distinguishable because the application of a non-waiver provision was not involved.

Clearly Dr. Jernigan was not required to stop seeing patients or work for no pay in order to preserve his claim to his full compensation.⁸

IV. The Wages Act Requires St. Francis to Pay Any Compensation It Has Withheld From Dr. Jernigan

The South Carolina Payment of Wages Act and basic contract law mandate that St. Francis pay Dr. Jernigan any compensation St. Francis has withheld as a result of applying modifiers. The Wages Act provides that “every employer ... shall pay wages due” their employees. S.C. Code § 41-10-40(A). The act “is remedial legislation designed to protect working people and assist them in collecting

⁸ While not material, it also bears noting that St. Francis’ assertion, Opp’n at 16, that Dr. Jernigan’s counsel did not raise his objections to the application of payment modifiers in mid-2017 is false. The litigation hold letter sent on Dr. Jernigan’s behalf on August 24, 2017, Ex. A to Plaintiff’s Interrogatories, makes clear that Jernigan’s counsel had been raising the issues that led to this lawsuit for months. The letter reminded St. Francis that the Wyche firm represented a number of POA Physicians regarding St. Francis’ “breach of its contractual compensation obligations to them” and stated “[b]ased on our conversations, I assume that St. Francis and its affiliates understand that some or all of my clients will be forced to bring suit on their claims if they are not resolved in some other way.” (emphasis added). The truth is that Dr. Jernigan’s counsel immediately raised the breach of contract issue and eventually sent a litigation hold letter based on it when St. Francis had not resolved the issue.

compensation wrongfully withheld.” *Dumas v. InfoSafe Corp.*, 320 S.C. 188, 195, 463 S.E.2d 641, 645 (Ct. App. 1995). The act defines wages as “all amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount.” S.C. Code § 41-10-10(2).

This broad definition covers the pay at issue here. *Allen v. Pinnacle Healthcare Sys., LLC*, 394 S.C. 268, 271, 715 S.E.2d 362, 364 (Ct. App. 2011). In *Allen*, the employer agreed to pay the physician “a bonus of sixty percent of collections to apply to all electrodiagnostic procedures or techniques performed, as well as other diagnostic procedures developed or used by Allen, less his regular salary.” *Id.* That bonus pay was considered wages under the Wages Act. That method of pay is essentially the same as the productivity pay in this case. Dr. Jernigan here is entitled to ■■■ for every value unit he performs less his base pay, and he is also entitled to a bonus based on the WRVUs his practice generates. There is thus no question that his productivity pay and bonus pay qualify as wages and that any amount of pay St. Francis has withheld must be paid to Dr. Jernigan. *See id.* The Court should thus hold that St. Francis must pay Dr. Jernigan any wages St. Francis has withheld from Dr. Jernigan because of St. Francis’s application of modifiers.

St. Francis appears to concede that, at least to the extent that compensation is due Dr. Jernigan under the Agreement, it does qualify as Wages under the act. Opp’n at 18. But St. Francis is incorrect in arguing that providing the statutory

notice of change in wages can remedy any failure to pay wages due. *Id.* at 19-20. In fact, an employer “cannot comply with the Payment of Wages Act, while breaching the contract, simply by providing seven days notice of the breach.” *See Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 317, 698 S.E.2d 773, 782–83 (2010) (holding that “even assuming that [the employer] gave notice, we find competent evidence to support the trial court's finding that [the employer] violated the Act”).⁹

CONCLUSION

For the foregoing reasons, Dr. Jernigan requests this Court grant the motion for partial summary judgment and hold that St. Francis may not apply payment modifiers to his WRVUs and that St. Francis owes Dr. Jernigan any compensation that Dr. Jernigan would have otherwise received had St. Francis not applied payment modifiers.

Respectfully submitted,

WYCHE, P.A.

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Attorney for Plaintiff

Dated: June 16, 2019

⁹ The one case cited by St. Francis is plainly distinguishable because the finding of no violation of the Wages Act only followed the conclusion that the employer “was not liable for breach of contract.” *Davis v. Greenwood Sch. Dist.* 50, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005)

Statutory and Regulatory Appendix

42 U.S.C. § 1395w-4 Establishment of fee schedules

...

(b)(1) In general

Before November 1 of the preceding year, for each year beginning with 1998, subject to subsection (p), the Secretary shall establish, by regulation, fee schedules that establish payment amounts for all physicians' services furnished in all fee schedule areas (as defined in subsection (j)(2)) for the year. Except as provided in paragraph (2), each such payment amount for a service shall be equal to the product of--

(A) the relative value for the service (as determined in subsection (c)(2)),

(B) the conversion factor (established under subsection (d)) for the year, and

(C) the geographic adjustment factor (established under subsection (e)(2)) for the service for the fee schedule area.

....

42 CFR § 414.22 Relative value units (RVUs).

CMS establishes RVUs for physicians' work, practice expense, and malpractice insurance.

(a) Physician work RVUs—

(1) General rule. Physician work RVUs are established using a relative value scale in which the value of physician work for a particular service is rated relative to the value of work for other physician services.

(2) Special RVUs for anesthesia and radiology services—

(i) Anesthesia services. The rules for determining RVUs for anesthesia services are set forth in § 414.46.

(ii) Radiology services. CMS bases the RVUs for all radiology services on the relative value scale developed under section 1834(b)(1)(A) of the Act, with appropriate modifications to ensure that the RVUs established for radiology services that are similar or related to other physician services are consistent with the RVUs established for those similar or related services.

....

**Final Rule Medicare Program; Fee Schedule for Physicians' Services,
56 FR 59502-01 (issued Nov. 25, 1991)**

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule.

SUMMARY: This final rule sets forth a fee schedule for payment for physicians' services beginning January 1, 1992. Establishment of this fee schedule is required by section 6102(a) of the Omnibus Budget Reconciliation Act of 1989, as amended by the Omnibus Budget Reconciliation Act of 1990. This final rule explains which services will be included in the fee schedule and sets forth the formula for computing payment amounts. Application of transition rules during 1992 through 1995 is also described, as well as other adjustments to fee schedule payment amounts.

DATES: These regulations apply to services furnished beginning January 1, 1992. These regulations are effective January 1, 1992.

...

II. Summary of the Provisions in This Final Rule

In this section we provide brief summaries of the provisions of the final rule. Information about the statutory requirements for establishing the physician fee schedule and the differences between the policies proposed on June 5, 1991 and the policies in the final rule is provided in section III of this preamble (Analysis of Comments and Responses).

A. Services to be Included in the Fee Schedule

1. Physicians—General

Section 1848(a)(1) of the Act (as added by section 6102 of Public Law 101-239) requires that payment be made under the physician fee schedule for all physicians' services, as defined in section 1848(j)(3) of the Act, including: Professional services of physicians; services and supplies incident to physicians' services (except drugs, which we will exclude); outpatient physical and occupational therapy; diagnostic X-ray and other diagnostic tests; and X-ray, radium, and radioactive isotope therapy (§ 415.2, definition of "Physicians' Services").

...

B. Formula for Computing Payment Amounts

Section 1848(a) of the Act specifies that payment for Medicare physicians' services must be based on the lesser of the actual charge or the payment amount computed under the fee schedule. Although the law refers to the fee schedule values as “payment amounts”, in fact under the statutory formula the amount paid directly to a physician or beneficiary by Medicare will be 80 percent of the actual charge or 80 percent of the fee schedule payment amount, whichever is less. The beneficiary is required to pay the remaining 20 percent. (Throughout this final rule, we have used the terms “fee schedule payment amount,” “payment amount,” “payment,” and “allowed charge” as used in the statute to include the amounts for which both the beneficiary and Medicare are responsible.)

Under the formula set forth in section 1848(b)(1) of the Act, payment amounts for particular services under the physician fee schedule will be computed as the product of three factors: (1) A relative value for the service, (2) the GAF for the fee schedule area, and (3) a nationally uniform dollar CF. (Although we generally describe a single nationally uniform CF, different CFs for surgical services and other services may be established as part of the Medicare volume performance standards (MVPS) and annual update process. A discussion of the update process appears in the section on the CF.) This general formula can be expressed as:

$$\text{Payments} = \text{RVU}_t \times \text{GAF}_a \times \text{CF}_s$$

where

RVU_t=Total relative value units for the service

GAF_t=Total geographic adjustment factor for the fee schedule area

CF=Uniform national CF

s=Service

a=Fee schedule area

Section 1848(e)(2) of the Act requires the total GAF for a fee schedule area to be the sum of three components, relating to the three components of the total RVU for a service. The three components are:

- (1) Physician work;
- (2) Practice expenses or overhead, such as rent, staff salaries, equipment, and supplies, exclusive of professional malpractice liability insurance costs; and
- (3) Professional liability insurance or malpractice costs.

Section 1848(c)(1) of the Act defines the components of the RVU for a physician service. The physician work RVU must reflect the physician resources

required to furnish the service, including time and intensity of effort. Under the formula specified at section ***59508**1848(c)(2)(C), the practice expense and malpractice RVUs are based on historical data for practice expense as a fraction of total physician revenue, weighted by specialty, applied to estimated 1991 average allowed charges under the customary, prevailing, and reasonable charge methodology.

...

C. Sources of Relative Value Units (RVUs)

1. Physician Work RVUs

The physician work RVUs are based primarily on the work of the Harvard research team. We used a group of CMDs to review the comments received on the work RVUs in the proposed rule (most of these RVUs came from Harvard), to fill gaps in the Harvard RVUs, and to resolve anomalies that we identified in our review of the Harvard RVUs. The list of RVUs for physician work is contained in addendum B....

H. Adjustments to Fee Schedule Payments

...

3. Payment Modifiers

Only modifiers for which we will establish a national payment policy will affect payment. If there is no national payment policy governing the use of a modifier, carriers may not increase or decrease payment based on the presence or absence of that modifier. However, carriers can continue to use local modifiers if they are used for purposes other than payment (for example, utilization or medical review screening). We have not required the use of a modifier for services billed by a physician that are covered as “incident to a physician's service” if the physician does not personally perform the service.

a. Multiple surgery (CPT modifier 51)—(1) General. If a surgeon performs more than one procedure on the same patient on the same day, we will pay 100 percent of the global fee for the highest value procedure only, 50 percent of the global fee for the second most expensive procedure, and 25 percent of the global fee for the third, fourth, and fifth procedures. Each procedure after the fifth procedure will require submission of documentation and special carrier review to determine the payment amount.

...

b. Bilateral surgery (CPT modifier 50). The bilateral modifier is used to indicate cases in which a procedure normally done on only one side of the body was, in fact, performed on both sides of the body. The CPT identifies surgical procedures that are typically bilateral in nature. For these codes, the bilateral modifier will not result in increased payment.

