NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

MAGGIE HO, Individually, and Derivatively, on Behalf of MORRIS ANESTHESIA GROUP, P.A., and AMBULATORY ANESTHESIA PHYSICIANS LLC,

Plaintiff,

v.

MORRIS ANESTHESIA GROUP, P.A., AMBULATORY ANESTHESIA PHYSICIANS LLC, MARYANN PANEI, LEON SPECTHRIE, RONALD SHORE, JEFFRY ADEST, GARFUNKEL WILD, P.C., et al.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : MORRIS COUNTY

DOCKET NO. MRS-L-753-20

CIVIL ACTION - CBLP

OPINION

Argued: November 19, 2024

Decided: November 22, 2024

Paul S. Grossman, Esq. and Michael Mietlicki, Esq. of Weiner Law Group LLP, attorneys for the Plaintiff.

Benjamin S. Teris, Esq. and Jill A. Guldin, Esq. of Pierson Ferdinand LLP, attorneys for the Defendants.

Frank J. DeAngelis, P.J. Ch.,

I. BACKGROUND INFORMATION

This matter comes before the Court by way of Practice Defendants' motion for summary judgment. By way of background, Plaintiff Maggie Ho ("Plaintiff" or "Dr. Ho"), individually and derivatively on behalf of Morris Anesthesia Group, P.A. ("MAG"), and Ambulatory Anesthesia Physicians ("AAP"), (collectively the "Practice") is a board-certified anesthesiologist, formerly a shareholder and director of MAG and AAP. Following a breakdown of the professional

relationship between Plaintiff and Defendants Maryann Panei, Leon Specthrie, and Ronald Shore (the "Majority")(collectively with MAG and AAP "Practice Defendants"), Plaintiff submitted her resignation on September 30, 2019 for December 31, 2019. Plaintiff filed the initial Complaint on March 26, 2020.

Plaintiff alleges that in March 2018, Dr. Jill Young ("Dr. Young") the Practice Chairperson, announced her planned retirement for December 31, 2019. Plaintiff claims that the Majority began consulting with general counsel for the Practice ("Defendant Attorneys"). Plaintiff was not included or part to these consults. A shareholder meeting was held with board members on May 24, 2019 to discuss Dr. Young's personal use of her computer. Plaintiff asserts that at the meeting, the Majority informed Plaintiff that counsel had advised that Dr. Young be immediately terminated. Plaintiff alleges that as a result, she voted to terminate Dr. Young. Dr. Panei was then appointed interim-Chairperson.

A subsequent meeting was held on May 28, 2019 to appoint the permanent Chairperson. Practice Defendants maintain that this subsequent meeting was discussed during the May 24, 2019 meeting. Plaintiff asserts that she received an email informing her the meeting was being held only 16 minutes prior to the start of the meeting, while she was on a pre-planned vacation. At the May 28, 2019 meeting, no objections were made by any Shareholder to Dr. Panei being appointed Chairperson. Plaintiff claims that as a result, he remained the acting Chairperson.

Plaintiff submits that following the May 28, 2019 meeting, she was no longer provided with director-level reports and was restricted in her access to the Practice's financial information. Plaintiff alleges that the Majority also changed the locks to the main office, but did not give her a new set of keys. The Majority later provided her with the keys. Plaintiff claims that she was excluded from participation in ongoing litigation with a medical billing company with whom the

Practice did business. Plaintiff further alleges that job functions that were previously hers were given to other employees; board meetings were scheduled while she was known to be unable to attend; and compensation for extra hours worked stopped being paid until she complained. Plaintiff submitted a letter of resignation, dated September 30, 2019, and effective as of December 31, 2019.

Plaintiff asserts that the Practice began to decrease the number of procedures scheduled for her in October 2019, following the submission of her letter of resignation, decreasing Plaintiff's compensation. Plaintiff alleges that her compensation per procedure was also decreased.

The Practice accused Dr. Ho of discussing HIPAA protected medical information for non-medical reasons. Plaintiff alleges that she had informed Dr. Young that other anesthesiologists at the Practice had been discussing Dr. Young's medical information before her arrival for her procedure. When the Practice discovered that Dr. Ho told Dr. Young about the purported gossip, an investigation was launched into the supposed HIPAA violation. Plaintiff asserts that the investigation was dropped when her counsel made clear that an attempt to terminate Plaintiff on the basis of informing a patient of the Practice's own HIPAA violation would be met with litigation.

Despite the Majority's alleged misconduct, Plaintiff alleges that she continued to perform all work duties until her final day of work on December 31, 2019. Plaintiff filed a Complaint on the same day, seeking compensation for damages incurred by the alleged constructive termination of Plaintiff by Defendants. The parties engaged in multiple rounds of motion practice over the next two years. The Court subsequently issued a Case Management Order, which ordered the parties to serve discovery requests upon each other by February 16, 2022, with responses delivered thereto by March 16, 2022. In so following, by consent of all parties, Plaintiff filed a second Amended

Complaint on May 10, 2022. In the second Amended Complaint, Plaintiff alleged that the Practice Defendants forced out Dr. Young, the former president of MAG, and subsequently began efforts to force out Plaintiff, who was then the vice-president of MAG. In the instant application, Practice Defendants seek summary judgment.

II. STANDARD OF REVIEW

Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The trial court's "function is not . . . to weigh the evidence and determine the truth . . . but to determine whether there is a genuine issue for trial." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. at 520 (1995) (*quoting* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). The trial judge must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. When the facts present "a single, unavoidable resolution" and the evidence "is so one-sided that one party must prevail as a matter of law," then a trial court should grant summary judgment. Id.

III. ANALYSIS

Practice Defendants argue that Counts One and Two of the Complaint alleging minority shareholder oppression must be dismissed with prejudice because discovery has revealed that Plaintiff is no longer a shareholder. Practice Defendants submit that on September 23, 2022, this Court held that "in order for Plaintiff to maintain a cause of action under Counts 1 and 2 of the [SAC], she must be a shareholder. If it is determined during discovery that Plaintiff is no longer a

shareholder, the Counts 1 and 2 will fail." Practice Defendants assert that both the MAG Shareholder's Agreement and the AAP Operating Agreement provide that "[a]n individual's status as a Shareholder shall terminate upon termination of his Amended Employment Agreement for any reason." Practice Defendants maintain that on September 30, 2019, Plaintiff submitted, through counsel, resignation notices, signed by her to MAG/AAP, which indicated she was "[w]ithdrawing as a MAG Shareholder", "[r]esigning as Officer, Director and employee of MAG", "[w]ithdrawing as an AAP interest-holder", "[r]esigning as Officer, Director and employee of AAP", and "[r]esigning as Officer, Director and employee of AAP" effective December 31, 2019. Practice Defendants' Statement of Undisputed Material Facts (DSMF) ¶¶ 116-17. Practice Defendants allege that Plaintiff admitted under oath that she understood she was no longer a member or shareholder effective December 31, 2019. DSMF ¶ 119. Practice Defendants therefore argue that consistent with Our September 23, 2022 Order, Counts One and Two of the Complaint should be dismissed.

