JAMS ARBITRATION
Benson Everett Legg, JAMS Arbitrator

BENJAMIN B. BRIDGES, MD, et al.	*	
	*	
Claimants,	*	
v.	*	JAMS Reference No: 1410008607
ANNE ARUNDEL PHYSICIANS GROUP, LLC	*	
	*	
Respondent.	*	

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Interim Award
April 14, 2021

SUMMARY OF DECISIONS

1. AAPG did not materially breach its Employment Agreements with the nine (9) Oncologists by, for example, closing a lab used by them or failing to add drugs to the Oncology Formulary.

2. AAPG has a legally protected interest sufficient to validate the non-competition provision of the Oncologists' Employment Agreements.

3. The use of the broad phrase, "practice of medicine" does not invalidate the non-competition provisions of the Oncologists' Employment Agreements.

4. The two-year term of the post-termination restrictions in the Oncologists' Employment Agreements is reasonable and enforceable.

5. The Territory, which includes the Primary Service Area and the Extended Service Area, is overly broad. I will "blue pencil" the Territory by excising all zip codes beyond the Primary Service Area, where over 80% of AAMC's oncology patients resided according to 2019 statistics.

6. The non-competition clauses of the Oncologists' Employment Agreements neither impose an undue burden on the Oncologists, nor do they violate public policy.

7. The non-competition clauses of the "Clinton 4" do not include a "private practice carve out."

8. The patient solicitation provisions of the Oncologists' Employment Agreements are overbroad and, therefore, unenforceable.

9. None of the Oncologists violated their restrictive covenants by accepting employment with MOH during their tenure with AAPG. Their Shareholder Agreements with MOH did not become effective until October 23, 2020.

10. AAPG terminated Drs. Taksey, Graze, Selonick, Werner, Garg, and Bridges without cause. Thus, their post-termination non-competition covenants, as set out in Section 14.3, are unenforceable.

11. The Oncologists did not misappropriate AAPG and AAMC's confidential and proprietary information. Ex. J-20 was created to determine the Oncologists' compensation pursuant to the complex compensation formula in their Employment Agreements. It was not created for marketing purposes. The information in Ex. J-20 was useful, but not indispensable, to MOH in making the decision to hire the Oncologists. Ex. J-20 has limited future competitive value to MOH and U.S. Oncology. AAPG and AAMC did not take strict measures to safeguard the document. Hence, it is not a trade secret under MUSTA.

12. Drs. Taksey, Werner, and Tweed did not breach their duty of loyalty by disclosing proprietary information derived from their service on the Medical Oncology Executive Committee. AAPG failed to substantiate this claim by identifying the proprietary, and valuable business information disclosed to the Oncologists. I credit the doctors' testimony that the purview of the committee was patient care and treatment, not business plans.

13. Drs. Taksey, Graze, Selonick, Werner and Garg did not violate Section 14.1(B) of their Employment Agreements by managing, operating, or providing professional services to MOH and U.S. Oncology.

14. Drs. Taksey, Selonick, Werner, and Garg violated their common law duty of loyalty to AAPG. While AAPG employees, they actively assisted MOH and U.S. Oncology in recruiting AAMC employees. I will hold a hearing on the subject of damages.

The Parties

Claimants, Counter-Respondents are Benjamin B. Bridges, M.D. ("Dr. Bridges"), Adam Goldrich, M.D. ("Dr. Goldrich"), Carol K. Tweed, M.D. ("Dr. Tweed"), David Weng, M.D., Ph.D. ("Dr. Weng"), Ravin Garg, M.D. ("Dr. Garg"), Peter R. Graze, M.D. ("Dr. Graze"), Stuart E. Selonick, M.D. ("Dr. Selonick"), Jason D. Taksey, M.D. ("Dr. Taksey"), and Jeanine L. Werner, M.D. ("Dr. Werner") (hereinafter sometimes collectively referred to as the "Oncologists"). Respondent is Anne Arundel Physician Group, LLC ("AAPG"). Anne Arundel Medical Center, an affiliate of AAPG is referred to as "AAMC."

The Pleadings

On July 17, 2020, the Oncologists initiated this arbitration by filing a Demand for Arbitration together with a Notice of Claims and Physician Employment Agreements. On July 27, 2020, the Oncologists filed an Amended Demand for Arbitration. They seek an order declaring that the post-employment Non-Competition and Non-Solicitation restrictions in their respective Employment Agreements with AAPG are null, void, and unenforceable. Further, they seek a declaration that they are authorized to practice medicine for a private practice within the Primary Service Area specified in their Employment Agreements.

Inter alia, the Oncologists also seek the following declarations:

(i) The Non-Competition and Non-Solicitation Covenants in the AOC Agreement and the Non-Competition Covenant in Dr. Goldrich's Employment Agreement are void and unenforceable because AAPG terminated the Employment Agreements of the oncologists covered by these agreements without cause.

(ii) Maryland Oncology Hematology, LLC ("MOH") is a private medical practice that is neither part of nor affiliated with any hospital or healthcare system.

(iii) U.S. Oncology is a business management services company that is unrelated to MOH.

(iv) MOH does not provide clinical or administrative services to any healthcare system, hospital, or affiliate of any healthcare system or hospital.

(v) Drs. Garg, Graze, Selonick, Taksey, and Werner neither managed nor operated MOH while they were employed by AAPG.

(vi) The Oncologists did not unfairly compete with AAPG.

(vii) The Statistics Report is not a trade secret under MUSTA.

(viii) The Oncologists did not violate their contractual confidentiality obligations by sharing the Statistics Report with MOH, and they had a legal right under the National Labor Relations Act to share the Statistics Report with MOH.

Respondent, AAPG answered the Demand and filed a Motion for Leave to File Counterclaims Against Claimants. The Arbitrator granted the motion and received the Counterclaims. In January 2021, Respondent filed Amended Counterclaims, which assert the following counts:

Count I: Breach of Contract Against all Oncologists. *Inter alia,* Respondent alleges that the Oncologists breached their respective employment agreements by (i) accepting employment with a competitor of AAPG, (ii) working for MOH in violation of their Employment Agreements, (iii) disclosing confidential and proprietary information to MOH, (iv) assisting in

the management and operation of MOH while still employed by AAPG, and (v) not acting in the exclusive and best interests of AAPG while still employed by AAPG.

Count II: Breach of the Duty of Loyalty and Fiduciary Duty Against Drs. Taksey, Werner, and Tweed. Respondent contends that as representatives on the Medical Oncology Executive Committee for AAPG and AAMC, these doctors owed AAPG a special duty of loyalty. The doctors violated this duty by disclosing to MOH AAPG's patient statistics, financial data about AAPG's performance, AAPG's strategic plan, and other financial and proprietary information. Respondents seek compensatory damages, including the amounts paid as wages during the period in which the doctors engaged in disloyal acts, and punitive damages.

Count III: Unfair Competition against all Oncologists. Respondents contend that by engaging in the misconduct alleged in Counts I and II, Claimants damaged Respondent in an amount to be determined at the arbitration hearing.

Count IV: Violation of the Maryland Uniform Trade Secrets Act (MUSTA) against all of the Oncologists. Respondent contends that its patient statistics and other proprietary information are trade secrets protected by MUSTA. AAPG claims that the Oncologists misappropriated its trade secrets by disclosing them to MOH, unjustly enriching themselves and harming AAPG. Respondent seeks an amount to be determined at arbitration that exceeds $75,000 exclusive of interest and costs plus an award of punitive damages and attorneys' fees as permitted under the statute.

Other Relief: AAPG seeks an injunction preventing the Oncologists from (i) engaging in wrongful competition against their former employer, (ii) violating their common law duties

towards AAPG, and (iii) violating the non-competition provisions of their respective Employment Agreements.

Governing Law

The Employment Agreements provide that they shall be governed by and construed in accordance with the laws of the State of Maryland.

Arbitration

The Employment Agreements provide for arbitration of any disputes arising under them. The written decision of the arbitrator is binding, final and conclusive on the parties and enforceable by a court of competent jurisdiction.

Prevailing Party

If a dispute over the Employment Agreements is taken to arbitration, the prevailing party is entitled to recover reasonable attorneys' fees, costs, and all expenses incurred in that proceeding. By stipulation, the parties agreed to litigate the issue of fees and costs after the award deciding the merits has been entered.

The Governing Rules

The JAMS Comprehensive Rules & Procedures ("JAMS Rules") apply.

Discovery

By agreement of the parties, I permitted discovery, which, *inter alia.,* included document requests, depositions of the nine Oncologists, and depositions of MOH and AAPG by their corporate representatives.

The Merits Hearing

The arbitration hearing was spread over eight days in January 2021. Fifteen witnesses testified. More than fifty exhibits were introduced.

Post-Hearing Briefing and Argument

The parties filed post-hearing briefs consisting of 161 pages. Counsel made closing argument on February 19, 2021. I held further argument on April 7, 2021.

Maryland Law Regarding Restrictive Covenants

The law governing post-employment non-competition covenants varies from state to state. In most states, covenants not-to-compete are valid if reasonable in purpose, duration, and geographic reach. In California and a few other states, however, such covenants are almost always void as illegal restraints on trade and employment.[1] In Connecticut, although non-competition covenants are legal if reasonable, a specific statute regulates the medical profession. The statute prohibits clauses that restrict a physician's competitive activities (i) for longer than one year, and (ii) beyond a 15-mile geographic radius from the primary site where the physician now practices. In Connecticut, a physician's non-competition clause is also unenforceable if the contractual relationship was terminated by the former employer without cause. Conn. Gen. Stat. Section 20-14(p). *See Stamford Health Medical Group v. Alleva,* 2018 WL 5307842 (Sup. Ct. Conn. 2018).[2]

[1] *See,* Orrick Law Firm, California Law on Restrictive Covenants and Trade Secrets. Orrick's monograph states that Montana, North Dakota, and Oklahoma are also hostile to post-termination non-competition covenants.
[2] Although the issue was not squarely before the court, it decided that contractual bans on soliciting patients or misuse of confidential information remain valid after the statute. Fn. 3.