In the absence of any evidence with respect to the actual difference in work for bilateral procedures, we will continue the historic practice of paying 150 percent of the global fee.

....

S.C. Code § 41-10-10

...

(2) "Wages" means all amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount and includes vacation, holiday, and sick leave payments which are due to an employee under any employer policy or employment contract. Funds placed in pension plans or profit sharing plans are not wages subject to this chapter.

1 STATE OF SOUTH CAROLINA)
2) IN THE COURT OF COMMON PLEAS
3 COUNTY OF GREENVILLE)
4
5 W. Clark Jernigan,)
6)
7 Plaintiff,)
8 vs.) Case No. 2018-CP-23-05985
9)
10 St. Francis Physician)
11 Services, Inc.,)
12)
13 Defendant.)
14 _____)

15
16
17 HEARING TRANSCRIPT
18

19 The above-mentioned Non-Jury Motion Hearing was
20 taken on the 18th day of June, 2019, before the Honorable
21 Robin B. Stilwell, commencing at the hour of 12:10 p.m. at
22 the Greenville County Circuit Court, Greenville,
23 South Carolina:
24
25

1 APPEARANCES:

2
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17
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20
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1 BY THE COURT:

2 The next case up is Jernigan versus St. Francis, and
3 that's Case No. 2018-CP-23-5985, a Motion to Compel for
4 Partial Summary Judgment.

5 So, I'll be happy to hear from you in whatever order
6 you think is appropriate.

7 BY MR. PARR:

8 Your Honor, this is Henry Parr.

9 We'd like to start with the summary judgment motion,
10 if that's all right with the Court?

11 BY THE COURT:

12 Yes, sir, absolutely.

13 BY MR. PARR:

14 So, Your Honor, you had briefs from both the parties on
15 this motion. This is a breach of contract for an
16 employment case that involved Dr. Jernigan's compensation
17 from St. Francis, and the parties are not in disagreement
18 on the principles governing the summary judgment request
19 here. We're asking the Court to construe an unambiguous
20 contract of employment, and I think the law is clear from
21 the cases in both memos that when a contract is
22 unambiguous, the construction interpretation of the
23 contract is before the Court, and it's a matter of a
24 summary judgment, and we say this contract is unambiguous,
25 and we're asking for partial summary judgment on one of

1 the issues that relates to the interpretation of the
2 contract.

3 BY THE COURT:

4 Okay.

5 BY MR. PARR:

6 And so what I would like to do is to show you some of the
7 clauses of the contract and explain why we say it's clear,
8 and then I'll proceed to address the arguments made by
9 counsel.

10 BY THE COURT:

11 Okay.

12 BY MR. PARR:

13 One of the things, just to summarize the position of the
14 parties, this is a contract that was first entered in
15 2006, and then it was amended in 2008, and if you look ---
16 I'm going to refer to the exhibits in Dr. Jernigan's
17 Affidavit.

18 BY THE COURT:

19 Okay.

20 BY MR. PARR:

21 Exhibit A is an Employment Agreement. Section II, this is
22 page 31 of that exhibit.

23 BY THE COURT:

24 Okay.

25 BY MR. PARR:

1 I just want to point out that in 2008 it was amended and
2 it was extended for a number of 12 years; and if you go to
3 the next page, and in connection with that amendment, Dr.
4 Jernigan's productivity compensation was increased. Look
5 at Exhibit page, Section V will show that. That's the
6 provision that changed the wRVU conversion factor from \$64
7 to the \$75. So, St. Francis wanted him to extend the
8 contract, so they offered him a higher rate per RVU, and
9 it was extended for 12 years; and because this was a
10 contract with very limited termination provision, this is
11 not an at-will contract, and this is not --- the prior
12 contract gave Dr. Jernigan the right to terminate on 365
13 days' notice. This amendment took that right away and has
14 severely limited termination rights for him. So he was in
15 good agreement that it was going to last for 12 years,
16 and, of course, anybody entering an agreement that's going
17 to last for 12 years would want their compensation really
18 spelled out clearly, and that was done in this contract in
19 Exhibit 4.1.1.

20 Let's show 13.02.4, which I'm moving to that exhibit
21 of the agreement. That's on page 23, and there are three
22 basic types of compensation. There's base compensation,
23 productivity compensation and bonus compensation, and what
24 we're talking about today is the productivity and bonus
25 compensation.

1 BY THE COURT:

2 Okay.

3 BY MR. PARR:

4 And as you can see here, this exhibit is five pages. They
5 worked really hard to be very clear and detailed about
6 what Dr. Jernigan's compensation was going to be for this
7 12-year period, and it says here in this second sentence,
8 and if you highlight this portion, "That any productivity
9 compensation shall be calculated in accordance with this
10 Section II based on actual, actual --- actual work
11 relative values units attributed to the services performed
12 by the physician each month." The actual wRVUs, and
13 that's one of the key issues in this motion today, and it
14 basically says it has a formula here that's very clearly
15 stated. This is how you figure his productivity
16 compensation. Every month you take the actual work
17 relative value units times the conversion factor, which
18 we've seen is \$75, minus the base compensation he's
19 already received, and if that's positive, that's his
20 productivity compensation, and he's supposed to be paid
21 that by the 15th of the following month; and if you'll go
22 to the next page, it's similar detailed provisions about
23 the comp calculation of his year-end bonus down in
24 paragraph three, just that first paragraph in the formula.

1 Again, there's the bonus compensation rule, which is
2 not part of our motion today, but, again, the wRVUs is the
3 wRVUs for the year as the percent over the total of the
4 practice times the compensation rule is his bonus. So
5 that's what the agreement says and it's very clear about
6 that. This is an agreement that is almost 30 pages of the
7 agreement.

8 So, what are wRVUs? And we attached an appendix to
9 our memo. If you would, go to 50.19. This is something
10 defined by Regulations and by the Center for Medicare
11 Services. Highlight that A1 for me. This is the Code of
12 Federal Regulations. This is what physician's work RVUs
13 are. They are established using relative values scale.
14 It's the value of physician's work for a particular
15 service. It's regulated relative to the value of work for
16 other physician services, and every year the Center for
17 Medicare Services puts out a chart. It provides the work
18 RVU numbers for over a thousand procedures that doctors
19 perform, and go to 16.02. I have to show you an example
20 of the chart.

21 This is --- this is the chart, and it's hard to see,
22 so we'll just highlight this part here.

23 See, this is the chart, and this is --- this is
24 relating --- what they've done is they've picked one
25 element of the way that the government figures out what

1 it's going to pay for a doctor's services. It's a
2 multi-factored formula, but what they had picked out for
3 Dr. Jernigan's compensation is just this item here, the
4 work earnings, and this is just one part of a whole, a
5 huge database, which lists the work RVU value for each of
6 these different procedures, and there are many more; but
7 so the contract says to get the RVUs for Dr. Jernigan over
8 here, you go to this chart, you find out what the code is,
9 you go over to here to the work RVU, and that's what he
10 gets, and that's what he got for the first ten years of
11 his agreement until September 1, 2016, when St. Francis
12 decided they would change the formula from what the
13 contract provided.

14 Go back and show the whole document without this
15 highlighted.

16 What --- just show the whole document. Okay. Just
17 highlight this part right here on some of this.

18 What is paid to the hospital in St. Francis' work
19 spread is determined by a lot of other factors, including
20 this conversion factor and other RVUs and these things
21 called payment modifiers, and these payment modifiers, as
22 we point out in our brief, were established by the
23 government in 1991; and so what happens is once, once they
24 go through this whole process of these multiple factors,
25 then sometimes, if these payment modifiers apply, what St.

1 Francis is paid might be adjusted up or down based on the
2 modifier, but those are payment modifiers. They are not
3 RVU modifiers. They are not work RVUs, and they are not
4 what the contract refers to. I can show you also that
5 this chart has a glossary that comes with it, and if you
6 would show 15 --- let's see, 14, please. This is Exhibit
7 B to the Jernigan Affidavit, and what we were just looking
8 at was Exhibit D to the Jernigan Affidavit, the chart, and
9 then go to the 02. This is --- and highlight this part
10 here.

11 These are sort of the explanations of the databases
12 reflected in the chart, and you can say --- see it has
13 this information for more than 10,000 physician services,
14 and the file contains associated relative value units.
15 That's one thing. It also contains various payment policy
16 indicators needed for payment adjustment. Those are the
17 modifiers that St. Francis wants to apply, but they are
18 not RVU modifiers. They are payment policy modifiers, and
19 this document has a definition of work RVUs in it that the
20 government uses. Could you show pages seven and eight, if
21 you have it, because the definition leads to what they
22 owe?

23 This is the work RVU definition right here. A work
24 RVU is a relative value unit for the physician worked in
25 the service as published in the federal register, and this

1 is showing --- this is saying what's in that column that
2 we showed you earlier, work RVUs, and this same document
3 makes clear that the payment modifiers are something else.

4 Would you go to 14.10, please?

5 Later on, they talk about the payment modifiers, and
6 here's one, the multiple procedure modifiers 51, and it
7 says, this --- highlight this part, please, right here.

8 This is a payment adjustment rule for multiple
9 procedures. It's not about your RVU modifier. This is an
10 adjustment that the government is going to pay once
11 they've calculated their whole formula involving all the
12 different elements, and this is what St. Francis wants to
13 apply to Dr. Jernigan's compensation, even though the
14 contract doesn't allow it.

15 So, could you show the PowerPoint slide for
16 productivity compensation?

17 So, here's what the contract provides for
18 productivity compensation for Dr. Jernigan. It is very
19 clear about everything that is supposed to be included.
20 It is not silent. Monthly RVUs times \$75, minus monthly
21 income compensation, equals productivity compensation if
22 positive.

23 So this is what St. Francis wants to do to change
24 the equation. They want to add another element that the
25 contract does not include. They will insert payment

1 modifiers to reduce these wRVUs, even though for the first
2 ten years they never did it, and even though the contract
3 doesn't even refer to it, they say the contract is silent
4 about them, and that gives them the right to add it, but
5 it is not silent. Under their argument, any formula in
6 any contract would not be safe because you would have to
7 list everything singular that you've excluded. You
8 couldn't just list the formula and say, "That's it." If
9 there's ever a contract that was clear, specific and
10 complete on compensation, this one is; and so what does
11 St. Francis say, and show the bonus compensation, too.
12 They're also --- it's a similar thing they did with the
13 bonus compensation.