Practice Defendants contend that Counts Eight and Nine of the Complaint should be dismissed because there was no "Chairperson Agreement," nor was there any promise made for Plaintiff to become Chair. Practice Defendants allege that counts eight and nine constitute attempted election interference. Practice Defendants provide that governing documents require an election for Chairperson of MAG and AAP, and that an individual cannot be appointed Chairperson absent the vote. Practice Defendants submit that Count 8 asserts a breach of contract claim, requiring Plaintiff establish (1) "[t]he parties entered into a contract containing certain terms"; (2) "that plaintiff[s] did what the contract required [her] to do"; (3) "that defendant[s] did not do what the contract required [them] to do[;]"; and (4) that defendant[s'] breach, or failure to do what the contract required, caused a loss to the plaintiff." Globe Motor Co. v. Igdalev, 225 N.J.

469, 482 (2016). Practice Defendants argue that there is no evidence here that there was a contract into which the parties entered to make Plaintiff Chairperson of MAG/AAP.

Practice Defendants assert that promissory estoppel claim in Count Nine requires Plaintiff establish: "(1) a clear and definite promise; (2) made with the expectation that the promisee will rely on it; (3) reasonable reliance; and (4) definite and substantial detriment." Toll Bros., Inc. v. Bd. of Chosen Freeholders of Burlington, 194 N.J. 223, 253 (2008). Practice Defendants posit that there was no clear and definite promise and that there is no evidence to suggest otherwise. Practice Defendants claim that even if there were a promise, Plaintiff cannot prove she "reasonably relied" on such promise because of the voting requirements found in the governing documents.

Practice Defendants argue that Counts Ten and Eleven should be dismissed because there is no Vice Chairperson Agreement. Practice Defendants maintain that Plaintiff's MAG Employment Agreement and AAP Services Agreement do not indicate she is Vice Chairperson or guarantee that she would serve as Vice Chairperson, nor does either agreement provide for any special compensation for serving as Vice Chairperson. Practice Defendants claim that both the MAG Shareholders' Agreement and AAP Operating Agreement provide that the Vice Chairperson is to be elected at the annual meeting of the Board/Members of MAG/AAP. Practice Defendants allege that Plaintiff served as Vice Chairperson because she was elected to be Vice Chairperson, not because of a Vice Chairperson Agreement, and that accordingly, she was not entitled to any special compensation or additional rights. Practice Defendants make the same argument for the promissory estoppel claim, alleging that there was no promise for Plaintiff to serve indefinitely as Vice Chairperson or reasonable reliance on Plaintiff's part.

Practice Defendants contend that Plaintiff's oppression claims fail as a matter of law and should be dismissed even if Plaintiff is determined to still be a member. Practice Defendants assert

that Plaintiff cannot maintain an action for shareholder/member oppression based on her alleged disagreement on how the MAG Practice Defendants exercised business judgment. Practice Defendants provide that the oppression statutes do not allow court interference for mere disagreement or discord among shareholders. Brenner v. Berkowitz, 134 N.J. 488, 517 (1993). Practice Defendants submit that to prevail on action under N.J.S.A. 14A:12-7 (shareholder oppression), the plaintiff must show:

> In the case of a corporation having [twenty-five] or less shareholders, the directors or those in control have acted fraudulently or illegally, mismanaged the corporation, or abused their authority as officers or directors or have acted oppressively or unfairly toward one or more minority shareholders in their capacities as shareholders, directors, officers, or employees.

N.J.S.A. 14A:12-7(1)(c).

Practice Defendants further submit that under the minority member oppression statute, N.J.S.A. 42:2C-48(a)(5), an oppressed member may seek an order dissolving the company where the members in control of the company "(a) have acted, are acting, or will act in a manner that is illegal or fraudulent; or (b) have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant." Practice Defendants argue that Plaintiff has alleged nothing but "mere disagreement or discord among" shareholders regarding the exercise of business judgment. Brenner, 134 N.J. at 506.

Furthermore, Practice Defendants maintain that Plaintiff is not entitled to recover the monetary relief she seeks for shareholder/member oppression as the typical remedy under N.J.S.A. 14A:12-7 is a buyout of the minority shares. Practice Defendants allege that the shares are worth nominal value and MAG/AAP already attempted to provide the nominal value to Plaintiff. Practice Defendants submit that an award of monetary relief under the statute is an extraordinary remedy that should only be used in extreme circumstances. Practice Defendants assert that in the event

Plaintiff is permitted to proceed with her oppression claims, the only remedy should be for her to finally accept the nominal value of her shares.

Practice Defendants argue that that they are entitled to summary judgment on Counts Six and Seven—Plaintiff's breach of contract claims that assert liability on a constructive discharge theory. Practice Defendants question whether a constructive discharge claim can exist for a breach of contract claim but claim that if one exists, Plaintiff cannot prove it. Practice Defendants contend that Plaintiff was a highly compensated shareholder/member of an anesthesia practice who was allegedly upset with management changes and purported lack of respect from her partners, not an employee, for example, who faced repeated overt acts of racial or sexual harassment in the workplace. Practice Defendants submit that a constructive discharge is where an "'employer knowingly permit[s] conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign.'" Muench v. Township of Haddon, 255 N.J. Super. 288, 302 (App. Div. 1992). Practice Defendants provide that "[a] reduction of an employee's supervisory duties does not constitute the intolerable conditions which are necessary to establish constructive discharge." Cherchi v. Mobil Oil Corp., 693 F. Supp. 156, 162 (D.N.J. 1988).

