MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 12

KEVIN GLASSMAN, M.D.,

Plaintiff,

- against -

PROHEALTH AMBULATORY SURGERY CENTER, INC. and PROHEALTH CORPORATION,

Defendants.

Index No.: 00 9774/2001

DECISION AFTER TRIAL

This matter has a long, and some would say tortured, procedural history which is set forth below, as is a description of the parties and findings of fact and conclusions of law. This case was tried over a twelve day period in the summer of 2006 after numerous delays and a counsel change by the defense on the eve of trial. Over 150 exhibits were submitted. Both sides submitted proposed findings of fact and legal memoranda by early December 2006. Plaintiff's findings of fact were fifty-three pages while those of the defense were four pages in length. However, mere length of the argument does not mean your view is correct.

THE PARTIES TO THIS LAWSUIT

The plaintiff in this lawsuit is Dr. Kevin Glassman, a board certified anesthesiologist. (211:22-25) (Glassman).

Defendant ProHealth Ambulatory Surgery Center, Inc., ("ProHealth ASC") is a business corporation formed in 1998 to operate an ambulatory surgery center located at 2800 Marcus Avenue, Lake Success, New York. Defendant ProHealth Corporation ("PHC") provides various services to ProHealth ASC, including administrative staff, human resources, finance and regulatory issues. Where appropriate, the defendants are collectively referred to herein as "ProHealth."

Dr. David Cooper is the President of ProHealth ASC and the Chief Executive Officer of PHC. (Ex. 139. ¶ 1).

Dr. Glassman was employed as Director of Anesthesiology and Medical Director of ProHealth ASC from September 1998 through the date of his termination on April 2, 2001. The terms of Dr. Glassman's employment with ProHealth are set forth in a letter agreement signed by Dr. Glassman on June 18, 1998, and by Dr. Cooper on June 25, 1998, and referred to throughout this litigation as the "Employment Agreement." (Ex. 1) or the "Agreement".

THE PROCEDURAL HISTORY

Dr. Glassman commenced this litigation by filing a Verified Complaint. Following a decision on ProHealth's motion to dismiss, Dr. Glassman served a Verified Amended Complaint dated January 10, 2002. (Ex. 131). ProHealth's Verified Answer and Counterclaims is dated January 25, 2002. (Ex. 132).

In late 2003, ProHealth moved for leave to serve an Amended Answer with Counterclaims. ProHealth's motion was based upon Dr. Glassman's deposition testimony in which he admitted to having withheld certain fees from medical services performed outside the ambulatory surgery center. It was also based upon numerous documents, including bank records

and checks, produced during discovery. (It was at this time that the court was told that counsel for ProHealth would present its findings to the Nassau County District Attorney's Office.)

The motion to amend was granted in part and denied in part in a Decision and Order dated February 3, 2004. ("Motion to Amend Decision"). Defendant thereupon served an Amended Verified Answer and Counterclaims dated February 17, 2004. (Ex. 133). ProHealth's motion to reargue the Motion to Amend Decision was denied by Order dated May 21, 2004 ("Reargument Decision"), which also struck portions of the Amended Answer and Counterclaims. A motion to renew the motion to amend was denied in Decisions and Orders dated March 4, 2005 and March 24, 2005 ("Renewal Decision"). In short, this court held in those decisions that ProHealth was barred by law from receiving fees for medical services provided outside of its ambulatory surgery center. This court held that any provision of the Employment Agreement requiring Dr. Glassman to turn over to ProHealth "outside" fees was void and unenforceable as an illegal contract provision. As a result, the court denied ProHealth leave to assert various contract and tort claims related to the outside fees that Dr. Glassman had withheld from ProHealth. (It was at this point in the procedural history of the case that counsel for ProHealth told the court that the practice the court had found was "illegal" was commonly done all over the State and that this court was destroying a common statewide practice. The court invited a motion to renew and/or reargue which was eventually denied. (See above Decisions and Orders of March 2005.)

In Decisions and Orders dated November 21, 2005, the Appellate Division, Second Department, affirmed this court's decisions and orders on ProHealth's motion to amend, motion to reargue and motion to renew. *Glassman v. proHealth Ambulatory Surgery Center, Inc.*, 23 A.D.3d 522 (2d Dept. 2005); *Glassman v. ProHealth Ambulatory Surgery Center, Inc.*, 23

A.D.3d 523 (2d Dept. 2005). ProHealth's motion for leve to appeal to the Court of Appeals was denied on January 30, 2006. *Glassman v. ProHealth Ambulatory Surgery Center, Inc.*, 2006 N.Y. Slip. Op. 61225 (2d dept. January 30, 2006).

After the conclusion of discovery and after the decisions by the Appellate Division, Dr. Glassman moved for partial summary judgment and ProHealth cross-moved for summary judgment dismissing the Verified Amended Complaint. In a Decision and Order dated April 28, 2006 ("Summary Judgment Decision"), this court granted Dr. Glassman's motion for partial summary judgment and denied ProHealth's cross motion. Specifically, this court granted summary judgment on Dr. Glassman's eleventh cause of action declaring that the restrictive covenant in the Employment Agreement was void and unenforceable as a matter of law, granted summary judgment dismissing ProHealth's fourth affirmative defense (*i.e.*, that plaintiff's claims were barred by his alleged "prior material breach" of the Employment Agreement).

In dismissing ProHealth's fourth affirmative defense, this court specifically held, after reviewing all of the arguments and evidence submitted by the parties, that "as a matter of law, plaintiff is not in breach of the non-solicitation provision, the duty of loyalty, or any other provision of the agreement." (Summary Judgment Decision at 14).

PROHEALTH HIRED DR. GLASSMAN TO DEVELOP AN OUTSIDE PRACTICE
INITIAL DISCUSSIONS REGARDING THE OUTSIDE PRACTICE.

In the spring of 1998, Dr. Glassman was approached by a physician affiliated with ProHealth, Dr. Anthony Ardito, and asked if he would be interested in discussions about developing an ambulatory surgery center. (212:7-16) (Glassman). Dr. Glassman agreed and began having discussions with Dr. Cooper concerning the terms of his employment as Director of Anesthesiology and Medical Director of ProHealth ASC.

From the very beginning, Dr. Glassman and Dr. Cooper discussed having the anesthesiologists employed by ProHealth perform medical services at private physician offices outside of, and unrelated to, the ambulatory surgery center. (1397:5-7) (Cooper) ("he wanted to discuss the possibility of providing anesthesia services with me and a new concept about outside practices"). Dr. Glassman explained that he had developed an existing private office practice that he believed could grow at ProHealth. (414:9-11) (Glassman). Dr. Cooper testified, "he had an idea that we could develop a new book of business together to provide anesthesia services not only at the Am Surg Center and locations in the building but at mobile, I think mobile anesthesia, whatever, outside anesthesia as well." (1400:7-11) (Cooper).

Prior to, and during the entire course of Dr. Glassman's employment with ProHealth, Dr. Glassman had a professional relationship with a Dr. Michael Levin. Dr. Levin would contact Dr. Glassman to inquire if Dr. Glassman could provide anesthesiology services at facilities outside of the ProHealth facility. Dr. Glassman himself did provide such outside services at the behest of Dr. Levin, and at times, Dr. Glassman would, in his capacity as Director of Anesthesiology and Medical Director of ProHealth ASC, arrange for another anesthesiologist employed by ProHealth to provide such outside anesthesiology services.

Dr. Levin provided billing services for the anesthesiology services rendered by either Dr. Glassman or other ProHealth anesthesiologists who provided anesthesia services to the outside referrals from Dr. Levin.

Dr. Glassman received payments at his home address for those anesthesiology services rendered by both Dr. Glassman and other ProHealth anesthesiologists who provided outside anesthesia services from Dr. Levin's outside referrals. Dr. Glassman deposited the

aforesaid payments into his personal account. Dr. Glassman also wrote checks to ProHealth reflecting, in part, the funds he had received from Dr. Levin.

Dr. Glassman retained a pool of funds in his personal account that is comprised of payments for those anesthesiology services rendered by both Dr. Glassman and other anesthesiologists employed by ProHealth who provided anesthesia services to the outside referrals from Dr. Levin.

At no time did Dr. Glassman obtain specific, prior, written permission of Dr. Cooper to provide outside medical services.

PROHEALTH LACKED LEGAL AUTHORITY FOR THE OUTSIDE PRACTICE

As set forth in this court's decision on defendants' Motion to Amend, ProHealth required permission from the New York State Department of Health and the Public Health Council to operate an ambulatory surgery center. To obtain such permission, ProHealth filed a Certificate of Need ("CON") application.

There is no dispute that the CON only requested permission to provide medical services inside the ambulatory surgery center. (1530:20-1531:2) (Cooper). Referring to the possibility of providing medical services outside of the ambulatory surgery center, Dr. Cooper acknowledged, "I am sure there is not a sentence in here [*i.e.*, the CON] that would say that." (1540:5-6) (Cooper).

Dr. Cooper never told Dr. Glassman that ProHealth was not asking for permission to provide outside services. (1544:11-1544:1) (Cooper). Dr. Glassman never read the CON nor even had a copy nor had a reason to request a copy. (1673:3-11) (Glassman). Thus, only ProHealth knew or should have known that it was barred by law from receiving fees for medical

services provided outside of the ambulatory surgery center since the CON never requested such permission. Dr. Cooper did not reveal this information to Dr. Glassman.

Despite lacking regulatory approval to provide medical services outside of the ambulatory surgery center, Dr. Cooper hired Dr. Glassman to develop this outside practice. Dr. Cooper confirmed, in fact, that developing the outside business "was part of the inducement, the enticement to hire him" and "was part of what I hired him to do." (1560:10-1561-1) (Cooper).

The parties negotiated the terms of the Employment Agreement. Both sides were represented by counsel. The final Employment Agreement was signed in June 1998. (Ex. 1).

THE RELEVANT PROVISIONS OF THE EMPLOYMENT AGREEMENT
THE NET ANNUAL ANESTHESIA REVENUE POOL

In addition to a base salary of $350,000, Dr. Glassman was contractually entitled to "salary augmentation" in the form of payments from a Net Annual Anesthesia Revenue ("NAAR") pool. (Ex. 1 at § 6(C)). The manner of calculating the NAAR pool was expressly set forth in the Employment Agreement:

> For purposes of this agreement, the term "Net Annual Anesthesia Revenue" shall mean the amounts actually collected by ProHEALTH ASC from the provision of professional services by anesthesiologists and CRNAs who are employed by ProHEALTH ASC during each calendar year which this Agreement remains in effect, including professional anesthesia services performed at locations other than ProHEALTH ASC (provided ProHEALTH ASC has, in its sole discretion, approved the performance of such outside activities); minus (i) the salary and fringe benefit costs of such professionals during such calendar year and (ii) eight (8%) percent of such collections to defray billing costs.

Thus, to calculate the NAAR, one simply needs to know (a) the amounts actually collected by ProHealth from the provision of professional services by the anesthesiologists and

CRNAs and (b) the salary and fringe benefit costs of such professionals. Section 6(C) of the Employment Agreement is quite clear in declaring that the only subtractions from total collections would be (i) salary and fringe benefit costs and (ii) eight percent of collections to defray billing costs. No other expenses are to be included in the calculation. Once that amount is calculated for a given year, Section 6(C) provides that the salary augmentation pool will consist of 75% of the first $500,000 (*i.e.*, $375,000) and 50% of all amounts in excess of $500,000.