14 Here's the formula in the contract for the bonus
15 compensation specific and complete. The physician RVUs or
16 the total RVUs in practice times the bonus compensation.
17 This is what St. Francis wants to do. They want to insert
18 elements in this formula. They want to apply payment
19 modifiers, again, and also in the bonus there's some other
20 undisclosed limitation that they're using to prevent Dr.
21 Jernigan from getting a bonus, and we had yet to find out
22 what it is and that's why we wanted to set this for our
23 motion to compel. So this is the issue, Your Honor.
24 We're asking you to grant summary judgment that St.
25 Francis is not allowed to apply payment modifiers to

1 reduce Dr. Jernigan's wRVUs in his compensation, and all
2 you need to do to determine that is to read this contract.
3 It's very complete.

4 So what did they say? They say sign the PVKs. I
5 think there was lease that left out one of the major terms
6 that, that when it's silent, it's ambiguous. Well, that
7 argument doesn't make any sense, because this contract is
8 complete. It has a specific formula for compensation.

9 And then they say that the contract itself allows
10 St. Francis to change Dr. Jernigan's compensation at its
11 whim based on a policy --- any policy that chooses to
12 adopt at any time, and they cite to you a number of
13 provisions that the contract, which they show support
14 their assertion, but I want to show you those provisions
15 of the contract, because not a single one of them supports
16 their argument.

17 The first one they mention is on pages eight and
18 nine of No. 13, and I'm referring back to the employment
19 agreement. This is provision 1.2.6, and if you'll
20 highlight that, please.

21 This is the provision that says that Dr. Jernigan is
22 going to comply with a Code of Conduct, and the terms of
23 the corporate responsibilities program. It has nothing to
24 do with his compensation.

25 Then the next one they cite is on pages 10 and 11,

1 2.4.3, and the page numbers I'm giving are our PowerPoint
2 presentation, not ---

3 BY THE COURT:

4 Okay.

5 BY MR. PARR:

6 --- the employment agreement. 2.4.3, Your Honor, is here.

7 This is a provision that says Dr. Jernigan is going to
8 comply with hospital policies and maintain his medical
9 records. There it is. There's nothing whatsoever in this
10 language that suggests that St. Francis has the right to
11 revise the compensation formula.

12 The next one is on page 11.2.5. This one is about
13 billing, and in this Section B is reference to policy, and
14 it basically says that St. Francis can forgive patient
15 bills in accordance to its policies, and there's the
16 reference to policies right there. It has nothing to do
17 with Dr. Jernigan's compensation.

18 The next one is on page 12 of the next page, Section
19 2.8 is cited. This one has nothing to do with Dr.
20 Jernigan's compensation. It says the clinical
21 administrative services it provides must comply with the
22 Catholic directives and the policies of St. Francis.
23 Nothing is suggested they change his compensation.

24 Then the next one is 2.9. Again, this says he will
25 comply with the rules necessary for St. Francis to obtain

1 reimbursement. This has nothing to do with his
2 compensation; and then the last one is 2.1.3, which is on
3 the same page, and this is a long provision, but if you
4 read the first, you can see this is basically about his
5 administrative services, and he has to do various types of
6 administrative services in compliance to St. Francis'
7 policies. Again, nothing to do with his compensation.

8 They also point to a section of the compensation
9 provision, and would you show 13.7, please, number one.
10 This is part of Exhibit 4.1.1, and its definitional
11 section, and it basically points out that the work
12 relative values will be updated each year by CMS and the
13 federal register, and what this is referring to is the
14 chart that we showed you earlier, which comes out every
15 year where they adjust the work relative value units.
16 Nothing in this suggests that they can change the
17 compensation formula.

18 So what other arguments do they make? They say that
19 this motion is premature, and that they need more time for
20 discovery, and they provide a chart for you showing what
21 more discovery would produce.

22 Could you show 42.9, please? This is from their
23 memorandum that I believe --- and would you highlight the
24 chart?

25 First of all, as we --- as we all admit, and as even

1 St. Francis concedes when a document like this contract is
2 complete, there's no parol evidence allowed, so there's
3 really no need for discovery at all, and --- but what I
4 wanted to point out of the five things listed on this
5 chart, only two of them are linked to this contract issue,
6 only the first two. They --- they say, and if you read
7 the --- the Affidavit from Ms. Mergo you received, they
8 aren't committing to get an expert. They are saying they
9 are considering that they possibly might try to get an
10 expert, and then they said they'd like to Dr. Jernigan's
11 deposition on behalf of the intent of the contract, but
12 those are no reason to delay summary judgment, because
13 this is an integrated contract. It's complete. None of
14 that evidence is admissible. This motion is wrongful
15 termination, because the contract is unambiguous.

16 The other three things don't relate to the contract.

17 This one, they say they want to take Dr. Jernigan's
18 deposition and a deposition of Dr. Baumgarten about their
19 defense of waiver and estoppel in acquiescence. That is
20 not necessary.

21 I'll go to the waiver argument now. They also
22 suggests that Dr. Jernigan by continuing to work, once
23 they started changing his compensation, has somehow waived
24 his right to object to it. What they've overlooked is the
25 non-waiver clause of the contract.

1 Show 13.20.

2 Section 7.11 of the contract completely forecloses
3 this argument. It basically, St. Francis and Dr. Jernigan
4 agree that you don't have to demand strict performance of
5 any of the terms, and it shall not be construed as a
6 waiver or recommendation, and you may at any time demand
7 strict performance; and, furthermore, the cases that they
8 cite on waiver don't apply to this situation at all. The
9 main case, the Pirelli (phonetic spelling) case was an
10 oral contract where a gentleman was working on an oral
11 contract under an oral agreement that they agreed to a
12 certain amount, and the employer said, "I'm changing it."
13 And he said, "I don't like that," but he kept on working,
14 and Justice Ness said, "Well, you kept on working, so you
15 waived any objection to it." They weren't faced with a
16 comprehensive 12-year agreement like this with an
17 anti-waiver clause, and the law does not require Dr.
18 Jernigan to all of a sudden stop treating patients and
19 withdraw from his practice just because St. Francis has
20 violated this agreement. This clause specifically
21 reserves his right to continue working, continues seeing
22 his patients and grant this case in his favor.

23 So there is no reason to delay, even if they've had
24 a valid waiver argument, there would be no reason to delay
25 construing the agreement. It wouldn't --- it wouldn't

1 delay it, and since the waiver argument is bogus
2 altogether, it's irrelevant.

3 BY THE COURT:

4 Okay.

5 BY MR. PARR:

6 So, would you go back to the chart 42.0.09, and the other
7 evidence they say we need to delay.

8 So the last few pieces of evidence they say we need
9 to delay is about showing that they provided a requisite
10 notice pursuant to the Wage Payment Act. That's not an
11 issue in this motion at all. There's no reason to delay
12 because of that. Whether or not notice was provided does
13 not affect anything in this motion, and then they say they
14 need to do discovery about whether there was a bonafide
15 dispute, that's not part of this motion, either, so that's
16 certainly not a basis for delay.

17 And those are the only arguments they make about
18 their contract, that they say it gives them the right to
19 change his compensation anytime on a whim, that it was
20 silent and that they need more time because it's
21 premature. Those arguments all fail and St. Francis
22 shouldn't --- is entitled to a judgment upon this court,
23 the contract does not allow --- Dr. Jernigan is entitled
24 to it, the contract does not allow St. Francis to change
25 his compensation by applying a payment modifier to reduce

1 his compensation.

2 We also asked for a ruling from the Court that the
3 compensation due under the agreement constitutes wages
4 under the Wage Act, because St. Francis has an issue and
5 have appeared to have denied that in their Answer. In
6 their memorandum they now do say, I think I'm right,
7 anything due him under the agreement does qualify his
8 wages under the Wage Act, so we don't need a declaration
9 as to that.

10 They do raise this issue from the Greenwood case,
11 and they cited for the proposition that if they gave a
12 proper notice, his Wage Act thing would be barred, but
13 that's not what the law is. We have cited to you Mathis
14 versus Brown and Brown, South Carolina. It's in our memo,
15 too. 389 SC 299, specifically says that even if an
16 employer gives notice and you breach the agreement, that
17 doesn't excuse your failure to pay the wages.

18 Thank you, Your Honor. I'll be glad to answer any
19 questions you may have.

20 BY THE COURT:

21 No, I'm good. Thank you, Mr. Parr. I appreciate it.

22 Yes, ma'am?

23 BY MS. MERGO:

24 May it please the Court: Your Honor, Nikole Mergo. Also
25 with me, Ashley Parr and Matthew Roberts, and one of our

1 summer associates Denver Smith is here to observe.

2 BY THE COURT:

3 Welcome.

4 BY MS. MERGO:

5 Thank you, Your Honor. I'd like to start where Mr. Parr
6 chose not to start, which is with the reason he chose not
7 to start with his motion to compel is because this is
8 premature to have a dispositive motion heard with
9 outstanding discovery requests, no depositions have been
10 taken, no experts have been obtained, and Mr. Parr is here
11 to argue right after this motion, a motion to compel,
12 where he seeks discovery dating back to 2006 for six
13 physicians, plus Dr. Jernigan, certainly there is a fact
14 question, if he needs all of that discovery. The two are
15 inherently inconsistent; and, in fact, he's attached to
16 Dr. Jernigan's Affidavit and three pages of their
17 memorandum what the intentions of the parties were, what
18 the course of dealing was, what folks thought at the time
19 they executed the contract. He's attached letters from
20 2006. Dr. Jernigan has talked in his Affidavit about what
21 the course of dealing was. All of those, if he didn't ---
22 if he thinks that this contract is clear and unambiguous
23 and within the four corners, he wouldn't have needed to
24 discuss any of that.

25 Those are all fact questions, and we have

1 outstanding discovery, and we have not been able to take
2 the deposition of the plaintiff, yet. We've been
3 answering Mr. Parr's discovery, and we will have an
4 expert, maybe more than one expert, as I noted in my
5 Affidavit, because our position is that these CMS
6 schedules that we've referenced in the contract and then
7 Mr. Parr put up here on the screen, and I'll go through
8 them with you in a moment, that that does allow us to
9 modify the work RVUs, and that is subject to expert
10 testimony whether or not that's a reasonable
11 interpretation of the contract in that regard.

12 So I just start by saying this a premature motion
13 that is being heard at the same time as a motion to compel
14 related to multiple fact issues, and the case law in the
15 state is that those two are inherently inconsistent when
16 there is --- when we have not had a full and fair
17 opportunity to go through these issues that summary
18 judgment should be denied, and all inferences have to be
19 taken in favor of the non-moving party, and the plaintiff
20 bears the burden of proof in that regard.

