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MICHAEL P. ONDIK, M.D.,

Plaintiff/Appellant,

v.

PRINCETON EYE AND EAR LIMITED LIABILITY COMPANY,

Defendant/Respondent.

Civil Action

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002654-23

On Appeal from the Superior Court
Mercer County Chancery Division
Docket No. MER-C-79-23

Sat Below: The Honorable Patrick J. Bartels, JSC

DEFENDANT/RESPONDENT PRINCETON EYE AND EAR LLC'S BRIEF

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PRELIMINARY STATEMENT

After having received all of the benefits of five years of employment with Respondent Princeton Eye & Ear (the "Practice"), Appellant Dr. Michael Ondik seeks to invalidate his post-employment restrictions, to which he expressly agreed, simply because he found them to be inconvenient. This Court should dismiss and/or deny his appeal because it is improper and baseless.

First, Dr. Ondik's appeal remains procedurally improper because he is appealing the Chancery Court's Orders that clearly and unambiguously denied his applications for an order to show cause/reconsideration and dismissed his Complaint without prejudice. Rather than filing an amended Complaint, he filed this improper appeal and new complaint in the Law Division based on arguments that he already made to the Chancery Court. For this reason alone, Dr. Ondik's appeal should be dismissed.

Second, the Chancery Court properly denied Dr. Ondik's application for a preliminary injunction and his motion for reconsideration because Dr. Ondik failed to demonstrate any of the Crowe factors. No irreparable harm existed. At the time of his initial application, Dr. Ondik was still employed by the Practice, which had not taken any steps to prevent him from working at Hunterdon Otolaryngology & Allergy Associates ("Hunterdon"). Not only was his initial application not ripe, but

it also concerned issues of money damages that do not support a preliminary injunction. Therefore, the Chancery Court properly denied Dr. Ondik's applications.

By the time Dr. Ondik filed his motion for reconsideration/second application for a preliminary injunction, Hunterdon had withdrawn its employment offer, rendering Dr. Ondik's motion/application moot. Regardless, the Chancery Court noted that Dr. Ondik still had not demonstrated the existence of irreparable harm because he was free to find alternate employment outside the restrictive radius. Dr. Ondik has now done this, confirming the Chancery Court's denial of his reconsideration motion/second application was appropriate. At no time did the potential enforcement of the restrictive covenant in his Employment Agreement create irreparable harm for Dr. Ondik.

Nor did Dr. Ondik show a likelihood of success on the merits. The Practice's Restrictive Covenant protected its legitimate business interests—its investment in Dr. Ondik, its patient and referral bases, and good will. Dr. Ondik admittedly "had no professional presence in New Jersey" when he was hired by the Practice. (Ab22). Thus, the only patients and referral sources Dr. Ondik had were those to which the Practice introduced him as part of his employment. New Jersey case law clearly supports the Practice's ability to protect its relationships with a restrictive covenant.

The Restrictive Covenant did not and will not impose an undue hardship on Dr. Ondik. Contrary to Dr. Ondik's dramatic (and incorrect) pronouncements about

the Restrictive Covenant's scope, he could have easily found work in South Jersey (as his former colleagues did) or the Philadelphia area. Instead, Dr. Ondik chose to accept employment in Washington State, more than two thousand miles away, simply confirming that a twenty mile restrictive radius does not create an undue burden.

Finally, the Restrictive Covenant does not injure the public. It is undisputed that there is an abundance of ENT physicians to serve patients in Central Jersey, of which Dr. Ondik was just one. Dr. Ondik does not have a unique specialty that cannot be and is not being satisfied by the market, particularly given that Dr. Ondik no longer works in the state.

Not only did Dr. Ondik fail to show that he was likely to prevail in his bid to invalidate his restrictive covenant, he failed to show that the equities favor him. He simply expected to be excused from his post employment restrictions without any compensation/concession to the Practice.

For all of the reasons, the Chancery Court properly denied both of the of Dr. Ondik's applications, and this Court should dismiss/deny Dr. Ondik's appeal.

PROCEDURAL HISTORY

Dr. Ondik filed his Verified Complaint and Order to Show Cause on November 1, 2023, seeking declaratory judgment that the Restrictive Covenant in his Employment Agreement to which he had voluntarily agreed was unenforceable

and/or limiting the Restrictive Covenant so that Dr. Ondik could work at the Hunterdon's Flemington office when his employment with the Practice ended on December 31, 2023. (Pa7, ¶36). Dr. Ondik admitted Hunterdon's office within the scope and radius prohibited by the Restrictive Covenant. (Id., ¶37).

On November 17, 2023, the Practice opposed the application, in part because the issues presented by Dr. Ondik's application were not ripe: Dr. Ondik was still employed at the Practice, the Practice had not made any determination about enforcing the Restrictive Covenant and had been negotiating with Dr. Ondik. (Ra8-118). Regardless Dr. Ondik could not satisfy the requirements for a preliminary injunction. (Id.). On December 1, 2023, the Chancery Court conducted oral argument. (1T).[1] On December 11, 2023, the Court entered an order and Statement of Reasons denying Dr. Ondik's application without prejudice because it was not ripe. ("December 2023 Order") (Ra4-7).

The Practice filed its answer to the Complaint on December 18, 2023. It did not file a counterclaim or a third-party claim. (Ra126-135).

On December 20, 2023, Dr. Ondik filed a reconsideration motion/second order to show cause again seeking to invalidate the Restrictive Covenant. (Pa49).

[1] Reference to "1T" refers to the December 1, 2023 transcript of the oral argument on Dr. Ondik's initial application. Reference to "2T" refers to the January 24, 2024 transcript of the oral argument on Dr. Ondik's second application, and "3T" refers to the January 26, 204 transcript of the Court's decision on the second application.

Although Dr. Ondik tried to disguise what was actually a motion for reconsideration, he merely relied on his initial briefing and claimed "changed circumstances" warranted the Court's reconsideration/issuance of the preliminary injunctive relief that Dr. Ondik initially requested. (Ra 136-138, Ab6). That is by definition a motion for reconsideration as the Chancery Court properly noted.

Dr. Ondik's purported changed circumstance was a letter the Practice had sent to Hunterdon two months earlier advising it of the terms of Dr. Ondik's Employment Agreement. Because the Practice had not taken any action with respect to that letter, Dr. Ondik included in his arguments that he had allegedly forfeited his incentive bonus. (Ra140-41). The Practice opposed the application and moved to dismiss the Complaint because the claims were moot. (Pa52-53).

The Chancery Court held oral argument on January 24, 2024, and on January 26, 2024, it denied Dr. Ondik's second application and expressly dismissed his Complaint ***without*** prejudice. (3T10:15-11:7). The Chancery Court found that Hunterdon's retraction of the employment offer rendered issues related to that employment and the Restrictive Covenant moot. (3T9:13-10:1; 3T10:15-25). The Chancery Court did however note that Dr. Ondik failed to demonstrate irreparable harm (3T8:2-17; 3T10:2-14) and that there were equitable interests on both sides. (3T6:7-10).

The Chancery Court entered its order on April 24, 2024 ("2024 Order"). (Ra3). Dr. Ondik filed his appeal on May 6, 2024. (Pa57). On May 13, 2024, the Chancery Court filed an "amplification" of its April 24, 2024 Order, emphasizing that it had dismissed the Complaint **without prejudice,** although that was apparent from the decision itself. (Ra1-2). On May 14, 2024, Dr. Ondik filed an Amended Notice of Appeal insisting that although the Chancery Court had dismissed his Complaint without prejudice, the Order was still final. (Pa63-66). He claimed that the Order disposed of all the issues between the parties, when in fact it expressly did not. (*Id.)*

On May 21, 2024, Dr. Ondik filed a new Complaint in the Law Division alleging breach of contract, breach of the implied covenant of good faith and fair dealing, fraud and conspiracy related to his allegedly forfeit incentive bonus ("Law Division Complaint"). *See* MER-L-000977-24.