Practice Defendants allege that there is no evidence that there were "conditions of discrimination [at MAG/AAP] so intolerable that a reasonable person subject to them would resign." Muench, 255 N.J. Super. at 302. Practice Defendants argue that Plaintiff's allegations that she was left out of advance discussions before the meeting at which Dr. Young was terminated and then felt disrespected by Drs. Panei, Shore, and Specthrie do not amount to harassment. Practice Defendants assert that even if Plaintiff's responsibilities were reduced, in accord with Cherchi, that is insufficient to establish a claim of constructive discharge. Practice Defendants

additionally rebut Plaintiff's claims for severance because she has not reached the age of 55 per the terms of the MAG Employment Agreement and AAP Member Services Agreement.

Practice Defendants argue that Plaintiff's claim for a breach of the implied covenant of good faith and fair dealing fail as a matter of law. Practice Defendants submit that "[t]o recover for breach of the implied covenant, a plaintiff must prove that: (1) a contract exists between the parties; (2) the plaintiff performed under the terms of the contract; (3) the defendant acted in bad faith with the purpose of depriving the plaintiff of rights or benefits under the contract; and (4) the defendant's actions caused the plaintiff to sustain damages." Luongo v. Vill. Supermarket, Inc., 261 F. Supp. 3d 520, 531-32 (D.N.J. 2017). Practice Defendants posit that there is no evidence that Practice Defendants deprived Plaintiff of a contractual right. Practice Defendants allege that they have acted in good faith in accordance with the requirements of all contracts.

Practice Defendants also assert that Plaintiff's fiduciary duty claims cannot survive summary judgment. Practice Defendants provide that "[t]o establish a claim for breach of fiduciary duty, a plaintiff must show that: (1) the defendant had a duty to the plaintiff; (2) the duty was breached; (3) injury to the plaintiff occurred as a result of the breach; and (4) the defendant caused that injury." Namerow v. PediatriCare Assocs., LLC, 461 N.J. Super. 133, 146 (Ch. Div. 2018). Practice Defendants maintain that "[t]here is no valid claim for breach of fiduciary duty based on members in a member-managed company acting in conformity with the provisions clearly set forth in the Agreement." Id. at 147. Practice Defendants allege that they have acted in accordance with the MAG Shareholders' Agreement and AAP Operating Agreement.

Practice Defendants further contend that Plaintiff's claims for defamation must be dismissed because Plaintiff has allegedly admitted that she violated HIPAA and has no evidence that Practice Defendants informed a third party that she violated HIPAA. Practice Defendants

submit that to survive summary judgment, Plaintiff would have to provide evidence that "(1) that [Practice Defendants] made a false and defamatory statement concerning [Plaintiff]; (2) that the statement was communicated to another person (and not privileged); and (3) that [Practice Defendants] acted negligently or with actual malice." G.D. v. Kenny, 205 N.J. 275, 292-93 (2011). Practice Defendants argue that "[t]ruth is an absolute defense to a defamation action and defeats such an action 'even when a statement is not perfectly accurate.'" G.D., 205 N.J. at 293. Practice Defendants allege that Plaintiff violated HIPAA by attempting to share a patient list with Dr. Young without proper redactions in violation of the HIPAA "Privacy Rule," 45 C.F.R. §§ 164.502(d)(1)-(2). Practice Defendants assert that in deposition, Plaintiff admitted that she could have done a better job applying the HIPAA privacy rule with respect to the Patient List. Practice Defendants claim that this admission is evidence that if the Court determines Practice Defendants did tell a third party of Plaintiff's alleged violation, they were telling a substantial truth. Practice Defendants, however, deny any such allegation.

Practice Defendants argue that they are entitled to summary judgment on Plaintiff's CEPA claim. Practice Defendants submit that CEPA prohibits an employer from taking an adverse employment action against an employee for engaging in protected activity. See Klein v. Univ. of Med. & Dentistry, 377 N.J. Super. 28, 46 (App. Div.), certif. denied, 185 N.J. 39 (2005). Practice Defendants provide that a CEPA plaintiff cannot establish a prima facie case unless he or she produces competent evidence to demonstrate: "(1) he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) he or she performed a 'whistle-blowing' activity . . . ; (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action." Dzwonar v. McDevitt,

177 N.J. 451, 462 (2003). Practice Defendants allege that the CEPA claim fails because Plaintiff: (1) does not constitute an employee for purposes of CEPA; (2) did not have a reasonable belief that MAG/AAP had violated the law; (3) did not engage in whistleblowing activity – she did not report anything to MAG/AAP; (4) suffered no adverse employment action; and (5) she cannot establish a causal connection.

Practice Defendants assert that as Vice Chairperson and a Class A shareholder/member of MAG/AAP, Plaintiff was not an employee. Practice Defendants submit that to determine if an individual is an employee for CEPA purposes, courts will look at: (1) whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; (2) whether and, if so, to what extent the organization supervises the individual's work; (3) whether the individual reports to someone higher in the organization; (4) whether and, if so, to what extent the individual is able to influence the organization; (5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and (6) whether the individual shares in the profits, losses, and liabilities of the organization. Practice Defendants allege that Plaintiff had the ability as Vice Chairperson and a shareholder/member of MAG/AAP to influence the dealings and activities of MAG/AAP, including with physician recruitment and management of the facilities, implicating the fourth factor and precluding Defendant from employee status for CEPA purposes.

Practice Defendants further argue that Plaintiff did not engage in CEPA protected activity because she did not report to anyone at MAG/AAP that she believed there was a HIPAA violation. Furthermore, Practice Defendants contend that Plaintiff did not suffer an adverse employment action. Practice Defendants provide that CEPA defines adverse employment action as “the discharge, suspension or demotion of an employee, or other adverse employment action taken

against an employee in the terms and conditions of employment." N.J.S.A. 34:19-2(e). Practice Defendants maintain that Plaintiff was not terminated following the communications between attorneys regarding HIPAA. Practice Defendants allege that even if in response to Plaintiff purportedly raising concern of a HIPAA violation, she too was accused of a HIPAA violation. Therefore, Practice Defendants submit that any action on their part does not constitute "the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment . . ." See N.J.S.A. 34:19-2(e). Practice Defendants contend that Plaintiff cannot claim that her scheduling responsibilities were removed as retaliation. Practice Defendants provide that her responsibilities had been removed as of October 24, 2019—before her October 31, 2019 conversation with Dr. Pikus regarding Dr. Young's procedure. Furthermore, Practice Defendants argue that Plaintiff cannot claim her pay was reduced as a result of the conversation, as she earned more units in November 2019 than she had in October 2019. Finally, in regard to the CEPA claim, Practice Defendants maintain that because Plaintiff admitted that she violated HIPAA, she cannot establish a causal connection between any alleged whistleblowing or alleged disciplinary action. Beasley v. Passaic Cty., 377 N.J. Super. 585, 607 (App. Div. 2005).