21 All right. Mr. Parr, and we also think, and we put
22 a footnote in our brief about this, Mr. Parr also
23 represents five other physicians that have --- he's going
24 to come up on a session limitations deadline, and we think
25 that's the reason that he's trying to jam through with a

1 summary judgment argument is to try to see a preclusive
2 effect related to the other employment agreements, which
3 he has chosen not to have brought or bring at this time
4 but which all have been provided draft complaints to the
5 defendant in this matter. So we all think --- also think
6 that's what going on in the background here, and that it's
7 totally premature, and it would be a disservice not to let
8 St. Francis Physician Services have a chance to conduct
9 discovery in this case.

10 Also, there is a wage payment claim, and he just
11 noted on the screen that we --- they have not raised a
12 wage payment claim. There is a South Carolina wage
13 payment claim, so we would like to have discovery
14 regarding when Dr. Jernigan knew about this change, the
15 extent of his knowledge on the wage payment plan, because
16 if there's no breach, there are no wages due and owing
17 under the Wage Payment Act. So that is relevant discovery
18 contrary to what Mr. Parr said that we need to take.

19 All right.

20 Mr. Parr argues that the contract prohibits these
21 payment modifiers. There is nowhere in this contract that
22 prohibits the use of payment modifiers, and we noted in
23 our brief, Your Honor, as --- as you know, physician
24 compensation is regulated by federal government. This is
25 a regulated industry. St. Francis Physician Services has

1 to have the ability to change and be flexible and update
2 physician compensation based on physician compensation
3 surveys, like the MGMA guidelines, and that's what
4 happened in this case. They reviewed the industry. They
5 reviewed compensation guidelines, and they changed the
6 policy across the system, and Dr. Jernigan was well aware
7 of it. There is nothing in the contract that prohibits
8 that; and so my position, St. Francis' position is you
9 can't have it both ways. It is silent on that, so that's
10 not clear and unambiguous. So it would be ambiguous at
11 least in that regard to the specific point of where the
12 modifiers can be used. It is silent on modifiers. Our
13 position is that modifiers in terms of physician
14 compensation, work relative value units, they are
15 inextricably linked. This is the way the federal
16 government pays, the other providers pay, and we brought
17 this more in line with how the providers pay physicians to
18 further integrate that. So on the specific point of
19 payment modifiers, the contract is silent, and that would
20 raise a question of fact.

21 Now as to whether we're permitted to do it under the
22 contract aside from that, yes, we believe the contract,
23 because physician compensation is governed by federal law
24 and policies and other things, that we have to have the
25 flexibility, and this regulatory industry environment to

1 make changes to physician compensation to continually move
2 forward in how they are paid and follow the industry in
3 that regard. So there are a number of requirements in the
4 contract, and Mr. Parr took them out of context, that
5 require the physician to comply with the policies of the
6 defendant.

7 One of those is 2.8. It's compliance of standard.
8 It says that the clinical services and services provided
9 by Dr. Jernigan have to follow the administrative policies
10 of the employer and the hospitals, including the Code, the
11 bylaws, the rules and regulations of the employer and the
12 medical staff as may be amended from time to time. We
13 changed the policy about modifiers to bring it more in
14 line with how we were being paid for the services by
15 payers. They're inextricably linked. So in addition to
16 the policy language in the contract, Your Honor, if you
17 would take a look at page 26 of the Employment Agreement.
18 Mr. Parr also put that on the screen.

19 BY MR. PARR:

20 Would you like me to put it on the screen?

21 BY MS. MERGO:

22 Sure. That would be fine.

23 Your Honor, our position is that this paragraph,
24 which states wRVUs, work relative value units, are updated
25 in the billing practice management software each year

1 according to the schedule published each year by CMS,
2 Center for Medicare and Medicaid Services in the federal
3 register.

4 Okay. Mr. Parr attached for you the CMS schedules.
5 He attached for you the definitions to Dr. Jernigan's
6 Affidavit.

7 If you'd take a look with me at Exhibit B to his
8 Affidavit. Mr. Parr also put this up there. The CMS
9 schedule, referenced right there, defines modifiers. It
10 is a way that you pay physicians. wRVUs can be modified
11 or unmodified. They are inextricably linked.

12 If the CMS schedule expressly referenced in the
13 compensation provision of the contract, our position is
14 that that permits us to apply the modifiers because it is
15 specifically used by CMS in this fee schedule. It is also
16 on Exhibit C and D. He put the charts up there. The
17 modifiers are defined on those charts, as well. He says
18 they're payment modifiers. They are modifying RVUs.
19 That's how CMS does it, and the St. Francis Physician
20 Services made a decision to bring those more in line. It
21 is in the CMS fee schedule that is in the contract. Our
22 position is we have the right to do it, at the least that
23 raises a question of the ambiguity that we think an expert
24 should be able to speak to whether that's a reasonable
25 interpretation or not. Certainly not Mr. Parr or myself.

1 It should be up to an expert to talk about whether that's
2 a reasonable interpretation, but that --- that is our view
3 and that that is where we have the right, permissive right
4 to make these changes because it is specifically
5 referenced in the exhibit to the compensation provisions
6 of the contract.

7 Now we have also raised defense's waiver which Mr.
8 Parr went over. I understand his position on that. We've
9 also raised defenses of estoppel. Mr. Parr negotiated
10 with St. Francis Physician Services after he stopped
11 representing them. He negotiated for a year over these
12 employment agreements before he chose to bring this suit.
13 So we also have an estoppel argument. We think discovery
14 is appropriate on that, as well.

15 So the point here, Your Honor, is this is premature.

16 It's inherently inconsistent with a motion to compel
17 seeking discovery going back 13 years for six doctors.
18 There is a question of fact as to whether a silence on the
19 specific use of wRVUs raises ambiguity and also whether or
20 not the reference to the CMS schedules permitted St.
21 Francis to make those changes. We also have a defense's
22 estoppel that I've already referenced that raise questions
23 of fact that we should have a right to depose Dr. Jernigan
24 on.

25 With respect to the payment of Wage Act, again, all

1 right, in my chart, the exhibit that we attached, which is
2 appropriate under 56 to show that we still need discovery,
3 we need discovery on when Dr. Jernigan knew about this
4 policy change, if there was notification as early as April
5 2016, it was implemented in September 1st of 2016, and
6 there were negotiations continuously, so his knowledge of
7 that is important to this case under the Payment of Wage
8 Act both for knowledge and notice, also for bonafide
9 dispute. So knowledge and notice is a part of this motion
10 that Mr. Parr has brought. It's expressly in the motion,
11 and for the purposes of a bonafide dispute, we also
12 believe it is important for that, as well; and, Your
13 Honor, our position is there was no breach, so the wages
14 are not due under the Payment of Wage Act, and that's the
15 Baugh versus Columbia Heart case. I'm not saying that you
16 can give notice and breach anyway. That's not what we're
17 saying we did. We're saying we gave notice as
18 appropriate. There was no breach. Therefore, under the
19 Payment of Wage Act, there are no wages due and owing. So
20 that's our position on the Payment of Wage Act claim, as
21 well.

22 I believe that is all I have, Your Honor.

23 BY THE COURT:

24 Okay.

25 BY MS. MERGO:

1 Thank you.

2 BY THE COURT:

3 So, let me ask you all, I've been looking feverishly for
4 the full Employment Contract. Was that filed under seal
5 or is it ---

6 BY MR. PARR:

7 Yes, it was.

8 BY THE COURT:

9 Okay. Can you all give me a copy?

10 BY MR. PARR:

11 It's Exhibit A to ---

12 BY THE COURT:

13 I will ---

14 BY MS. MERGO:

15 We'll give it to you.

16 BY THE COURT:

17 --- get a copy.

18 BY MR. PARR:

19 I have a copy for you that I can give you right now.

20 BY THE COURT:

21 Thank you.

22 BY MR. PARR:

23 This is Exhibit A to the Jernigan Affidavit that was
24 filed.

25 BY THE COURT:

1 Okay. All right. Good. Thank you very much.

2 Okay. Mr. Parr, would you like to respond to Ms.
3 Mergo?

4 BY MR. PARR:

5 Yes, just briefly, Your Honor.

6 Ms. Mergo mentioned that after I appeared I was
7 mainly negotiating with contracts. I want to show 3.15.
8 That's just not the truth, and my letter shows this.

9 BY MS. MERGO:

10 Your Honor, let me clarify. I don't believe I said he
11 wasn't objecting after he came in ---

12 BY MR. PARR:

13 Well, this ---

14 BY MS. MERGO:

15 And I was talking about the negotiations. I don't want to
16 be --- that's not what I said.

17 BY THE COURT:

18 I got you.

19 BY MS. MERGO:

20 When he came into the case, he did object. That was much
21 later.

22 BY MR. PARR:

23 Your memo says opposite, and so are you correcting your
24 statement in your memo? I can read ---

25 BY MS. MERGO:

1 I ---

2 BY MR. PARR:

3 --- it to you if you want me to.

4 BY MS. MERGO:

5 Go ahead.

6 BY MR. PARR:

7 Her memo says that all I've talked about was negotiating
8 new contracts, and they don't cite a source for it, but
9 this is a litigation whole letter that I wrote, and I
10 don't know why the memo got --- but it says, "As you know,
11 you represent them in connection with the breach," and
12 based on our conversations, I assume that St. Francis
13 understands all of my clients will be forced to bring some
14 or all bring suit if their complaints are not resolved.
15 St. Francis is well aware of these claims, and as I
16 pointed out, the waiver is not for argument. Our basis is
17 based on Section 7.11 of the contract, which is the
18 section that we mentioned earlier. So there's no issue in
19 this motion about notice or bonafide dispute. We're not
20 asking for any ruling from the Court that would fall under
21 those issues, so there's no reason to belabor them based
22 on those issues.

23 I think it's telling that St. Francis, with all the
24 time they've had, you know, this hearing was scheduled
25 originally in April, and we've been delayed about 60 days

1 since then, they have not and they cannot point to a
2 single document from the federal government that uses the
3 word payment modifiers, RVU, work RVU modifiers. The
4 documents that I showed you and I can show them, again, if
5 they would be helpful, refers to these modifiers as
6 payment modifiers, and that's what they are; and the fact
7 that there's no reference in the contract of that and the
8 payment modifiers are not included in the specific
9 formulas used in the contract shows that St. Francis had
10 no contractual right to change the contract.

11 Now Ms. Mergo made the argument that St. Francis
12 needed to right to change with the times and make all
13 these adjust with the times. Well, if it needed that
14 right, why get Dr. Jernigan to sign a 12-year contract
15 with specific compensation terms and a specific formula?

16 There is a provision in the contract, 3.4, that St.
17 Francis put in that says in the event, here, that the
18 employer seeks advice of counsel, there's a substantial
19 risk the agreement does not comply with applicable law or
20 to jeopardize it, the parties are supposed to --- St.
21 Francis is supposed to let Dr. Jernigan know and they're
22 supposed to confer, and that if they can't resolve it,
23 either one can terminate it in 30 days. Well, St. Francis
24 has not terminated his contract. They kept it in place,
25 because they don't want Dr. Jernigan going somewhere else.