Although Dr. Glassman's Employment Agreement does not expressly state what his share of the NAAR Pool would be, it is clear to the court that Dr. Glassman was entitled to that portion of the pool not contractually allocated to the other anesthesiologists and CRNAs.[1] (378:11-379:5; 555:7-11) (Glassman). Bruce Lederman, the attorney representing Dr. Glassman in negotiations of the Employment Agreement, testified concerning his discussions with ProHealth's attorney, Norton Travis: "We absolutely had a discussion that there was a pie. Certain pieces of it would be given to other doctors. The remainder would be Dr. Glassman's." (730:12-15) (Lederman). ProHealth did not introduce any evidence contesting this interpretation of Dr. Glassman's share of the NAAR Pool.

ProHealth admits that it never made any payments to Dr. Glassman or the other anesthesiologists from the NAAR Pool. It is apparent that such failure led directly to the disputes between Dr. Glassman and Dr. Cooper, resulting in the termination of Dr. Glassman's employment and the institution of this lawsuit. The defense argues there were other reasons for

[1] Each anesthesiologist and CRNA had a separate contract containing a specific percentage allocation of the NAAR Pool. (Ex. 37-39, 42-46).

the termination which justified the termination and were of a material nature, which will be addressed at a later point.

"SEVERANCE" PROVISION OF THE EMPLOYMENT AGREEMENT

Though the contract speaks for itself, it is important to understand the preliminary discussions that predated its signing. They reflect what both Dr. Cooper and Dr. Glassman knew before the contract was signed. As a condition of leaving his employment at Long Island Jewish Medical Center and joining the start-up ProHealth and its nascent ASC, Dr. Glassman requested that his contract guarantee him severance in the event that ProHealth terminated his employment prior to the end of the three-year term. When ProHealth proposed that it be permitted to terminate his employment for "just cause" without paying him the severance, Dr. Glassman rejected the proposal and requested that the term "just cause" be narrowly defined. (Ex. 3 at p. 3).

ProHealth's initial draft of the Employment Agreement listed eight situations that would constitute "just cause" for Dr. Glassman's termination. (Ex. 2 at §9(B)). The parties then engaged in protracted negotiations over this provision and severely limited the situations that would be deemed "just cause" for Dr. Glassman's termination. (216:2-217:7) (Glassman). (224:12-23) (Glassman); see also Ex. 4 at p. 5, Ex. 6 at p. 5.

Special attention was given to the issue of whether a breach of the Employment Agreement by Dr. Glassman would constitute "just cause" for his termination, thereby denying him severance. ProHealth's original draft said that it would if Dr. Glassman "materially" breached the Employment Agreement. (Ex. 2 at §9(B)). Later drafts prepared by ProHealth's attorneys reflect limitation of that provision. (See, e.g., Ex. 4 at §9(B); Ex. 6 at §9(B)).

As agreed in section 9(B)(vii) of the signed Employment Agreement, to constitute "just cause" sufficient to obviate Dr. Glassman's contractual right to severance, he must "materially breach [the] terms and conditions of this Agreement and thereby materially and adversely affect either (i) patient health, safety or welfare or (ii) the operations of ProHEALTH ASC, after receiving thirty (30) days notice and opportunity to cure such material breach to the reasonable satisfaction of ProHEALTH ASC." (Ex. 1 at §9(B)(vii)).

Thus, the parties agreed that for a breach of the Employment Agreement by Dr. Glassman to constitute "just cause" for his termination without severance, it must satisfy three conditions. First, the breach must be "material." Second, it must "materially and adversely affect" either patient safety or the operations of ProHealth ASC. Third, Dr. Glassman must be given 30 days notice and opportunity to cure the breach.

The mandatory 30 days "notice and opportunity to cure" must comport with Section 20, which states as follows:

> Any notices required or permitted to be given under this agreement shall be sufficient if in writing, and sent by registered or certified mail, return receipt requested to your residence (in the case you) or to the principal office of ProHealth ASC (in case of ProHealth ASC).

(Ex. 1 at §20) (Emphasis added).

During the trial, the parties argued over the meaning of Section 20 and its impact on Section 9(B)(vii). After affording the parties full opportunity to litigate the issue, this Court ruled as a matter of law that the notice required by Section 9(B)(vii) must be in writing. (725:6-15) (Court).

When it terminated Dr. Glassman's employment, ProHealth maintained that the termination was pursuant to Section 9(B)(vii) of the Employment Agreement. (Ex. 25). Throughout most of this litigation (pre-trial), ProHealth continued to justify the termination solely with reference to Section 9(B)(vii). For example, see e.g., Ex. 132 at Counterclaim ¶8 (ProHealth's initial Verified Answer and Counterclaims); Ex. 133 at Counterclaim ¶39 (ProHealth's Verified Amended Answer and Counterclaims). Until the trial, ProHealth never claimed any other justification for Dr. Glassman's termination.

REQUIRED PENSION CONTRIBUTIONS

Under section 2(d) of the Employment Agreement, ProHealth was required to make a minimum contribution of $10,000 per year to a pension plan for Dr. Glassman. No such contribution was ever made. (256:13-15; 324:2-4; 382:20-24) (Glassman); (1522:17-22) (Cooper). Said failure predates any claimed breach by plaintiff. Defendants argue that their accountant told them that to make such a contribution for one employee would require similar contributions for all employees. This is not a defense to the failure nor does it explain why an alternate methodology could not have been arranged.

DR. GLASSMAN'S EQUITY PARTICIPATION IN PROHEALTH

Section 7 of the Employment Agreement grants Dr. Glassman the option to purchase up to 3% of the issued and outstanding stock of ProHealth ASC in the event that there is a "sale of all of the issued and outstanding stock or substantially all of the assets of ProHEALTH ASC to a third-party purchaser." Only three situations can defeat that option: (i) If Dr. Glassman were to quit before the end of his contract; (ii) if he were fired for "just cause" as defined in Section 9(B); or (iii) if he rejected ProHealth's offer to renew the Employment Agreement on the same terms and conditions. (Ex. 1 at § 7(d)).

ProHealth has never claimed that the first or third condition ever occurred. Thus, the only issue remaining regarding Dr. Glassman's continuing right to a 3% option is the question of whether his termination satisfied the definition for "just cause" under Section 9(B) of the Employment Agreement.

THE EMPLOYMENT AGREEMENT'S TWO "ATTORNEYS FEES" PROVISIONS

The Employment Agreement contains two provisions regarding an award of attorneys' fees. The first, Section 11(E), directs the Court to award attorneys' fees and other costs to the "prevailing party" in "any litigation at law or in equity with respect to any breach of the restrictive covenant." The second, Section 31, provides that "[i]n the event that either party brings litigation to enforce the terms of this Agreement, the prevailing part shall be entitled to all expenses incurred, including but not limited to reasonable attorney's fees and court costs." (Ex. 1 at § 31). Both sections are applicable to this litigation.

EVENTS LEADING UP TO DR. GLASSMAN'S TERMINATION

During the trial ProHealth argued that Dr. Glassman's actions impaired the operations of the ASC. One of the arguments was that the ASC had a busy operating room and Dr. Glassman's actions impaired functioning of the operating room.

However, ProHealth's suggestion of a busy Operating Room is belied by its own witnesses. Head Nurse Maureen Lawrence started work at ProHealth in March or April of 1999. (939:3-4) (Lawrence). At that point, ProHealth still only "had a few cases.' (941:11) (Lawrence). While the case load then "grew a little bit," unfortunately, "[i]n 2000 it was still not picking up." (943:2-3) (Lawrence). Another ProHealth witness, Certified Registered Nurse

Anesthetist ("CRNA") Claude Baconcini agreed that in the beginning, things were not very busy. (988:13-15) (Baconcini).

By contrast, as Dr. Cooper admitted, during this same period the off-site anesthesia practice "grew in the off-site practices dramatically." (1404:13-14) (Cooper). According to Dr. Cooper, the operating room schedule was not growing "dramatically." (1406:4-6) (Cooper). He then volunteered that "It grew exponentially after Dr. Glassman was terminated." There was no proof submitted to support his gratuitous statement. Further, if he is referring to the off-site practice it was found to be illegal by this court and the Appellate Division. If he was referring to the on-site surgical practice, its growth, if any, is unrelated to the presence or absence of Dr. Glassman. Dr. Glassman was not out there on the streets of Nassau County beating the bushes for more surgery patients.

In reference to ProHealth's financial health, Dr. Cooper testified: "We were losing a tremendous amount of money." (1410:3-4) (Cooper). Even ProHealth's accountants expressed "substantial doubt about its ability to continue as a going concern." (Ex. 105 at 100601; Ex. 108 at 100613). These financial losses apparently caused Dr. Cooper to reject the legally binding contracts he had signed with his employees.

Starting in mid-1999, Dr. Cooper informed Dr. Glassman that he would not make various payments required by the Employment Agreement and similar provisions in the contracts of the other anesthesiologists. (328:15-19; 329:7-12) (Glassman). Dr. Cooper reiterated this position in an email dated October 1, 1999: "Kevin, I think you need to show me that you are really concerned about the bottom line and you wouldn't even conceive of taking

money out of any pool if I am still personally in the whole [sic] downstairs."[2] (Ex. 8). Dr. Cooper's reference to "any pool" meant the contractual NAAR Pool for Dr. Glassman and the other anesthesiologists. (327:13-328:3) (Glassman). That email was not the first time Dr. Cooper had made such a statement. (328:15-19; 329:7-12) (Glassman).

Dr. Cooper continued to remind Dr. Glassman that he would not honor the written agreements that he had signed to induce the anesthesiologists to become employees of ProHealth. In early January 2000, it was Dr. Cooper who further escalated the tension at ProHealth by sending the following email to Dr. Glassman:

> Kevin, you need to stop referring to "the contract" in your dealings with us. There are substantial losses downstairs and you must be flexible on all fronts including the number of anesthesiologists, staff, and even salaries, regardless of any contract. If we are in this for the long haul you must re-look at the bottomline, all our costs and how they are allocated. The only individuals not effected [sic] by these huge losses to date, are you and your anesthesiologists.

(Ex. 9).

Dr. Cooper's reference to "the contract", was to Dr. Glassman's Employment Agreement. (330:20-24) (Glassman). Dr. Glassman and Dr. Cooper had had similar oral conversations prior to this email. (330:25-331:3) (Glassman).

This critical email confirms that Dr. Cooper knew that the anesthesiologists were entitled to money from the NAAR pool -- that is why they were the only ones "not [a]ffected by these huge losses" -- and that he was unwilling to pay Dr. Glassman and the other anesthesiologists what their contracts required. Instead, he was demanding that they be "flexible on all fronts," including "salaries, regardless of any contract." (Ex. 9.)

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[2] Dr. Cooper's email also attacked Dr. Glassman for "encourage[ing]" the anesthesiologists to take other financial benefits guaranteed by their contracts. (Ex. 8) ("It's bad enough that the others are 'encouraged' to use their $5K a year so they don't lose it!").

Dr. Glassman proposed several alternative ways to restructure the relationship between the Anesthesiology Department and the ASC. (See e.g., Exs. 10, 11 & 13). These proposals offered Dr. Cooper what he wanted: a forfeiture of the anesthesiologists' right to pool payments. (334:5-7) (Glassman).