Next, Practice Defendants assert that Plaintiff's Pierce claim is barred by CEPA's waiver provision, and even if it were not, Practice Defendants argue the claim would fail because Plaintiff was not terminated. Practice Defendants submit that CEPA's waiver provision provides that ""the institution of an action in accordance with this act shall be deemed a waiver of the rights and remedies available under any . . . State law . . . or under the common law." N.J.S.A. 34:19–8. Practice Defendants maintain that "[t]he causes of action that fall within this waiver provision are those causes of action that are directly related to the employee's termination due to disclosure of

the employer's wrongdoing." Falco v. Community Medical Center, 296 N.J. Super. 298, 318 (App. Div. 1997). Practice Defendants allege that common-law claims of wrongful discharge in violation of public policy, which merely duplicate a CEPA claim, are routinely dismissed under CEPA's exclusivity provision . . .." Maw v. Advanced Clinical Commc'ns, 359 N.J. Super. 420, 441 (App. Div. 2003), rev'd on other grounds, 179 N.J. 439 (2004). Practice Defendants posit that because Plaintiff's Pierce claim (Count Twelve) is identical to her CEPA claim (Count Eleven), it is barred by CEPA's waiver provision and should be dismissed. Moreover, Practice Defendants claim that because it is undisputed Plaintiff was not terminated, her Pierce claim fails as a matter of law and Count Twelve should be dismissed.

As to Plaintiff's request for declaratory judgment and blue pencil restrictive covenant claim, Practice Defendants argue that they should be dismissed as moot. Practice Defendants provide that "a claim seeking a declaratory judgment providing relief from a contractual provision, court order, or the like, becomes moot when the provision expires by its own terms." Desi's Pizza, Inc. v. City of Wilkes-Barre, 321 F.3d 411, 428 (3d Cir. 2003). Practice Defendants assert that the longest restrictive covenants at issue had a three-year non-compete period, which expired on December 31, 2022, three years from Plaintiffs final date of employment. Practice Defendants therefore contend that they are moot. Finally, Practice Defendants claim that there is no such thing as Plaintiff's damages for overbroad restrictive covenant claim. Practice Defendants contend that that such a claim is not recognized by law.

In opposition, Plaintiff argues that she is an oppressed shareholder and interest holder. Plaintiff posits that under New Jersey law, oppression of a minority shareholder is defined as conduct that frustrates a shareholder's reasonable expectations. Brenner v. Berkowitz, 134 N.J. 488, 506 (1993). Plaintiff submits that such conduct may include interfering with a shareholder's

role as a director or employee, thereby violating their reasonable expectation of secure employment or meaningful participation in the business's management. Muellenberg v. Bikon Corp., 143 N.J. 168, 180 (1996). Plaintiff alleges that the record establishes that Practice Defendants engaged in deliberate actions which excluded Dr. Ho from fulfilling the key leadership position she had fulfilled since 2006 and denied her access to information as an effort to effort to exclude Plaintiff from her leadership role and full participation in decision making affecting the practice. Plaintiff maintains that this violated her reasonable expectations of meaningful participation. Plaintiff alleges that Practice Defendants retained separate counsel, without Plaintiff's knowledge and excluding her on the retainer agreement, to advise them on significant decisions, including the removal of Dr. Young. Plaintiff contends that Practice Defendants deliberately withheld material information, severely undermining's Plaintiff's role and constituting oppressive conduct. Plaintiff argues that Practice Defendants did not follow proper procedure or act in good faith when holding the May 24 and 28, 2019 meetings, by not consulting Plaintiff as an "A" shareholder and the senior-most officer after Dr. Young.

To rebut Practice Defendants' claim that Plaintiff is no longer a shareholder, Plaintiff submits that New Jersey courts have ruled that an oppressed shareholder's claim cannot be extinguished merely because the majority shareholders successfully forced that individual out of the company. Brown v. Brown, 323 N.J. Super. 30, 39 (App. Div. 1999). Plaintiff contends that her shareholder status did not automatically terminate upon resignation. Plaintiff alleges the contractual terms require more than an expression of intent and require action by the company, which did not occur in this case. Plaintiff asserts that the MAG Shareholders' Agreement provides "[i]n the event of a Shareholder's withdrawal or termination…[t]he Withdrawing Shareholder, or his/her estate, shall sell, and the P.A. shall purchase, all of the Stock owned by such shareholder

at a Closing to be held pursuant to Section 12 of the Agreement." (Defs.' Ex. B ("MAG Shareholder's Agreement"). Plaintiff alleges that Practice Defendants did not tender or offer checks to Plaintiff until after this litigation had begun—and after the sixty-day timeframe set forth in the MAG Shareholder's Agreement. Plaintiff therefore argues that Practice Defendants have waived their right to purchase Plaintiff's shares. See, e.g., Evcco Leasing Corp. v. Ace Trucking Co., 828 F.2d 188, 195 (3d Cir. 1987) ("It is well settled that waiver may be established by conduct inconsistent with claiming the waived right or any action or failure to act evincing an intent not to claim the right").

Plaintiff claims that she is entitled to money damages even under the oppression statutes because New Jersey law allows courts to award monetary damages when appropriate in cases of oppression: "[A] court of equity undoubtedly has the authority and flexibility to fashion a remedy, which may include monetary damages, in order to ameliorate the wrong." Walensky v. Jonathon Royce Intl., Inc., 264 N.J. Super. 276, 279 (App. Div. 1993). Plaintiff submits that even if shareholder oppression is not fully established, courts retain broad equitable powers to fashion appropriate remedies, including monetary damages. Sipko v. Koger, Inc., 251 N.J. 162, 180–81 (2022).

Next, Plaintiff alleges that Practice Defendants breached the implied covenant of good faith and fair dealing. Plaintiff submits that under New Jersey law, "every contract in New Jersey contains an implied covenant of good faith and fair dealing" obligating "both parties in a contract to take such actions, which . . . are necessary to carry out the purpose for which the contract was made and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract" without legitimate purpose. Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 417-18, 420 (1997).