On the same day, the Practice and Drs. Shah and Patel filed a motion in the Appellate Division to dismiss Dr. Ondik's appeal because the Orders that are the subject of the appeal are not final. (Pa67). On June 11, 2024, the Appellate Division denied the motion to dismiss without prejudice or explanation. (Pa68)[2]

[2] The Practice and Drs. Shah and Patel also moved to dismiss the Law Division Complaint based on the entire controversy, which was denied. The Appellate Division denied their request for leave to file an appeal and consolidate that appeal with this one.

FACTUAL BACKGROUND

The Restrictive Covenant Protects The Practice's Legitimate Business Interests: Its Investment in Dr. Ondik, Its Patients and Referral Base

Dr. Ondik began his employment with the Practice in 2018. (Pa3 ¶16). At that time, he entered an employment agreement ("Employment Agreement"). (Ra22-31). It set forth Dr. Ondik's compensation formula that included an tiered incentive bonus, with the first tier requiring the physician generate revenue between $800,000 and $1,000,000. (Ra25, ¶6). The Employment Agreement also contained a restrictive covenant governing where he could practice after his employment with the Practice ended, which occurred on December 31, 2023 ("Restrictive Covenant"). (Ra26-27, ¶8).

The Restrictive Covenant is a five (5) year, twenty (20) mile restriction, the terms of which Dr. Ondik specifically negotiated and to which he agreed. (Ra11 ¶18-20). It applied to Practice's offices and the hospitals where its physicians worked.[3] (Ra12 ¶21). The ENT market in Central Jersey is very crowded, so the Restrictive Covenant is necessary to protect the Practice's legitimate business interests. (Ra33-59). The temporal restriction protects Practice's investment in its physicians, including paying for their insurance, licensing and continuing education.

[3] The Practice's Princeton and Freehold office locations were actually located on hospital premises.

And it protects the Practice's patient and referral base to which it is giving the physicians access. (Ra6-9 ¶¶27-36; 39-45).

By his own admission, Dr. Ondik had no presence, patients or referrals in the Central Jersey area before he was hired by the Practice. (Ab22). The Practice introduced Dr. Ondik to its patients and referral sources. It also paid for his licenses, insurance, continuing medical education and all of his other expenses, in addition to his compensation, which exceeded $1.5 million dollars in total.

Dr. Ondik lived in Newtown Pennsylvania. (Pa2-3 ¶10). He was already commuting at least 15 miles just to get to Practice's Lawrenceville office, and even further to get to its Freehold office and Centrastate Hospital. He could simply drive ten (10) miles in the opposite direction to comply with the Restrictive Covenant following the termination of his Employment Agreement.[4] Dr. Ondik did not need to move or uproot his family in order to find a new position.

Dr. Ondik Fails To Negotiate An Amendment To His Employment Agreement

During the summer and fall of 2023, Dr. Ondik advised that he wanted to practice at Hunterdon, which he admitted was within the restrictive radius. The

[4] Dr. Ondik's hyperbolic argument that the Restrictive Covenant covers over 3,000 miles is patently false. He is well aware that other former Practice employees with the same Restrictive Covenant are currently practicing in Marlton, after the Court enforced their covenant. Similarly, any hospitals at issue is also within the same radius as Princeton's offices. (Ra16-17, ¶47-50)

parties engaged in negotiations regarding a possible amendment to Dr. Ondik's Employment Agreement and Restrictive Covenant, but they did not reach a final agreement. (Ra18, ¶55-56). On October 17, 2023, the Practice advised Hunterdon of the terms of Dr. Ondik's Employment Agreement (which Dr. Ondik should have done) and reserved all of its rights regarding same. (Ra140, 2T12:13-13:6). Hunterdon did not respond to the letter, and the Practice did not take any action. (*Id*.).

Dr. Ondik Files His First Failed Application

Approximately two months before he voluntarily ended his employment with the Practice, on November 1, 2023, Dr. Ondik filed the Chancery Complaint and an Order to Show Cause seeking a preliminary injunction ruling that his potential future employment with Hunterdon at its Flemington office did not violate the terms of the Restrictive Covenant even though Hunterdon's Flemington Office was admittedly within the scope of the prohibited radius. (Pa1-41). At the time that Dr. Ondik commenced his action, the Practice had not taken any steps to enforce the Restrictive Covenant, or even settled on a course of action.

The Chancery Court conducted oral argument on December 1, 2023 (1T), and subsequently on December 11, 2023 issued the December 2023 Order, denying Dr. Ondik's application without prejudice because it was not yet ripe. (Ra4). Specifically, the Chancery Court noted that Dr. Ondik was still employed by the

Practice, which had not taken any steps to enforce the Restrictive Covenant. (Ra7). Dr. Ondik could not manufacture irreparable harm to himself by threatening breach his own contract.

The Practice filed its answer on December 18, 2023, which did not contain a counterclaim or third-party claim (although obviously the Practice was not waiving its right to amend). (Ra126). The next day, two months after it received October 17, 2023 Letter, Hunterdon apparently gave Dr. Ondik formal notice that it was rescinding its offer.[5] (Ra137).

Dr. Ondik Filed His Failed Application For Reconsideration/Injunction

Again, although the Practice had taken no action, on December 20, 2023 Dr. Ondik filed a motion for reconsideration/second application for an order to show cause again seeking to enjoin the enforcement of the Restrictive Covenant related to his potential employment at Hunterdon. (Pa49-51). Although not expressly styled as a motion for reconsideration, as set forth above, Dr. Ondik's application claimed that the October 17, 2023 letter constituted changed circumstances warranting reconsideration of the December 2023 Order. (Ra137-138, ¶6-9). Notably, Dr. Ondik did not oppose/correct the Practice's argument that he was seeking reconsideration (compare Ra159-166, Ra167-178), but the October 17, 2023 letter

[5] Although it is not clear from Dr. Ondik's papers, Hunterdon may have informally advised Dr. Ondik of its intentions the week before.

changed nothing with respect to the lack of merit in Dr. Ondik's application as set forth above.

Because Hunterdon withdrew its offer of employment, the Chancery Court no longer had a live controversy to decide. Judgment regarding enforcement of the Restrictive Covenant to Dr. Ondik's employment at Hunterdon could have had no practical effect on the controversy; it would have been nothing more than an advisory opinion. The issue was moot. (Id., 2T9:10-12:6). Thus, the Practice moved to dismiss the second application and the Complaint. (Id., Pa52-53).

Dr. Ondik Attempts To Bolster His Moot Claims By Raising His Incentive Bonus

In his January 8, 2024 reply brief and during his January 24, 2024 oral argument, Dr. Ondik argued that the matter was not moot because Hunterdon subsequently amended its previously unequivocal rescission of employment to state that if at some point the restrictions in Dr. Ondik's Employment Agreement were modified, Dr. Ondik could begin employment at Hunterdon. (RA169). Dr. Ondik also argued the Practice had already been compensated for his potential breach of the Restrictive Covenant because Dr. Ondik had forfeited his 2023 incentive bonus in the approximate amount of $80,000. (Ra165, 170, 176-178).

The Chancery Court Dismissed Dr. Ondik's Complaint And Application Because They Were Moot.

On January 26, 2024, the Chancery Court granted the Practice's motion and dismissed both Dr. Ondik's second application for an order to show cause and his Complaint without prejudice. (Id., 3T10:15-25). The Chancery Court noted that Dr. Ondik had not established the factors necessary for the issuance of a preliminary injunction pursuant to Crowe v. DeGoia. While the Court noted there were equitable arguments on both sides, it specifically noted that Dr. Ondik had not established any irreparable harm because he was always free to find employment outside the restrictive radius. (3T6:7-14; 3T8:2-17; 3T10:2-14).