Dr. Cooper particularly liked one of the proposals (creation of a separate professional corporation) but his father precluded the idea. (1464:5-10) (Cooper) ("Originally it was actually somewhat intriguing" but eventually rejected). (See also Ex. 11 (Memorandum from Milton Cooper stating "I told [Dr. Glassman that] David did mention some of the discussions and that David had some enthusiasm to some of the concepts, but I was very unhappy with the idea that was proposed")).

By December 2000, Dr. Glassman found himself caught between the members of his department, who expected to get their contractual pool payments, and Dr. Cooper who was insisting that the pool be waived. (338:7-10) (Glassman) ("The anesthesiologists were asking me 'how are we doing? Will we get a bonus?' They had been working, some of them, for two years on a substandard salary"); (763:7-11) (Wolf) ("[t]hings were heating up because there was, clearly, a discussion going on about whether the members of the anesthesiology department were going to get the bonus that was in their contract").

A critical meeting was held between the anesthesiologists and Dr. Cooper in December 2000. (338:21-339:2) (Glassman). At that meeting, Dr. Cooper announced that he would not make any payments from the NAAR pool because the ambulatory surgery center as a whole was not profitable. (339:13-22) (Glassman). Dr. Cooper determined that new

employment agreements would have to be signed waiving rights to the NAAR pool and that those anesthesiologists who refused would be terminated. (339:23-340:5) (Glassman).

Dr. Cooper admits telling the anesthesiologists at the December 2000 meeting that they would be fired if they did not agree to a change in the pool provision of their contracts. (1589; 20-25) (Cooper); (see also (1590:1-7) (Cooper) ("I told them that if they -- if we couldn't have an agreement, I could no longer employ anesthesiologists here"). Anyone who did not sign the new agreement had the "option" of giving 90 days notice or receiving 90 days notice. (1590:8-12) (Cooper). He even told one of them, Dr. Holly Berns, that the only reason she had not been terminated sooner was that he thought she had agreed to sign the new contract. (1590:15-22) (Cooper).

Dr. Daniel Ulicny, another anesthesiologist, testified at his deposition (which was read into the Trial Record) that he understood that if he did not sign the proposed amendment, his employment would be ended. (929:16-21; 930:14-20) (Ulicny).

In Dr. Cooper's own words, "I told everyone that if they, if we collectively did not come up with a new way to deal with this, then I would have to terminate the whole relationship with the anesthesia group and out source it; that I would have to give everyone their 90 days notice." (926:17-927:4) (Cooper). Dr. Cooper even wrote a letter to one of the anesthesiologists summarizing his December 2000 threat: "Any anesthesiologist who did not like the new terms of the agreement or who did not accept that the 'Old Pool' was being terminated had the option of giving 90 days notice to resign, or receiving 90 days notice." (Ex. 17).

In another letter, Dr. Cooper again confirmed that he refused to make any payments from the NAAR pool because the ASC as a whole was not profitable and that any

anesthesiologist who would not agree to waive his or her rights to the NAAR pool would be fired:

> I had informed Dr. Glassman months before our December meetings that "the pool" could not continue unless the entire ASC was profitable. . . .
>
> I informed you, as well as the rest of the group at our meeting in December, that in the interest of the entire ASC, the "old pool" had to end at the close of 2000, and I was willing to work out a "new Pool" for the future. At that meeting, I stated that I would need to give 90 days notice to anyone who felt they couldn't participate.

(Ex. 27); Accord (1504:14-16) (Cooper) ("Everyone was given contracts in January if they were going to choose to stay.").

Dr. Cooper carried out his threat. When Dr. Dennis Wolf informed Dr. Cooper in January 2001 that he would not sign the proposed amendment to his contract, Dr. Cooper responded, "then I will have to terminate you." (755:16-20) (Wolf). There was no doubt in Dr. Wolf's mind that Dr. Cooper fired him. (776:25-777:5) (Wolf). That conclusion is confirmed by an internal ProHealth document stating that Dr. Wolf had been "terminated" rather than resigned. (Ex. 28). As Dr. Cooper no doubt hoped and expected, Dr. Wolf immediately informed the other anesthesiologists that Dr. Cooper was not bluffing: "When I came out of the office one of the other anesthesiologists, who I think it was Dr. McConnell, was in the hallway. I looked at her and said, 'I just got fired.'" (756:12-15) (Wolf). The resulting turmoil within the Anesthesiology Department was hardly surprising and cannot reasonably be laid at the feet of Dr. Glassman.

Dr. Cooper did not present Dr. Glassman with a proposed amended contract until sometime in late February 2001. (342:7-10) (Glassman). The draft itself is dated February 12,

2001. (Ex. 15). At no time prior to his termination was Dr. Glassman ever informed that the proposed contract was taken off the table. (347:8-11) (Glassman).

Despite ProHealth's claim that Dr. Glassman was in the process of being fired in February 2001, the proposed contract amendment would indicate otherwise. Dr. Glassman was being offered a raise and a bonus to stay. (Ex. 15, ¶¶ 1 & 2). ProHealth was also offering to extend the expiration of his contract from September 1, 2001 to December 31, 2002. (Ex. 15, ¶ 4). Similarly, on February 27, 2001, ProHealth's Board of Directors reappointed Dr. Glassman as Medical Director for the year 2001. (Ex. 69).

In an email dated March 20, 2001, Dr. Glassman informed Dr. Cooper that he was having the proposed contract reviewed by an attorney. (Ex. 18). The attorney wrote to Dr. Cooper on March 21, 2001, indicating that Dr. Glassman was not willing to sign the amendment as drafted. (Ex. 19). Dr. Glassman was terminated less than two weeks later. At no time prior to being fired was Dr. Glassman ever told that termination was a possibility. (374:16-19) (Glassman).

Dr. Glassman was fired on Monday, April 2, 2001. (383:16-23) (Glassman). This was confirmed in a letter from Dr. Cooper sent the next day, April 3, 2001. (Exs. 25, 133, Counterclaim ¶39). This letter confirmed that he was being terminated solely pursuant to Section 9(B)(vii) of the Employment Agreement. Id.

Dr. Cooper conceded at trial that he never sent Dr. Glassman any written notice to cure pursuant to Section 9(B)(vii). (1604:16-20) (Cooper).

Section 6(C) of the Employment Agreement provides that Dr. Glassman would allocate the salary augmentation among all employed anesthesiologists and CRNAs, subject to

the approval of ProHealth's President, Dr. David Cooper, "which approval shall not be unreasonably withheld provided that such salary augmentation is being disbursed in a fair and equitable manner."

As noted above, each anesthesiologist and CRNA was allocated a specific percentage of the NAAR Pool with Dr. Glassman receiving the remaining amount. (730:12-15) (Lederman); (378:11-379:5; 555:7-11) (Glassman). The allocation was done by having Dr. Cooper sign a contract with a specific allocation for the individual anesthesiologists. (253:2-254:20) (Glassman). Each of those contracts was received in evidence. (See Exs. 37-39, 41-46). Exhibit 143 demonstrates the exact percentage allocated by Dr. Cooper to each individual anesthesiologist. (376:21-378:25) (Glassman).

The employment agreements signed by Dr. Cooper for the other anesthesiologists and CRNAs establish that 71% of the NAAR Pool was allocated to others, resulting in Dr. Glassman being entitled to 29% of the NAAR Pool. The following chart demonstrates the final allocation of the NAAR Pool:

Employee	Contractual Share of Pool	Agreement
Baconcini, Claude	10%	Ex. 39, p. 1
Berns, Holly	10%	Ex. 45, § 6
Kandell, Lisa	8%	Ex. 37, § 6
Martinez, Irenio	5%	Ex. 38, § 2
McConnell, Susan	10%	Ex. 43, § 6
Ulicny, Daniel	20%	Ex. 42, § 6
Wolf, Dennis	8%	Ex. 46, § 6
TOTAL TO OTHERS	71%	
Remaining to Dr. Glassman	29%	

An additional anesthesiologist, Dr. Breitstein, had been employed by ProHealth and allocated 20% of the NAAR Pool. (Ex. 41, § 6). Dr. Breitstein ceased being an employee of

ProHealth as of December 31, 1999, when his employment terminated by mutual consent, and no longer received a salary or benefits from ProHealth ASC and no longer turned his fees over to ProHealth ASC. (1605:17-1606:8) (Cooper); (265:9-17; 280:18-22; 281:2-20) (Glassman). Consequently, he was no longer entitled to a share of the NAAR pool. (Ex. 41. § 6) (Dr. Breitstein only entitled to share in the pool, "[d]uring the term of this Agreement").

Following Dr. Breitstein's departure, most of his share of the NAAR pool was allocated to his replacements. Dr. Berns was made a fulltime employee and given an additional 3% share of the NAAR pool. (Compare Ex. 44, § 6 with Ex. 45, § 6). In addition, ProHealth hired Dr. Dennis Wolf and allocated him an 8% share of the NAAR pool. (Ex. 46, § 6).

Dr. Glassman's 29% share of the NAAR Pool satisfied the "fair and equitable" requirement of Section 6(C) when his base salary is compared with that of the other members of the Anesthesiology Department. The total annual salaries for all members of the Anesthesiology Department totaled $1,206,000:

Employee	Salary	Agreement
Baconcini, C.	$90,000	Ex. 39
Berns, Holly	$165,000	Ex. 45
Glassman, Kevin	$350,000	Ex. 1
Kandell, Lisa	$85,000	Ex. 37
Martinez, Irenio	$70,000	Ex. 38
McConnell, S.	$150,000	Ex. 43
Ulicny, Daniel	$190,000	Ex. 42
Wolf, Dennis	$106,000	Ex. 46
TOTAL	1,206,000	

Dr. Glassman's base salary of $350,000 was almost exactly 29% of the total base salaries ($1,206,000) of his department. Consequently, since Dr. Cooper allocated Dr. Glassman 29% of the total departmental salaries, it was certainly "fair and equitable" that he would also receive 29% of the NAAR Pool.

At trial, Dr. Glassman presented a chart, Exhibit 144, showing his calculation of the NAAR Pool. Dr. Glassman testified fully concerning the calculations contained in that document. (379:6-382:6) (Glassman). Exhibit 144 shows that for the period of his Employment Agreement, September 1, 1998 through September 1, 2001, the anesthesiologists were entitled to NAAR Pool payments of $1,688,902. (Ex. 144); (381:21-25) (Glassman). Dr. Glassman's 29% share would, therefore, is $489,782 (excluding interest). (Id.).

The calculation contained in Plaintiff's Exhibit 144 is reproduced here:

	1998-99	2000	1/1/01 to 9/1/01	TOTAL
Anesthesia Revenue	2,052,201	2,981,655	2,174,955	7,208,811
Salary & Fringe	1,590,790	1,329,663	982,466	3,902,919
8% Revenue for billing	164,176	238,532	173,996	576,705
Revenue minus (Sal. & Fringe + 8%)	297,235	1,413,460	1,018,493	2,729,187
75% of first $500,000	222,926	375,000	375,000	972,926
50% after first $500,000		456,730	259,246	715,976
TOTAL NAAR POOL	222,926	831,730	634,246	1,688,902
Glassman 29%	64,649	241,202	183,931	489,782

All numbers for Exhibit 144 come from ProHealth's Responses and Objections to Plaintiff's Second Set of Interrogatories ("Second Interrogatories). (Ex. 136); (379:6-381:9) (Glassman). ProHealth is bound by those answers. Thus, tracking the precise language employed in Section 6(c) of the Employment Agreement, Second Interrogatory number 1 sought "the amounts actually collected by ProHEALTH ASC . . . from the provision of professional services by anesthesiologists and Certified Registered Nurse Anesthetists" during the relevant time periods. ProHealth's answer referred to its Exhibit A which breaks down what it admits were the revenues "actually collected . . . from the provision of professional services by [the] anesthesiologists and [CRNAs]." (Ex. 136, p. 3). Those numbers, on the line labeled "subtotal", are the numbers used in Exhibit 144.