1 They want him to still be bound under their contract, but
2 they have refused to pay him under this specific formula
3 that they agreed to use.

4 The argument, I don't understand how St. Francis
5 consent --- can say with a straight face that the contract
6 is silent when it has a specific formula. The formula
7 says how this is to be calculated. It uses the word work
8 RVUs, which is defined over and over again by federal
9 regulations, and that's --- that's what it means. We
10 don't need any experts; and, indeed, if they had an
11 expert, they've had 60 days to come up with an Affidavit
12 of an expert to say that, they haven't. The Affidavit
13 that was filed in the court said, "We're considering it,"
14 and no expert testimony would be admitted anyway because
15 the language of the contract is clear, parol evidence
16 would not be allowed, and we think we're entitled to the
17 ruling that we requested, Your Honor, that this contract
18 does not allow St. Francis to reduce Dr. Jernigan's wRVUs
19 or further reduce the payment of Dr. Jernigan.

20 Thank you, Your Honor.

21 BY THE COURT:

22 Okay. So let me ask you: You indicate, Mr. Parr, that
23 St. Francis had Dr. Jernigan in the --- from your
24 perspective, in the appropriate way in compliance with the
25 Employment Contract for, you said, ten years?

1 BY MR. PARR:

2 Up until Sept --- yes. I think it was September 1, 2016.

3 Their contract started September 1, 2006, but they haven't

4 --- they don't dispute that fact.

5 BY THE COURT:

6 Okay. All right. Well, what changed?

7 BY MR. PARR:

8 That's what we would like to know. The payment modifiers

9 were there all along, and St. Francis has reimbursements

10 from the federal government were being adjusted by them,

11 but they weren't affecting Dr. Jernigan's wRVUs because

12 the contract would not allow it.

13 BY THE COURT:

14 Okay.

15 BY MR. PARR:

16 We need the Court to make this clear, because it can say a

17 lot more, its vague about this subject, not just for this

18 incident but for others, as well, as Mr. Mergo pointed

19 out, and there's no further reason to delay telling St.

20 Francis you've got to comply with your contracts. That's

21 our request. Thank you, sir.

22 BY THE COURT:

23 Ms. Mergo, do you know what changed?

24 BY MS. MERGO:

25 Yes, Your Honor, we submitted an Affidavit from Bill Gay,

1 which is attached to our memorandum.

2 BY THE COURT:

3 Yes, ma'am.

4 BY MS. MERGO:

5 Regarding their review of physician compensation surveys,
6 like the MGMA, which are documents that have been produced
7 in this case. The documents produced in this case to Mr.
8 Parr and Dr. Jernigan, and Dr. Jernigan knew at the time
9 that the reasons that the change was made is to further
10 integrate the way St. Francis Physician Services was
11 reimbursed by payers with the way it pays its physicians
12 as expressly referenced in the CMS schedule that is
13 expressly referenced in Exhibit A, the compensation
14 provisions of the agreement, and Mr. Parr continues to say
15 that there's no need for parol evidence when three pages
16 of his memorandum and the entire Exhibit G is all about
17 course of dealing and the negotiations at the time of the
18 original contract. You cannot have it both ways. That is
19 entirely inconsistent.

20 BY MR. PARR:

21 Your Honor, if I may, I'd like to show you Mr. Gay's
22 Affidavit. This is the Affidavit Ms. Mergo talked about.
23 Paragraph four he is explaining why they made the change.
24 This is what he says. They evaluated industry practices,
25 and then the next page, paragraph five says they made a

1 business decision for a variety of reasons. It doesn't
2 give all of them, and the contract doesn't let them just
3 say, "It suits us to change the compensation." It would
4 really undermine contract law in this country if an
5 employer like St. Francis can change an employee's
6 compensation in the way they have done, and it undermines
7 the rule of law that we have to go through all these
8 lawsuits and spending all this time fussing about it when
9 the contract was so clear, and that's why we need to this
10 motion for summary judgment.

11 BY MS. MERGO:

12 Your Honor, if I might respond?

13 BY THE COURT:

14 Sure.

15 BY MS. MERGO:

16 If Mr. Parr wants to know why it was changed and the
17 Affidavit is not sufficient, that's the entire point of
18 this exercise. He can take Mr. Gay's deposition. He can
19 take the deposition and find out why it was changed and
20 why St. Francis believes pursuant to that provision of the
21 contract in the compensation section that references the
22 CMS schedule we believe it was appropriate.

23 BY THE COURT:

24 Yeah, that was that --- as much as anything, that was kind
25 of a rhetorical question about what changed. I ---

1 BY MR. PARR:

2 We don't need to know.

3 BY THE COURT:

4 I know what changed. I mean I know what changed, but it's
5 all about money, right? The change is money.

6 BY MS. MERGO:

7 Your Honor, and I neglected to do one thing. There ---
8 they referenced in their brief that we only gave you
9 prematurity cases that were in tort cases, and I just
10 wanted to hand up two that are in the context of contract
11 cases where the Court held that summary judgment was
12 premature. So I just wanted to hand those up to you, and
13 I have a copy for Mr. Parr.

14 BY THE COURT:

15 Okay. All right. So while you're handing that up, do we
16 still have a motion to compel that we need to hear?

17 BY MR. PARR:

18 Yes, Your Honor, we do, and I'm going to have Mr. Cox
19 offer that.

20 BY THE COURT:

21 Okay.

22 BY MR. COX:

23 May it please the Court: I'm Jim Cox from the Wyche Law
24 Firm, also representing Dr. Jernigan, Your Honor.

25 BY MS. MERGO:

1 Dr. Jernigan. I understand a good faith argument with
2 regard to an award of treble damages, but that doesn't
3 necessarily mean that all of the information related to
4 those other doctors should be provided to the plaintiff.
5 I think there may be an element of overbroad in that.

6 Now, having said that, there may be emails involving
7 those doctors which probably discussed the policy and the
8 payment methodology change, payment calculation change.
9 So I think it is important that they get all of that
10 information, but there --- it needs to be tempered, so
11 that it's not just everything related to these other
12 doctors. Okay?

13 So, as I sit here, and I don't know the quality of
14 your discovery heretofore. It's hard for me to define
15 that with particularity, but I'm going to ask you all to
16 work on that. Okay? But you know I come down someplace
17 in between, okay? Because if I say, "Okay. Compelled,
18 you get it all," that's probably too much. If I say, "You
19 can't have any of it," that's probably too little.

20 So it's got to be something in between that's fair
21 and that's reasonably calculated to lead to discovery of
22 admissible evidence in this case. In this case. Okay?

23 All right. With respect to the Motion for Partial
24 Summary Judgment, I'm going to go look back at the
25 agreement and all of the submissions that you've given,

1 and, although it's a very important question that comes
2 before the Court, you know, it's really a simple question
3 that I don't know the answer to right now, and that is
4 does the compensation methodology as articulated in the
5 contract allow for payment modifiers? And that's really
6 it. I'm going to look at it and I'm going to see. I'm
7 going to read it. That's why I wanted you all to give me
8 the whole thing, because I'm going to read the four
9 corners. Okay, and once I've had the opportunity to do
10 that, I'll get back in touch with you.

11 BY MR. PARR:

12 Your Honor, how can we make sure that you get the same
13 filing under seal? I want to be sure that you can see the
14 whole ---

15 BY THE COURT:

16 I can get it from the Clerk.

17 BY MR. PARR:

18 All right.

19 BY THE COURT:

20 I can go to the Clerk and tell them to bring it to me.

21 BY MR. PARR:

22 If so, that would be helpful, also.

23 BY THE COURT:

24 Yeah, I'm okay. I'm not disclose any of it. I don't want
25 to have to talk about this case to anyone any more than I

1 absolutely have to. As a matter of fact, it stays in the
2 context of this courtroom and maybe a little bit ---

3 BY MR. PARR:

4 If we read these cases and have it, can we send an email?

5 BY THE COURT:

6 You certainly may. Yes, you can.

7 I will tell you this: You know, I deal with summary
8 judgment issues all the time, and I understand the issues
9 related to having need more discovery and it's premature,
10 and I'm very reluctant to grant summary judgment in those
11 instances and lot of those instances it is premature.

12 This case is a little bit different to me because it
13 --- and I don't know the answer to this question, yet, but
14 it may be that the four corners of the contract precisely
15 define the terms and the methodology. I don't know. I'd
16 have to read it and see. Okay? And if they do, then the
17 premature argument goes away. If there's ambiguity, then
18 the premature argument rules. Okay? So it really depends
19 on what the four corners of the contract say. Okay. I
20 appreciate it.

21 BY MR. PARR:

22 Thank you, Your Honor.

23 BY MR. COX AND BY MS. MERGO:

24 Thank you.

25 (HEARING CONCLUDED AT 1:25 P.M.)

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

W. CLARK JERNIGAN, M.D.,

Plaintiff,

vs.

ST. FRANCIS PHYSICIAN SERVICES,
INC.,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No. 2018-CP-23-5985

**DEFENDANT’S MOTION TO
RECONSIDER, ALTER, AND AMEND
ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF’S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

Pursuant to South Carolina Rules of Civil Procedure 54(b) and 59(e), Defendant St. Francis Physician Services, Inc. (“Defendant”), hereby moves the Court to reconsider, alter, and amend that portion of its Order dated July 15, 2019 granting in part Plaintiff’s motion for partial summary judgment (the “Order”).

As more fully set forth in the Memorandum in Support filed contemporaneously herewith, Defendant respectfully requests that the Court reconsider, alter, and amend the Order, including because it contains errors of law and fails to consider, address, or make findings as to certain arguments or issues raised by Defendant.

This motion is supported by applicable law, Defendant’s Memorandum in Support filed contemporaneously herewith, and any other and further information as shall be timely presented to the Court.

(Signature Page to Follow)

Respectfully submitted,

s/ Nikole Setzler Mergo

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Nikole Setzler Mergo, SC Bar No. 68010

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*Attorneys for Defendant St. Francis Physician
Services, Inc.*

July 25, 2019
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

W. CLARK JERNIGAN, M.D.,

Plaintiff,

vs.