Because the law regarding post-employment restrictive covenants varies from state to state, it is prudent to focus on Maryland case law. "In Maryland, a covenant not to compete will generally be upheld if its duration and geographic area are only so broad as is reasonably necessary to protect the employer's business and if it does not impose undue hardships on the employee or disregard the interests of the public." *MedServ Int'l, Inc. v. Rooney*, 2006 WL 8457083, at *4 (D. Md. 2006) (Williams, J) (internal citation omitted). To enforce a restrictive covenant under Maryland law, "(1) the employer must have a legally protected interest, (2) the restrictive covenant must be no wider in scope and duration than is reasonably necessary to protect the employer's interest, (3) the covenant cannot impose an undue hardship on the employee, and (4) the covenant cannot violate public policy." *Ameritox, Ltd v. Savelich*, 92 F. Supp. 3d 389, 398 (D. Md. 2015) (citing *Deutsche Post Global Mail, Ltd. v. Conrad*, 116 F. Appx. 435, 438 (4th Cir. 2004)). Maryland does not impose a different set of requirements on covenants involving doctors.

It is jarring to discuss the practice of medicine in terms of customer lists, market share, marketability, and proprietary business information. Nevertheless, the practice of medicine is a business. Increasingly, it has become a large, ever-more-concentrated, ever more competitive business. Doctors compete against other doctors, hospitals against other hospitals, and health services against other health services. Maryland extends to the business of medicine protections against unfair competition that apply to other businesses. The Court of Special Appeals has stated that In Maryland, "[t]there is no prohibition against non-competition agreements between

physicians."[3] Non-compete agreements have been enforced against doctors in federal and state cases arising under Maryland law.

As a threshold matter, I must consider whether AAPG materially breached its Employment Agreements with the nine Oncologists. In a case involving perinatologists, the Court of Special Appeals stated: "An employee defending against a claim for breach of non-competition provision by her former-employer may assert evidence that the employer had breached the employment agreement such that the employee's duty to perform under the non-competition agreement was extinguished." *Maternal-Fetal Medicine Associates of Md., LLC v. Stanley-Christian,* 2013 WL 3941970, at *7 (Md. App. 2013). The Oncologists' employment agreements impose duties on AAPG. For example, Section 8 of the AOC Agreements (**Obligations of AAPG)** lists "facilities and services" that AAPG was required to provide the Oncologists "at its sole cost and expense."

The Oncologists testified that they left their employment in large measure because of AAPG's and AAMC's actions and attitudes that made them feel devalued and threatened their effectiveness in treating patients. AAPG, they said, referred to them as a "cost center," resisted placing new drugs in the formulary, closed a convenient lab, declined to meet with them, and created the impression that AAPG and AAMC might eventually exit the field of oncology and hematology. I find that these and other actions did not materially breach the Oncologists' employment agreements. I also find that the Oncologists, while employed by AAPG, lived up to their obligation to devote their full time and attention to treating patients. They did not slack off in any way.

[3]*Maternal-Fetal Med. Associates. of Md., LLC v. Stanley-Christian,* 2013 WL 3941970, at *17 (Md. Ct. Spec. App., July 24, 2013).

I return to the law of restrictive covenants. Because AAPG drafted the agreements, they must be construed against the drafter. Non-competition agreements restrain trade and are generally disfavored. They are justified, however, when they reasonably protect the investment and good will of the former employer. A non-competition agreement involving a physician involves additional considerations. "If an agreement forces a physician to relocate outside the geographic area of the physician's practice, a patient's legitimate interest in selecting the physician of their choice is impaired."[4] AAPG bears the burden of proving, by a preponderance of the evidence, that the restrictive covenants imposed on the Oncologists meet the requirements of Maryland law.

In reviewing the reasonableness of the Oncologists' Employment Agreements with AAPG, the record provides a useful source of comparison. When the Oncologists joined MOH, they signed a Stockholder Employment Agreement (Stockholder Employee). Ex. C-13. This seventeen-page agreement was negotiated by the Oncologists with the advice of counsel. Section VI imposes detailed non-competition, non-solicitation, and confidentiality obligations on the Oncologists. The Oncologists do not contend that these provisions, which they entered into less than a year ago, are unreasonable or unenforceable under Maryland law. Hence, the AAPG employment agreements are enforceable to the extent that they track the MOH agreements.

AAPG Has a Legally Protected Interest Sufficient to Validate the Non-Competition Provisions of the Oncologists' Employment Agreements

[4] *See Mercho-Roushdi-Shoemaker-Dilly Thoraco-Vascular Corp. v. Blatchford,* 900 N.E.2d 786, 795-96 (Ind. Ct. App. 2009).

In Maryland, post-termination non-competition covenants are supported by a legally protected interest "if a part of the compensated services of the former employee consisted in the creation of the good will of customers and clients which is likely to follow the person of the former employee." *Holloway v. Faw, Casson & Co.,* 572 A.2d 510, 515 (Md. 1990) (quoting *Silver v. Goldberger*, 188 A.2d 155, 158 (Md. 1963)).

In a recent federal case decided under Maryland law, Judge Hollander granted "a motion for preliminary injunction seeking enforcement of a restrictive covenant against a physician." *Occupational Health Centers of the Southwest, P.A. v. Toney,* 2017 WL 1546430, at *1 (D. Md. 2017) (Hollander, J.) Discussing the "legally protected interest" requirement, Judge Hollander quoted from several leading Maryland cases, as follows:

> When a covenant not to compete is reasonable on its face as to both time and space, the factors for determining the enforceability of a covenant based on the facts and circumstances of the case are: "whether the person sought to be enjoined is an unskilled worker whose services are not unique; whether the covenant is necessary to prevent the solicitation of customers or the use of trade secrets, assigned routes, or private customer lists; whether there is any exploitation of personal contacts between the employee and the customer; and, whether enforcement of the clause would impose undue hardship on the employee or disregard the interests of the public."[5]
>
> In addition, "restrictive covenants may be applied and enforced…against those employees who provide unique services, or to prevent the future misuse of trade secrets, routes or lists of clients, or solicitation of customers."[6]
>
> There is a distinction "between the cases where business success is attributable to the quality of the product being sold and those where

[5] *Toney, 2017 WL 1546430, at *10-11,* quoting from *Ecology Services, Inc. v. Clym Environmental Services, LLC,* 181 Md. App. 1 (2008) (the internal quotation is from *Budget Rent A Car of Wash., Inc. v. Raab,* 268 Md. 478, 482 (1973)).

[6] *Toney, 2017 WL 1546430, at *11,* quoting from *Becker v. Bailey,* 268 Md. 93, 97 (1973)

> the personal contact of the employee with the customer is an important factor. In the latter case, the employer has a stronger need for protection against diversion of his business to the former employee who has had personal contacts with the customers which the employer lacks."[7]

In *Toney*, the former employer credibly asserted that the (i) doctor was "in a position to establish a personal relationship with" its clients and thus "it could be anticipated that those clients would follow him," and (ii) "Toney's role as State Medical Director is unique, distinct, and highly marketable to…private employers who may be seeking to engage an Occupational Medicine provider."[8] Based on the facts presented, Judge Hollander ruled: "In my view, [the former employer] has met the first element to justify enforcement of the covenant not to compete. It has set forth a legally protected interest."[9]

Recognizing that doctors provide unique services, non-competition agreements are routinely found in the employment contracts of physicians. The nine Oncologists were required to sign non-competition agreements as Shareholder Employees when they joined MOH. Ex. C-13. In their Stockholder Employment Agreements, the Oncologists explicitly agreed that their post-termination non-competition covenants are supported by a legally protected interest. The agreements provide, *inter alia:*

> VI.1 **Acknowledgements** Physician recognizes that Practice has entered into this Agreement in reliance upon the covenants and assurances made by Physician in this Agreement, that Physician's covenants in Sections 6.2 and 6.3 are reasonable and necessary to ensure the continuation of the business of Practice and to protect the goodwill, reputation and interests of Practice, and that irrevocable

[7] *Toney, 2017 WL 1546430, at *11,* quoting from *Millward v. Gerstung Int'l Sport Ed., Inc.,* 268 Md. 483, 488-489 (1973).
[8] *Toney, 2017 WL 1546430, at *12.*
[9] *Toney, 2017 WL 1546430, at *12.*

harm and damage will be done to Practice if Physician violates or breaches these covenants. Therefore, the parties mutually acknowledge all of the following:

(a) In exchange for Physician's covenants to Practice in this Agreement, Practice is furnishing to Physician, in addition to Physician's compensation, valuable consideration including, but not limited to: (i) full access to an established medical practice and a large patient base; (ii) the availability of expensive medical equipment, office equipment, and trained support staff, and (iii) specialized training, as necessary, to provide medical oncology and hematology services according to Practice's standards.

(b) If Physician practices oncology or hematology within the Practice Territory in competition with the business of Practice or solicits Practice's patients, employees, or referral sources, it would cause economic harm and loss of goodwill to Practice, resulting in immediate and irreparable loss of goodwill to Practice, resulting in immediate and irreparable loss, injuries and damage to Practice.

(c) Neither the public in general nor any patients will be adversely affected by the enforcement of covenants in this Article VI, in that other providers of similar professional medical services are readily available within the restricted area.

(d) Each and every covenant and restriction in this Article VI is reasonable in respect of such matter, length of time and geographical area; and Practice has been induced to enter into this Agreement with Physician, in part, due to the representation by Physician that Physician will abide and be bound by each of the covenants and restraints contained in this Article VI.