Plaintiff argues that she had enforceable contracts with the Practice, providing certain rights and benefits to Plaintiff, including a role on the Board of Directors, the opportunity to position herself as a trusted leader and steward of the organization, and a meaningful role in decision-making processes that directly impacted the operation and governance of the Practice. Plaintiff alleges that Practice Defendants breached this covenant by marginalizing Plaintiff through bad faith actions designed to diminish her authority and influence within the organization, without any legitimate purpose. Plaintiff maintains that regardless of whether Practice Defendants acted in accordance with their various agreements, a breach of the implied covenant of good faith and fair dealing can occur even if the express terms of a contract have not been violated. Sons of Thunder, 148 N.J. at 422-23. Plaintiff contends that whether she was constructively discharged is irrelevant to her claim for breach of the implied covenant and that the key question is whether Practice Defendants' actions during the course of the contractual relationship destroyed or injured Plaintiff's benefits under the agreements.

Plaintiff alleges that Practice Defendants breached their fiduciary duties. Plaintiff submits that "[t]he essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position." McKelvey v. Pierce, 173 N.J. 26, 57 (2002). Plaintiff provides that the fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care. F.G. v. MacDonell, 150 N.J. 550, 564 (1997). Plaintiff alleges that in New Jersey, it is well-established that shareholders in closely held corporations owe each other fiduciary duties similar to those in partnerships. See, e.g., Muellenberg v. Bikon Corp., 143 N.J. 168, 177 (1996). Plaintiff argues that Practice Defendants breached their fiduciary duties because Plaintiff was excluded from full participation in crucial

decisions and denied access to important information, despite her role as a director, managing member, and Vice Chairperson.

Practice Defendants rely on Namerow v. PediatriCare Assocs., LLC, 461 N.J. Super. 133, 139 (Ch. Div. 2018). Plaintiff distinguishes Namerow from the instant matter as the issue in Namerow was whether the parties should pay out a retiring member based on a net worth valuation of the company or a fair market valuation of the company. Plaintiff provides that the court held that the plaintiff could not use a fiduciary duty claim to force valuation terms different than those previously agreed upon by the parties. Id. at 146–47. Plaintiff asserts that if her fiduciary duty claim in this case were so intertwined with a disputed amendment, as was the case in Namerow, Practice Defendants' argument may be applicable, but as the matter currently stands, it is not. Plaintiff therefore argues that her breach of fiduciary duty should not be subject to summary judgment.

Plaintiff alleges that Practice Defendants breached their contracts with Plaintiff. Plaintiff submits that to establish a breach of contract claim, a plaintiff has the burden to demonstrate that: (1) the Parties entered into a valid contract; (2) Defendants failed to perform their obligations under the contract; and (3) Plaintiff sustained damages as a result. Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007). Plaintiff addresses each alleged contract individually.

First addressing the Practice's Employment Agreements, Plaintiff argues that under New Jersey contract law, when multiple documents are executed simultaneously and address the same subject matter, they are treated as a unitary contract and interpreted together. See Kroblin Refrigerated Xpress, Inc. v. Pitterich, 805 F.2d 96, 107 (3d Cir. 1986). Plaintiff asserts that in this case, the Employment Agreements were executed on the same day, cross-referenced each other, and collectively outlined the operating framework for the Practice, as well as Plaintiff's role within

it, and therefore argues that they should be read together. Plaintiff alleges that the Practice breached these agreements by excluding Plaintiff from legal discussions regarding the Practice, withholding material information from her, scheduling meetings she could not attend, and changing the locks to the office without informing her.

Plaintiff maintains that Practice Defendants' interference with Plaintiff's duties amounted to a de facto demotion, actionable under New Jersey law, even in cases where the employment agreement allows termination without cause. See, e.g., Kass v. Brown Boveri Corp., 199 N.J. Super. 42, 46-55 (App. Div. 1985). Plaintiff contends that her responsibilities as Vice Chairperson and Director were integral to her employment, and her exclusion from these duties represents a breach of these agreements. Plaintiff contests Practice Defendants' classification of her alleged exclusion as dissatisfaction or interpersonal conflict. Plaintiff provides that constructive discharge can be found even in the absence of sexual or racial discrimination.

Plaintiff submits that the "obligation" to do what is necessary and reasonable to remain employed is the standard against which the intolerable behavior is measured, not an obligation to tolerate behavior which would otherwise be inconsistent with the reasonable performance of her duties. See, e.g., Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 276 (App. Div. 1996) (considering, once the employer is found to have violated the Law Against Discrimination, the "obligation" in the context of the complained of harassment). Plaintiff alleges that she did everything in her power to continue performing her duties, including seeking feedback from her partners and standing up for herself when her responsibilities were reduced. Addressing the argument for severance payments, Plaintiff acknowledges that at the time of her resignation, she was not yet 55 years old and therefore not immediately entitled to these payments. However,

Plaintiff contends that the guaranteed severance payments represent a category of damages she could have sought had her continued employment been feasible.

As to the alleged Chairperson Agreement, Plaintiff alleges that she agreed with Dr. Young, the then-acting Chairperson, to a plan in which she would be trained and promoted to the position of Chairperson upon Dr. Young's retirement. Plaintiff does not argue that she was elected Chairperson but maintains that she was placed into the "chair-in-training" position. Plaintiff alleges that the Practice has never held an election and that none of the partners objected to her assuming the position. Plaintiff provides that New Jersey law does not require every agreement to be reduced to writing. Borough of W. Caldwell v. Borough of Caldwell, 26 N.J. 9, 24 (1958). Plaintiff asserts that "[a] contract arises from offer and acceptance, and must be sufficiently definite 'that the performance to be rendered by each party can be ascertained with reasonable certainty.'" Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992). Plaintiff submits that "[t]he interpretation of a contract is ordinarily a legal question for the court and may be decided on summary judgment unless 'there is uncertainty, ambiguity or the need for parol evidence in aid of interpretation.'" Celanese Ltd. v. Essex Cty. Imp. Auth., 404 N.J. Super. 514, 528 (App. Div. 2009). Plaintiff argues that in this case, Practice Defendants' arguments reveal that this is a situation where interpretation of the terms is not strictly a legal question, but one in which the intention of the parties is "dependent on conflicting testimony." Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 92 (App. Div. 2001).

Plaintiff alleges that the plan to ultimately appoint Dr. Ho as Chairperson was discussed at a formal meeting with the A partners in early 2019, during which no objections or alternative proposals were raised by Practice Defendants. Plaintiff contends that although silence in response to the presentation of an offer generally does not manifest assent, the relationships between the

parties justify her expecting a reply and, therefore, assuming that silence indicated assent to the proposal. See Weichert Co. Realtors, 128 N.J. at 436.