ST. FRANCIS PHYSICIAN SERVICES,
INC.,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No. 2018-CP-23-5985

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendant's Motion to Reconsider, Alter, and Amend Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment was served via the South Carolina E-Filing Portal, on the 25th day of July 2019, to the following counsel of record:

Henry L. Parr, Jr., Esquire
James E. Cox, Jr., Esquire
200 East Camperdown Way
Greenville, South Carolina 29602
hparr@wyche.com
jcox@wyche.com

s/ Nikole Setzler Mergo

Nikole Setzler Mergo, SC Bar No. 68010
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202

W Y C H E

Attorneys at Law

August 24, 2017

Roy M. Albert
Bon Secours Health System, Inc.
8990 Old Annapolis Rd.
Ste. M
Columbia, MD 21045

Re: Breach by St. Francis Physician Services, Inc. ("St. Francis") of its contractual compensation obligations to Piedmont Orthopedic Associates Physicians. ("POA Physicians")

Dear Roy:

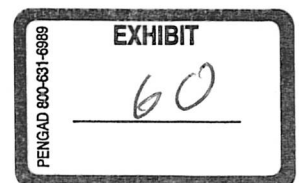
As you know, our firm represents a number of the POA Physicians in connection with its breach of its contractual compensation obligations to them. Based on our conversations, I assume that St. Francis and its affiliates understand that some or all of my clients will be forced to bring suit on their claims if they are not resolved in some other way and that St. Francis and its affiliates have already taken the necessary steps to preserve all communications and other data associated with or relevant to these claims (the "Relevant Information").

Nevertheless, I write this letter to emphasize the importance of St. Francis as well as its affiliates including Bon Secours St. Francis Health System and its affiliates (collectively "BSSFH") taking all necessary steps to preserve the Relevant Information, intact and without modification. The Relevant Information includes, without limitation, all documents, tangible things, and electronically stored information. The Relevant Time Period is June 1, 2006 through the present and applies in every instance in this letter, unless expressly indicated otherwise. The necessary steps include, without limitation, the following:

1. suspending data destruction and backup tape recycling policies;
2. imaging and preserving information stored on personal electronic devices (such as smart phones, tablets, laptops, or other devices) and in personal e-mail accounts maintained by your clients and used at any time during the Relevant Time Period;
3. preserving relevant software, including legacy software (unless an exact copy or mirror image is made and stored) and hardware that is no longer in service but was in service during the Relevant Time Period;
4. retaining and preserving necessary information to access, review and reconstruct (if necessary) relevant electronic data, including identification codes and passwords, decryption applications, decompression software, reconstruction software, network access codes, manuals and user instructions;
5. retaining and preserving all backup tapes or other storage media; and
6. any other reasonable steps necessary to prevent the destruction, loss, override or modification of relevant data either intentionally or inadvertently, such as through implementation of your clients' document retention policy.

W Y C H E
PROFESSIONAL ASSOCIATION

44 East Camperdown Way, Greenville, SC 29601- 3512
p: 864.242.8200 | f: 864.235.8900
www.wyche.com



August 24, 2017

Page 2

5. retaining and preserving all backup tapes or other storage media; and
6. any other reasonable steps necessary to prevent the destruction, loss, override or modification of relevant data either intentionally or inadvertently, such as through implementation of your clients' document retention policy.

This above list is not exhaustive. You and your clients must preserve all Relevant Information.

We believe that at least the individuals listed on Attachment A ("Involved Parties") possess, authored or received relevant documents. This list is not exhaustive, you and your clients must preserve all the Relevant Information, even though it might have been maintained, authored or received by other individuals.

We believe that, among other information, the following information is relevant to the case and must be preserved:

1. Communications (text message, e-mail, or any other form of communication) involving any of the Involved Parties, and/or representatives of St. Francis or BSSFH (collectively "SF Health") involving or related to compensation and/or terms of employment of any of the POA Physicians, including without limitation the fair market value of the services of any of the POA Physicians;
2. Communications (text message, e-mail, or any other form of communication) involving any of the Involved Parties, and/or representatives of SF Health involving or related to any actual or perceived risk that any employment agreement with any POA Physician does not comply with applicable law, jeopardizes the exempt status of his employer or somehow legally precludes his Employer from billing a third party payor for services ordered by that physician or any other physician associated with that physician;
3. Meeting minutes and other records of actions of deliberations of any board of trustees of any entity included within BSSFH or any internal committee, including without limitation the Intermediate Sanctions Compensation Committee, related to or regarding the compensation of any POA Physician.
4. Information submitted to or considered by any board of trustees of any entity included within BSSFH or any internal committee involved in reviewing compensation of any of the POA Physicians, including without limitation the Intermediate Sanctions Compensation Committee;
5. All information regarding the work or conclusions of any internal committee involved in reviewing the actual or potential compensation of any of the POA Physicians;
6. Draft and final memoranda regarding modifiers;
7. Information provided to or received from Healthcare Futures, or any other consultant group related to compensation and/or terms of employment of any of the POA Physicians, including without limitation information regarding the fair market value of the services provided by any POA Physician;
8. Information regarding any meetings or communications regarding the compensation of any of the POA Physicians;

August 24, 2017

Page 3

9. Information provided to any POA Physician regarding his compensation or the results of the operation of his medical practice;
10. Records and data of any type showing, related to, or used to determine the compensation of any POA Physician;
11. Reports, studies, analyses, reviews, or reports regarding or related to the compensation or terms of employment of any of the POA Physicians;
12. Proposed and actual employment contracts or amendments thereof with any of the POA Physicians, including all drafts of any such documents; and
13. Information regarding the review, collection, destruction, maintenance, alteration, preservation, and/or protection of Relevant Information.

In addition, you and your clients must take reasonable steps to preserve all Relevant Information that is not in your or your clients' possession, but is within your or your clients' custody or control. As with documents in your or your clients' possession, all electronically stored information in the possession of non-parties must be preserved intact and without modification. You and your clients must notify any third parties of the need to preserve evidence in their possession or control without modification.

Preservation of electronically stored information includes preservation not only of the electronic information itself, but also of relevant *related* information (however stored and whether or not in your or your clients' possession) including:

1. active, archived and deleted copies of electronic information, such as e-mails, voicemails, text messages, instant messages (IMs), calendars, diaries, word processing files, spreadsheets, PDFs, JPEGs, PowerPoint presentations, temporary internet files, cookies and .ZIP files, among others;
2. databases and computer logs; and
3. metadata about the information, including the date it was created and last was modified and the individual that created it.

Relevant Information can be found in the following forms, though this list is not exclusive:

1. Digital communications (any e-mail account – including personal e-mails, voicemail, texting, instant messaging);
2. Word processing documents (such as Word or Word Perfect documents, including drafts and revisions);
3. Spreadsheets and tables (such as Excel or Lotus 123 worksheets, including drafts and revisions);
4. Image and facsimile files (such as .pdf, .tiff, .jpg, .gif images);
5. Sound recordings and voicemail files (such as .wav and .mp3 files);
6. Databases (such as Access, Oracle, SQL and SAP server data);
7. Contact and relationship management data (such as Outlook, Lotus Notes and ACT!);
8. Calendar and diary application data (such as Outlook PST, Gmail, Yahoo, or blog tools);
9. Telephone logs, bills, and records;

W Y C H E

August 24, 2017

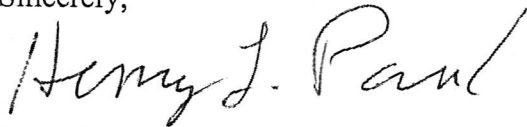
Page 4

10. Presentation data or slide shows produced by presentation software (such as Microsoft PowerPoint);
11. Data created with the use of mobile phones, smart phones, or any other mobile devices;
12. Social media posts, messages, or other communications (such as FaceBook, Twitter, LinkedIn, Snap Chat, Instagram, or MySpace)
13. Internet usage files;
14. Network access and server activity logs;
15. Back-up and archival files (.zip and .gho).

The foregoing lists are not exhaustive, and your clients must preserve all Relevant Information. Failure to preserve Relevant Information may constitute spoliation of evidence, which may subject you or your clients to sanctions. We trust that you and your clients will preserve all relevant hard copy documents and electronically stored information until the claims of the POA Physicians have been resolved.

If you have any questions at all about this letter, please call me immediately.

Sincerely,

A handwritten signature in cursive script that reads "Henry L. Parr, Jr.".

Henry L. Parr, Jr
864-242-8209

Enclosure

Attachment A

1. All POA Physicians
2. Brett Halverson and any other person associated with Healthcare Futures
3. All consultants retained regarding any aspect of the compensation of any POA Physician
4. Valinda Rutledge
5. Nancy Graebner and all other persons holding executive positions with St. Francis Physician Services, Inc.
6. All members of internal review committees referenced in any employment contract with any POA Physician.
7. Bill Gay
8. Kimberly Wilson
9. Matthew Littlejohn
10. Anselmo Nunez
11. Marlon Priest
12. Matt Toddy
13. Mark Nantz
14. Craig McCoy
15. Wael Haider
16. Bland Burkhardt, Jr.
17. Roy Albert
18. Cordell Mack
19. Justin Winkels
20. Members of the Specialists Work Group
21. Members of the Intermediate Sanctions Compensation Committee
22. Members of any of the boards of trustees of any of the entities included within BSSFH

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. _____
Case No. 2018-CP-23-05985

RECEIVED
AUG 23 2019
SC Court of Appeals

W. Clark Jernigan, M.D. Respondent,

v.

St. Francis Physician Services, Inc. Appellant.

NOTICE OF APPEAL

Pursuant to Rule 203, SCACR, Appellant St. Francis Physician Services, Inc. appeals the Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment of the Honorable Robin B. Stilwell dated July 15, 2019. Appellant received electronic notice of the entry of the Order on July 15, 2019. A copy of the Order is attached hereto.

Pursuant to Rule 59(e), SCRCP, Appellant timely filed a Motion to Reconsider, Alter, and Amend Order on July 26, 2019. According to Rule 203(b)(1), SCACR, the timely filing of a Rule 59 Motion stayed the time for filing an appeal. On August 7, 2019, the Honorable Robin B. Stilwell entered an Order Denying Appellant's Motion to Reconsider, Alter, and Amend Order. Appellant received electronic notice of the entry of the Order on August 7, 2019. Upon the entry of the order denying the motion, Appellant has timely appealed, calculating the remaining time pursuant to the rules. A copy of the Order is attached hereto.

Respectfully submitted,



Matthew B. Roberts, SC Bar No. 8856

mroberts@nexsenpruet.com

Nikole Setzler Mergo, SC Bar No. 68010

nmergo@nexsenpruet.com

Ashley Robertson Parr, SC Bar No. 101346

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Facsimile: (803) 253-8277

Attorneys for Appellant

St. Francis Physician Services, Inc.

This the 23rd of August, 2019.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. _____
Case No. 2018-CP-23-05985

RECEIVED
AUG 23 2019
SC Court of Appeals

W. Clark Jernigan, M.D. Respondent,

v.

St. Francis Physician Services, Inc. Appellant.