The Oncologists' Employment Agreements with AAPG contain similar acknowledgements that the restrictive covenants serve a legitimate interest. Ex. J-1. Section 14.5 of the AOC Agreements provide, *inter alia.:*

14.5 **Acknowledgement**. Physician acknowledges and agrees that:

A. The foregoing covenants are reasonable and necessary to protect AAPG's and AAHS's lawful economic interest in its patients and services….

B. The restrictions in this Agreement are reasonable and necessary, in terms of both scope and duration, to protect legitimate interests of AAPG and AAHS….

The Oncologists testified that they signed their Employment Agreements with AAPG despite their belief that the restrictive covenants in them are invalid and unenforceable. I find that the Oncologists' subjective beliefs, which contradict the agreements they signed, are irrelevant. The restrictive covenants rise or fall on their reasonableness. In any event, none of the Claimants explained why MOH has a legally protectable interest in the goodwill generated by their services, but AAPG and AAHS do not.

I find that AAPG has a legally protected interest in the goodwill that the Oncologists were compensated to create during their long tenure with AAPG and AAMC. After they were hired, the Oncologists' patient growth surged, then was steady and consistent year after year. The Oncologists' exemplary education, personal skill, and diligence is largely responsible for this growth. The patient growth is, however, also attributable to the strong financial and strategic investment made by AAPG and AAMC in the oncology practice, by the Oncologists' access to their employer's physician referral network, by the hospital's branding efforts, and by the other professionals supplied by AAPG and the AAMC to support the oncology practice. This support cadre includes surgical and radiation oncologists, nurse practitioners, nurse navigators, social and financial counselors, and business executives.

I point to two instructive cases. The first, *Maternal-Fetal Medicine Associates of Md., LLC v. Stanley-Christian,* 2013 WL 3941970 (Md. App. 2013), was decided by the Court of Special Appeals of Maryland. Maryland's intermediate appellate court upheld a post-termination non-competition clause that covered a doctor specializing in at-risk pregnancies. The court found that the departing physician provided unique services, and that she was in a position to exploit her

personal contacts with patients. Hence, the court found that the former employer "had legitimate business interests in, for example, its patient list, that warranted protection."

The second case, although out-of-state, is pertinent. *Mercho-Roushdi-Shoemaker-Dilley Thoraco-Vascular Corp. v. Blatchford*, 900 N.E.2d 786, 796 (Ind. Ct. App. 2009). The court ruled that the former employer, a medical practice, had a legitimate interest deserving protection by the restrictive covenant. "Here, MSRD presented evidence that it spent eight years and several million dollars establishing its practice in Terre Haute before bringing Blatchford and Ceiutat in from out of state. As such, it has a legitimate interest to be protected."[10]

Hence, I rule that AAPG has a legally protected interest sufficient to enforce the post-termination non-competition provisions against the Oncologists.

Are the Restrictive Covenants in the Oncologists' Employment Agreements No wider in Scope and Duration Than is Reasonably Necessary to Protect AAPG's Interest?

The Practice of Medicine

The nine Oncologists argue that the use of the phrase "practice of medicine" in their respective Employment Agreements is overly broad. Section 14.3 **Following Term** of the AOC Agreement provides: "Physician agrees that for a period of two (2) years following termination of this Agreement, Physician **shall not practice medicine in the Territory** as an employee of, or contracted provider with…." (emphasis added) Claimants argue that the use of the phrase,

[10] The *Blatchford* court cited with approval another Indiana case involving a doctor who had left a clinic. "The members of the Clinic who spent years and money developing the Clinic had a legitimate and realistic desire to protect not only their investment in Dr. Primus but also to restrict her competition with them once she left the Clinic. They have a protectable interest in enforcing the covenant against Dr. Primus[.]" *Harris v. Primus,* 450 N.E.2d 80, 85 (Ind. Ct. App. 1983), quoted at 900 N.E.2d 786, 796.

"practice of medicine" is overly broad and, therefore, renders the covenant unenforceable. Each of the Oncologists, they argue, is licensed to practice medicine generally. The non-competition clauses would preclude them from practicing, for example, surgery or obstetrics. A reasonable covenant, Claimants contend, would have specified their medical specialty, oncology and hematology. In that regard, the post-termination non-competition clauses of Claimants' Stockholder Agreements with MOH limit the type of practice covered. Section VI.2 (**Non-Competition)** includes the following carve out: "nor shall it [the covenant] include the practice of any field of medicine that does not involve hematology, oncology, or any supervision, administration or prescribing of chemotherapy (including but not limited to internal medicine.)"

I agree that a better drafted non-competition clause would have specified internal medicine, oncology, and hematology as the prohibited practice areas. Several reported cases involve contracts that were tailored to the doctor's practice. For example, in *Ballesteros v. Johnson,* 812 S.W. 2d 217, 219-20 (Mo. Ct. App. 217), the contract at issue was nuanced and prohibited the doctor from "engag[ing] in general cardiology and critical care, cardiology and critical care consulting, heart catheterizations, echocardiography, Holter monitoring, electrocardiogram interpretations, or exercise stress testing, at or within the following described hospitals…." In *Cardiovascular Institute of the South v. Abel,* 2015 WL 1019500 (La. App. 2017), the covenant specified that the doctor could not, for two years following the end of his employment, "carry on or engage in the business of the practice of medicine in the sub-specialty of cardiology in the Parishes of…." In *Occupational Health Centers of the Southwest, P.A. v. Toney,* 2017 WL 1546430, at *12 (D. Md. 2017) (Hollander, J.), the non-competition clause applied to only one field of medicine, occupational medicine. Judge Hollander wrote: "Significantly, Dr.

Toney is not precluded from working as a doctor anywhere in the State, so long as it is not in the field of occupational medicine."

The lack of precision in the AAPG agreements is not a fatal flaw, however. Clauses using the phrase "practice of medicine" have been upheld when applied to medical specialists. For example, in *Maternal-Fetal Med. Assocs. of Md., LLC v. Stanley-Christian,* a case applying Maryland law, the physician, a perinatologist, practiced a sub-specialty of obstetrics concerned with providing care during high-risk pregnancies. The non-competition provision, which was upheld, prohibited the physician from practicing medicine in Montgomery County, Northwest Washington D.C., and/or within 20 miles of any Maternal-Fetal office for a two-year period following the termination of her employment for any reason. 2013 WL 3941970, at *17-18. Another pertinent case, although not arising under Maryland law, is *McMurray v. Bateman.* The doctor was a surgeon. The covenant, which was upheld, prohibited him from practicing medicine or surgery for a three-year period within a 50-mile radius of Forest Park, Georgia. 144 S.E.2d 345 (1965).

Moreover, the Oncologists' practices were not limited to oncology and hematology. A more precise definition of their practice would cover internal medicine as well as oncology and hematology. Oncology and hematology are subspecialties of internal medicine. Six of the Oncologists are, or were, board certified in internal medicine, and all were required, as part of their training, to complete a residency in internal medicine. Their cancer patients experience complications such as infections and pneumonia, that, in another context, would be treated by an internist. The Oncologists can, and do, treat such complications. Moreover, Dr. Selonick

maintained a small internal medicine practice throughout his employment with AAPG. Hence, a broader definition than just oncology and hematology is justified.

Finally, there is no credible evidence that the Oncologists would have delivered babies or repaired damaged knees during the non-competition period. They were trained in the sub-specialties of oncology and hematology, they practiced at AAPG and AAMC in those specialties, they were hired by MOH to practice in those specialties, MOH provides oncology and hematology services exclusively, and AAPG and AAMC do not seek to enforce the Oncologists' non-competes outside the sub-specialty of oncology and hematology.

Hence, I find that the use of the phrase "practice of medicine" does not invalidate the non-competition provisions of the Oncologists' Employment Agreements.

The Validity of The Two-Year Non-Competition Clauses

Two years is a fairly standard non-competition period for professionals such as the Oncologists.

When they began their respective employment with AAPG, all of the Oncologists agreed to a two-year non-competition period. For example, the AOC Agreements provide in Section 14.3 that, "Physician agrees that **for a period of two (2) years following termination** of this Agreement, Physician shall not practice medicine in the Territory…." Ex. J-1. (emphasis added)

The Oncologists' employment agreements with MOH also include a two-year non-competition period. Section VI.2 (**Non-Competition**) provides: "Physician, during the period of Physician's employment by Practice and **for a period of two (2) years following termination** of Physician's employment…shall not, directly or indirectly…engage in or participate in any business or practice within the Practice Territory that is in competition in any manner whatsoever with

the business of Practice." Ex. C-13. (emphasis added). Dr. Haggerty testified that all 43 physicians employed by MOH, including himself, are subject to a two-year non-compete provision.

In Section 14.5 of the AOC Agreements, each of the signatory Oncologists agreed that two- years was a reasonable period. For example, in the AOC Agreements they "acknowledge[] and agree[] that…B. [t]he restrictions in this Agreement are reasonable and necessary, in terms of both scope **and duration,** to protect legitimate interests of AAPG and AAHS….[and] Physician expressly and irrevocably waives any claim to the contrary as to each of these points of agreement." (emphasis added) Ex. J-1.

In their Employment Agreements with MOH, the Oncologists also agreed that two years was reasonable. Section V1(d) recites: "Each and every covenant and restriction in this Article VI is reasonable in respect of such matter, length of time and geographic area; and Practice has been induced to enter into this Agreement with Physician, in part, due to the representation by Physician will abide and be bound by each of the covenants and restraints contained in this *Article* VI."