Next addressing the alleged Vice Chairperson Agreement, Plaintiff argues that despite the absence of a written contract, the long-standing arrangement and course of conduct between the Parties created a reasonable expectation that Plaintiff would continue in upper management unless a new Vice Chairperson was elected. Weichert Co. Realtors, 128 N.J. at 436. Plaintiff alleges that her experience in her role indicates that her responsibilities went beyond the vague descriptions in the written governing documents and involved more administrative work. Plaintiff asserts that by excluding her from meaningful participation in leadership and reducing her role to mere administrative duties, Practice Defendants left her with the empty title of Vice Chairperson.

Plaintiff provides that her promissory estoppel claims on the challenged agreements should be allowed to continue. Plaintiff submits that promissory estoppel applies where a promise was made, relied upon, and resulted in injustice. Pop's Cones, Inc. v. Resorts Int'l Hotel, Inc., 307 N.J. Super. 461, 469-70 (App. Div. 1998). Plaintiff therefore posits that even if Defendants' arguments about the existence of a formal contract were correct, Plaintiff's reliance on the Practice's promises is still compensable under the doctrine of promissory estoppel. Plaintiff alleges that she reasonably relied on promises made by the then-Chairperson, Dr. Young, that she would remain Vice Chairperson and subsequently become Chairperson upon completion of her training. Plaintiff claims that relying on the lack of objection from the Practice members, she undertook additional work, forwent other opportunities, and actively prepared for the transition to Chairperson. Plaintiff argues that Practice Defendants' later alleged refusal to honor these promises, by reducing her role and freezing her out of management, breached these promises and caused Plaintiff a substantial and definite detriment.

Plaintiff contends that both her CEPA and Pierce claims should survive summary judgment. Plaintiff alleges that the supposed HIPAA violation cited to by Practice Defendants involved a redacted document which never left the possession of the Practice and that there was no HIPAA violation on her part. Plaintiff claims that the document was part of her attempt to report a potential HIPAA violation committed by Dr. Pikus, hence the whistleblowing activity. Plaintiff asserts that in response to her report of potential HIPAA violation she was subjected to retaliatory behavior by the Practice Defendants through a threat to terminate her employment for cause during pre-suit discussions between her counsel and the Practice's counsel.

Plaintiff maintains that she was an employee of the Practice for CEPA purposes. Plaintiff provides that New Jersey courts use a holistic approach to determine employee status in cases involving shareholder-directors, focusing on factors such as the individual's ability to influence the organization and their actual power within it. Feldman v. Hunterdon Radiological Assocs., 187 N.J. 228, 244-47 (2006). Plaintiff alleges that she was increasingly marginalized from her leadership role within the Practice, particularly as she had given notice of her intent to resign at the end of that year—leading to her being excluded from all meetings of directors and, as Defendants point out, relieved of scheduling duties. Plaintiff claims that her alleged reduced influence and exclusion from crucial decisions make her an employee for CEPA purposes.

Plaintiff further argues that she participated in whistleblowing activity. Plaintiff submits that CEPA protects employees who disclose or object to practices they reasonably believe violate the law or clear mandates of public policy. Dzwonar, 177 N.J. at 464. Plaintiff maintains that her belief that there was a HIPAA violation when Dr. Pikus shared information about Dr. Young's medical procedure was reasonable under the circumstances. Regarding any allegation that Plaintiff's report of the violation to the victim as opposed to her superior was insufficient for a

CEPA claim, Plaintiff explains that there is a conflict between the definitions in CEPA and a physician's responsibilities under HIPAA as HIPAA requires notification to the individual. See 45 C.F.R. § 164.404. As to Plaintiff' Pierce claim, Plaintiff provides that this was pled in the alternative to Plaintiff's CEPA claim, and thus CEPA's waiver provision does not apply. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980).

Plaintiff alleges that she was defamed by Practice Defendants' accusations of a breach of HIPAA. Plaintiff submits that defamation requires showing that: (1) the defendant made a false and defamatory statement concerning the plaintiff; (2) the statement was published to another person; and (3) the defendant acted negligently or with actual malice. G.D. v. Kenny, 205 N.J. 275, 292-93 (2011). Plaintiff accuses Practice Defendants of mischaracterizing her testimony as an admission of a HIPAA violation. Plaintiff maintains that she explicitly denied any conscious or intentional violation of HIPAA, and further that she never disclosed any patient information (Ex. D, 2023 Ho Dep., 40:13-42:6; Certification of Maggie Ho. ¶ 150). Plaintiff contends that the "substantial truth" exception does not apply because the core of the accusation, that Plaintiff violated HIPAA, is allegedly false. Plaintiff maintains that Practice Defendants shared their allegations with Dr. Pikus and Dr. Shore, satisfying the publication requirement.

Finally, Plaintiff argues that her claims regarding the restrictive covenants are not moot. Plaintiff claims that she complied with the restrictive covenants for the entire three-year period, and this compliance limited her ability to seek comparable employment, causing significant financial and professional damages. Plaintiff alleges that she is entitled to damages because while an unlawful contract may not be enforced, a party is entitled to be compensated for the damages caused by their good faith performance of their obligations under the agreement. See, e.g., McAllister v. McAllister Coal Co., 120 N.J. Eq. 394, 401 (Ch. Div. 1936). Plaintiff submits that

the covenants were unlawfully broad under Solari Indus., Inc. v. Malady, 55 N.J. 571, 576 (1970). Plaintiff contends that the Practice does not have a legitimate business interest in restricting competition or protecting confidential business information, patient and referral bases, and investment in training physicians. See Cmty. Hosp. Grp., Inc. v. More, 183 N.J. 36, 58 (2005). Plaintiff asserts that anesthesiologists do not have patient lists or customer bases in the traditional sense, as their services are tied to the facilities they work at rather than individual patient relationships. Plaintiff argues that the restrictive covenants caused her undue hardship due to the alleged excessive geographic and temporal scope. Plaintiff claims that the covenants cover a large portion of the state for a duration of three years.

In reply, Defendants request that portions of Plaintiff's affidavit be stricken. Defendants submit that under the sham affidavit doctrine, courts should disregard an "offsetting affidavit that is submitted in opposition to a motion for summary judgment when the affidavit contradicts the affiant's prior deposition testimony." Shelcusky v. Garjulio, 172 N.J. 185, 194 (2002). Defendants provide that several of Plaintiff's statements in her certification are inherently irreconcilable with her deposition testimony and should be stricken, including but not limited to allegations of improper notice of the May 28, 2019 meeting and the date of her resignation. Next, Defendants maintain their arguments as to why Plaintiff is no longer a shareholder. Defendants allege that that the plain language of the MAG Shareholder's Agreement and AAP Operating Agreement provide that she ceased being a shareholder/member upon her December 31, 2019 resignation.