The Chancery Court, however, left the door open for Dr. Ondik should circumstances arise when he could satisfy the *Crowe* factors. This was expressly stated in the Court's decision: "**the motion to dismiss is granted, plaintiff's complaint is dismissed without prejudice**." (Id., 3T11:5-7) (emphasis added).

It is also clear in the wording of the Order itself, that was subsequently entered on April 24, 2024 (the 2024 Order) (Ra3). The 2024 Order denied Dr. Ondik's motion for reconsideration **without prejudice.** (Id.). This only made sense if the dismissal of the Complaint was similarly without prejudice, which it was.

Despite the fact that the December 2023 Order and the 2024 Order were both without prejudice and thus, not final orders, on May 6, 2024, Dr. Ondik filed a Notice of Appeal, rather than seek leave to file an interlocutory appeal. (Pa57-60). On May

8, 2024, the Practice advised Dr. Ondik that the appeal was improper and requested that he withdraw it.

On May 13, 2024, the Chancery Court entered an amplification of its 2024 Order, emphasizing that the dismissal of the Complaint was without prejudice. (Ra1). Rather than withdraw his appeal, Dr. Ondik filed an amended Notice of Appeal, insisting that the 2024 Order, even as amplified, was a final order. (Pa63-66).

On May 21, 2023, Dr. Ondik filed the Law Division Complaint against the Practice and its principals alleging breach of contract, breach of the implied covenant and fair dealing, fraud and conspiracy related to his alleged 2023 incentive bonus. Despite the Practice's motions to dismiss and to stay the matter, the Law Division mater is proceeding.

Dr. Ondik's New Employment

Since July 2024, Dr. Ondik has been employed as an Otolaryngologist by Health Alliance in Wenatchee Washington. https://www.healthalliance.org/ProviderProfile/539982/WAX?isFromGateway=False Notably this is well outside the scope of the Restrictive Covenant. Thus, the Chancery Court's concern about providing an advisory opinion regarding potential employment with Hunterdon was entirely accurate given Dr. Ondik's ability to secure employment outside of the restricted radius.

ARGUMENT

POINT I

THE 2024 ORDER IS NOT A FINAL ORDER. (Ra1-3)

Generally only "an order that finally adjudicates all issues as to all parties is a final order[.]" Grow Co., Inc. v. Chokshi, 403 N.J. Super. 443, 457-458 (App. Div. 2008). "[T]o create appellate jurisdiction", an order must completely dispose of all pleaded claims between the parties and that disposition itself must be final. Id. at 460.

A dismissal without prejudice cannot accomplish this because it "adjudicates nothing." Rubin v. Tress, 464 N.J. Super. 49, 56 fn. 3 (App. Div. 2020). See also Vitanza v. James, 397 N.J. Super. 516, 517-519 (App. Div. 2008) (dismissing appeal, in the absence of a motion by respondent, because the order was not final). The plaintiff can institute a new action, with new facts and/or causes of action. Malhame v. Borough of Demarest, 174 N.J. Super. 28, 30-31 (App. Div. 1980). See also Johnson v. City of Hoboken, 476 N.J. Super. 361, 370 (App. Div. 2023) (same).

The same is true of an order dismissing an action based on mootness, which is also not an adjudication on the merits. Transamerica Ins. Co. v. Nat'l Roofing, Inc., 108 N.J. 59, 64 (1987).

In this case, the Chancery Court's 2024 Order did not adjudicate all of the issues as to all of the parties with finality. It denied, without prejudice, reconsideration of its December 2023 Order denying Dr. Ondik's first application for an order to show cause because it was not ripe. It denied without prejudice Dr. Ondik's second application for a preliminary injunction and dismissed the Complaint, without prejudice, because the issues around the Restrictive Covenant became moot when Dr. Ondik's employer voluntarily rescinded its offer. The Court made this clear in its opinion on which the 2024 Order is based:

> There is at this point in time no live controversy, and the plaintiff's request at this time would amount to an advisory opinion…so I am denying the plaintiff's application, and I am going to grant the application filed by the defendant, because there is simply no claim left—open at this time, **but it's done without prejudice**.
>
> [(3T10:18-25) (emphasis added).]

The Trial Court's amplification of that Order similarly confirmed that the dismissal was without prejudice and not a decision on the merits. (Ra1).

Contrary to Dr. Ondik's insistence that the 2024 Order disposed of all of the issues between the parties, the Trial Court actually found that no live issues existed for it to decide. The Court merely reserved Dr. Ondik's right to refile his Complaint should a live controversy arise. That is the opposite of a final order.

No live controversy arose because as predicted by the Chancery Court, Dr. Ondik was able to find alternate employment outside the restricted radius. Thus, no

justiciable issue exists even now. Dr. Ondik is now employed and not in violation of the Restrictive Covenant; and he is pursuing a new complaint in the Law Division. No concrete issue exists for this Court or the Chancery Court to decide with respect to this appeal. It is precisely for this reason that the Trial Court dismissed the Complaint in the first place.

This is not a case where the interests of justice warrant this Court's deciding an appeal of a non-final order. See Johnson, 476 N. J. Super. at 370 (allowing appeal where deadline to amend complaint had passed); Caggiano v. Fontoura, 354 N.J. Super. 111, 125 (App. Div. 2002) (allowing appeal of interlocutory order where "serious allegations" concerning law enforcement were at issue). Dr. Ondik faces no bar to his claims.

Just as the Chancery Court dismissed Dr. Ondik's Complain, this Court should dismiss his appeal because it is improper, baseless and a waste of this Court's resources. That was true before Dr. Ondik filed his new complaint in the Law Division and obtained his new job, and it remains true now.

POINT II

THE CHANCERY COURT DID NOT ABUSE ITS DISCRETION IN DENYING DR. ONDIK'S APPLICATIONS. (Ra1-7)

Contrary to Dr. Ondik's argument that this Court should apply a *de novo* standard of review, this Court will not reverse Chancery Court's denial of injunctive relief unless the Chancery Court abused its discretion. Waste Mgmt. of N.J., Inc. v.

Union Cnty. Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008); Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 396 (App. Div. 2006).

This Court applies the same standard when reviewing the Chancery Court's denial of Dr. Ondik's motion for reconsideration. The Pitney Bowes Bank v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015). Although Dr. Ondik ignores the reconsideration standard in his brief, the 2024 Order expressly denied Dr. Ondik's motion for *reconsideration* of the Court's December 2023 Order (Pa61).

Regardless of whether this Court treats Dr. Ondik's appeal as an appeal of a motion for reconsideration or an appeal of denial of his request for an injunction, the Court reviews the Chancery Court's decision for abuse of discretion—not under a *de novo* review.

Dr. Ondik has not even argued, much less demonstrated, that the Chancery Court's decisions were irrational, inexplicably departed from existing policies or were based on an impermissible basis. Pitney Bowes, 440 N.J. Super. at 382. This is because he cannot. As set forth below, it is clear that the Chancery Court did not abuse its discretion in denying Dr. Ondik's initial application for a preliminary injunction or his motion for reconsideration thereafter.

POINT III

THE CHANCERY COURT PROPERLY DENIED DR. ONDIK'S FIRST APPLICATION FOR A PRELIMINARY INJUNCTION. (Ra4-118)

Dr. Ondik's initial application for a preliminary injunction failed to demonstrate the "Crowe" factors necessary to obtain a preliminary injunction: 1) likelihood of success on the merits; 2) irreparable harm; 3) balancing of the equities. Crowe v DiGoia, 90 N.J. 126, 132 (1989).

However, "declaratory judgment is not an appropriate way to discern the rights or status of parties upon a state of facts that are future, contingent or uncertain." Independent Realty Co. v. Twp. of North Bergen, 376 N.J. Super. 295, 302 (App. Div. 2005). The Court will not decide "in advance the validity of a possible [claim or] defense in some expected future lawsuit. Id. (citing Donadio v. Cunningham, 58 N.J. 309, 325 (1971)).