In that Dr. Glassman was terminated on April 3, 2001, the court finds he is not entitled to a share of the entire eight months of revenue in the pool, but only to three months. Without using specific figures, but by averaging the $183,931.00 over eight months Dr. Glassman's share of the NAAR pool in 2001 amounts to $68,974.00. Therefore, the total due Dr. Glassman from the NAAR pool from the date of his employment in 1998 to his termination in 2001 is $374,825.00 (exclusive of interest).

Plaintiff argues that he is entitled to a share of the pool through September 1, 2001. This argument is founded upon an interpretation of the agreement that would extend his time for sharing in the pool based upon the failure to give a 120 day notice. The court finds the plaintiff cannot share in the pool when he was not a contributor to the pool and the extension of the sharing period as profered by the plaintiff is rejected.

During the trial, ProHealth argued that certain revenue generated by Dr. Breitstein while employed by ProHealth ASC should not have been included in the NAAR Pool

calculation. ProHealth's Chief Financial Officer, Gary Tighe, admitted, however, that this revenue has always been carried on the books and records of ProHealth ASC as "anesthesia revenue." (833:21-834:19) (Tighe). In any event, this argument is rejected because ProHealth presented no competent evidence showing an actual calculation of that portion of the revenue generated by Dr. Breitstein that it felt did not fall within the definition of Section 6(C). Mr. Tighe simply stated his unsupported opinion that some of these revenues represented services performed by Dr. Brietstein "but not in his capacity as an anesthesiologist." (830:8-9) (Tighe).

During the trial, ProHealth identified several other expense items that it argued should be included in the calculation of the NAAR pool. These additional items included the cost of drugs and a fee allegedly "accrued to" ProHealth Care Associates, LLP, for space used by one of the anesthesiologists, Dr. Daniel Brietstein. ProHealth's argument finds no support in the language of Section 6(c), which clearly states that the only expenses to be deducted from revenues for purposes of the NAAR Pool are "salary and fringe benefit costs" and "eight (8%) percent of such collections to defray billing costs."

Tighe testified further that there was a time that even he thought Dr. Glassman was entitled to money from the NAAR Pool. (804:12-17) (Tighe). That belief existed on "June 17, 2003," more than two years after Dr. Glassman had been terminated. (804:18-22) (Tighe). Only after he had repeated discussions with Dr. Cooper did that belief change. (See e.g., 835:20-23) (Tighe).

ProHealth argues that even if Dr. Glassman would be entitled to a share of the NAAR pool, the pool was in the "red" at his termination and he, therefore, would not be entitled to any recovery from the pool.

On May 10, 2001, five weeks after, ProHealth's attorneys sent Dr. Glassman's attorneys a purported accounting of the NAAR Pool. (Ex. 29). That document, prepared by Gary Tighe, purports to show that the NAAR Pool was negative, by just $21,626, for the period ending 12/31/00. (Id.)

The evidence at trial established that between the time of Dr. Glassman's firing and the preparation of Exhibit 29, ProHealth engaged in numerous adjustments to its "General Ledger." The cumulative effect of these after-the-fact changes was to make the NAAR pool appear to be negative. For example, ProHealth's post-termination pool analysis includes a $100,000 entry for 1999 identified as "fee for Breitstein from LLP." (Ex. 29).

This so-called "fee for Breitstein" appears to be fictitious. At first, Mr. Tighe testified that this fee "was accrued before Kevin was fired." (844:6-7) (Tighe). Mr. Tighe was then shown a ProHealth "Adjusting Journal Entry" (Exhibit 114) confirming in his own handwriting that this "Brietstein fee," allegedly for 1999, was not even "accrued" until April 27, 2001, several weeks after Dr. Glassman had been fired. (845:12-15; 845:22-24) (Tighe). Upon questioning by the Court, Mr. Tighe could not explain why this 1999 entry was done in 2001, responding simply, "Don't know." (846:6-11) (Tighe). Although supposedly "accrued," Mr. Tighe acknowledged that the fee was never actually "paid." (843:14-19) (Tighe).

Mr. Tighe further admitted that he has never seen any document stating this alleged fee was an actual obligation of ProHealth ASC. (835:3-8) (Tighe). He simply began including it on calculations of the NAAR Pool after Dr. Glassman's termination because Dr. Cooper told him to.[3] (835:20-836:2; 846:19-21; 847:8-12) (Tighe).

[3] Mr. Tighe testified that he made this change "to correct the books." (847:4). It was really a "cooking" of the books.

Other retroactive changes to ProHealth's General Ledger made after Dr. Glassman's termination include a reallocation of certain "global fees" received from the Aetna Insurance Company (Ex. 115), a reclassification of certain "infusion drugs" to the Anesthesia Department (Ex. 116 and 121), reclassification of "infusion drugs to procedure supplies" (Ex. 120), and reclassification of other drugs to the Anesthesia Department (Ex. 123 & 124). (848-7-849:11; 850:19-851:18; 853:17-25; 870:4-23; 886:13-19;) (Tighe).

ProHealth's post-termination pool analysis includes deduction for numerous expenses that are not properly included pursuant to the unambiguous terms of Section 6(C) of the Employment Agreement. The only expenses that should have been included in the calculation were (a) salaries and fringe benefits and (b) 8% of revenue for billing. Consequently, the amounts listed for "Other Anesthesia Costs" ($295,021),[4] "Drug Costs" ($380,321)[5] and "Fee for Breitstein from LLP", ($100,000), should not have been included in the calculation. In addition, the "Management Fee ProHEALTH" ($341,226) exceeds the contractual 8% of revenue formula contained in Section 6(C) of the Employment Agreement. Without going into further detail the court rejects the revisionist accounting of ProHealth.

However, Exhibit 29 introduced through Mr. Tighe is significant because it corroborates the fact that at the time ProHealth terminated Dr. Glassman's employment, its own books and records revealed that Dr. Glassman and the other anesthesiologists were contractually owed money from the NAAR Pool. It is not surprising, therefore, that Mr. Tighe himself thought Dr. Glassman was owed money despite preparing Exhibit 29. That realization no doubt

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[4] No witness from ProHealth was able to justify inclusion of the items listed as "Other Anesthesia Costs." Whatever these costs supposedly represent, they are neither "salaries" nor "other fringe benefits" since those items are listed separately as part of the calculation of "Compensation" on Exhibit 29. (839-40) (Tighe).

[5] Mr. Tighe testified that Exhibit 29 included all drugs used by the ambulatory surgery center, not just drugs used by the anesthesiologists. (837:17-22) (Tighe). "It was all the drugs." (839:5-840:19) (Tighe).

explains Dr. Cooper's insistence that the anesthesiologists agree to waive the NAAR Pool or face termination. Furthermore, it shows that ProHealth engaged in a concerted effort to "re-calculate" its books and records to avoid this contractual obligation.

Consequently, the Court concludes that Dr. Glassman's Exhibit 144 when adjusted for time of termination properly calculates his share of the NAAR Pool. He is owed $374,825 plus interest due to ProHealth's breach of Section 6(C) of the Employment Agreement.

SEVERANCE

Dr. Cooper's letter confirming Dr. Glassman's termination clearly stated that he was being "terminated for just cause pursuant to Section 9B(vii) of your Employment Agreement." (Ex. 25). ProHealth continued to justify the termination solely with reference to Section 9(B)(vii) in its initial Verified Answer and Counterclaims. (Ex. 132 at Counterclaim ¶8). Even after Dr. Glassman admitted withholding certain fees, ProHealth's Verified Amended Answer and Counterclaims still justified his termination by citing only Section 9(B)(vii). (Ex. 133 at Counterclaim ¶39). ProHealth never moved to amend its Answer to assert an affirmative defense justifying his termination on any other grounds.

During discovery, ProHealth was specifically asked to state all reasons justifying Dr. Glassman's termination. In its Responses and Objections to Plaintiff's First Interrogatories ("First Interrogatories"), ProHealth simply listed the ways in which it justified his termination pursuant to Section 9(B)(vii). (See Ex. 135 at responses to interrogatories 10 & 11). ProHealth never amended that response to justify the termination on any other grounds (*e.g.*, on the matters it claims it only learned about during Dr. Glassman's deposition).

WRITTEN NOTICE AND OPPORTUNITY TO CURE

As noted above, ProHealth could not terminate Dr. Glassman under Section 9(B)(vii) unless it gave him 30 days "notice and opportunity to cure." (Ex. 1, § 9(B)(vii)). Reading Section 9(B)(vii) in conjunction with Section 20 of the Employment Agreement, this Court held during trial that the "notice and opportunity to cure" was contractually required to be given in writing. (725:6-15).

Dr. Cooper admitted that ProHealth never gave Dr. Glassman written notice and opportunity to cure. (1604:14-25) (Cooper). Dr. Glassman's termination, therefore, did not meet the express requirements of Section 9(B)(vii) of the Employment Agreement. Up until trial that was the only basis on which ProHealth purported to justify Dr. Glassman's termination throughout this litigation. Consequently, Dr. Glassman's termination was not for the "just cause" claimed in ProHealth's pleadings and he is entitled to contractual severance.

CAN PROHEALTH JUSTIFY DR. GLASSMAN'S TERMINATION BY CLAIMING THAT HE BREACHED THE EMPLOYMENT AGREEMENT?

Throughout the trial, ProHealth repeatedly attempted to justify Dr. Glassman's termination by claiming that he had breached the Employment Agreement. There are three flaws in that argument. First, under the express terms of the Employment Agreement, a breach of contract can only constitute a "just cause" termination denying Dr. Glassman severance if he fails to remedy the breach after receiving 30 days written notice and opportunity to cure. (Ex. 1, §§ 9(B)(vii), 20); (725:6-15) (Court). Since, as the court has found, ProHealth never gave Dr. Glassman "written notice and opportunity to cure" any alleged breach of the Employment Agreement, any such breach does not constitute "just cause" for his termination under the express terms of the Employment Agreement.

Second, the parties agreed that a breach of the Employment Agreement would only be sufficient to deny Dr. Glassman severance if it "materially and adversely affect[ed] either: (i) patient health, safety or welfare or (ii) the operations of ProHEALTH ASC." (Ex. 1, § 9(B)(vii). At trial, ProHealth failed to prove that any alleged breaches of the Employment Agreement adversely affected either patients or the operations of ProHealth ASC.

Third, the issue of whether Dr. Glassman materially breached the Employment Agreement so as to relieve ProHealth of its contractual obligation to pay him severance was already resolved against ProHealth on its motion for summary judgment when the Court dismissed ProHealth's Fourth Affirmative Defense.

In determining the Motion to Amend, this Court authorized ProHealth to assert a Fourth Affirmative Defense, which states: "ProHealth is relieved of its obligations to Plaintiff, if any, as a result of Plaintiff's prior material breach of a written employment agreement between Plaintiff and ASC." (Ex. 133, ¶ 108). This particular affirmative defense had not been raised in ProHealth's original Verified Answer and Counterclaims.