Defendants allege that even if Plaintiff could proceed with her oppression claims, the allegations cited in her opposition do not support such a claim as a matter of law. Defendants summarize Plaintiff's allegations as (1) excluding her from retention of private legal counsel; (2) scheduling the May 24, 2019 meeting without her and allegedly withholding information; (3)

purportedly excluding her from leadership positions and reducing her duties; (4) installing a security camera; and (5) being locked out of the office for maybe an hour. Defendants posit that none of these allegations constitute oppression. Defendants maintain that they have an absolute right to hire a personal attorney, and that Plaintiff has no right to be represented by the same attorney. Cf. Estate of Kennedy v. Rosenblatt, 447 N.J. Super. 444, 453 (App. Div. 2016). Defendants claim that Plaintiff admitted she received proper notice for the May 28 Special Meeting. MSJ Ex. C, Pl. Dep. at 121:9-19. Defendants further allege that the governing documents also provide that only three shareholders/members are necessary to call a Special Meeting. MSJ, Ex. B ¶ (c)(iii). Defendants assert that Plaintiff fails to cite evidence to support her broad allegation that she was somehow excluded from leadership positions. Defendants argue that Plaintiff's testimony that she has no recollection of any duties Defendants reduced besides her scheduling duties—which were not removed until after she noticed her resignation—undermines this allegation. Defendants contend that the fact Plaintiff places substantial attention on being locked out of the office for possibly an hour does not establish oppression as Plaintiff was given the key that same afternoon or evening and it never happened again.

Additionally, Defendants argue that the alleged Chairperson and Vice Chairperson agreements cannot be enforced because there is allegedly no evidence that the Parties agreed to this arrangement and the governing documents required a vote for Chairperson. Defendants make the same argument for the Vice Chairperson agreement. As to Plaintiff's claims for the implied covenant of good faith and fair dealing and breach of fiduciary duty, Defendants take issue with Plaintiff's reliance on her affidavit for the same reasons as alleged above. Defendants allege that Plaintiff fails to cite any evidence on how any "bad faith" act caused her any damage under any

specific agreement. See Luongo v. Vill. Supermarket, Inc., 261 F. Supp. 3d 520, 531-32 (D.N.J. 2017).

Turning to Plaintiff's constructive discharge claim, Defendants argue that Plaintiff does not assert a discrimination claim and there is no evidence that her job responsibilities were reduced to the point she had "nothing meaningful to do with her time." Halbrook v. Reichhold Chems., Inc., 735 F. Supp. 121, 122 (S.D.N.Y. 1990). Defendants maintain that the discrimination cases Plaintiff cites do not support liability as they are discrimination cases. Defendants next assert that Plaintiff's defamation claim must also fail because Plaintiff admitted to violating HIPAA. Pl. Opp. Ex. D, Pl. Dep. at 41:7-42:15. Defendants allege that any discussions Dr. Pikas had regarding HIPAA violations occurred before his deposition in this action in preparation for his testimony. Opp. Ex. F, Shore Dep. at 18:2-21:9; Opp. Ex. J, Pikus Dep. at 144:22-145:14.

Defendants also ask that the Court reject Plaintiff's Pierce and CEPA claims. Defendants contend that Plaintiff did not follow the requirements of CEPA because she did not alert a supervisor of her concerns. Defendants take issue with Plaintiff's alleged attempt to redefine whistleblower under CEPA. Defendants argue that Plaintiff fails to cite evidence of any adverse employment action taken in response to this purported whistleblowing, which occurred after her September 30, 2019 notice of resignation. Defendants provide the letter from MAG's attorney to her attorney referenced by Plaintiff was not a threat and only states that MAG was investigating and evaluating its options. MSJ Ex. P at MHo0275-277. Defendants submit that an employer's investigation of alleged employee misconduct, as occurred here, does not constitute an adverse employment action. See Spinks v. Twp. of Clinton, 402 N.J. Super. 465, 484 (App. Div. 2008).

Finally, Defendants allege that Plaintiff's restrictive covenant claims are moot and lack evidentiary support. Defendants argue that the relief Plaintiff seeks simply does not comport with

the law. Defendants argue that a restrictive covenant that expires by its terms cannot form the basis for a claim for damages. Defendants provide that a claim seeking declaratory judgment for relief from a contractual provision (like a noncompete) becomes moot when that provision expires by its own terms. Stanton v. Greenstar Recycled Holdings, L.L.C., No. 10-5658 (MLC), 2012 U.S. Dist. LEXIS 108289, at *18-19 (D.N.J. Aug. 2, 2012). Defendants maintain that Plaintiff does not allege that she sought to modify or invalidate the restrictive covenants before or during their term or that she was prevented or deterred from challenging the restrictive covenants by any threat or coercion from Defendants.

First addressing, Plaintiff's claims for minority shareholder or member oppression, the Court finds that pursuant to the September 23, 2022 Order, Counts One and Two must be dismissed with prejudice. The Order clearly states that "[i]f it is determined during discovery that Plaintiff is no longer a shareholder, the Counts 1 and 2 will fail." September 23, 2022 Order. At the time of its decision, the Court examined the applicable law but noted there was a question of fact as to whether Plaintiff was still a shareholder. In addition, the Brown case relied on by Plaintiff dealt with the standing to bring a derivative suit, as opposed to an oppressed shareholder claim. See Brown, 323 N.J. Super. at 30. On September 30, 2019, Plaintiff submitted resignation notices indicating she was withdrawing as a shareholder and acknowledging that her shareholder status thus terminated.

It is axiomatic that a non-shareholder cannot be an oppressed minority shareholder. To the extent that Plaintiff contends that she was treated unfairly while she was a shareholder, then she would be permitted to bring a breach of fiduciary duty claim against the other shareholders, which she has done in these proceedings. While there was a delay in receiving the buyout of her shares when litigation ensured, the failure to accept the buyout of the share does not mean that Plaintiff

continues to be a shareholder. The Shareholder Agreement notes that shares are returned to the company if a party rejects the buy-out payment. Further, the governing documents indicate that an individual's status as a shareholder will terminate upon termination of the employment agreement. In addition, the type of relief sought in an oppressed minority shareholder claim, i.e. the appointment of a receiver, special fiscal agent, and/or dissolution, is not the type of relief sought by Plaintiff. Accordingly, no genuine issues of material fact exist as to Counts One and Two.