At the time that Dr. Ondik brought his initial application for a preliminary injunction, he was still employed with the Practice, which had not taken any steps to enforce the Restrictive Covenant. Dr. Ondik was attempting to manufacture the *Crowe* standards to protect his own planned breach of contract, not based on anything that the Practice had done or was planning to do.

The Chancery Court denied Dr. Ondik's application, without prejudice, because it was not yet ripe. Dr. Ondik apparently does not challenge that finding

despite having moved for reconsideration and then filing an appeal. As set forth below, even if Dr. Ondik's first application had been ripe, it still would have failed on the merits.

POINT IV

THE CHANCERY COURT PROPERLY DENIED DR. ONDIK'S RECONSIDERATION MOTION/SECOND APPLICATION AS MOOT.

(Ra1-6, Ra126-144)

"Mootness is a threshold justiciability determination rooted in the notion that judicial power is to be exercised only when a party is immediately threatened with harm." Betancourt v. Trinitas Hosp., 415 N.J. Super. 301, 311 (App. Div. 2010). An issue or case is moot where "the decision sought in a matter, when rendered, can have no practical effect on the existing controversy." Id. (quoting Greenfield v. N.J. Dep't. of Corr., 382 N.J. Super. 254, 257-58 (App. Div. 2006)).

For purposes of judicial economy and restraint, the Court does not decide cases where the issues are hypothetical or where judgment cannot grant effective relief. Stop & Shop Supermarket Co., LLC v. Cnty. of Bergen, 450 N.J. Super. 286, 294 (App. Div. 2017). For this reason, the Court does not decide issues that have become moot or academic prior to judicial resolution. Id.

The lack of an actual controversy bars a request for injunctive relief. New Jersey Citizen Action v. State, 2022 WL4592552, *5 (N.J. Super. Ct. Law Div. Sept. 28, 2022) (citing Crowe v. De Goia, 90 N.J. 126, 132-34 (1983)). This is because

no threat of irreparable harm exists where no live controversy exists, and the Court's ruling cannot effectuate relief.

Here, once Hunterdon withdrew its offer of employment, it rendered Dr. Ondik's second application for a preliminary injunction moot. This was unchanged by virtue of Hunterdon's attempt to walk back the recission by claiming it was conditional. The fact remains no live controversy existed before the Court.

Moreover, Dr. Ondik has now secured employment outside the restricted radius—in Washington State. Thus, even if the issue of the Restrictive Covenant had not been moot in January 2024 (and it was), it is certainly moot now.

No doubt Dr. Ondik will respond that the Court should nevertheless decide the issue of whether his potential employment with Hunterdon would violate the Restrictive Covenant in the hope that Hunterdon might reverse its decision and reoffer him employment. However, that is exactly the type of advisory ruling that the Court does not issue. This was improper as noted by the Chancery Court and as discussed at length in Point VI of this brief.

Dr. Ondik is asking the Court to rule on the validity of a possible defense to a potential future claim that the Practice has not yet brought—and not just against Dr. Ondik, but also as to Hunterdon, which is a not even a party to the action. This is improper and is not a basis for granting declaratory judgment or an injunction, which

is why the Chancery Court properly dismissed the application and the Complaint. This Court should likewise dismiss Dr. Ondik's appeal.

POINT V

THE CHANCERY COURT DID NOT ABUSE ITS DISCRETION IN DENYING DR. ONDIK'S RECONSIDERATION MOTION/SECOND APPLICATION EVEN IF IT WAS NOT MOOT. (Ra1-178)

Dr. Ondik's reconsideration motion/second application for a preliminary injunction fairs no better than his first. Leaving aside the fact that his briefs in support of that application failed to address the Crowe factors at all, and instead focused solely on Hunterdon's withdraw of its offer of employment, the Chancery Court properly denied the second application, clearly finding the interests of justice did not warrant reconsideration. Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021); see also Rule 4:42-2.

The Chancery Court specifically found that Dr. Ondik failed demonstrate, by clear and convincing evidence, the factors laid out in Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982), which are required to obtain a preliminary injunction. (3T6-10). The Crowe factors are, of course,: (1) irreparable harm is likely if the relief is denied; (2) the applicable underlying law is well-settled; (3) the material facts are not substantially disputed and there exists a reasonable probability of ultimate success on the merits; and (4) the balance of the hardship to the parties favors the issuance of the requested relief. 90 N.J. at 132-34; Waste Mgmt., 399 N.J. Super. at 520

(collecting cases noting "[e]ach of these factors must be clearly and convincingly demonstrated"); McKenzie v. Corzine, 396 N.J. Super. 405, 414 (App. Div. 2007) ("[A]ll these factors must weigh in favor of injunctive relief."). Dr. Ondik failed to establish any of these factors, much less with clear and convincing evidence.

Dr. Ondik was not seeking a status quo injunction that would have left the parties in the same place during the pendency of the litigation. The opposite is true. The status quo is that Dr. Ondik was bound by the terms of the Restrictive Covenant at the time he filed his application: "Physician expressly agrees that during the term of this agreement and for a period of five (5) years following termination…." (Ra27, ¶ 8.1).

After five years, Dr. Ondik sought to reverse the status quo and to have the Court specifically terminate a restriction that has been in place throughout his employment. This is improper. It is also contrary to settled New Jersey law, including prior decisions enforcing the very same Restrictive Covenant. (Ra61-91).

A. DR. ONDIK'S APPLICATION IS CONTRARY TO SETTLED LAW.

Restrictive Covenants entered into as a condition of employment are fully enforceable under New Jersey law. Solari Indus. v. Malady, 55 N.J. 571, 585 (1970); ADP, LLC v. Kusins, 460 N.J. Super. 368, 400 (App. Div. 2019). In *ADP*, the Appellate Division stated its intention to "bring some clarity and uniformity" to the enforcement of restrictive covenants, concluding that it is reasonable for a

company to restrict its former employees from providing services to a competing business. ADP, 460 N.J. Super. at 377-78.

The Supreme Court of New Jersey has established a three part test to determine the validity of a restrictive covenant. A restrictive covenant is reasonable and enforceable where it 1) protects the legitimate interests of the employer, 2) imposes no undue hardship on the employee and 3) does not injure the public. Ingersoll-Rand Co. v. Ciavatta, 110 N.J. 609, 628 (1988) (citing Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 32-33 (1971)); Solari Indus., 55 N.J. 571.

Restrictive covenants with physicians are the same. See Karlin v. Weinberg, 77 N.J. 408, 422-23 (1978); Community Hosp. Grp. Inc. v. More, 183 N.J. 36, 55-56 (2005); see also Pierson v. Medical Health Centers, P.A., 183 N.J. 65, 69 (2005) (holding that restrictive covenants with physicians are enforceable if they meet the standard set forth in Karlin).

Specifically, the Court will enforce an agreement restricting or limiting a physician's post-separation conduct if it "protects the legitimate interests of the employer, imposes no undue hardship on the employee and is not injurious to the public." Maw v. Advanced Clinical Communications, Inc., 179 N.J. 439, 447 (2004) (citations omitted); see also Karlin, 77 N.J. at 422-23. The Court considers whether the restrictive covenant is "reasonable under all the circumstances of the case."

Karlin, 77 N.J. at 417; see also Solari Indus., 55 N.J. at 576; Platinum Management v. Dahms, 285 N.J. Super. 274, 293 (Law Div. 1995).

In this case, Dr. Ondik expressly negotiated the Restrictive Covenant in his Employment Agreement, and he agreed that what he negotiated was reasonable and necessary to protect the Practice. His newly manufactured claim to the contrary fails.