Two-year non-competition periods have been regularly upheld under Maryland law. "Maryland has consistently upheld two-year limitations on employment with competitors as reasonable." *Padco Advisors, Inc. v. Omdahl*, 179 F. Supp. 2d 600, 606 (D. Md. 2002). Other Maryland cases include:

Gill v. Computer Equipment Corp., 266 Md. 170, 180 (1972). When validating a two-year restrictive covenant, the Maryland Court of Appeals agreed with the finding of the trial court: "The trial court here found that the restrictive covenant was valid, the agreement being reasonable as to time and scope."

NaturaLawn of America, Inc. v. West Group., LLC, 484 F. Supp. 2d 392, 400 (D. Md. 2007) The court wrote: "Finally, a term of two years is a reasonable time period for the [non-competition] restriction under Maryland law.").

Occupational Health Centers of the Southwest, P.A. v. Toney, 2017 WL 1546430, at *12 (D. Md. 2017) (Hollander, J.) In a case involving an occupational medicine provider, the Court wrote: "As to the second element, scope and duration, the Agreement provides that the length of the non-compete term is two years. 'Maryland has consistently upheld two year limitations on employment with competitors as reasonable.'…Thus, under *Padco,* 179 F.Supp. 2d at 606, the duration is reasonable.")

Maternal-Fetal Medicine Associates of Md., LLC v. Stanley-Christian, 2013 WL 3941970 (Md. App. 2013). A two-year post-termination non-compete was upheld against a perinatologist.

Courts of other states have upheld restrictions of two-years or longer against doctors. *See Mercho-Roushdi-Shoemaker-Dilley Thoraco-Vascular Corp. v. Blatchford,* 900 N.E.2d 786 (Ind. Ct. App. 2009) (three-year covenant upheld against a heart surgeon); *Cardiovascular Institute of the South v. Abel,* 2015 WL 1019500 (La. App. 2017) (two-year covenant upheld against a cardiologist); *Retina Services, Ltd. v. Garoon,* 538 N.E. 2d 651 (Ill. App. 1989) (upholding a two-year covenant against an ophthalmologist), and *McAlpin v. Coweta Fayette Surgical Associates, P.C.,* 458 S.E.2d 499 (Ga. Ct. App. 1995) (a restriction of two-years enforced against a surgeon).

Claimants point out that the post-termination non-competes of the seven Oncologists AAPG hired to replace the Claimants are limited to one-year. Moreover, the non-competes in some of the reported cases involving doctors are limited to one year only. *See, e.g., Harris v. Primus,* 450 N.E.2d 80 (Ind. Ct. App. 2009), and *Ballesteros v. Johnson,* 812 S.W. 2d 217 (Mo. Ct.

App. 1991). These points do not render the two-year restriction the Oncologists agreed to unreasonable. If they did, the two-year restrictions on their contracts with MOH would also be unenforceable.

Factually, two years is reasonable because cancer patients generally remain active for at least five years.[11] Moreover, MOH specializes in the practice of oncology and hematology, and the Oncologists do not contend that the two-year non-competes in their MOH contracts are invalid.

Hence, I find that the two-year restrictions in the Oncologists' employment agreements with AAPG is reasonable and enforceable.

The Territorial Restrictions on the Oncologists

The non-competition clauses in all nine of the Oncologists' Employment Agreements cover the same Territory. The bounds of the Territory encompass 103 zip codes. Thirty (30) of those zip codes constitute AAMC's Primary Service Area as defined by the State of Maryland's Health Services Cost Review Commission ("HSCRC"). A Primary Service Area is the geographic area in which 60% of the patients discharged from a hospital reside. Ex. R-79. AAMC's Primary Service Area encompasses most of Anne Arundel County as well as portions of Prince George's and Queen Anne's Counties.

A hospital's Extended Service Area is the geographic area in which 80% of the patients discharged from the hospital reside. AAMC's Extended Service Area includes its Primary Service Area plus an additional sixty-five (65) zip codes. AAMC's Extended Service Area encompasses all of Anne Arundel, Calvert, and Queen Anne's Counties, as well as sizeable portions of Prince

[11] *See* Respondents' Post-Hearing Brief at p. 5, fn. 4.

George's, Talbot, Caroline, and Kent Counties, small portions of Howard and Baltimore Counties, and a small portion of Baltimore City.

AAMC's Extended Service Area includes 95 zip codes. The remaining eight zip codes (103 – 95 = 8) encompassed by the Territory represent areas into which AAPG "hoped" to expand.

By signing their Employment Agreements, the Oncologists expressly agreed that the Territory was reasonable in scope. Most were represented by counsel. The post-termination provisions, including duration and geographic scope, were negotiated terms. Their employment agreements were not contracts of adhesion. Testimony from the Oncologists that their attorney considered the non-competes to be unenforceable is inadmissible. Because the attorney did not testify, his or her advice is hearsay. Moreover, because the attorney did not testify, AAPG was not permitted discovery into the advice he or she gave the Oncologists.

The Practice Area covered by the Oncologists' non-completion clauses in their agreements with MOH is potentially smaller. Section VI.2 (**Non-Competition)** states: "The term '**Practice Territory'** means the geographic area within a radius of ten (10) miles of any existing or future office location or facility at which Physician regularly provided clinical services for at least two hundred (200) hours during the twelve (12) months preceding the termination of Physician's employment." Ex. C-13.

I use the term, "potentially" because an Oncologist might practice at more than one office for the required two hundred (200) hours. If so, the proscribed post-termination Practice Area would include a ten (10) mile radius from all qualifying offices. According to its web site, MOH has twelve (12) offices in Maryland.

Returning to Claimants' non-competes with AAPG, a 10-mile radius from Annapolis encompasses less than the Primary Service Area. A 20-mile radius from Annapolis encompasses more than the Primary Service Area, but less than the Extended Service Area. Ex. R-79, slides 2 and 4. The parts of the Extended Service Area that a 20-mile radius does not include are principally Calvert County and a section of the Eastern Shore.

The territorial reach of the Oncologists' non-competes with AAPG must be measured in terms of the case law. The most pertinent Maryland case is M*aternal-Fetal Medicine Associates of Md., LLC v. Stanley-Christian,* 2013 WL 3941970, at *17-18 (Md. App. 2013). The covenant prohibited Dr. Christian "from practicing medicine in Montgomery County, Northwest Washington DC, and/or within 20 miles of any Maternal-Fetal office for a two year period following the termination of her employment for any reason…." In upholding the restrictive covenant, the Maryland Court of Special Appeals ruled that "the geographic scope of the Non-Competition Provision, twenty miles, is quite limited, and its duration, two years, is not unreasonable." The appeals court also quoted with approval the trial court's ruling that granted summary judgment to the former employer: The trial court stated:

> In our case, this was a negotiated non-compete contract of employment and non-compete clause between the parties, both parties having attorneys. Both parties deem that this non-compete was necessary for the protection of the parties and of the business.
>
> There are limitations in this which are reasonable, being the geographic [scope and] in time. There doesn't appear to me to be anything unreasonable about the geographic or time restrictions on this, and therefore…I find that the terms of this non-compete clause are reasonable, and therefore, are subject to be enforced by the defendant in this case.

In affirming the trial court on this point, the Court of Special Appeals wrote: "We conclude that the court properly applied the law to the undisputed facts."

Cases from other jurisdictions have approved substantial geographic restrictions.

These include:

Harris v. Primus, 450 N.E.2d 80, 85 (Ind. Ct. App. 1983). The court upheld a covenant that prohibited the practice of medicine or surgery within a 50-mile radius of a clinic. It wrote: "The undisputed evidence showed that the Clinic's patient service area was at least a 50 mile radius. The covenant was reasonable."

Retina Services, Ltd. v. Garoon, 538 N.E. 2d 651, 654 (Ill. App. 1989). The court upheld a five- hospital restriction. "The supreme court has found to be reasonable geographic limitations in medical practice cases which were far broader in scope than the five-hospital limitation here." As noted by the *Garoon* court, the limitations upheld by the state supreme court included a "3-year prohibition from practicing all medicine within the City of Rockford and surrounding radius of 25 miles," and a "5-year prohibition on practicing medicine within a 25-mile radius of Kankakee." The court observed: "The sole covenant not-to-compete in medical practice cases found by the supreme court to be unreasonable involved a covenant far broader in scope than the one in the case at bar."

McAlpin v. Coweta Fayette Surgical Associates, P.C., 458 S.E.2d 499, 502 (Ga. Ct. App. 1995). The intermediate appellate court upheld the non-competition clause of an employment contract between a medical corporation and its physician employee that imposed a ten-county geographical restriction. The professional corporation had patients in all ten counties, although "the bulk of its patients" were from two counties. The doctor in charge of the corporation testified to his belief that a newly approved hospital would expand his professional corporation's opportunities and patient base. The intermediate appellate court relied on a decision in which the Georgia Supreme Court wrote: "'[t]he territorial limitation of the covenant was, according to

precedents set by this court, not too broad if the territory included was that throughout which the plaintiff generally practiced, although not necessarily in every part of the area included, including territory over which he had reasonable prospects of extending his practice.'" (citations omitted). Discussing the state supreme court's decision, the intermediate appellate court observed: "There, the Supreme Court approved the restriction of medicine and surgery by a doctor/employee within a 50-mile radius of Forest Park, Georgia, for a three-year period."

Applying the precedent to the facts, I find that the territory covered by the Oncologists' non-competes was reasonable when the AOC physicians were hired. The Territory was not constructed arbitrarily. It encompasses two areas, the Primary and Extended Service Areas. These areas were recognized by a Maryland Commission, the HSCRC, as defining the overall "service area" of AAHC. The Territory also included eight (8) zip codes into which the hospital reasonably hoped to expand. *McAlpin* recognizes the legitimacy of including a reasonable expansion territory.