Next the Court will address Count 3 alleging a breach of the covenant of good faith and fair dealing. To establish a breach of the covenant of good faith and fair dealing, a plaintiff must prove that " (1) a contract exists between the parties; (2) the plaintiff performed under the terms of the contract; (3) the defendant acted in bad faith with the purpose of depriving the plaintiff of rights or benefits under the contract; and (4) the defendant's actions caused the plaintiff to sustain damages." Luongo, 261 F. Supp. 3d at 531-32. However, a breach of the implied covenant of good faith and fair dealing can occur even if the express terms of a contract have not been violated. Sons of Thunder, 148 N.J. at 422-23. Valid contracts exist between the parties and Plaintiff performed on those contracts. Plaintiff argues that Defendants' actions during the course of the contractual relationship destroyed or injured Plaintiff's benefits under the agreements. With respect to the written agreements, Plaintiff's allegations are sufficient.

Plaintiff has not provided evidence to establish the existence of a Chairperson Agreement or a Vice Chairperson Agreement. A vote was never held to make Plaintiff the Chairperson, and her agreement with Dr. Young does not override the procedural requirements for this appointment as set forth in the governing documents. Defendants' alleged lack of objection does not equate to an agreement. As to the alleged Vice Chairperson Agreement, Plaintiff was properly voted into the position, but no contract exists to establish any additional rights or benefits awarded to the Vice

Chairperson. As Vice-Chairperson, Plaintiff was only entitled to the rights set forth in the governing documents. Therefore, Plaintiff cannot rely on either alleged agreement to support any of her claims, including the breach of the covenant of good faith and fair dealing. Thus Count 3 of the Complaint is dismissed as to the claims related to the alleged Chairperson and Vice-Chairperson Agreements.

Counts 4 and 5 allege a breach of fiduciary duties. A claim for breach of fiduciary duties requires Plaintiff "show that: (1) the defendant had a duty to the plaintiff; (2) the duty was breached; (3) injury to the plaintiff occurred as a result of the breach; and (4) the defendant caused that injury." Namerow, 461 N.J. Super. at 146. Shareholders in closely held corporations owe each other fiduciary duties similar to those in partnerships. See Muellenberg, 143 N.J. at 177. Nonetheless, "[t]here is no valid claim for breach of fiduciary duty based on members in a member-managed company acting in conformity with the provisions clearly set forth in the Agreement." Namerow, 461 N.J. Super at 147. Plaintiff argues that Practice Defendants breached their fiduciary duties because Plaintiff was excluded from full participation in crucial decisions and denied access to important information, despite her role as a director, managing member, and Vice Chairperson. Plaintiff has provided evidence indicating that she was essentially frozen out of the Practice. Plaintiff indicates that Defendants removed her scheduling authority, physically locked her out of the practice, and did not inform her of Dr. Young's buyout or termination. Thus, the motion to dismiss the claim for a breach of fiduciary duty claims is denied.

In addition, the Court finds that a question of material fact remains as to Plaintiff's constructive discharge claims found in Counts 6 and 7. While these claims are typically brought in a discrimination setting, the lack of discriminatory allegations does not preclude the claim.

Plaintiff has submitted evidence of a reduction in her professional responsibilities and behavior by Practice Defendants that a reasonable fact finder could find intolerable.

The Court finds that after giving all favorable inferences to Plaintiff, no questions of material fact exist regarding Counts 8 and 10 as they allege breach of contract for the Chairperson and Vice Chairperson Agreements. For reasons explained above, Plaintiff has not provided evidence to establish the existence of these agreements. However, as to the related promissory estoppel claims in Counts 9 and 11, the Court finds questions of fact. While the agreements themselves may not exist, whether Plaintiff reasonably relied on Dr. Young's promises regarding the alleged agreements should be left to a jury. Furthermore, Plaintiff was voted in as Vice-Chairperson and performed duties in that same capacity outside of the ones listed in the governing documents. Thus, questions of fact exist as to the true scope of her duties as Vice-Chairperson.

Turning next to Plaintiff's CEPA claim, the Court finds that no question of material fact exists. A claim under CEPA requires a plaintiff to demonstrate that "(1) he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) he or she performed a 'whistle-blowing' activity . . . ; (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action." Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003). No such whistleblowing activity took place. Plaintiff argues that there is a conflict between the definitions in CEPA and a physician's responsibilities under HIPAA as HIPAA requires notification to the individual. See 45 C.F.R. § 164.404. This may be true, but it does not change the requirements of CEPA. To bring a CEPA claim, Plaintiff had to engage in whistleblowing activity as defined by CEPA. Plaintiff did not attempt to share the alleged HIPAA violation with anyone at MAG or AAP. Therefore, Plaintiff

did not engage in whistleblowing activity, and the CEPA claim fails. However, questions of fact remain as to Plaintiff's Pierce claim, which was pled in the alternative and does not have the same technical deficiencies.

The Court finds that a question of material regarding Count 15's claim for defamation. While it is true that "[t]ruth is an absolute defense to a defamation action and defeats such an action 'even when a statement is not perfectly accurate,'" it is unclear that such a truth is present here. G.D., 205 N.J. at 293. Defendants cite to Plaintiff's deposition, but she never admits to having violated HIPAA. Plaintiff only agrees that she could have done a better job to abide by its policies.

Finally, the Court finds that there exists no question of material fact as to Plaintiff's request for declaratory judgment regarding the restrictive covenants in Counts 18 through 20. The covenants expired in December of 2022 and are no longer binding or applicable. Plaintiff claims that she is entitled to damages because while an unlawful contract may not be enforced, a party is entitled to be compensated for the damages caused by their good faith performance of their obligations under the agreement. See McAllister, 120 N.J. Eq. 401. However, Plaintiff does not provide any precedent of damages being awarded for overbroad restrictive covenants that are not challenged while they are in effect. Plaintiff does not submit any evidence that she was prevented from obtaining employment after December 31, 2019 because of the restrictive covenants. Moreover, Plaintiff did not seek a ruling that the restrictive covenants were unenforceable. Thus, the claims relating to the restrictive covenants are dismissed.

IV. CONCLUSION

Accordingly, Defendants' motion for summary judgment is granted in part as set forth above.