By its Fourth Affirmative Defense, ProHealth included all its allegations regarding Dr. Glassman's withholding of the outside fees, his arrangement with Dr. Michael Levin, and claims related to a biller, Ava Neroda. (Ex. 136 at Response to Second Interrogatory 26).

When Dr. Glassman moved for partial summary judgment seeking, *inter alia*, to dismiss the Fourth Affirmative Defense, ProHealth was obligated to identify each alleged breach and present evidence establishing that it constituted a material breach of the Employment Agreement. ProHealth failed to do so. In granting Dr. Glassman summary judgment dismissing ProHealth's Fourth Affirmative Defense, this Court specifically held, after reviewing all of the

arguments and evidence submitted by ProHealth, that "as a matter of law, plaintiff is not in breach of the non-solicitation provision, the duty of loyalty, or any other provision of the agreement." (Summary Judgment Decision at 14) (emphasis added). This holding constituted "law of the case" barring re-litigation at the trial. What then was left for the court to decide at trial?

THE EVIDENCE AT TRIAL REFUTED PROHEALTH'S JUSTIFICATION FOR DR. GLASSMAN'S TERMINATION.

Up until trial, ProHealth defended Dr. Glassman's termination as a "just cause" termination solely on the grounds that he allegedly "failed to perform his 'credentialing and quality assurance functions' as medical director and promoted a 'divisive atmosphere' in the workplace." (Summary Judgment Decision at 5). (See also Ex. 141 at ¶ 30). The evidence at trial, however, failed to support such claims.

CREDENTIALING OBLIGATIONS OF DR. GLASSMAN.

ProHealth's sole support for its "credentialing" argument was the testimony of Dr. Gary Weissman, Medical Director of PHC (testimony presented on video). (ProHealth presented no evidence that Dr. Glassman failed in his "quality assurance" function). ProHealth claimed that Dr. Weissman was an expert on the applicable requirements of the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO"). On cross examination, however, Dr. Weissman admitted that he never received training on JCAHO requirements for ambulatory surgery centers, never received any certification on JCAHO requirements, never wrote any articles on JCAHO credentialing requirements, never gave expert testimony on JCAHO requirements, and has never been recognized by any court as an expert on JCAHO requirements. (37:20-25; 38:2-39:24) (Weissman). Dr. Weissman also admitted that he has never actually been

the medical director of a hospital or ambulatory surgery center. (35:16-36:6) (Weissman). Despite all of the above weaknesses in Dr. Weissman's background, he still could have given valuable evidentiary testimony, but failed to do so.

Dr. Weissman's opinion was based solely on his "informal review" of certain credentialing files. (31:19-32:7) (Weissman). That "informal review" took place in 2001 or 2002 and Dr. Weissman's testimony was based entirely on his memory from five years earlier of what he thinks was (and was not) in those files. (42:18-43:2) (Weissman). Significantly, ProHealth did not produce those file to substantiate Dr. Weissman's purported recollection.

Dr. Weissman could not corroborate the claim that any alleged deficiencies in those credentialing files were actually Dr. Glassman's job responsibility. For example, Dr. Weissman admitted that no provision of the Employment Agreement assigned that responsibility to Dr. Glassman. (43:3-16; 44:8-45:19) (Weissman). In fact, paragraph 1 of the Employment Agreement expressly states that Dr. Glassman's "specific duties and responsibilities as Director of Anesthesiology and Medical Director of ProHEALTH ASC are outlined on Exhibit A annexed hereto" and neither credentialing nor re-credentialing is specified in that document as a duty or responsibility of Dr. Glassman. (Ex. 1, Schedule A).

Dr. Weissman also conceded that there was no provision in the JCAHO standards that placed this responsibility on Dr. Glassman as medical director. (87:8-89:9) (Weissman). "It doesn't mandate that it has to be the medical director, no." (89:4-5) (Weissman). That concession was particularly significant because Dr. Weissman was being offered as an expert on whether Dr. Glassman had failed in some responsibility placed upon him by JCAHO.

Furthermore, ProHealth never substantiated its claim that there was any deficiency with respect to credentialing or re-credentialing of physicians while Dr. Glassman was employed there. Thus, ProHealth received JCAHO's Official Accreditation Decision Report in June 2000. (Ex. 36). With respect to "Credentialing and Privileging of Licensed Independent Practitioners," it received the highest possible rating, "substantial compliance." (Ex. 36 at 6). At its April 4, 2000, meeting, ProHealth's Board of Directors specifically reviewed the "peer review process" and concluded that it was "acceptable." (Ex. 65). On November 9, 2000, the Medical Executive Committee approved the recommendation of the Credentialing Committee for re-credentialing of various physicians. (Ex. 81). Dr. Weissman was in attendance at that meeting and there is no indication that any committee member found the re-credentialing files to be inadequate in any way.

Dr. Daniel Ulicny served as chairman of ProHealth's credentialing committee. (930:22-931:11) (Ulicny). Dr. Ulicny never heard anyone complain about Dr. Glassman's performance regarding credentialing or re-credentialing. (931:17-21) (Ulicny).

The evidence actually showed that Dr. Glassman tried to improve the re-credentialing system but that Dr. Weissman refused to assist him.[6] On January 17, 2001, Dr. Glassman sent an email to Dr. Weissman requesting his assistance in developing appropriate re-credentialing forms to comply with JCAHO requirements. (Ex. 93); (366:11-367:9) (Glassman). Dr. Weissman never responded to Dr. Glassman's email and never gave him the assistance that was requested. (368:2-13; 369:5-7) (Glassman); (Weissman 80:10-82:16). Dr. Glassman was forced to develop the appropriate forms on his own. (368:14-16) (Glassman). This re-credentialing

[6] Dr. Weissman admitted that this was the type of assistance that he and PHC were contractually required to give to Dr. Glassman (Weissman 82:9-13).

tool was specifically discussed at the February 21, 2001 meeting of the ProHealth Credentialing Committee. (Exhibit 96; 368:17-369:7) (Glassman).

The minutes of a meeting of ProHealth's Board of Directors February 27, 2001, further undermines ProHealth's claim that there was any deficiency with respect to the re-credentialing files. With only Dr. Cooper, Dr. Weissman and Ms. Kubala in attendance, "all recommendations of the [Medical Executive Committee] for credentialing and re-credentialing were accepted" by the Board of Directors. (Ex. 69, item 2). Clearly, then, the re-credentialing files submitted to the Board on February 27, 2001 -- just a few weeks before Dr. Glassman's termination -- were not inadequate or insufficient. Once again the use of Dr. Weisman during trial was an attempt by ProHealth to revise history and it fails.

DID DR. GLASSMAN CAUSE A "DIVISIVE ATMOSPHERE" AT THE ASC?

The evidence produced by ProHealth fails to support its claim that Dr. Glassman created a "divisive atmosphere." It is clear to the court that if there was a "divisive atmosphere" within the Anesthesiology Department it was Dr. Cooper's threat to fire anyone who refused to waive his or her contractual share of the NAAR Pool. A threat, that the staff learned, Dr. Cooper was prepared to carry out. Dr. Cooper argues that Dr. Glassman knew of ProHealth's financial issues and he was supposed to relay the problems to the staff prior to the December 2000 meeting. That in no way makes Dr. Glassman responsible for divisiveness at ProHealth.

The testimony produced on this area included that of Head Nurse Maureen Lawrence. Ms. Lawrence testified simply that the staff became "agitated" when it learned about the contract negotiations between Dr. Cooper and the anesthesiologists. (944:10-945:13) (Lawrence). CRNA Baconcini agreed that the atmosphere before the December 2000 departmental meeting with Dr. Cooper "was fine. . . . I didn't see any sort of problem." (1007:13-19) (Baconcini).

Nurse Lawrence admitted that she never knew that it was Dr. Cooper who was insisting on the contract negotiations and who had told the anesthesiologists that if they did not sign amendments he would fire them. (968:2-21) (Lawrence). Thus, as she admitted on cross-examination: "the atmosphere changed because of the discussion of the contract negotiations. I did not know the content of those negotiations." (969:8-11) (Lawrence).

It does not surprise or shock the court that the anesthesiologists would be upset when they learned that Dr. Cooper refused to make the contractual NAAR Pool payments. Dr. Cooper himself admitted that ProHealth recruited the anesthesiologists at "below market salaries" by promising them payments from the pool. (1412:5-20) (Cooper). Essentially, they were promised a piece of the action which was not forthcoming. CRNA Baconcini confirmed that the NAAR Pool was a significant factor in his decision to accept employment at ProHealth: "I accepted an artificially low salary because I was promised a share of the anesthesia profits at the end of the year, and then on an annual basis to offset that." (987:23-988:2) (Baconcini) (See also 1061:4-6: "the original contract, was money at the end of the year offset by a [n] artificially low salary") (Baconcini).

Thus, it is clear that any morale problems within the Anesthesiology Department were not caused by Dr. Glassman.

DID PROHEALTH BREACH ITS OBLIGATION TO MAKE PENSION CONTRIBUTIONS FOR DR. GLASSMAN?

ProHealth admits that it never made the pension contributions required by Dr. Glassman's Employment Agreement. (1522:17-22) (Cooper). It also failed to make any payment to Dr. Glassman in lieu of the contractually required pension payment. (915:16-25) (Cooper).

Dr. Cooper testified that ProHealth could not make a contribution to its 401(k) plan just for Dr. Glassman. (1492:11-16) (Cooper). Even if that were true -- and ProHealth presented no competent evidence supporting Dr. Cooper's unqualified legal interpretation[7] -- ProHealth did not demonstrate that it could not have made a comparable payment to or for Dr. Glassman (e.g., sometimes known as a "rabbi trust" or "top hat" pension contribution that would not have to satisfy the nondiscrimination standards of a 401(k) plan). ProHealth's excuse notwithstanding, the fact remains that Dr. Glassman was contractually entitled to a $10,000 per year benefit that ProHealth failed to provide, which was in breach of the agreement.

ATTORNEY'S FEES

Section 11(E) of the Employment Agreement directs the Court to award attorneys fees and other costs to the "prevailing party" in "any litigation at law or in equity with respect to any breach of the restrictive covenant."

A second provision of the Employment Agreement, Section 31, provides that "[i]n the event that either party brings litigation to enforce the terms of this Agreement, the prevailing party shall be entitled to all expenses incurred, including but not limited to reasonable attorney's fees and court costs." (Ex. 1, § 31.)

Whether and to what extent attorney fees are awarded will be addressed at the end of the decision.

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[7] For example, ProHealth never called any attorney or other pension expert to testify that he or she had concluded that there was no lawful way for ProHealth to comply with the contractual obligation.

PROHEALTH FAILED TO PROVE THAT DR. GLASSMAN ENGAGED IN ILLEGAL FEE SPLITTING WITH DR. MICHAEL LEVIN.

During plaintiff's direct case, a case for breach by the defendants was meticulously presented and any negative conduct by Dr. Glassman was refuted. Counsel downplayed the self-help tactics of Dr. Glassman in withholding a portion of the funds from ProHealth that had been earned by the anesthesiologists' off-site activities. What was the defense case?