PROOF OF SERVICE

I hereby certify that a copy of Appellant's *Notice of Appeal* has been served upon the Respondent's counsel pursuant to Rule 262(b), SCACR, by hand delivering a copy of the same, on the 23rd day of August, 2019, to the address as shown below:

Henry L. Parr, Jr., Esquire
James E. Cox, Jr., Esquire
200 East Camperdown Way
Greenville, South Carolina 29602
hparr@wyche.com
jcox@wyche.com

Ashley R. Parr

Ashley Robertson Parr, SC Bar No. 101346
NEXSEN PRUET, LLC
55 E. Camperdown Way, Suite 400 (29601)
Post Office Drawer 10648
Greenville, South Carolina 29603

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE <i>W. Clark Jernigan, M.D.,</i> Plaintiff, v. <i>St. Francis Physician Services, Inc.,</i> Defendant.	IN THE COURT OF COMMON PLEAS Case No. 2018-CP-23-5985 ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT RECEIVED
--	--

AUG 23 2019

SC Court of Appeals

Plaintiff, Dr. Clark Jernigan, moved for partial summary judgment in this action. Both Dr. Jernigan and defendant, St. Francis Physician Services, Inc. ("St. Francis"), have submitted memoranda with supporting documents as well as oral arguments regarding the motion. In his motion for partial summary judgment, Dr. Jernigan asked the Court to declare three things:

1. That his employment agreement with St. Francis does not permit St. Francis to reduce the number of his Work Relative Value Units ("WRVUs") for purposes of calculating his compensation by applying payment modifiers;
2. That the compensation due Dr. Jernigan from St. Francis under his employment agreement is considered "wages" for purposes of the South Carolina Payment of Wages Act, S.C. Code § 41-10-10 *et seq.*; and
3. That St. Francis owes Dr. Jernigan any compensation that he would have otherwise received had St. Francis not applied payment modifiers to

reduce his WRVUs.

After consideration of the parties' submissions and oral argument, for the reasons set forth more fully below, the court grants Dr. Jernigan's motion and makes the requested declarations with respect to items one and two but declines to grant it with respect to item three.

STANDARD OF REVIEW

South Carolina Rule 56 allows a plaintiff to bring a motion for partial summary judgment to streamline the issues in a case. S.C. R. Civ. P. 56(d). "The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Watson v. Underwood*, 407 S.C. 443, 453, 756 S.E.2d 155, 160 (Ct. App. 2014). "Summary judgment is appropriate when there is no genuine issue of any material fact such that the moving party is entitled to judgment as a matter of law." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

Summary judgment is a particularly appropriate tool when it comes to contract cases because "the construction of a contract is a question of law for the court." *HK New Plan Exchange Property Owner I, LLC v. Coker*, 375 S.C. 18, 23, 649 S.E.2d 181, 184 (Ct. App. 2007). "Summary judgment is proper and a trial unnecessary where the intention of the parties as to the legal effect of the contract may be gathered from the four corners of the instrument itself." *Id.*; see also *Environmental Solutions International, Inc. v. J.C. Const., Inc.*, 2008 WL 9841725, at *6 (S.C. Ct. App. June 2, 2008). In addition, "[b]ecause the ambiguity of contracts and statutes are questions

of law, [this Court does] not view the evidence in any particular light.” *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 198, 821 S.E.2d 667, 669 (2018).

UNDISPUTED FACTS

Plaintiff Dr. Clark Jernigan is an orthopedic surgeon. He has been employed by St. Francis since September 1, 2006 under an employment agreement that became effective on that date and remains in effect until September 1, 2020, with slight modifications. Dr. Jernigan’s agreement is set forth in Exhibit A¹ to the affidavit he submitted in support of his motion for partial summary judgment.

The terms of Dr. Jernigan’s Employment Agreement

Dr. Jernigan’s employment agreement with St. Francis lays out, in clear language, a compensation model that entitles Dr. Jernigan to three types of compensation: base pay, productivity pay, and potential bonus. *Id.* at 23–25. He is first guaranteed an established base rate of pay. But through the productivity pay and bonus pay, he can earn more than the base rate of compensation.

The contract provides that Dr. Jernigan’s productivity pay, and to some extent his bonus pay, are determined by looking to the number of WRVUs Dr. Jernigan performs in a given period of time. *Id.* at 23-24. Those WRVU values are assigned by the federal agency known as the Centers for Medicare and Medicaid Services (“CMS”). The agreement explicitly dictates that the WRVUs used to determine Dr. Jernigan’s compensation will correspond to the WRVU “schedule published each year

¹ Unless specifically stated otherwise, all exhibit references are to the exhibits to the Jernigan Affidavit previously filed with his motion for partial summary judgment.

by CMS in the Federal Register.” Exhibit A at 26. The schedule has a column of WRVU values clearly labeled Work RVU’s that provides the WRVUs assigned for each procedure. See Exhibits C and D.

The contract also makes clear how St. Francis must use WRVUs to calculate Dr. Jernigan’s performance compensation. It states, “Any Productivity Compensation Physician receives shall be calculated ... on the basis of actual Work Relative Value Units (WRVU’s) attributable to services personally performed by Physician each month multiplied by the appropriate conversion factor and subtracting from the product thereof the monthly Base Compensation paid to Physician.” Exhibit A at 23. The conversion factor is stated in dollars. *Id.* at 32. The contract then says, “The remainder, if positive, is the amount of Productivity Compensation to be paid for such month.” *Id.* at 23. The contract also details how the WRVUs affect Dr. Jernigan’s bonus pay. Exhibit A at 24–25.

More succinctly, the number of WRVUs Dr. Jernigan performs in a month is multiplied by the amount of the conversion factor. If the result exceeds Dr. Jernigan’s base pay for the month, then Dr. Jernigan is entitled to the difference as productivity compensation. For example, if the conversion factor were \$75 and if Dr. Jernigan performed 200 WRVUs in a particular month, his productivity pay would be \$15,000 (200 multiplied by \$75). If his base pay were \$10,000 a month, he would be entitled to \$5,000 in productivity pay (\$15,000 less \$10,000).

St. Francis’s Decision to Apply Payment Modifiers to reduce Dr.
Jernigan’s WRVUs

For the first ten years of Dr. Jernigan's employment, St. Francis calculated his WRVU's without applying payment modifiers² to reduce them. Then, St. Francis made a unilateral decision that as of September 1, 2016, it would begin applying payment modifiers to reduce Dr. Jernigan's WRVUs.³ St. Francis's new modifier policy "require[d] all wRVUs to be modifier-adjusted inside of all ... physician compensation plans." Exhibit E.

Even though Dr. Jernigan's employment agreement makes no reference to payment modifiers, St. Francis applied its new policy to him. Beginning September 1, 2016, St. Francis applied these modifiers to reduce Dr. Jernigan's WRVUs for purposes of calculating his compensation.

CONCLUSIONS OF LAW

Does the agreement permit St. Francis to apply payment modifiers to reduce Dr. Jernigan's WRVUS?

Dr. Jernigan's motion seeks a declaration that his agreement does not permit St. Francis to apply payment modifiers to reduce his WRVU's for purposes of determining his productivity and bonus compensation. The Court finds that there are

² Payment modifiers were established in 1991. *See Final Rule Medicare Program: Fee Schedule for Physicians' Services*, 56 FR 59502-01, 1991 WL 245153 (F.R.) (issued Nov. 25, 1991) (hereinafter "CMS Fee Schedule 1991"). Since 1992, payment modifiers have been a part of how the federal government determines how much to pay providers like St. Francis for medical services under the Medicare and Medicaid programs. *Id.* ("These regulations apply to services furnished beginning January 1, 1992."). They were affecting the reimbursement St. Francis receives from the federal government before and after St. Francis employed Dr. Jernigan. These modifiers can reflect "team surgery, bilateral surgery, etc." Exhibit B at 1. Importantly, the modifiers apply to the final price the government is willing to pay. But modifiers do not affect the underlying WRVUs. Modifiers and WRVUs are separate concepts. CMS always determines the WRVUs separately from the modifiers. *See* Exhibit D.

³ Gay Aff. ¶¶ 4 and 5, submitted by St. Francis in opposition to summary judgment.

no material facts in dispute regarding this issue and grants this portion of the motion for partial summary judgment. As noted above, “Summary judgment is proper and a trial unnecessary where,” as in Dr. Jernigan’s case, “the intention of the parties as to the legal effect of the contract may be gathered from the four corners of the instrument itself.” *HK New Plan Exchange Property Owner I, LLC v. Coker*, 375 S.C. 18, 23, 649 S.E.2d 181, 184 (Ct. App. 2007); *see also Environmental Solutions International, Inc. v. J.C. Const., Inc.*, 2008 WL 9841725, at *6 (S.C. Ct. App. June 2, 2008). “Where an agreement is clear on its face and unambiguous, the court’s only function is to interpret its lawful meaning and the intent of the parties as found within the agreement.” *Miles v. Miles*, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011) (quotation omitted). Here the four corners of Dr. Jernigan’s agreement make clear that payment modifiers are not part of the formula for determining his compensation. The contract’s language is plain: “Any Productivity Compensation Physician receives shall be calculated ... on the basis of actual Work Relative Value Units (WRVU’s) attributable to services personally performed by Physician each month multiplied by the appropriate conversion factor and subtracting from the product thereof the monthly Base Compensation paid to Physician.” Exhibit A at 23. There is a similarly specific description of how bonus compensation must be calculated using actual WRVUs.

The contract’s specific compensation formula does not include the application of payment modifiers. It does not use the term “payment modifiers.” *See* Exhibit A at 23–26. The formula for his productivity compensation does not include payment

modifiers. It is as follows:

Monthly (WRVU's x Conversion Factor) – Monthly Base Compensation
= Productivity Compensation, if positive

Ex. A at 23.

Nor does the formula for calculation of his bonus compensation refer to payment modifiers. It is as follows:

(Physician WRVU's / Total WRVUs of Medical Practice) x Bonus
Compensation Pool.

Ex A at 24.

St. Francis makes a number of arguments in support of its decision to apply payment modifiers but none of them overcome the clear and specific terms of Dr. Jernigan's employment agreement or show that St. Francis was entitled to apply payment modifiers to reduce Dr. Jernigan's WRVUs for purposes of determining his compensation.