When the Territory was originally calculated in 2009, AAPG and AAMC did not have historical oncology patient numbers. Mr. Odenwald assumed that oncology patients would track hospital discharges generally and mirror the statistics undergirding the primary and extended service areas.

Although the Territory was reasonable when the AOC Employment Agreements were negotiated and signed, the passage of time has altered the demographics. In 2019, just over 80% of AAMC's oncology patients were located in the 30 Primary Service Area zip codes.[12] Thus, in 2021, it is unnecessary to protect AAPG and AAMC's investment in the Oncologists, and

[12] *See* Respondent's Post-Hearing Brief at p. 8, fn. 7.

the goodwill they were hired to create, by extending the protected Territory beyond the Primary Service Area.

Under Maryland law, I have the authority to "blue pencil" the Territory down to a reasonable area if two conditions are met. First, I would decline to exercise that authority if the Territory was unreasonably large in the first place. An employer should not be permitted to craft an unreasonable non-compete, forcing the former employee to bring suit in order to reduce it to reasonable bounds.[13] Many former employees lack the resources to challenge an unreasonable non-compete in court.

Second, a judge or arbitrator cannot re-write the non-compete; he can only strike language to reduce the covenant to reasonable limits. *See Cytimmune Sciences, Inc. v. Paciotti*, 2016 WL 4699417, at *4 (D. Md. 2016) (Grimm, J.) ("Maryland law permits courts to preserve otherwise unenforceable non-compete agreements by excising overly broad terms. But under this 'blue pencil' approach, 'a court may not rearrange or supplement the language of the restrictive covenant.'") (internal citation omitted). *See also, Deutsche Post, 116 Fed. Appx.* 435, 439 (4th Cir. 2004) ("A court can only blue pencil a restrictive covenant if the offending provision is neatly severable." "Maryland courts have excised restrictions that render a covenant overbroad only in circumstances in which the restrictions are contained in a separate clause or separate sentence."), and *Ameritox, Ltd. v. Savelich,* 92 F.Supp.3d 389, 400 (D. Md. 2015) (A court

[13] I appreciate that AAPG has known the actual patient-location statistics for years. It could have decreased the Territory, but did not. This is a material weakness in AAPG's case. Nevertheless, AAPG is and AAMC are entitled to reasonable protection of their goodwill and investment in the Oncologists. Using "blue pencil" authority, I can reduce the Territory to proper bounds.

may not strike the dominant language or words from a single sentence restrictive covenant, "leaving only a narrower iteration of the original, broader restriction.")

In our case, the Territory can be blue penciled. In the AOC Employment Agreements, for example, Section 14.3 states that, following his term, "Physician shall not practice medicine in the Territory." Exhibit 14.1 defines the Territory as a group of individually numbered zip codes. Blue penciling can be achieved by crossing out all of the zip codes save those in the Primary Service Area. All of the Oncologists' Employment Agreements will be blue penciled accordingly.

The Non-Competition Clauses Neither Impose an Undue Burden on The Oncologists, Nor Do They Violate Public Policy

With respect to Drs. Taksey, Graze, Selonick, Werner, and Garg, the clauses would impose no hardship because their agreements have a buy-out (liquidated damages) provision. In the event the clauses are enforceable against these doctors, MOH and U.S. Oncology have agreed to pay the buy-out sums on their behalf. These doctors are practicing in Annapolis within the Territory.

Drs. Tweed, Weng, Goldrich, and Bridges have no buy-out provision in their Agreements. Nevertheless, they are employed by MOH and are working at MOH's offices in Clinton, Maryland, which is outside the restricted Territory. Hence, they have suffered no undue hardship.

There is no harm to the public because there is no shortage of oncologists in the Territory. Drs. Taksey, Graze, Selonick, Werner and Garg are all practicing in Annapolis. The covenants do not inconvenience their patients. If the patients of Drs. Tweed, Weng, Goldrich, and Bridges find it inconvenient to drive to Clinton, they can switch to one of the doctors practicing at MOH's

Annapolis office. They could also switch to one of the seven (7) oncologists hired by AAPG to replace the nine (9) who left.[14]

Whether the Restrictive Covenants of Drs. Taksey, Graze, Selonick, Werner, and Garg Prohibit Their Employment with MOH in the Restricted Territory

The employment agreements signed by Drs. Taksey, Graze, Selonick, Werner and Garg provide in relevant part:

> 14.3 Following Term. Physician agrees that for a period of two (2) years following termination of this Agreement, Physician shall not practice medicine in the Territory as an employee of, or contracted provider with:… (ii) any medical practice or other entity or organization any of whose principals, employees or contractors provides professional clinical or administrative services to a healthcare system or hospital, or any affiliate of a healthcare system or hospital, that provides services in competition with AAPG or AAHS.

Exhibits J-1, J-2, J-3, J-4 and J-6 at Section 14.3.

Under their Employment Agreements, the doctors are prohibited for two (2) years from practicing medicine "as an employee of" or "contracted provider with" "any affiliate of a healthcare system or hospital that provides services in competition with AAPG or AAHS."

The agreements define "an affiliate of a healthcare system or a hospital" as any "entity in which a healthcare system or a hospital, directly or indirectly, whether by means of ownership, voting rights, contract or otherwise, holds any legal or equitable interest or title, share of profits or right to participate in governance."

[14] I appreciate that oncologists are not fungible, and that the necessity of switching doctors can be disconcerting to any patient, especially a cancer patient. Nonetheless, the case law defines public policy in terms of the availability of doctors able to treat a patient living in a restricted territory.

The parties dispute whether MOH and U.S. Oncology are "affiliates" of a "healthcare system or hospital." This issue need not be decided because the post-termination non-competition provisions of these doctors do not apply because they were terminated without cause.

The Non-Competition Clauses of Drs. Tweed, Weng, Goldrich, and Bridges Prohibit Their Employment with MOH in the Restricted Territory

The post-termination covenants applicable to these doctors lack the complexity of the AOC covenants. They provide that for two (2) years post-termination, these four Oncologists: "shall not (a) practice medicine directly or indirectly, as an owner, employee, consultant, or in any other capacity, engage in the practice of medicine within AAPG's Primary Service Area as outlined on Exhibit 14."[15] The Oncologists are not in breach of their restrictive covenants because they have been practicing in Clinton, Maryland, which is outside the restricted territory. For the year remaining on their covenants, they may practice anywhere outside the 30 zip codes.[16] They may not practice within AAMC's Primary Service Area, however.

The Non-Solicitation Covenants, Which Ban the Solicitation of All Current and Former Patients of AAPG, or Family Members of Those Patients, Are Unenforceable Because They Are Over-Broad

The patient non-solicitation provision in each of the Oncologists' Employment Agreements uniformly provide that they may not, for a period of two (2) years: "Actively solicit for treatment (or aid or cooperate with others in actively soliciting) *any former or existing*

[15] Confusingly, the Primary Service Area as defined in their employment agreements is equivalent to the Territory in the AOC employment agreements.

[16] The restrictive covenants of the "Clinton 4" do not include a "private practice carve-out."

patient (or member of any patient's household) of AAPG." Exhibits J-1, J-2, J-3, J-4, and J-6 at §15.1.A; Exhibits J-5, J-7, J-8, and J-9 at § 15.1 (emphasis added)

Three aspects of the patient non-solicitation provision render it unenforceable. First, it is not limited to patients of the Oncologists or even oncology patients. It covers any former or existing patient of AAPG (for instance, orthopedic patients), most of whom were never treated by the Oncologists. Second, it covers anyone who happens to live with a patient. Third, AAPG notified the Oncologists' patients of their change of affiliation. The patients have been allowed to follow the Oncologists to MOH. The Oncologists have the right to discuss their change of affiliation with their patients. This scenario creates insuperable difficulties in determining what constitutes "solicitation." For these reasons, I rule that the patient solicitation provisions of the Oncologists' Employment Agreements are void.

None of the Oncologists Violated Their Restrictive Covenants By Accepting Employment with MOH During Their Tenure With AAPG

The Oncologists signed Shareholder Employment Agreements with MOH in July 2020, after having received notice from AAPG that their employment would terminate on October 22, 2020. AAPG terminated the Oncologists because of their "intention" to join MOH after their six (6)-months' notice period had ended. The Shareholder Employment Agreements did not become effective until October 23, 2020, meaning that the Oncologists did not become employees of MOH until after their employment with AAPG had terminated. Under the facts

and circumstances of this case, I rule that the Oncologists did not violate their restrictive covenants by signing the Shareholder Employment Agreements.[17]

Drs. Taksey, Graze, Selonick, Werner, Garg, and Bridges Were Terminated by AAPG Without Cause. Hence, Their Non-Competition Clauses, as Set Forth in Section 14.3, Are Unenforceable

Section 14.3 of the AOC Employment Agreement ends with the following sentence. "The restrictions set forth in this **Section 14.3** shall not apply if AAPG terminates this Agreement without cause by giving notice to Physician pursuant to **Section 9.1** at any time." (emphasis in original) Section 9.1 **Termination Without Cause** provides: "Either party may terminate this Agreement upon six (6) months' advance written notice to the other; provided, however that neither party may deliver such notice prior to the expiration of the Initial Term." (emphasis in original)

To terminate without cause, therefore, two conditions must be met. First, the party must give "written notice;" oral notice does not count. Second, the party must give six (6) months advance notice.