ProHealth spent most of the trial accusing Dr. Glassman of criminality: "[H]e was stealing money from us through his illegal fee splitting with Dr. Levin, Ava Neroda and the various doctors." (35:21-25). See also 190:15-18 ("We know that Ava [Neroda] was a partner in crime with Dr. Glassman. We know that Dr. Levin was the third partner in this criminal conspiracy"); (478:22-23) ("He committed the crime of illegal fee splitting"); 495:10-11 ("she was involved in illegal fee splitting with Levin and Glassman"). ProHealth argued that this alleged illegal fee splitting with Dr. Levin and Ava Neroda justified Dr. Glassman's termination. In fact, ProHealth acknowledged that "[i]t's the only defense we have." (208:7).

There are three main flaws in ProHealth's "only defense." First, the evidence did not support ProHealth's claim that Dr. Glassman engaged in illegal fee splitting with Dr. Levin (or Ava Neroda). Second, because this Court (and the Appellate Division) held that ProHealth was not permitted to receive any of the outside medical fees, it was not harmed in any way by Dr. Glassman's arrangement with Dr. Levin. In fact, ProHealth benefited by it. Third, the Employment Agreement contains a carefully negotiated provision defining the circumstances

permitting a "just cause" termination and ProHealth's claims regarding Dr. Levin are not consistent with any of those grounds.[8] (Ex. 1 at § 9(B)).

THE LEGALITY OF THE ARRANGEMENT WITH DR. LEVIN.

Dr. Michael Levin is a practicing anesthesiologist. (1631:6-10) (Levin). He has a successful practice and often asks other anesthesiologists to cover offices for him if he is not available. (1633:14; 1636:21-23) (Levin). "I was called with schedules and then either I would provide services or I would have somebody else provide those services." (1636:21-23) (Levin). Prior to working for ProHealth, Dr. Glassman occasionally covered for Dr. Levin. (1634:9-14) (Levin). "I would call Kevin to see if he was available to cover offices that were my accounts, and if he was free, then he would do that." (1635:10-12) (Levin).

Dr. Levin had the same arrangement with Dr. Glassman that he had with every other anesthesiologist who covered for him. (1659:19-25) (Levin). Dr. Levin would receive payment from the patient (or the patient's insurance carrier), deduct a 20% fee, and then remit a net check to Dr. Glassman. (1635:10-15; 1638:9-10; 1659:14-22) (Levin). Dr. Glassman did not pay any fees to Dr. Levin. Rather, Dr. Levin remitted fees to Dr. Glassman. (1659:14-1660:2) (Levin).

The 20% fee that Dr. Levin retained compensated him for the services, materials and drugs that he provided for the treatment generating those fees. "Dr. Levin was providing services, equipment, medication at the locations where we would provide services as a subcontractor. . . . An anesthesia machine; anesthesia monitors; emergency equipment;

[8] For example, Section 9(B)(i) of the Employment Agreement states that Dr. Glassman can be terminated "for just cause" upon "a suspension, limitation or revocation of your license to practice medicine in the State of New York which is not stayed within ten (10) days of such suspension, limitation or revocation." It is not enough that ProHealth now claims that Dr. Glassman should have been suspended. Under this section there must be an actual determination and sanction by OPMC before these facts could support a "just cause" termination. Here, OPMC rejected ProHealth's claims.

defibrillators; emergency carts. . . . . Emergency carts; airway equipment; emergency medications." (582:5-24) (Glassman).

As Dr. Levin explained: "I was the one that supplied all of the materials, the interviews with the patients frequently I would conduct. Kevin would come in as the anesthesiologist to do the actual procedure on the day of the services, but I was doing all the scheduling and all the billing." (1635:18-23) (Levin). "I would see the records preoperatively or I would be informed if there was medical issues that needed to be addressed and there were questions that the physicians who were scheduling procedures or that were performing the procedures, not the anesthesia but the surgery, if they had medical questions about preoperative clearances or issues, they would get in touch with me first." (1636:2-8). "I had equipment and supplies in those offices. The equipment would have been anesthesia equipment or emergency medical equipment and the supplies would have been either emergency medical drugs or anesthetics." (1658:21-24) (Levin). Dr. Levin would answer preoperative anesthesia related questions and fielded questions arising postoperatively. (1658:25-1659:10) (Levin).

ProHealth submitted no evidence disputing Dr. Levin's testimony or establishing that this arrangement constituted illegal fee splitting. In fact, the relevant statute, New York State Education Law § 6530(19), expressly permits one physician to share fees with "a professional subcontractor or consultant authorized to practice medicine." Accord 8 N.Y. COMP. CODES R. & REGS. § 29.1(b)(4).

ProHealth repeatedly pressed the Nassau County District Attorney's Office to prosecute Dr. Glassman, providing him with depositions in this matter and "documents produced by Dr. Michael Levin." (Ex. 136, Responses to Second Interrogatories 24 & 25). While not

binding on this Court, the refusal of that law enforcement entity to pursue the matter gives support to the conclusion that these facts do not constitute illegal fee splitting.

Also significant is the Office of Professional Medical Conduct's rejection of ProHealth's argument. (71:22-72:18). ProHealth had represented to this Court at the start of the trial: "It wasn't our side that filed the [OPMC] complaint that started this proceeding against Dr. Glassman, although they are convinced that it was. It wasn't us." (91:6-9). Later in the trial, Dr. Cooper admitted, rather reluctantly, that in fact it was ProHealth that filed the OPMC complaint against Dr. Glassman. (1620:14-1622:4) (Cooper). Surely OPMC would have taken action against Dr. Glassman if these facts amounted to illegal fee-splitting. N.Y. Pub. Health Law § 230 (OPMC to investigate alleged violations of Education Law §§ 6530 & 6531). It is not clear whether the defendants initialed the complaint or merely responded to an OPMC inquiry, but the weight of inferences go to support a complaint by them that initiated the inquiry.

WHAT HARM WAS CAUSED TO PROHEALTH BY DR. GLASSMAN'S ARRANGEMENT WITH DR. LEVIN?

In order to support termination for "just cause" ProHealth not only must prove a material breach, but also that the breach materially harmed or effected ProHealth. ProHealth's repeated arguments regarding Dr. Levin ignore the decisions of this Court and the Appellate Division holding that ProHealth was not permitted by law to provide out services and, thus, receive any of those fees. Thus, whether Dr. Glassman received 100% of the fees or just 80% did not in retrospect harm ProHealth in any way. ProHealth was not entitled to any of those outside fees.

ProHealth actually benefitted by the arrangement between Dr. Glassman and Dr. Levin. ProHealth received substantial money from Dr. Levin. As he explained at the time to ProHealth's Administrator, Cynthia Kubala, Dr. Glassman occasionally wrote a personal check

to ProHealth for the fees he received from Dr. Levin for work done while he was a ProHealth employee.[9] (596:9-23) (Glassman). In other instances, Dr. Glassman simply turned in to ProHealth the checks he received from Dr. Levin. (Ex. 147). See also 1348:19-21; 1349:23-1350:4; 1353:22-1354:4) (Tighe). Dr. Glassman contends that he only stopped turning over this money when Dr. Cooper announced his intent to breach the Employment Agreement. (538:4-539:21) (Glassman).

When Dr. Glassman withheld fees from ProHealth he was unaware that ProHealth was not entitled to share those fees. He was also unaware that Dr. Cooper's CON application had not included a request to provide off-site anesthesiologist services. When ProHealth terminated him they were unaware that he had withheld a portion of the fees for services he and others performed off-site. Does any of this matter to our case? ProHealth contends its after acquired knowledge can support a valid termination.

DR. GLASSMAN DID NOT CONCEAL DR. LEVIN'S INVOLVEMENT WITH THE OUTSIDE PRACTICE.

Throughout the trial, ProHealth insisted that it would prove that Dr. Glassman had intentionally prevented it from learning that Dr. Levin was involved with the outside practice. The evidence, however, proved just the opposite. Dr. Levin's role in arranging off-site assignments was well known at ProHealth as was the fact that he issued payments in the form of checks payable individually to Dr. Glassman and sent to Dr. Glassman's home address. Far from concealing this information, Dr. Glassman disclosed it all at the time. ProHealth did not see it because it did not look.

[9] When Dr. Glassman first started at ProHealth, he was owed money from Dr. Levin for the work he had previously done. Thus, in 1998 and early 1999, some of the checks from Dr. Levin to Dr. Glassman included amounts for services provided before Dr. Glassman became a ProHealth employee. (428:17-429:8) (Glassman).

Even before starting at ProHealth, Dr. Glassman told Dr. Cooper "that he had many connections and friends and that he had experience with an outside practice." (1557:21-22) (Cooper). Dr. Cooper did not ask who was the source of the outside business and evidently did not think it important. (1560:4-9) (Cooper). "I never asked him." (1559:25) (Cooper). Dr. Cooper simply knew that Dr. Glassman had many "friends and relationships" that he would use to develop the outside business. (1560:1-3) (Cooper). "We reached an agreement. I wasn't quite sure exactly how we would proceed. He let -- I asked how would this grow. He did inform me he had a lot of friends in the community, doctors that would refer to him and that's how it would grow." (1400:14-19) (Cooper). "I know that he said he had referral sources and friends." (1404:25-1405:2) (Cooper).

Dr. Cooper was not sure if he heard Dr. Levin's name prior to Dr. Glassman's termination. (1466:3-4) (Cooper). Whether he knew the name or not, he knew about the relationship: "I am aware that there was a friend, referral source. I didn't know if it was a broker, if you will, or somebody who was participating in a practice subcontract situation as it was called by Dr. Glassman." (1464:25-1465:7) (Cooper).

Others within ProHealth clearly knew that Dr. Levin was arranging for some of the outside assignments. CRNA Baconcini admitted meeting Dr. Levin and knowing that he was a source of business for ProHealth's outside practice. "Dr. Levin was a friend of Kevin's, and I was informed that he had some outside practice, and that we were going to be helping him out in the beginning to cover his cases, whenever he couldn't make them." (990:7-11) (Baconcini). "Dr. Levin had a very large practice. He wasn't able to cover all these cases simultaneously. And Dr. Glassman would supplement his manpower by sending our anesthesiologists out for those cases." (992:7-11) (Baconcini).

CRNA Baconcini remembered seeing Dr. Levin at ProHealth "approximately once a month." (990:12-17) (Baconcini). Far from concealing their relationship, Dr. Glassman readily told CRNA Baconcini about the agreement to work together and have ProHealth anesthesiologists cover for Dr. Levin as part of "this outside practice thing." (993:8-10) (Baconcini). CRNA Baconcini was aware of this going on throughout the relevant time period. (993:23-994:14) (Baconcini).

When asked "was it a secret that Dr. Levin was arranging for some of the outside services," CRNA Baconcini candidly admitted, "No." (1041:18-20) (Baconcini). He then answered "correct" when asked if "it was generally known that there were certain offices that the anesthesiologists went to, that had something to do with Dr. Levin." (1043:5-8). There was no secret about that. (1043:9-10) (Baconcini).

Dr. Glassman expressly discussed the Dr. Levin relationship with ProHealth's Administrator Cynthia Kubala. "We had an understanding, Miss Kubala and I, that we were providing the services; we would be paid for those services, and for those particular practices where we were subcontracting or covering for Dr. Levin." (591:2-6) (Glassman). He specifically told Ms. Kubala that "[w]e were providing coverage for Dr. Levin. And he, in turn, would pay us for the services that we provided." (595:17-21) (Glassman). Called as a witness at trial by ProHealth, Ms. Kubala never denied that understanding. Seemingly, the only one at ProHealth who did not know about the Dr. Glassman-Dr. Levin relationship was Dr. Cooper; it appears to the court he did not care so long as the income flow from such services continued.