1. The Restrictive Covenant Protects the Practice's Legitimate Interests.

The Restrictive Covenant protects the Practice's legitimate business interests including: (1) its patient and patient referral bases; and (2) the investment in Dr. Ondik. More, 183 N.J. at 42. Dr. Ondik expressly acknowledged this as part of his Agreement, which he negotiated. (Ra12).

The twenty-mile radius is necessary to protect the Practice's referral and patient base, which it has spent years and millions building. (Ra13-16). It represents the Practice's goodwill. (Ra93-118). The scope is indisputably reasonable given the overcrowded ENT market in Central Jersey. (Ra33-59).[6]

Although Dr. Ondik was not newly out of residency, he admits he had no presence in New Jersey when he began working at the Practice. (Ab22). He had no patients or referral sources when he joined the Practice. Nor did he have any when

[6] Dr. Ondik's anticipated argument that Hunterdon's exact zip code was not included in the expert's analysis misses the point, which is that practices within Hunterdon County that are also within 20 miles of the Practice comprise the relevant market. That includes Hunterdon.

he left the Practice. He was dependent on the Practice and Drs. Shah and Patel. Those are the only sources of business that Dr. Ondik has to offer to a new employer.

In addition to its patients and referral sources, it takes the Practice on average five years to recoup its investment in a physician. The Practice paid Dr. Ondik a base salary of $300,000, plus bonuses, such that his compensation over the past five years exceeded $1.5 million dollars. The Practice paid for his continuing medical education and malpractice insurance, which cost the Practice more than $76,000. That represents a significant investment in Dr. Ondik. (Ra13-16)

Five years also the time it takes for the Practice to recruit and train a replacement for Dr. Ondik. That is why the initial term of the Employment Agreement and the period for the Restrictive Covenant are both five years. (Id.)

The Practice also shared its Confidential Information with Dr. Ondik, which was the subject of a separate prohibition against sharing. Dr. Ondik argues that because he currently agrees to be bound by that provision, the Practice does not need the protection of the Restrictive Covenant. Leaving aside the fact that it is not up to Dr. Ondik to decide what the Practice needs to protect its interests, he is wrong. (Ra13, ¶¶27-29)

The various provisions in the Employment Agreement do not operate in isolation as Dr. Ondik argues. Rather, the Restrictive Covenant, the Non-Solicitation Agreement and the prohibition on disclosing Confidential Information work together

to protect all of the Practice's interests. (Id.) Collectively, they ensure that Dr. Ondik does not and has no reason or justification for seeking to disclose the Practice's Confidential Information, soliciting its patients or referral sources; he is prohibited from putting himself in a circumstance where doing either could be beneficial by virtue of the Restrictive Covenant. Thus, Dr. Ondik is required to abide by all aspects of the restrictions to protect the Practice just as he agreed.

2. The Restrictive Covenant Does Not Create An Undue Hardship on Dr. Ondik.

Enforcement of the Restrictive Covenant does not create any undue hardship for Dr. Ondik because the restrictions are reasonable and temporally and geographically reasonable and sound.

First, New Jersey Courts routinely enforce restrictive covenants of five years.

- Rubel & Jensen Corp. v. Rubel, 85 N.J. Super. 27, 41 (App. Div. 1964) (upholding an **11-county** restriction);
- Scholastic Funding Grp., LLC v. Kimble, 2007 WL 1231795, at *4-5 (D.N.J. April 24, 2007) (Ex. 1) (upholding **nationwide restriction**);
- The Cmty. Hosp. Grp, Inc. v. More, 183 N.J. 36, 62 (2005) (blue penciling **30 mile non-compete to 16 miles** due to neurosurgeon shortage);
- Pierson v. Med. Health Ctrs, P.A., 183 N.J. 65, 69 (2005) (enforcing physician's **2 year** non-compete);
- Karlin v. Weinberg, 77 N.J. 408, 421 (1978) (refusing to strike physicians **5-year**, **10-mile** restriction)

As stated, five years is specifically appropriate here because that is the equivalent of the time that it will take the Practice to hire and train new physicians to replace Ondik. (Ra15, ¶¶ 38-41). It correlates directly to the time period of the Employment Agreement because that is how long for the Practice to recoup its investment.

Second, the twenty mile radius from each of the Practice's offices is a reasonable geographic restriction. (Ra16 at ¶ 42). It represents the market from which the Practice draws its patients and referrals. Unlike the situation in Community Hospital v. More, the field of otolaryngology is highly competitive and heavily populated. (Id. at ¶ 43). Restricting Dr. Ondik in this otherwise crowded market, does not create a hardship to Plaintiff, patients or hospitals. (Id. at ¶ 44). The Restrictive Covenant is reasonable. (Ra16 at ¶45, Ra61-91).

This case is unlike Graziano v. Grant, 326 N.J. Super 328 (App. Div. 1999) on which Dr. Ondik relies. There, the parties had not agreed to the terms of a restrictive covenant, unlike here where a valid and agreed upon restriction exists. The Graziano Trial Court simply imposed a 3 year 20 mile limitation in absence of an agreement by the parties or supportive fact finding.

The radius does not prevent Dr. Ondik from making a living; he simply has to do so in compliance with the Restrictive Covenants, which the Chancery Court found. (Ra17, ¶¶48-51). He was free to work in South Jersey and Pennsylvania—

just not parts of Central Jersey and Eastern Pennsylvania where the Practice operates and from which it draws it patients and referrals, an area already well-served. This does not present a hardship to Dr. Ondik who lives in Newtown Pennsylvania and can easily avoid the restrictions. The fact that he chose not to does not create an undue hardship. To the contrary, he had to drives close to 15 miles to get to the Practice's Lawrenceville office. He could have easily driven just a few miles in the opposite direction to be outside the restricted radius.[7]

Instead, Dr. Ondik apparently chose to accept employment in Washington State for reason unrelated to the Restrictive Covenant. Thus, he cannot complain that a 20 mile restrictive radius is too onerous.[8]

Dr. Ondik's own admissions and conduct confirm that the Restrictive Covenant does not create an undue burden.

3. The Restrictive Covenant Is Not Injurious To The Public.

As stated, the public is not harmed by this Restrictive Covenant at all. Dr. Ondik has not been practicing in New Jersey for nearly a year. No patient crisis

[7] Dr. Ondik's argument that the restrictive covenant reaches as far as Somerset and Camden counties is spurious. Former Practice employees are currently practicing in Marlton.

[8] Dr. Ondik's argument about the consolidation of healthcare practices and running afoul of the restrictive covenant because of a practice's remote office and the supposedly 3,721 square miles covered by the Restrictive Covenant are baseless since the sole location raised by Dr. Ondik on his applications was Hunterdon's Flemington office. (Ra16 ¶47)

ensued. There exists a plethora of physicians to serve the needs of the population. (Ra33-59). Given that Dr. Ondik does not practice in a highly specialized or limited field such as neurosurgery, this does not present any harm to patients. This is particularly true here were Dr. Ondik admits that he did not treat any appreciable number of patients while at the Practice. (Ab22)

Reasonable restrictive covenants, such as the one here are enforceable, even where they impact patient choice. Accord Desai v. St. Barnabas, 103 N.J. 79 (1986). Although the standards the Court considers for privilege determinations are different, the point is the same: Patient choice is not the only consideration or even the most important.

Dr. Ondik has failed to establish that his claim is based on settled law or that it has a likelihood of success on the merits. Thus, he has failed to carry his burden with respect to the first requirement under *Crowe*, as he does with the balance of the requirements.