Two writings are candidates as "written notice." The first is Dr. Weng's email of April 6, 2020 to Dr. Schwartz, Dr. Riker, Mr. Odenwald, and Mr. Meisenberg. Attached to the email was a letter to Dr. Schwartz, which Dr. Weng characterized as "our proposal to join Maryland Oncology Hematology…." The letter uses language indicating that the Oncologists had a "unified intention" to leave AAPG and join MOH. This language includes:

[17] It is unclear whether the Stockholder Employment Agreements were enforceable in any respect until October 23, 2020. That would seem to be the case. Nevertheless, the Oncologists did not become employees of MOH until their employment with AAPG had ended. A departing employee may prepare to compete against his employer, so long as he does not actually compete or otherwise breach his duty of loyalty. Hence, the date on which the Oncologists joined MOH as employees is determinative.

- "We believe that our proposal to join Maryland Oncology Hematology will substantially advance the interests of Luminis Health, DCI, the CCN and most importantly-the needs of our community."
- "Our Assessment of Needs and Our Proposed Action."
- "We think that we can advance this goal for Luminis, with the unified intention of our nine physicians to leave Anne Arundel Physicians Group and to join Maryland Oncology Hematology (MOH). We hope to serve Luminis as the MOH Annapolis area division, implemented in the next 6-9 months."
- "As we move to MOH…."
- "However, as we move to MOH…."
- "We look forward to productive discussions of the process for implementing this new relationship."
- "As MOH physicians, we will have greater resources…."

As of April 6, 2020, the Oncologists, MOH, and U.S. Oncology had engaged in serious discussions for the doctors to leave AAPG and join MOH. The evidence supporting this proposition includes the following:

- By February 24, 2020, MOH and US Oncology had presented the Oncologists with an offer to leave AAPG and join MOH. Ex. R-82.
- In a February 26, 2020 email to MOH's Executive Director, Dr. Graze stated that he was "as enthusiastic as my other partners about pursuing plans to leave AAMC and join MOH/USO." Ex. R-10.

- On deposition, Dr. Graze testified that by late February of 2020, Claimants (other than Dr. Selonick) were "disgusted" with AAMC and AAPG and were "ready to go."
- In early March of 2020, all nine Oncologists signed a Confidential Non-Binding Term Sheet with U.S. Oncology. Ex. R-12.
- U.S. Oncology prepared "Talking Points" dated March 23, 2020 in connection with the Oncologists' plan to meet with AAPG and AAMC about their decision and to "outline intent to leave AAMC employment and become part of" MOH, and to "[e]mphasize collective decision of all 9 physicians." Ex. R-15.
- By March 27, 2020, U.S. Oncology was estimating a 5–6-month transition period for the Oncologists to join MOH, including the build out of their new office in Annapolis. Ex. R-16.

The second candidate for "written notice" are the letters of April 23 and April 27, 2020 that Dr. Schwartz delivered to the Oncologists. He wrote:

- "This letter is intended to acknowledge your April 6, 2020 correspondence addressed to myself, as well as the representations made by Dr. Weng…while meeting with Peter Odenwald and Dr. Riker on April 6, 2020. Based on that correspondence and your confirmation during the April 6th meeting, we understand that you have made the decision to leave Anne Arundel Physicians Group (AAPG) and to join Maryland Oncology Hematology (MOH)."
- "As you are aware, your employment agreement has a requirement for approximately six (6) months advanced notice of your intention to terminate your employment. As such, your last day of employment will be October 22, 2020. In the near future, we

will provide you with a more formal letter explaining the logistics and timing of your transition, and your continuing obligations under your respective employment agreements."

Dr. Schwartz followed up with a second letter of April 27, 2020 addressed to each of the Oncologists. He wrote:

- "We anticipate, pursuant the notice of intent to terminate your employment that was previously provided, that the last day of your employment will be October 22, 2020. If you wish to discuss the possibility of an earlier final date of employment by mutual agreement, we will be willing to speak with you."
- "It is AAPG's sole right and obligation to notify AAPG's patients during the transition. AAPG will provide written notice to its patients regarding your transition and AAPG will make appropriate arrangements to ensure the continuity of care for AAPG's patients."
- "During the Transition Period and for two (2) years thereafter, you are contractually obligated not to practice medicine, directly or indirectly…within AAPG's primary service area as delineated by reference to the specific zip codes in your employment agreement."
- "I look forward to your anticipated compliance with all of your legal obligations during the Transition Period and thereafter."

I find that the Dr. Weng's email of April 6, 2020 did not constitute written notice as defined in Section 19.1. The email and attached proposal announce a "firm intention," but not an irrevocable decision. They do not name a resignation date. The Rubicon had not been crossed. I have taken into consideration the testimony of Dr. Riker and Mr. Odenwald concerning their meeting of April 6th with Dr. Taksey and Dr. Weng. According to them, Dr.

Taksey stated several times that the Oncologists' decision to leave AAPG had been made. This testimony is irrelevant because any statements of Dr. Taksey were oral, not written.

Written notice is a contractual requirement. The requirement of a writing is also prudent because it avoids misunderstandings. The Oncologists testified that they presented their proposal in good faith and expected AAPG to engage in further discussions. For example, Dr. Taksey testified that he did not tell Mr. Odenwald and Dr. Schwartz that he planned to resign. He said he was "in disbelief" when he received Dr. Schwartz's letters stating that his last day would be October 22. 2020. He did not decide to join MOH, he said, until July 7, 2020. The testimony of the other Oncologists was similar. For example:

- Dr. Garg testified that as of April 6, 2020 he had not made a final decision to join MOH. He was "traumatized" when he received Dr. Schwartz's letters.
- Dr. Weng testified that he did not intend his email and letter to be a notice of resignation for himself or the others. He said that Dr. Schwartz mischaracterized his email and letter as a letter of resignation.
- Dr. Tweed testified that the purpose of the April 6, 2020 email and letter was to propose a way to remove problems. It was not a letter of resignation. She did not resign her employment, she stated.
- Dr. Goldrich testified that he did not make a decision to join MOH until July 2020. He characterized Dr. Weng's letter as a "proposal" and not a "fait accompli."
- Dr. Graves testified that he did not resign; Dr. Schwartz fired him.

- Dr. Bridges testified that he did not make a decision to join MOH until July 2020. He also said that after he received the letter of termination, Dr. Reicher called him to say that he would still have a position at AAPG if he were willing to renegotiate his contract.
- Dr. Werner testified that she had not made a decision to leave AAPG for MOH on April 6, 2020. The letter of termination, she said, created "momentum" to join MOH.

I also find that Dr. Schwartz's letters of April 23 and April 27, 2020 constituted a "notice of termination" without cause within the intendment of Section 9.1. He wrote that "your last day of employment will be October 22, 2020." Hence, the non-competition provisions of Sections 14.3 do not apply to Drs. Taksey, Graze, Selonick, Werner, Garg, and Bridges. The non-solicitation covenant of Section 15 does apply, however.

Did the Oncologists Misappropriate Respondents' Confidential and Proprietary Information?

AAPG'S claim centers on Ex. J-20, AAMC Oncology and Hematology Statistics. Each month, AAPG prepared and distributed to the Oncologists a report that broke out each Oncologist's total number of hospital visits, outpatient visits, new patients seen, and WRVUs. Periodically, AAPG distributed to the Oncologists a cumulative report showing their annual totals in those categories from 2011 through the date of the Report. J-20 was the most recent report, covering both the monthly totals for 2019 and the annual totals for 2011-2019.

Both Mr. Odenwald and the Oncologists testified that these reports were prepared and distributed to the Oncologists in connection with their compensation, so they would understand the approximate amounts they had earned for the period under review. As spelled out in Exhibit 5.1 to the AOC Employment Agreements, each physician's compensation included a base salary plus a percentage share of a Compensation Pool, calculated and paid quarterly, "based on

Adjusted Clinical WRVUs and Practice Expenses of the Pooled Physicians for the immediately preceding Quarter." As defined in Exhibit 5.1, Adjusted Clinical WRVUs "means the sum of (A) actual Clinical WRVUs generated by the Pooled physicians with respect to Existing Patients, plus (B) actual Clinical WRVUs generated by the Pooled Physicians with respect to New Patients multiplied by 110%."[18]

A WRVU is a governmental term used to measure the productivity of a doctor. The AOC Agreement defines the term, in part:

> **Individual Clinical WRVUs** [I] means the workload value assigned to Physician's personally performed procedure and visit categories measured by the Resource Based Relative Value Scale and set forth in the most recent **Medicare Physician Fee Schedule** published in the Federal Register. The Clinical WRVUs for each concurrent procedural terminology (CPT) code represents the relative value of physician work (e.g., time, physical effort and skill, mental effort and judgment) **required** for that service in comparison to all other physician services. (emphasis in original)

Ex J-20 shows, for example, the following information for Dr. Garg for January 2019:

Hosp. 40
Off. Visits 237
WRVU 474.54
New Pts. 21

Ex J-20 also shows Dr. Garg's total for 2019:

Hosp. 470
Off. Visits 2,624
WRVU 5,297
New Pts. 293
% WRVU Total 11.8%

J-20 displays statistics for Dr. Garg and the other Oncologists for each year from 2011 to 2019. Dr. Taksey and Dr. Weng testified that WRVUs are a subset of RVUs. RVUs have three

[18] The Physician Compensation Formula set out in Exhibit 5.1B to the AOC Agreement is complex.

components that relate to patient visits: cost, insurance, and the doctor's productivity. With respect to the productivity factor, the doctor assigns a CPT Code to each patient visit. Exercising medical judgment, the doctor determines the appropriate code based on the complexity of the visit and the time spent. Each CPT Code has a numerical value.

The WRVU totals in Ex J-20 provides limited information. Using Dr. Garg as an example, his WRVU count for 2019 (5,297) does not tell the reader how many patients Dr. Garg saw, the patient's medical condition, the treatment Dr. Garg prescribed, the time he spent with the patient, the patient's residence, the referring physician, what AAPG received as reimbursement from the government or a private insurer, or whether the hospital was required to write off any portion of the charge.