St. Francis insists that the agreement gives it unlimited discretion to revise Dr. Jernigan's compensation formula based on its internal "policies." St. Francis' Memorandum in Opposition ("Opp'n") at 12-13. In support of this position, St. Francis refers to a number of provisions in the agreement that reference St. Francis policies. This argument distorts and confuses different provisions in the agreement. None of the provisions of the agreement cited by St. Francis have anything to do with Dr. Jernigan's compensation.⁴ The agreement requires St. Francis to

⁴ Exhibit A, § 2.8 pertains only to "services" to be provided by Dr. Jernigan; § 2.5 pertains only to charges, fees, and billing for his services; § 2.9 only to the requirement that his services comply with certain standards; § 1.2.6 requires that

compensate Dr. Jernigan according to the formula provided in the agreement. St. Francis is not free to adjust this formula whenever it chooses based on its own “policies.” “One party to a contract may not unilaterally alter its terms without the assent of the other party.” Am. Jur. 2d Contracts § 496. This is especially so when dealing with material terms in a contract, such as compensation. *W.E. Gilbert & Assocs. v. S.C. Nat. Bank*, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985) (“In a contract for services two essential terms are the scope of the work to be performed and the amount of compensation.”). Allowing unilateral modification would upend contract law and create vast uncertainties for employees and employers alike.

St. Francis also contends that the reference to the CMS schedule of WRVU values in note 1 on page 26 of the agreement suggests that St. Francis had discretion to reduce Dr. Jernigan’s WRVU’s by applying payment modifiers. But, in fact, the reference to the CMS annual WRVU schedule actually supports summary judgment. The language in note 1 about a CMS schedule refers clearly and specifically to WRVU’s and requires that St. Francis update the WRVU values each year as they are revised by CMS.⁵ It shows that WRVU values, not payment modifiers, determine Dr. Jernigan’s compensation. It makes no reference to payment modifiers.

St. Francis asserts that the agreement’s lack of any reference to payment

he abide by applicable codes of conduct; and § 2.13 pertains only to his performance of administrative services.

⁵ Note 1, page 26 of Exhibit A states “(WRVU’s) are updated ... each year according to the schedule published each year by CMS.”

modifiers, i.e. its “silence” as to payment modifiers, creates ambiguity as to whether they may be applied. But, as noted above, the compensation formula is clear as to how Dr. Jernigan’s compensation is to be determined. Its “silence” regarding payment modifiers does not create ambiguity but makes clear that they are not part of the formula.⁶

St. Francis asserts that its affirmative waiver defense prevents summary judgment. Opp’n at 16-17. This argument fails for two reasons. First, the affirmative waiver defense has no relevance to the meaning of the employment agreement and whether it permitted St. Francis to apply modifiers. Dr. Jernigan would be entitled to summary judgment on that point even if St. Francis’s waiver argument were valid. Second, the Agreement includes a non-waiver provision that forecloses St. Francis’s argument. Ex. A, Section 7.11, page 19 (Failure ... to demand strict performance ... on any of the terms ... shall not be construed as a ... waiver or relinquishment of any rights under this Agreement, and each party may at any time demand strict and complete performance by the other party ... of this Agreement.”). Such unambiguous, non-waiver provisions are enforceable as a matter of law, *see Nw. Nat. Ins. Co. v. R.S. Armstrong & Bros. Co.*, 627 F. Supp. 951, 954 (D.S.C. 1985), and the

⁶ The one case cited by St. Francis, at Opp’n at 14, regarding “ambiguity” is distinguishable on this basis. In *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 243, 672 S.E.2d 799, 803 (Ct. App. 2009), summary judgment was not appropriate because the contractual term at issue – “landlord/tenant claims” – was not defined and was not a term of art. Here, on the other hand, the Agreement specifically defines the compensation formula and defines WRVU.

cases cited by St. Francis (Opp'n at 16) are distinguishable because the application of a non-waiver provision was not involved.

Dr. Jernigan was not required to stop seeing patients or work for no pay in order to preserve his claim to his full compensation.

Finally, St. Francis seeks to delay summary judgment contending that the motion is premature and that additional discovery is needed. But, again, the clear and specific language of the agreement defeats this argument. The Court need not look any further to resolve the motion. Any parol evidence offered for the purpose of interpreting the terms of the contract⁷ as to the calculation of Dr. Jernigan's pay would be inadmissible. *See Columbia*, 299 S.C. at 519, 386 S.E.2d at 261 ("If a writing, on its face, appears to express the whole agreement between the parties, parol evidence cannot be admitted to add another term thereto."). Thus, it is impossible for St. Francis to meet its burden of "demonstrat[ing] a likelihood that further discovery [will] uncover additional evidence relevant to the issue" at hand. *Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659, 660 (Ct. App. 1994).⁸ There is

⁷ St. Francis also asserts a need for further discovery on its affirmative waiver defense, whether it provided the notice required under the Wages Act, and whether a bona fide dispute exists under the Wages Act. Opp'n at 9. But none of those of those issues are material to Dr. Jernigan's motion for partial summary judgment. As noted above, the affirmative waiver defense is irrelevant to the contract interpretation issue and, furthermore, is barred by the specific language of the agreement. Additionally, Dr. Jernigan is not seeking summary judgment regarding any notice issue or question about a bona fide dispute under the Wages Act.

⁸ St. Francis's argument to the contrary is curious because even St. Francis seems to recognize that the evidence it seeks is inadmissible for purposes of Dr. Jernigan's motion. Opp'n at 15 ("While parole evidence may be allowed for the

no reason for further discovery on this issue of contract interpretation. Dr. Jernigan is entitled to partial summary judgment in his favor as to his contention that his employment agreement does not permit St. Francis to reduce his WRVUs by the application of payment modifiers.

Is the compensation due Dr. Jernigan under his contract “wages” for purposes of the South Carolina Payment of Wages Act?

St. Francis asserts that its affirmative waiver defense prevents summary judgment. Opp’n at 16-17. This argument fails for two reasons. First, the affirmative waiver defense has no relevance to the meaning of the employment. The Act defines wages as “all amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount.” S.C. Code Ann. § 41-10-10(2). This broad definition covers the pay at issue here.

Does St. Francis owe Dr. Jernigan any compensation he would have otherwise received had St. Francis not applied payment modifiers to reduce his WRVUs?

Dr. Jernigan also seeks a declaration as to this point. Although Dr. Jernigan has an argument that this ruling logically flows from the Court’s ruling regarding the application of payment modifiers, the Court declines to grant this part of the

purpose of determining the intent of the parties and clearing up any ambiguity with respect to Definition/Note 1, consideration of such evidence is for the trier of fact, and is not appropriate at the summary judgment stage.”). In other words, the need for discovery cannot be a basis for denial of Dr. Jernigan’s motion. Rather, the only issue is whether the method for calculating Dr. Jernigan’s pay stated in the contract (and which St. Francis used for 10 years) is unambiguous as to payment modifiers. If it is (and it is), then no discovery can affect that conclusion.

motion at this time. It concludes that the potential for factual issues as to whether money is actually due and owing by St. Francis to Dr. Jernigan requires that, at least on the limited record before the Court at this time, this issue be left to the trier of fact.

CONCLUSION

For the foregoing reasons, this Court grants the motion for partial summary judgment as to points one and two and declares and holds that Dr. Jernigan's employment agreement does not permit St. Francis to apply payment modifiers to his actual WRVUs and that any compensation due Dr. Jernigan under the agreement qualifies as "wages" for purposes of the South Carolina Payment of Wages Act, S.C. Code § 41-10-10 *et seq.* The Court denies summary judgment as to whether St. Francis owes Dr. Jernigan any compensation that Dr. Jernigan would have otherwise received had St. Francis not applied payment modifiers.

IT IS SO ORDERED.



Greenville Common Pleas

Case Caption: W Clark Jernigan vs. St Francis Physician Services Inc
Case Number: 2018CP2305985
Type: Order/Summary Judgment

So Ordered

s/ Robin B. Stilwell 2158

Electronically signed on 2019-07-15 12:04:30 page 13 of 13

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
	)	
W. Clark Jernigan, M.D.,	)	ORDER DENYING DEFENDANT'S
	)	MOTION TO RECONSIDER,
Plaintiff,	)	ALTER, AND AMEND ORDER
	)	
vs.	)	
	)	
St. Francis Physician Services, Inc.,	)	
	)	
Defendant.	)	C. A. No.: 2018-CP-23-05985

This matter comes before the Court pursuant to the Defendant's Motion to Reconsider, Alter, and Amend Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment entered on or about July 15, 2019. The Defendant's Motion, dated July 25, 2019, was made pursuant to Rules 54(b) and 59(e) of the South Carolina Rules of Civil Procedure. After having had the opportunity to carefully review the Defendant's Motion, this Court elects to respectfully deny the same.

AND IT IS SO ORDERED.

ROBIN B. STILWELL

July 30, 2019
Greenville, South Carolina

RECEIVED
AUG 23 2019
SC Court of Appeals



Greenville Common Pleas

Case Caption: W Clark Jernigan vs. St Francis Physician Services Inc
Case Number: 2018CP2305985
Type: Order/Other

So Ordered

s/ Robin B. Stilwell 2158

Electronically signed on 2019-08-07 09:43:14 page 2 of 2

The South Carolina Court of Appeals

W. Clark Jernigan, M.D., Respondent,

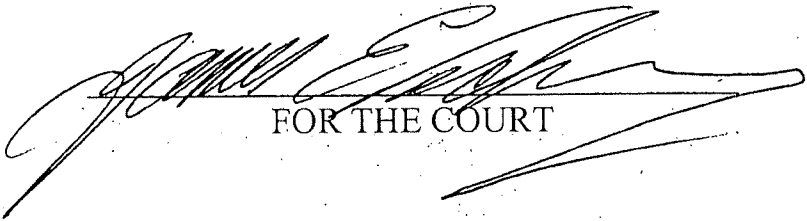
v.

St. Francis Physician Services, Inc., Appellant.

Appellate Case No. 2019-001415

ORDER

After careful consideration, Respondent's motion to dismiss is denied. Nothing in this order prevents the parties from arguing the issue of appealability in their briefs. Appellant's initial brief and designation of matter shall be served and filed within thirty days of the date of this order.



FOR THE COURT

Columbia, South Carolina

cc:

Matthew Brunson Roberts, Esquire
Nikole Setzler Mergo, Esquire
Ashley Robertson Parr, Esquire
Henry L. Parr, Jr., Esquire
James Edward Cox, Jr., Esquire

FILED

November 7, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-001415
Case No. 2018-CP-23-05985

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Jun 29 2020

SC Court of Appeals

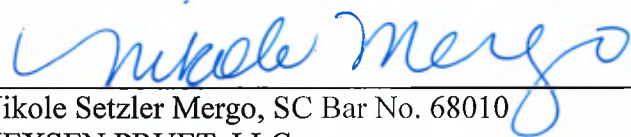
W. Clark Jernigan, M.D. Respondent,

v.

St. Francis Physician Services, Inc. Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed
to be included by any of the parties and not any other material.



Nikole Setzler Mergo, SC Bar No. 68010

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June 9, 2020
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