Dr. Glassman freely told Ms. Kubala that Dr. Levin issued checks payable to Dr. Glassman. The topic came up when Ms. Kubala learned that Dr. Glassman was writing his own personal checks to ProHealth: "[W]hen I was asked why checks were coming back to ProHealth

from my own checking account and paid back to ProHealth -- I was asked by Miss Kubala why I was writing checks back to ProHealth and what were those funds supposed to represent." (596:13-17) (Glassman). Dr. Glassman told Ms. Kubala that Dr. Levin wrote the checks payable to him and that he was withholding that portion of those checks that represented services he provided before becoming a ProHealth employee. (596:19-23) (Glassman).

Ms. Kubala confirmed that she knew at the time that Dr. Glassman had written at least one personal check back to ProHealth. (1554:2-6) (Kubala). She remembered having a conversation with Dr. Glassman about this topic but could not recall the details. "I remember having a conversation with him about why he had written a personal check to ProHealth. And I remember that he -- I don't remember what his answer was specifically. I remember it wasn't anything I found unusual or alarming and that's about it." (1555:7-11) (Kubala).

CRNA Baconcini also knew that when cases were done on the outside by ProHealth anesthesiologists working at one of Dr. Levin's accounts, the patient (or insurance company) checks were paid to Dr. Levin. (1004:23-1005:2) (Baconcini). Dr. Glassman freely told the department that the money would go Dr. Levin with a later reconciliation: "He told us that Dr. Levin's accounts would be reconciled at the end of the month with Dr. Levin. Dr. Levin would go through the cases and figure out what payments would be d[ue] to ProHealth." (1005:18-22) (Baconcini).

Once the Levin checks no longer contained payments for Dr. Glassman's pre-ProHealth work, Dr. Glassman endorsed them directly over to ProHealth. Exhibit 147 consists of a series of checks from Dr. Levin payable to Dr. Glassman but deposited into ProHealth's bank account. (1349:16-19) (Tighe). Each has Dr. Glassman's home address on them and each

was stamped for deposit to ProHealth's bank account at Chase Manhattan Bank. (1349:20-1350:4) (Tighe).

ProHealth has always had copies of the Levin checks deposited into ProHealth's bank account. (1348:19-21; 1349:23-1350:4) (Tighe). Despite always having had copies of these checks, ProHealth never told Dr. Glassman that this was inappropriate. (1350:22-1351:5) (Tighe). ProHealth also received checks issued by Cosmetique (plastic surgery center) to Dr. Glassman. (1351:6-1351:10) (Tighe). This information was in ProHealth's possession years before Dr. Glassman was terminated. (1353:22-1354:4).

PROHEALTH'S ACCOUNT 73

Although Mr. Tighe apparently did not know about it at the time, ProHealth's financial records also included a special "Account 73" which kept track of certain outside medical fees turned in to ProHealth by Dr. Glassman.[10] (Ex. AC; 1343:11-13) (Tighe). This Account 73, established by Ava Neroda – whom ProHealth called a "co-conspirator" of Dr. Glassman – clearly revealed to ProHealth that it had received checks from Dr. Levin.[11] (1279:15-16) (Tighe). As the Court noted during trial: "It also contains a column called Levin checks which reflect checks by Dr. Levin to the account. Now, I will be interested in knowing when someone discovered that a doctor who doesn't work for ProHealth is writing checks to ProHealth and why would such a doctor write checks to ProHealth." (1294:19-23) (Court). ProHealth never produced a witness to answer the Court's inquiry. Apparently, ProHealth never asked the controller from that period, Peter Gordon, if he was aware at the time that these checks

[10] Other than listening to Ava Neroda's testimony at the trial, Mr. Tighe had no personal knowledge of the criteria used for when checks would be posted to account 73. (1345:25-1346:6) (Tighe). He never checked to see if other accounts existed where outside money was also posted. (1346:24-1347:4) (Tighe). He also never spoke with Ms. Neroda's supervisors or co-workers to find out what account 73 was used for. (1347:5-11) (Tighe). He never spoke to anyone else to learn when account 73 was used. (1346:7-17) (Tighe).

[11] Account 73 also identified personal checks from Dr. Glassman written to ProHealth. (Ex. AC).

were being deposited into Account 73, or if he knew about Dr. Levin's involvement in the outside practice. (1521:14-1522:9) (Cooper).

The existence of Account 73 makes plain that Dr. Glassman did not hide these checks from ProHealth. They were obvious from ProHealth's own records, which anyone could have checked at any time during Dr. Glassman's employment. (1333:4-20) (Tighe).

Far from hiding his relationship with Dr. Levin, Account 73 proves that Dr. Glassman turned in documents revealing it. "It was generally known they were going out. If I analyzed the account, I would have questioned why are we still dealing with Levin, still dealing with Cosmetique and where is the money." (1358:8-12) (Tighe). This was not concealed by Dr. Glassman; Mr. Tighe simply never looked. (1361:7-16) (Tighe). It is not surprising that Mr. Tighe admitted that he "failed obviously to, in my fiduciary responsibility, to properly supervise this area." (1361:15-16) (Tighe). Mr. Tighe's predecessor, Mr. Gordon, may have looked at Account 73 and known all about the Levin checks and the Levin relationship but ProHealth never produced him at trial.

Account 73 is also significant because it confirms that Dr. Glassman was endorsing the checks he received from Dr. Levin (and others) over to ProHealth until Dr. Cooper began repudiating the Employment Agreement vis-a-vis the NAAR pool.

WAS THE OUTSIDE PRACTICE ARRANGED BY DR. LEVIN WITH DR. GLASSMAN A MATERIAL BREACH OF THE CONTRACT?

ProHealth argued during the trial that Dr. Glassman breached Section 1 of the Employment Agreement, prohibiting Dr. Glassman from engaging "in any other medical practice activities without the express written consent of the President of ProHEALTH ASC," when he accepted assignments from Dr. Levin as part of the initial outside practice. ProHealth's argument fails for several reasons: First, in granting plaintiff summary judgment and dismissing

ProHealth's Fourth Affirmative Defense, this Court already concluded, "as a matter of law," that ProHealth failed to establish a prior material breach of the Employment Agreement. (Summary Judgment Decision at 14). However, the court allowed testimony on this issue during trial.

Second, the facts at trial disproved ProHealth's claim. The outside practice arranged through Dr. Levin was not an "other medical practice" within the meaning of the Employment Agreement. It did not require separate written consent. Rather, "[Dr. Glassman] was hired to provide these services." (1574:17) (Cooper). Dr. Cooper admitted that he not only authorized but also approved having the ProHealth anesthesiologists provide services at outside medical offices. (923:23-924:21) (Cooper). Dr. Cooper authorized, permitted, wanted and encouraged Dr. Glassman to provide services in those outside offices. (1574:20-24) (Cooper). He did this even though he "didn't know exactly where it was going [to take place]." (924:21-22) (Cooper).

Dr. Cooper authorized Dr. Glassman to engage in the outside practice throughout his employment at ProHealth. (1574:7-13) (Cooper) ("he was authorized"). (The fact that it was later declared illegal by the court does not change what Dr. Cooper did or allowed to happen.) Mr. Tighe confirmed that the outside services were done "with the permission and at the direction of ProHealth". (1329:16-23) (Tighe). According to Dr. Weissman, Dr. Glassman and the other anesthesiologists were not only authorized to engage in the outside practice, "we encouraged them to do so." (932:3-10) (Weissman). Thus, whether that practice was through Dr. Levin or someone else, it did not need separate authorization by Dr. Cooper.

ProHealth tried to suggest that the outside work arranged through Dr. Levin was somehow different than the other outside work. CRNA Baconcini disagreed. He admitted that it was exactly the same. (1042:23-1043:4) (Baconcini).

In fact, the proof showed that Dr. Levin was the main source of the original outside practice that Dr. Cooper had authorized in the pre-employment negotiations. "When we had these discussions about my coming to ProHealth and providing an outside office space practice, this was the practice I had previously engaged in. Dr. Cooper knew I had an existing outside practice that I was going to continue to practice. And that was part of our agreement." (419:9-15) (Glassman). "[Dr. Levin] was the main provider of our office-based practice when I first began at ProHealth." (600:12-14) (Glassman). "[S]ubcontracting for Dr. Levin was a part of that outside practice, which ultimately grew to be a minor part of our outside practice. As we developed our own relationships with community physicians, that had nothing to do with Dr. Levin." (424:18-24) (Glassman).

Finally, for a "breach of contract" to constitute grounds for a "just cause" termination denying him severance, Dr. Glassman was entitled to 30 days written notice and opportunity to cure. (Ex. 1, §§ 9(B)(vii), 20). Although ProHealth was clearly on notice that Dr. Levin was arranging part of the authorized outside practice, it never gave Dr. Glassman notice and opportunity to cure this alleged breach of Section 1 of the Employment Agreement. Why - because it was not a breach? The defense reiterates the argument of fraud and claims the actions of Dr. Glassman precluded them from knowing of the relationship between Dr. Levin and Dr. Glassman and, therefore, the thirty day rule should not apply. The court disagrees and the evidence indicates otherwise.

Bottom line - it is all about the money. ProHealth does not really object to the outside practice or Dr. Levin's involvement. It simply remains annoyed that this court (and the Appellate Division) ruled that it had no right to the money.

Dr. Cooper admitted that ProHealth received and kept over $2 million from the outside gastroenterology procedures alone. (1578:22-1579:20) (Cooper); see also Exhibit A to Trial Exhibit 136 (showing that ProHealth received in excess of $2,000,000 from outside gastroenterology procedures from 1998-2001). All of that was illegal income that ProHealth has nonetheless kept. (Illegal in that ProHealth was not licensed to participate in medical activities outside of the Ambulatory Surgery Center.)

PROHEALTH ASC AND PROHEALTH CORP. OPERATED AS A SINGLE ENTITY.

The evidence at trial established that PHC and ProHealth ASC repeatedly disregarded any separate corporate form. They operated as one unit and, consequently, Dr. Glassman has established the requirements to "pierce the corporate veil" and hold both entities liable for any breach of the Employment Agreement.

The contractual relationship between ProHealth ASC and ProHealth Corp. is set forth in an Administrative Services Agreement ("ASC"). (Ex. 34). Significantly, that document did not result from "arms-length" negotiations but was drafted by one law firm representing both sides. (920:13-921:13) (Cooper). Dr. Cooper was the only officer, director or employee of either ProHealth ASC or PHC who "participated in negotiating the terms of the [ASC]." (921:14-23) (Cooper). The individual purporting to sign on behalf of ProHealth ASC was actually an employee of PHC not ProHealth ASC. (922:3-20) (Cooper).

Although the ASC states that it is effective "as of August 10, 1998" and ProHealth's Board of Directors minutes claim that it was signed in 1998 (Ex. 55), a footer on the bottom of each page of the ASC (including the signature page) indicates that it was not printed until more than a year later, on December 17, 1999. This suggests that the ASC and ProHealth's Board of Directors minutes were backdated.