In January 2020, Dr. Taksey provided J-20 to MOH.[19] His purpose was to provide MOH with an understanding of the Oncologists' productivity so that U.S. Oncology's finance team could develop a pro forma projecting what the Oncologists might earn if they joined MOH. AAPG, asserting that J-20 contains trade secrets, confidential and proprietary information, lodged three Counterclaims. They are:

Count I: Breach of Contract. The contracts referred to in this count are the Proprietary Information Agreement, which is part of the AOC Agreement (Ex. J-1, J-2, J-3, J-4, and J-6; Ex. 20), and the Confidentiality provision of the Tweed, Weng, Goldrich, and Bridges Agreements (Ex. J-5, J-7, J-8, and J-9 at §12).

Count II: Unfair Competition.

[19] Dr. Taksey advised the other Oncologists that he intended to provide the information to MOH and U.S. Oncology. None objected.

Count III: Violation of MUTSA, the Maryland Uniform Trade Secrets Act, Md. Code, Comml. Law Article.

My analysis will focus on MUSTA. Whether or not J-20 is a "trade secret" is essentially determinative of the other two counterclaims. MUTSA makes it unlawful for any person to disclose another's trade secret when the trade secret was acquired improperly or when the person acquired the trade secret "under circumstances giving ride to a duty to maintain its secrecy or limit its use." *See*, Md. Code, Commercial Law § 11-1201(c)(2), and 11-1203.

Section 11–1201(e) of MUTSA defines the term "trade secret" thus:

> [i]nformation, including a formula, pattern, compilation, program, device, method, technique, or process that: (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

To determine whether information is a trade secret, Maryland courts look to the following factors:

> (1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and to [its] competitors; (5) the amount of effort or money expended…in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

LeJeune v. Coin Acceptors, Inc., 849 A.2d 451, 460 (Md. 2004).

The parties disagree whether J-20 contains trade secrets. Mr. Odenwald, Dr. Schwartz, and Ms. Bayless testified that J-20 constitutes the "business playbook" for the oncology and hematology practice at AAPG and AAMC. J-20, they said, provides a detailed nine-year retrospective of sustained growth in the oncology practice's patient volume. This information would be invaluable to a competitor such as MOH and U.S. Oncology seeking to enter a new market, they testified. The witnesses identified several competitive edges that this information provided:

- MOH and U.S. Oncology used the information to structure an offer to the Oncologists. Ex. R-82 and R-83.
- The information gave MOH and U.S. Oncology the confidence necessary to invest more than $10 million building an Annapolis-centric practice around the Oncologists. Without the data, MOH and U.S. Oncology would have assumed a larger risk.
- The information enabled MOH and U.S. Oncology to adjust their marketing and business approach to compete against AAPG and AAMC more effectively.
- In the future, the data will enable MOH and U.S. Oncology to cross check their patient growth projections against historic patient growth.

Mr. Odenwald testified that over 800 man-hours went into creating J-20, at a total cost of over $60,000. He conceded that some, but not all of the information could be obtained from publicly available sources. He estimated that the cost of hiring an outside consultant to access

the publicly available sources and compile a report would be between $400,000 and $500,000. He also doubted that all of the information could be obtained at any cost.[20]

AAPG asserts that it took reasonable steps to maintain the secrecy of the information contained in Ex. J-20. Mr. Odenwald testified that AAPG limited the distribution of the reports to those with a need to know. Those who received the reports, including the Oncologists, were covered by a confidentiality agreement. *See AirFacts, Inc. v. de Amezaga*, 2018 WL 6051419, at *9 (4th Cir. 2018).

Under three Counts of the Counterclaim, AAPG asserts that the Oncologists, by providing Ex. J-20 to MOH and U.S. Oncology, breached the confidentiality provisions of their respective employment agreements, violated MUSTA, and unfairly competed against AAPG and AAMC. Having considered the record and the law, I find that Respondent failed to sustain these claims. My reasoning includes the following points.

AAPG did not compile Ex. J-20 for marketing or business development purposes. The statistical reports were created to determine the Oncologists' compensation pursuant to the complex compensation formula in their agreement. The reports were provided to the Oncologists to show how their compensation was derived.

AAPG did not take firm steps to guard the secrecy of the information. The reports were never stamped as "confidential." The Oncologists testified that AAPG never told them that the reports were proprietary. Moreover, they were not instructed to keep the documents secure. Instead, Drs. Tweed and Taksey testified that hard copies of similar reports and RVU data were

[20] Ms. Bayless, a current HSCRC Commissioner, testified that the entirety of the information on J-20 could not be replicated from public sources.

placed on desks and conference room tables, where "they sat" for long periods. The Oncologists were not instructed to give back, safeguard, or discard the reports. Practice Manager Valerie Lehman, the AAPG employee who prepared and distributed the reports, testified on deposition that she was not advised that the information in them was confidential. *See* Lehman Dep. Extract.[21]

The parties dispute whether J-20 could be duplicated from publicly available sources. Nevertheless, it is undisputed that much of the data is publicly available from a variety of sources, including CMS and HSCRC. For example, Dr. Weng was able to obtain his personal statistics from the CMS website for the year 2018, including the number of Medicare and Medicaid patients he saw and the services he provided. Mr. Odenwald testified that the HSCRC makes available datasets that include the total number of inpatient discharges and outpatient visits for each hospital or healthcare system, identified by zip code.

Ex. J-20 was not indispensable to the decision of MOH and U.S. Oncology to hire the nine (9) Oncologists. MOH and U.S. Oncology could approximate the size and historic growth of the Oncologists' practice from other sources. For example, the Oncologists were not barred from disclosing their Employment Agreements to MOH and U.S. Oncology. They were not barred from disclosing their compensation formula and their earnings month-by-month and year-by-year. They were not barred from estimating the total number of patients they had seen month-by-

[21] On November 17, 2020, Mr. Odenwald sent each of the Oncologists by regular mail and unencrypted email to their personal accounts a letter and attachments containing their RVU data for 2020 and additional information for every oncologist and nurse practitioner for the AAPG Oncology and Hematology Division, including the newly hired replacement oncologists. This information was more extensive than that provided to MOH and U.S. Oncology. See Ex. C-14. Although Mr. Odenwald testified that his assistant made an error in sending the documents, he personally signed the cover letters, which identified the enclosures and stated that they would be sent by regular mail.

month and year-by-year. Using this information and its own experience as a well-established oncology and hematology practice, MOH (with assistance from U.S. Oncology) could have reverse engineered an accurate picture of the growth of the Oncologists' practice. The information in Ex. R-20 may have been "convenient" for MOH and U.S. Oncology, but it was not indispensable to their decision to hire and invest in the Oncologists.

Respondent also failed to make the case that the information in Ex. J-20 will assist MOH and U.S. Oncology in competing against AAPG and AAMC going forward. AAPG posits that Ex J-20 will assist its competitors in deciding whether to counter flat or slumping patient visits with additional marketing and investment. Respondent failed to prove that MOH and U.S. Oncology could not make these business decisions based on their own expertise and experience. I conclude, therefore, that the Statistical Reports lacked sustained substantial competitive value to MOH and U.S. Oncology. *See Diamond v. T. Rowe Price Assocs., Inc.*, 852 F. Supp. 372, 412 (D. Md. 1994) (Legg, J.) ("While these documents may have some utility to T. Rowe Price, there is no evidence that they have any independent economic value for anyone else.").

Hence, I find that Respondent failed to sustain its claims that Claimants misappropriated its confidential and proprietary information.

Drs. Taksey, Werner, and Tweed Did Not Breach Their Duty of Loyalty by Disclosing Proprietary Information Derived From Their Service on the Medical Oncology Executive Committee

AAPG contends that these Oncologists violated their duty of loyalty by disclosing confidential information they learned through serving on AAPG's Medical Oncology Executive Committee. In addition to the statistics discussed in the previous section, AAPG alleges that the doctors were privy to, and disclosed to MOH, AAPG's strategic plans and other financial and

proprietary information. Respondents seek compensatory damages, including the amounts paid as wages during the period in which the doctors engaged in disloyal acts, and punitive damages.

I credit the doctors' testimony that the purview of the Medical Oncology Executive Committee was medical issues incident to patient care and treatment, and that the Committee was not created to formulate or review AAPG or AAMC's business plans. I also find that AAPG failed to substantiate its claim by identifying the proprietary business information disclosed to the Oncologists. Hence, I reject this claim.

Drs. Taksey, Graze, Selonick, Werner and Garg Violated Their Common Law Duty of Loyalty to AAPG Through Their Involvement in Recruiting AAPG and AAMC Employees for MOH While They Were Employed by AAPG.

Section 14.1(B) of the Employment Agreements of Drs. Taksey, Graze, Selonick, Werner and Garg provide:

> During the Term, Physician shall not, without AAPG's prior written consent, directly or indirectly… Manage, operate or provide professional services for any individual or entity that provides services similar to, or competitive with, those services provided by AAPG or AAHS.

In addition to this contractual undertaking, the Doctors owed a duty of loyalty to AAPG while they were employed. Under Maryland law, an employee who is planning to leave his employment has the right to prepare to compete against his employer by, for instance, forming a company, meeting with investors, obtaining financing, obtaining office space, signing a lease, and purchasing equipment. *See e.g., Maryland Metals v. Metzger,* 282 Md. 31, 38-

39 (1978). Nevertheless, the departing employee, during his employment, owes a duty of loyalty to his employer. He must faithfully fulfill his work obligations to his employer; he must not compete against his employer, and he cannot undermine his employer by, for example, hiring other employees, sowing discord, or encouraging them to leave their employment.