B. DR. ONDIK CANNOT DEMONSTRATE IRREPARABLE HARM.

Irreparable harm exists when money damages cannot adequately compensate the movant's injuries. See e.g., Crowe, 90 N.J. at 132-33; Board of Educ. of Union Beach v. New Jersey Educ. Ass'n., 96 N.J. Super. 371, 391 (Ch. Div. 1967), aff'd, 53 N.J. 29 (1968). The requirement of irreparable harm has been defined as follows:

> An injury is irreparable when it cannot be adequately compensated in damages or when there exists no certain pecuniary standard for the measurement of the damages. Inadequacy of damages as a compensation may be due to the nature of the injury itself or the nature of the right or property injured.
>
> [Scherman v. Stern, 93 N.J. Eq. 626, 631 (E. & A. 1922).]

Here, Dr. Ondik was simply asked to comply with his agreed-to contractual obligations, which might require him to commute a little further or in a different direction. The fact that he found those obligations to be inconvenient after the fact does not constitute irreparable harm. He was free to find a position outside of the restrictive radius, as both he and his former colleagues did, without uprooting his children or his mother-in-law.

Moreover, Dr. Ondik was offered the opportunity to negotiate a resolution in light of Hunterdon's location and the circumstance of his departure, but he rejected that. Dr. Ondik's refusal to compensate the Practice for his breach of the Employment Agreement does not constitute irreparable harm; rather, it is classic money damages (just not for him).

Similarly, the fact that Hunterdon withdrew its offer of employment did not create irreparable harm. The recission of that offer did not give rise to a claim against the Practice, but regardless the terms of the Hunterdon offer were fully quantifiable in terms of money damages.

Thus, Dr. Ondik has not and will not experience any irreparable harm regardless of whether the Restrictive Covenant is enforced. For all of these reasons, the Chancery Court found that Dr. Ondik had failed to demonstrate irreparable harm.

C. THE EQUITIES FAVOR THE PRACTICE.

The restrictions in Dr. Ondik's Employment Agreement apply regardless of the reason why his employment ended. However, Dr. Ondik voluntarily resigned to seek other opportunities. He reaped all the benefits of working at that Practice for five years and knew the scope of the restrictions for that same period. He had more than sufficient time to make plans that comport which his post-employment restrictions to the Practice and his own desires. Yet, Dr. Ondik selected a new practice whose only two offices are within the restricted radius, and demanded to be allowed to breach his post-employment obligations without any repercussions. When he did not get his way, he waited until there were just weeks left before his departure to file an application for a preliminary injunction in an effort to generate urgency and equity that simply do not exist.

Dr. Ondik not only agreed to the terms of the Restrictive Covenant – he specifically negotiated them. In return for not being bound if his employment terminated the first year, Dr. Ondik agreed to the restriction for the balance. In return he received over $1.6 million dollars in compensation, continued medical training,

malpractice insurance, access to the Practice's patients and referral sources. Having had the benefit of all of that for five years, Dr. Ondik is not free to now decide that he does not want to abide by the terms of the agreement that he made.

D. DR. ONDIK IS ASKING THE COURT TO BLUE PENCIL THE RESTRICTIONS DIFFERENTLY THAN HE REQUESTED OF THE CHANCERY COURT.

Dr. Ondik's applications to the Chancery Court focused solely on Hunterdon's Flemington office. He even represented to the Chancery Court that he would relinquish his privileges at Capital Health Hopewell. (Ra179-180, p. 6). Despite this, Dr. Ondik is now asking this Court for the first time to allow him to practice at hospitals that were not part of his initial application and to Blue Pencil his restrictive covenant by 17 miles – not .76 miles. (Ab31). It is completely inappropriate for Dr. Ondik to ask this Court for relief never sought and expressly waived before the Chancery Court. (Ra180 (agreeing to relinquish rights to practice at Capital Health Hopewell)). Neider v. Royal Indemnity Ins., 62 N.J. 229, 234 (1973) (noting that the Court will generally decline to consider issues raised for the first time on appeal).

Dr. Ondik's new pivot underscores the central weakness with his application; it is not based on any actual concrete set of facts against which the Chancery Court or even this Court is to evaluate. It's a constantly shifting position. His first application was based on a hypothetical speculative situation that had not occurred and ultimately never occurred. His second application was based on a moot offer of

employment and effectively sought an advisory opinion from the Chancery Court about what might happen if Hunterdon again offered him employment (i.e. reversed its decision to withdraw its offer). Now he is asking the Court to allow him to practice at unidentified hospitals that were never before raised. This is improper and yet another reason why the Court should deny his application.

To the extent that Dr. Ondik claims that Hunterdon's Flemington office is very close to the outer limit of the Restrictive Covenant, so he should be able to practice there, Courts do not make better contracts for parties than the one that they themselves negotiated. Schenck v. HJI Assocs., 295 N.J. Super. 445, 450 (App. Div.), certif. denied, 149 N.J. 35 (1997). Dr. Ondik should not be permitted to ignore the agreed-to limits freely and without consequence (i.e. money damages) for breaching the terms of his Employment Agreement. The Practice's Restrictive Covenant is valuable (Ra93-118).

POINT VI

THE COURT PROPERLY DISMISSED DR. ONDIK'S COMPLAINT.

(Ra1-3, Ra159-78, Pa52-53)

Dr. Ondik concedes in his appeal that he did oppose the dismissal of his Complaint based on mootness. (Ab31). Thus, this Court should not consider his newly raised arguments on appeal. Neider, 62 N.J. at 234 (generally decline to consider issues raised for the first time on appeal). Regardless, Dr. Ondik's new arguments fail.

As set forth above, mootness is a threshold question of justiciability. This is true even where a party seeks declaratory judgment. "Where the issue is moot, declaratory judgment will not lie because of the absence of an actual controversy." Pressler & Verniero, Current N.J. Court Rules, comment 1.2 on *R.* 4:42–3 (2024). The Court does not issue advisory opinions. G.H. v. Twp. of Galloway, 199 N.J. 135, 136 (2009). Thus, the Court will not entertain a request for declaratory judgment that is simply a disguised attempt to adjudicate in advance the validity of a possible defense in an expected future lawsuit. Donadio v. Cunningham, 58 N.J. 309, 325 (1971). Accordingly, when a party's rights "lose concreteness" due to developments subsequent to the filing of an action, there is no reason to continue the litigation. State v. Davila, 443 N.J. Super. 577, 584 (App. Div. 2016).

Dr. Ondik's requests for judgment declaring that his employment with Hunterdon did not violate the Restrictive Covenant became moot when Hunterdon withdrew its offer of employment. This remained unchanged when Hunterdon tried to condition the offer on the Chancery Court's rulings. Thus, the Chancery Court properly dismissed the Complaint without prejudice, leaving Dr. Ondik free to file an amended Complaint if and when he could bring a live controversy to the Court.

Instead, (as predicted by the Chancery Court) Dr. Ondik secured employment outside the Restrictive Covenant. Thus, even if his Complaint had not been rendered moot previously, it certainly is now.

CONCLUSION

For all of the foregoing reasons, the Practice respectfully requests that the Court dismiss Dr. Ondik's appeal as improper or in the alternative affirm the orders of the Chancery Court.

Dated: November 1, 2024

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November 18, 2024

Via eCourts
Appellate Court Division Judges
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Trenton, New Jersey 08625-0970

Re: Michael P. Ondik, M.D. v. Princeton Eye & Ear, LLC et als
Docket No.: A-002654-23
Our File No.: 5935.0001

The Honorable Judge:

Before this Court is an appeal filed by Appellant, Dr. Michael Ondik. The Respondent, Princeton Eye & Ear, LLC, has filed a brief in opposition to the appeal. Please accept this letter brief in lieu of a more formal brief in Reply to Respondent's opposition.

A. THE 2024 ORDER IS A FINAL, APPEALABLE ORDER.

A dismissal of a complaint without prejudice may be appealable as of right. See Rubin v. Tress, 464 N.J. Super. 49, 56 n. 3 (App. Div. 2020). In

Rubin, the Appellate Division ruled that a dismissal without prejudice, premised on a R. 4:6-2(e) motion to dismiss, was appealable as of right even though the only issue decided was the Plaintiff's failure to provide discovery in a timely manner pursuant to R. 4:18-2. Ibid. While dismissals without prejudice may invite questions as to their finality under R. 2:2-3, they can nonetheless be appealable as of right when they dispose of all issues as to all parties. Ibid.

In Scalza v. Shop Rite Supermarkets, Inc., 304 N.J. Super. 636 (App. Div 1997), the plaintiff appealed as of right from an order, obtained by defendants pursuant to R. 4:23-2(b)(3), dismissing her complaint without prejudice for failure to comply with an earlier order requiring more specific answers to interrogatories. As a preliminary matter, the Appellate Division dealt with the defendant's contention that the appeal should be dismissed as interlocutory, arguing that the plaintiff had no right to appeal because the dismissal was without prejudice. Id. at 638. On the issue of finality of an Order, the Court noted that where an order is in effect "similar to a dismissal of a complaint," the order is final and appealable as of right. Ibid., quoting In re Application of Tiene, 19 N.J. 149, 160 (1955). Accordingly, the Scalza Court held that the actual dismissal of a complaint, when the only other pleading is an answer, should generally be considered a final judgment for purposes of appeal. Scalza, 304 N.J. Super. At 638.

Furthermore, even the Court's expressed intent that dismissal of a complaint would be without prejudice to permit the plaintiff to bring a new action does not preclude the dismissal's finality and the right to appeal. Morris County v. 8 Court Street Ltd., 223 N.J. Super. 35, 38-39 (App. Div.), certif. den. 111 N.J. 572 (1988). An order that resolves final outstanding issues but is labeled "without prejudice" is still appealable as of right. See Devers v. Devers, 471 N.J. Super. 466, 472-475 (App. Div. 2022).

In the case sub judice, the Trial Court's Order is labeled "without prejudice" but it nonetheless disposed of all issues as to all parties in the case. When reciting his decision on the record, the Trial Judge noted that he was granting PEE's Cross-Motion to Dismiss "because there is simply no claim left…". (2T10:21-25). The "without prejudice" aspect of the Order simply means that if at some point in the future Dr. Ondik begins employment with a different practice or for himself inside the restricted area, he is not precluded from bringing a new action against PEE to challenge the reasonableness of PEE's Restrictive Covenant as it pertains to that new employment position. That, however, would be an entirely different case from the case currently before the Court.

On the facts of this case, the dismissal of Dr. Ondik's Verified Complaint is final. There is nothing Dr. Ondik can do under the current set of facts to

amend his pleading to change the result. Any amendment would present the exact same set of facts and would result in another dismissal based upon the same flawed reasoning expressed by the Trial Court. The fact that Dr. Ondik is not precluded from brining a different case, with entirely different facts, before the Court to challenge PEE's Restrictive Covenant in some other context does not strip the finality from the Trial Court's April 24, 2024 Order nor its appealability as of right.

B. THE ¾ MILE ENCROACHMENT INTO THE RESTRICTED AREA IS INSIGNIFICANT TO THE PROTECTION OF PEE'S LEGITIMATE BUSINESS INTERESTS.

PEE's opposition does not comment at all on the most pressing issue before the Court. The HOAA Flemington Office is 19.24 miles on a straight line from PEE's Lawrenceville Offices, where Dr. Ondik spends 70% of his time and is 17.22 miles on a straight line from Capital Health Medical Center – Hopewell, where Dr. Ondik spends one-hour per month. (Pa6). As part of his potential employment with HOAA, Dr. Ondik would relinquish his privileges at Capital Health Medical Center – Hopewell. The HOAA Flemington Office is more than 20 miles from all other locations that comprise the Restricted Area. This case boils down to a three-quarter mile encroachment.

PEE argues that its 20-mile radius, 3,721 square mile Restricted Area is

reasonable and necessary to protect its business interest but does not comment upon the actual facts of this case—specifically, whether a 19.24-mile radius or a 3,720 square mile Restricted Area would also adequately protect its business interests. The answer to that question is obviously a resounding yes, but PEE conveniently steered away from it throughout its opposition.

Squabbling over a .76-mile encroachment into a 3,721 square mile Restricted Area does not seem to be the conduct of an entity focused on seeking to protect legitimate business interests, but is instead more indicative of an entity carrying out a personal vendetta against a departing, highly skilled and credentialed physician. The problem with that, however, is that the effects of such conduct not only unreasonably harm Dr. Ondik and his ability to find alternate employment, but also unnecessarily puts his current and prospective patients in the crosshairs of PEE's crusade against Dr. Ondik. Because PEE has not advanced any arguments that they would suffer any harm by Dr. Ondik's employment in the HOAA Flemington Office, this Court should respectfully invoke its authority to "blue-pencil" the Restrictive Covenant in a manner that would permit Dr. Ondik's employment in the HOAA Flemington Office.

C. THE GEOGRAPHIC RESTRICTIONS IMPOSED BY THE COVENANT ARE UNREASONABLE.

To be enforceable, the geographic scope of the restrictive covenant must

not "foreclose resort to the services of the 'departing' physician by those of his patients who may otherwise desire to seek him out at his new location." Karlin v. Weinberg, 77 N.J. 408, 424 (1978). Covenants that "are excessive in geographic scope or duration, or if they fail to make a reasonable accommodation of patients' choice of physician" are unreasonable. Community Hospital Group v. Moore, 183 N.J. 36, 57 (2005) (quoting A.M.A., E-9.02:Restrictive Covenants and the Practice of Medicine). PEE simplistically measures each HOAA location from a specific PEE location to establish a "no practice" zone but that measurement disregards the aggregate geographic scope of the restrictions. The restriction is a twenty (20) mile radius, but when you aggregate that 20-mile radius from all seven (7) of PEE locations, they all overlap and form a massive Restricted Area that is 3,721 square miles and stretches from eastern Pennsylvania all the way to the Atlantic Ocean. This expansive Restricted Area will leave Dr. Ondik's patients stranded unless they begrudgingly travel unreasonable distances, and across state lines, to continue their treatment with him.

PEE acknowledges this issue and offers a solution that Dr. Ondik's patients can simply continue their treatment with Dr. Shah, who they contend is as equally qualified as Dr. Ondik. That contention misses the point. The Restrictive Covenant cannot be so vast that it forces Dr. Ondik's patients to

settle on continuing their treatment with a different doctor. It is axiomatic that a restrictive covenant will be found unreasonable if it disrupts existing doctor-patient relationships. Karlin, 77 N.J. at 424; see also Community Hospital, 183 N.J. at 47.

Here, because the Restricted Area covers the entire width of the State of New Jersey as well as the easternmost counties of Pennsylvania where Dr. Ondik resides, and because many hospitals and medical practices require on-call physicians to be within a 30–60-minute commute of the medical facility, enforcement of the Restrictive Covenant as is would unreasonably limit and, in all likelihood, entirely preclude Dr. Ondik from practicing medicine in the State of New Jersey. (Pa8-9). The result of that, at best, would be a total disruption of Dr. Ondik's current patient relationships and, in all probability, at worst, would result in the termination of those relationships unless his patients resort to traveling to another state to continue their treatment with him. This is precisely the kind of Restrictive Covenant that Karlin and Community Hospital dictate to be unreasonable and unenforceable.

Courts have upheld a ten (10) mile restriction as reasonable under certain circumstances. But a covenant that establishes a no practice zone of 20 miles, with an aggregate Restricted Area of 3,721 square miles is unreasonable because it prevents Dr. Ondik from practicing in New Jersey, which is where most, if not

all, of his patients reside. Because of that breadth, the restrictive covenant becomes a restriction on competition, not a covenant designed to protect a legitimate business interest. The effect of the Restrictive Covenant, plain and simple, is the improper elimination of competition. As such, geographic restrictions should not be enforced.