AAPG alleges that Dr. Taksey and Dr. Werner were actively involved in interviewing and hiring AAMC employees for MOH's new Annapolis office during August and September 2020 while they were still employees of AAPG. AAPG further alleges that MOH consulted Drs. Graze, Selonick, and Garg concerning those AAMC employees it was targeting for employment and gave these doctors "final say" on candidates. AAPG maintains that these actions (i) constitute the management and operation of an entity competitive with AAMC, (ii) breached the Doctors' common law duty of loyalty to AAPG and AAMC, and (iii) caused "concrete economic losses."

MOH hired away thirteen (13) AAMC employees to work at its new Annapolis office. Ex. R-80. Mr. Odenwald testified that in the health care industry the cost of replacing an employee is one-third of that employee's annual salary. Based on that measure of damages, AAPG seeks $281,812.72 for the loss of the thirteen employees.

I find that all nine (9) Oncologists fully performed their duties as doctors during their tenure with AAPG. They continued to treat patients full-time

through their last day of employment, October 22, 2020. They did not join MOH until October 23, 2020, and MOH's Annapolis Division did not open its doors until November 2, 2020.

I find that the Oncologists did not "manage or operate" MOH while they were employed by AAPG. Their involvement in the recruitment of AAMC employees did not rise to the level of "managing or operating" a competitive business. The sole issue to be decided concerns whether the Oncologists breached their duty of loyalty by participating in the recruitment of the thirteen (13) AAMC employees who left for MOH.

In *Maryland Metals*, the Court of Appeals discussed the tightrope that departing employees must walk when they plan to open a competing business. The Court wrote:

- "This concern for the integrity of the employment relationship has led courts to establish a rule that demands of a corporate officer or employee an undivided and unselfish loyalty to the corporation." 282 Md. pp. 37-38.
- "Thus, we have read into every contract of employment an implied duty that an employee act solely for the benefit of his employer in all matters within the scope of employment, avoiding all conflicts between his duty to the employer and his own self-interest." 282 Md. p. 38.
- "A direct corollary to this general principle of loyalty is that a corporate officer or other high-echelon employee is barred from actively

competing with his employer during the tenure of his employment, even in the absence of an express covenant so providing." 282 Md. p. 38.

- "Thus, prior to his termination, an employee.... must refrain from actively and directly competing with his employer for customers and employees, and must continue to exert his best efforts on behalf of his employer." 282 Md. p. 38.
- "Once the employment relationship comes to an end, of course, the employee is at liberty to solicit his former employer's business and employees, subject to certain restrictions concerning the misuse of his former employer's trade secrets and confidential information." 282 Md. p. 38.
- "The second policy recognized by the courts is that of safeguarding society's interest in fostering free and vigorous competition in the economic sphere." 282 Md. p. 38.
- "This policy in favor of free competition has prompted the recognition of a privilege in favor of employees which enables them to prepare or make arrangements to compete with their employers prior to leaving the employ of their prospective rivals without fear of incurring liability for breach of their fiduciary duty of loyalty." 282 Md. p. 39.
- "The right to make arrangements to compete is by no means absolute and the exercise of the privilege may, in appropriate circumstances,

rise to the level of a breach of an employee's fiduciary duty of loyalty….Examples of misconduct which will defeat the privilege are: misappropriation of trade secrets; solicitation of an employer's customers prior to cessation of employment; conspiracy to bring about mass resignation of employer's key employees; usurpation of employer's business opportunity." 282 Md. p. 40 (internal citations omitted).

- "Within these broad principles, the ultimate determination of whether an employee has breached his fiduciary duties to his employer by preparing to engage in a competing enterprise must be grounded upon a thoroughgoing examination of the facts and circumstances of the particular case." 282 Md. 40.

I find that during their employment with AAPG the Oncologists were prohibited from participating in the effort to recruit AAMC employees for the new MOH Annapolis office. They should not have involved themselves to any degree. There is a clear difference between neutral preparations, such as leasing office space, and preparations that harm one's employer. Recruiting other employees to join the new venture falls squarely into the latter category.

Dr. Hagerty, Practice President and corporate representative of MOH, testified on deposition that the Oncologists played a role in staffing MOH's Annapolis office with former AAMC employees.

Q. Did the nine oncologists hired from AAPG, effective October 23rd, 2020, have control over staff hiring and compensation in Annapolis?

A. They did have – they collaborated, yes. They collaborated with the MOH team.

XXX

Q. Okay. And did the nine oncologists have control over those decisions as to staff hiring?

A. I mean, I believe the word "control" – I mean, I believe they had some input, yes.

XXX

Q. Did they have final say over the hiring of staff in the Annapolis office?

A….I believe they had final say.

Q. Okay. Did the nine oncologists hired from AAPG have final say over the compensation for the staff hiring in Annapolis?

A. I believe they did have involvement in the salary ranges, compensation ranges.

Q….Did they have final say over those compensation decisions?

A. Yes.

Tish McFadden, Director of Human Resources for MOH, and Nicole Barnes, the EHR Administrator who assisted Ms. McFadden in staffing the

new MOH Annapolis office, sought advice from the Oncologists on staffing decisions. Several examples are as follows:

- On August 6, 2020, Tish McFadden emailed Nicole Barnes, Subject: "AAMC Team Member Needing Approval." "Hi Nicole, I just received a pretty strong resume from a Senior Practice Manager who works at Anne Arundel Medical Center. Can you please let me know if I have permission from the Physicians to reach out to her or not?" Ex. R-29
- Also on August 6, 2020, Ms. Barnes emailed Dr. Werner, Subject: "FW: AAMC Team Member Needing Approval." The other Oncologists were copied on the email. "See below from Tish, thoughts? Can she reach out to applicant?" Ex. R. 29.
- On August 24, 2020, Hannah Fisher of U.S. Oncology emailed Dr. Werner, with a copy to Nicole Barnes. Subject: "AAMC Offers/Second Interviews." "Good afternoon Dr. Werner. Can you please confirm if the below candidates require a second interview or if we can move straight to an offer?" Ms. Fisher listed ten (10) employees of AAMC. Ex. R. 36.
- On August 28, 2020, Nicole Barnes emailed the Oncologists, with copies to Tish McFadden and five (5) employees of U.S. Oncology. She wrote: "I wanted to let you know we are revamping the recruitment spreadsheet to include AAMC candidate's current salary as well as

offer status and final salary….[Y]ou will be key decision makers for all Annapolis staff." Ex R. 41.

- On September 4, 2020, Nicole Barnes emailed the Oncologists regarding Jacqueline Shanahan, a candidate for a Nurse Navigator position at MOH. Ms. Shanahan was, at that time, a Nurse Navigator at AAMC. Because MOH did not have Nurse Navigators. Ms. Barnes wanted information on the position. In specific, she wanted to know:

    1. How will the role of Nurse Navigator be at Annapolis compared to the hospital? She currently works with a team and knows she would be the only one working with the 9 Oncologists.
    2. Will she be able to continue to go out into the community and meet with PCPs to get referrals for the practice? She absolutely loves this part of her job. Ex. R 50.

- Dr. Taksey responded to Ms. Barnes in an email of September 4, 2020, on which the other Oncologists were copied. He wrote: "I would envision the role would be similar to what she does now…We would absolutely want her to go out to the community to help with referrals. Ex. R. 50.
- Dr. Weng also responded to Ms. Barnes in an email of September 4, 2020, on which he copied the other Oncologists. Subject: "Re: Recruitment." He wrote: "We would love for

her to be a part of the community outreach to all caregivers and service providers-both building and maintaining those connections." Ex. R. 50.

- In an email of September 4, 2020, Ms. McFadden wrote the Oncologists. "Good evening Annapolis Physicians…Attached is an update on our positions. We have identified a little over 50% of our hires." Ex. R. 50.
- Drs. Taksey, Werner, and Bridges interviewed a candidate, Dorian Stewart, for the practice manager position at MOH. Ms. Stewart was employed at AAMC at the time.

Drs. Werner and Taksey testified that they and their colleagues avoided discussing MOH with anyone who worked with the Luminis Health System. Although this testimony is inaccurate with respect to Ms. Stewart, whom they interviewed, I credit their statements.

Nevertheless, *Maryland Metals* clearly states that a current employee may not "conspire" with a future employer to recruit fellow employees. All nine (9) of the Oncologists violated their duty of loyalty by actively assisting MOH and U.S. Oncology in their efforts to recruit employees away from AAMC. AAPG only asserts this claim against Dr. Taksey, Selonick, Werner and Garg. I find them liable, and I will hold a further hearing to discuss the subject of damages.[22]

I made this Interim Award as of April 14, 2021. This is an Interim Award and not a Final Award or a Partial Final Award. I will schedule a hearing to consider (i) damages for breach of the

[22] Under their employment agreements with MOH, the Oncologists were responsible for paying employee compensation out of their Division earnings. Hence, they had a motive to assist MOH and U.S. Oncology in hiring productive employees away from AAMC.

duty of loyalty by recruiting fellow employees, (ii) the parties' claim for an award of attorneys' fees and costs, and (iii) any other issues that have not been addressed by this Interim Award.

The above is so Ordered this 14th day of April 2021.

/s/ Benson Everett Legg
Judge Benson Everett Legg (ret.)

PROOF OF SERVICE BY E-Mail

Re: Bridges MD, et al. Benjamin B. / Anne Arundel Physicians Group LLC
Reference No. 1410008607

I, Teresa Menendez, not a party to the within action, hereby declare that on April 14, 2021, I served the attached **Interim Award (April 14, 2021)** on the parties in the within action by electronic mail at Washington, DISTRICT OF COLUMBIA, addressed as follows:

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I declare under penalty of perjury the foregoing to be true and correct. Executed at Washington, DISTRICT OF COLUMBIA on April 14, 2021.

/s/
Teresa Menendez
JAMS
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