D. THE FIVE-YEAR DURATION OF THE RESTRICTIVE COVENANT IS EXCESSIVE AND SHOULD NOT BE ENFORCED.

A restrictive "covenant should not be enforced beyond the period needed for the employer (or any new associate . . .) to demonstrate his effectiveness to the patients." Karlin, 77 N.J. at 423. As a well-established Otolaryngology practice, PEE is positioned to demonstrate its effectiveness immediately. Restraining a five-year employee for a five-year period, as PEE seeks to do here, is punitive and prevents competition rather than sets the appropriate period of time to enable PEE to demonstrate effectiveness to its patients. In the factual circumstances here, the length of the restraint is overly broad.

The court in Community Hospital concluded that the length of the service to length of covenant ratio of 4:1 was reasonable and, therefore, upheld a two-year restriction against an 8-year employee. In this case, Dr. Ondik only worked for PEE for 5 years and PEE is seeking to restrain him for another 5 years. That equates to a length of the service to length of covenant ratio of 1:1. Under these

circumstances, the 5-year restraint is an illegitimate restriction designed to thwart competition rather than protect PEE's interest. As such, the 5-year restriction should not be enforced.

E. PEE'S INDIRECT COMPETITION CLAUSE IS IMPROPER, OVERREACHING, AND SHOULD NOT BE ENFORCED.

The Indirect Competition Clause is located within PEE's Restrictive Covenant and states as follows:

> For purposes of the foregoing, Physician's association by, or other association with, a medical Corporation having an office or other place of business located within the Restricted Area shall be deemed the "indirect" Corporation of medicine by Physician and, therefore, shall constitute a violation of this covenant, notwithstanding that he/she personally performs services exclusively outside of the Restricted Area.

Even if Dr. Ondik were to accept a position with a medical practice located completely outside of the Restricted Area, he would nonetheless be in violation of the Restrictive Covenant if that medical practice had a satellite office within the Restricted Area where other doctors practiced, even if Dr. Ondik never stepped foot in that satellite office.

The Indirect Competition Clause is particularly burdensome and unreasonable due to consolidation trends in the healthcare industry, where many practices now have multiple locations spanning large areas of PA and NJ, which significantly increases the risk that Dr. Ondik will run afoul of the Indirect

Competition Clause, effectively eliminating all possible job opportunities without having to uproot his family. (Pa8-9). During his search for a new job, Dr. Ondik came extremely close, and actually thought he did find a job outside of the Restricted Area at Jefferson University ENT in Philadelphia. However, when Jefferson analyzed PEE's Restrictive Covenant and, specifically, the Indirect Competition Clause, Dr. Ondik's employment offer was revoked. While Dr. Ondik was going to be working solely out of the Philadelphia office (outside the Restricted Area), Jefferson has over 100 affiliated locations and a few of those locations were located within the 3,721 square mile Restricted Area. As a result, Dr. Ondik could not accept the position.

To further illustrate the unreasonableness of the Indirect Competition Clause, if Dr. Ondik moved his family to California to accept a position with a medical practice across the country, but that practice also had a small office in Point Pleasant, NJ, Dr. Ondik would not be able to practice medicine at that California medical office due to the implementation of the Indirect Competition Clause. This may sound absurd—because it is—but that is the practical effect of the Indirect Competition Clause.

PEE's opposition brief does not explain, or even comment upon, the reasonableness or the necessity the Indirect Competition Clause. The Indirect Competition Clause not only prevents Dr. Ondik from practicing within the

3,721 square mile Restricted Area, but for him to be compliant with the Restrictive Covenant, also effectively acts to prevent other doctors, over which Dr. Ondik has no control, from practicing within the Restricted Area. The Indirect Competition Clause serves no legitimate purpose and is designed solely to unlawfully restrict competition. As such, the Indirect Competition Clause should not be enforced.

F. PEE'S CONFUSING ARGUMENTS ARE MERE FABRICATIONS DESIGNED TO BLUR THE REAL ISSUES IN THIS APPEAL.

PEE advances several head-scratching arguments throughout its opposition brief that appear to have been derived through thin air. Specifically, PEE strangely argues that "Dr. Ondik is asking the Court to rule on the validity of a possible defense to a potential future claim that the Practice has not yet brought—and not just against Dr. Ondik, but also as to Hunterdon, which is not even a party to the action." (See Respondent's Brief at page 20). The undersigned cannot decipher what this argument means. This appeal is about challenging the reasonableness of a five-year 3,721 square mile Restrictive Covenant as applied against Dr. Ondik's employment with HOAA, which encroaches the massive, restricted area by a mere .76 miles through a straight-line calculation but is completely outside of the restricted area when real driving distance is utilized. Respondent's attempts to improperly categorize this appeal

as something different are incoherent and designed solely as a distraction from the real issues before this Court.

Next, Respondent attempts to justify the overly broad Restrictive Covenant by arguing, with no support whatsoever, that Dr. Ondik specifically negotiated the terms of the Restrictive Covenant. (See Respondent's Brief at page 31). That unsupported assertion could not be further from the truth. The only aspect of the Restrictive Covenant that Dr. Ondik was permitted to negotiate was whether it would be enforceable if the employment relationship ended within the first year of the five-year Employment Agreement. Dr. Ondik was not permitted to negotiate the geographical scope nor the temporal limits of the restriction. As in most employment agreements, this was a take it or leave it contract of adhesion. The mere fact that Dr. Ondik signed the Employment Agreement does not mean the Restrictive Covenant contained therein is reasonable and narrowly tailored to protect PEE's legitimate business interests. To the contrary, as set forth in Appellant's briefs, the Restrictive Covenant is overly broad, punitive, and designed to unlawfully stifle competition.

Pages 32 through 33 of Respondent's brief contain perhaps the most bizarre arguments of all, which again appear to have been manufactured through thin air for the purposes of distracting this Court. Respondent asserts that Dr. Ondik is asking the Court to Blue Pencil the Restrictive Covenant by 17 miles

and that Dr. Ondik should not be permitted to advance new arguments that were not asserted to the trial court. Quite frankly, the undersigned has no idea what the Respondent is talking about. Dr. Ondik has not changed any of his arguments. Dr. Ondik has an active employment offer from HOAA. HOAA encroaches the 3,721 square mile restricted area by .76 miles. The purpose of this appeal, just like his Declaratory Judgment action before the Chancery Court, is to challenge the reasonableness of full enforcement of PEE's Restrictive Covenant as applied against Dr. Ondik's employment at HOAA. Blue Penciling the restricted area from a 20-mile radius to 19 miles, and eliminating the Indirect Competition Clause, will permit Dr. Ondik to begin working at HOAA immediately.

PEE argues that this appeal is moot because it claims Dr. Ondik found a job outside of the restricted area in the State of Washington. PEE's claim in this regard is false. Dr. Ondik attempted to commute from Newtown, PA to the State of Washington for work, but understandably, the commute was too much to bear for Dr. Ondik and his family. As such, Dr. Ondik is not employed in the State of Washington and remains hopeful to be permitted to begin a new chapter in his career at HOAA, where an office is waiting for him.

G. CONCLUSION.

For the foregoing reasons and based upon the above cited authorities,

Appellant respectfully submits that this Court should enter an Order that (1) reinstates Appellant's complaint; (2) reverses the trial court's denial of the Second OTSC; (3) imposes a temporary injunction on PEE's enforcement of the Restrictive Covenant as it pertains to HOAA; (4) blue pencil's the Restrictive Covenant to compress the Restricted Area by one mile; (5) invalidates the Indirect Competition Clause as it relates to HOAA; and (6) remands the matter back to the trial court to proceed accordingly.

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BY: _____
RYAN S. MALC

Dated: November 18, 2024