The ASC provides that PHC's fee would be its actual cost of providing services to ProHealth ASC "plus a markup of five percent (5%)." (Ex. 34 at § 8). In practice, however, PHC's actual fee was calculated as eight percent (8%) of ProHealth ASC's revenues. (922:24-923:6) (Cooper); see also Ex. 105 at 9 ("The fee to the Corp. For these services is 8% of Amsurge's collections"; Ex. 108 at 100620 (same); Ex. 109; Ex. 110; Ex. 111). Because PHC never received "establishment" approval from the New York State Department of Health, (912:4-8) (Cooper), it would appear that the fee arrangement as described constituted illegal fee splitting between ProHealth ASC and PHC in violation of 10 N.Y.C.R.R. § 600.9(c).

The evidence further established that PHC effectively ran the ambulatory surgery center, making all management decisions, including the hiring and firing of employees. Cynthia Kubala, the Administrator of ProHealth ASC, was actually an employee of PHC. (1552:11-14) (Kubala). She had the power and the ability to hire and fire ambulatory surgery center staff. (347:16-348:15) (Glassman).

PHC served as the Human Resources Department for ProHealth ASC. (349:17-22) (Glassman). Applicants to work at ProHealth ASC had to fill out PHC forms. (Ex. 35). ProHealth ASC employees were actually hired by PHC. (965:22-966:12) (Lawrence). Every member of the ProHealth ASC's Board of Directors, except Dr. Glassman, was connected with PHC (349:5-9).

This essentially comprises all the evidence submitted at trial and the court's findings thereon. However, an overview of the procedural history is needed to better understand this case.

CONCLUSIONS OF LAW

The court finds, as set forth in the preceding pages, that the actions of Dr. Glassman that were known to ProHealth did not breach his Employment Agreement. Thus, his termination as of April 3, 2001 was without cause as required by the Employment Agreement, nor was there ever any notice to cure given to Dr. Glassman orally or in writing as required by the Agreement. (Plaintiff's Ex. 1).

Then what was this trial about? The defense argued what could only be called revisionist fact-finding, re what ProHealth did not know and that which it contends was fraudulently concealed from them. It forms the foundation of their claim that they had the right to terminate Dr. Glassman if they had known about his conduct. It is the withholding of fees paid to Dr. Glassman on behalf of ProHealth, but not discovered until his examination before trial, that could be used as a basis for his termination if they had been known prior to his termination.

Initially, it must be pointed out that ProHealth never moved to amend it answer, counterclaims or affirmative defenses to include a defense of fraudulent concealment. All alleged acts of fraudulent concealment were known to the defense at the time the motion to amend the answer was made which included eleven proposed counterclaims.

Earlier claims of illegal fee splitting have fallen by the wayside and claims of illegal conduct as a basis for "just cause" for termination have been abandoned.

What remains are ProHealth's claims that Dr. Glassman breached the Employment Agreement by:

1. Not obtaining written consent to "engage in any other medical practice activities" (accepting referrals from Dr. Levin). The court finds Dr. Glassman did not engage in "any other

medical practice" beyond the off-site anesthesiologist work anticipated by Dr. Cooper and for which he did not need written or oral approval.

2. Violation of 6A of the Employment Agreement which required the completion of forms necessary to assign to ProHealth the right to bill and collect for the professional services Dr. Glassman or his staff of anesthesiologists rendered. In other words, allowing Dr. Levin to bill and collect for services rendered on Dr. Levin's accounts.

> It is hereby agreed that ProHEALTH ASC will bill patients directly for the professional services rendered by you (and the other employed anesthesiologists and certified registered nurse anesthesiologists ("CRNAs")) and shall be responsible for the collection of these professional fees. You agree to complete all required forms, as may be necessary, to assign to ProHEALTH ASC the right to bill and collect for such professional services. You agree that any checks or funds made payable or received by you for professional services rendered are and shall remain the property of ProHEALTH ASC, and you shall promptly pay over or endorse such sums to ProHEALTH ASC for deposit.

The clause was ignored uniformally by both sides and the argument is rejected by the court. ProHealth was aware of the checks from both Dr. Levin and Dr. Glassman and cannot now claim lack of knowledge of Section 6(A) violations (and failure to give notice to Dr. Glassman).

Defendants cannot claim, after the fact, that it had grounds to terminate Dr. Glassman, when the contract contained a "notice and opportunity to cure" provision and the employer has failed to give notice. *Kalus v. Prime Care Physicians, P.C.*, 20 A.D.3d 452,454 (2d Dept. 2005). A federal case rejecting the circuitous reasoning is *Markowitz v. Venture Info. Capital, Inc.*, 129 F. Supp. 2d 647, 653-654 (S.D.N.Y. 2001) ("The factual question regarding cause raised by after-acquired evidence is irrelevant if no notice was given, because without notice there was no contractual 'cause' for termination.").

3. Fraudulently concealing his contract breaches to the detriment of the defendants because, argues defendants, it was impossible for the defendants to discover such breaches and thus give the required thirty day notice to cure.

In setting forth its fraudulent concealment claims defendants argue that "[t]here is an abundance of evidence adduced at trial which shows that Dr. Glassman intentionally concealed his acts of deceit and theft from ProHealth during his employment so that ProHealth was left unaware of Glassman's wrongful acts." Therefore, argues the defense, the court should bar Dr. Glassman from collecting on any of the benefits or compensation he claims he is due despite the fact that no "notice" or "cure" period was given to Dr. Glassman.

The court is compelled to comment at this point that it fails to see the "abundance of evidence" found by the defendants, but not cited to the court. The defense does infer that this "evidence" is Dr. Glassman's not getting written consent from Dr. Cooper prior to rendering outside medical services. Further, it would be his and the other anesthesiologists providing services to Dr. Levin's referrals. The court has previously determined these issues and found they are without evidentiary value.

Perhaps the argument in defendants' papers that is most disturbing is its claim that "[a]t no time prior to or during Dr. Glassman's employment did he disclose to ProHealth that he was providing outside services to Dr. Levin's referrals."

All evidence reflects that ProHealth was fully aware of Dr. Levin and that the anesthesiologists of the ASC were providing off-site services to Dr. Levin's referrals. As shown earlier, the only act of Dr. Glassman of which defendants were truly unaware was the withholding a portion of the fees obtained through off-site work rather than turning them into ProHealth.

The defense relies on the factors set forth in *Morse/Diesel, Inc. v. Fidelity & Deposit Company of Maryland*, No. 86 Civ. 1494, 1992 WL75123 at *3 (S.D.N.Y., March 30, 1992) for the parameters of fraudulent concealment, (1) a relationship between the parties that creates a duty to disclose, (2) knowledge of a material fact by a party bound to disclose such a fact, (3) non-disclosure, (4) scienter, (5) reliance, and (6) damage.

When a party is duty bound to disclose a material fact, non-disclosure of such a fact is tantamount to an affirmative misrepresentation. *Striker v. Graham Pest Control Company, Inc.*, 179 A.D.2d 984 (3d Dept. 1992).

Thus, it could be argued, but not forcefully, that Dr. Glassman had a duty to tell ProHealth he was holding back fees earned from performing off-site services, which, pursuant to the Employment Agreement, belonged to ProHealth. It must be assumed without further evidence that at that time Dr. Glassman had no reason to believe there was anything illegal about his off-site activity.

However, the court has found and continues to find that there was no requirement to get written consent of Dr. Cooper to perform such services. Further, the court has found that ProHealth, though perhaps not Dr. Cooper personally, was aware of Dr. Levin and his relationship with Dr. Glassman and ProHealth.

There is no evidence of ProHealth's "reliance" on what Dr. Glassman did or did not tell them about receiving and keeping funds engendered by the Levin relationship. ProHealth argues they relief on Dr. Glassman as a "rainmaker" to procure outside anesthesiological income. The court believes they did, which is inconsistent with their argument on the "written consent" requirement.

Fraud based upon Dr. Glassman's withholding of fees was rejected by this court and the Appellate Division. The court now finds that the failure to amend the answer, counterclaims or affirmative defense to include fraudulent concealment precludes the consideration of such a claim at this time. All the evidence that was needed to support such an amendment was known to the defense when its motion to amend was filed. However, even if fraudulent concealment defense was allowed by the court, the evidence does not support it. Evidence, the court notes, that must rise to the level of "clear and convincing." *Gaidon v. Guardian Life Insurance Company of America*, N.Y.2d 330, 349-350 (1999).

As previously pointed out, the evidence shows that the employees of ProHEALTH ASC, as well as the books and records of ProHealth, prove that Dr. Levin was a known factor in the ASC and his referrals provide a major source of income to the ASC from the outside practice.

The court further rejects the broad argument that "the entire contract was infected by this fraud" referring to defendants' claim it was "Dr. Glassman's intent to steal from ProHealth and then hide it from them." There is a serious lack of evidence to support this claim.

As a result of the above breaches, i.e. off-site practice without permission of ProHealth and the billing by Dr. Levin, ProHealth argues it was damaged. Specifically, it had scheduling conflicts caused by the anesthesiologists working outside of ProHealth. The court finds there is absolutely no evidence to support this claim.

Because Dr. Glassman "fraudulently concealed" his conduct from ProHealth, which was not discovered until after litigation of this matter was well underway (2003), that ProHealth did not have the opportunity to comply with the thirty day notice to cure prior to discharging Dr.

Glassman. In other words, the damage of the concealment was the inability to fire to cause and with notice to cure and then fire him (assuming he could not have cured).

ProHealth argues that Dr. Glassman's behavior which they contend "'effectively' stole from his employer" rose to the level of "grave misconduct and dishonesty" that precludes him from recovering any further compensation or benefits under his Employment Agreement. See *Hadden v. Consolidated Edison Company of New York*, 45 N.Y.2d 466 (1978).

In *Hadden*, the former vice-president of defendant sought to secure entitlement to his pension plan. He had retired and was collecting his pension when defendant learned that plaintiff had received bribes and gifts from persons in the construction business doing business with defendant and they then revoked his retirement benefits. Prior to his retirement, during an investigation, he had told defendant that certain parties had spoken to him about bribery, but there had been no bribery. Defendant forbore firing defendant based on such information. The trial term had found for defendant, the Appellate Division reversed, and the Court of Appeals reinstated the trial term finding concluding that acceptance of bribes and gifts by an employee from those doing business with the employer and in contravention of defendant's rules (employer's rules) constitutes such grave misconduct as to justify his discharge which is subject to waiver by words or conduct, but any relinquishment of the option to discharge induced by such deceit and device as to constitute fraud is ineffective and not binding.

Relying on *Hadden*, supra, defendants contend that the court can use the after-acquired information (Glassman withholding of fees) to deny the plaintiff the benefits of his contract.

Defendant analogizes our facts to *Hadden*. He reaches into the decision of the court and notes that since Hadden's acts were in "contravention of the [employer's] rules", *Hadden,*

id.) then this court should apply the Court of Appeals reasoning and "should deny Dr. Glassman's claims that he is entitled to additional compensation and benefits pursuant to his Employment Agreement because he intentionally concealed from ProHealth the facts concerning his theft of funds and services throughout the course of his employment and the financial benefits and profits he was wrongfully obtaining as a result." (Defendants' Post Trial Memorandum of Law, p. 12).

Our case is not *Hadden.* In *Hadden* there were affirmative statements made by the plaintiff upon which defendant relied in allowing plaintiff to retire with his full benefits. The Court of Appeals in *Hadden* stated that the waiver of the right to terminate (by the employer) could be rescinded if induced by an affirmative misstatement. In the instant case, there was no affirmative statements made upon which defendants relied. Also, and not to be overlooked, to our knowledge there was no "thirty day notice" nor a right to cure any defect within Hadden's contract. Nor was there a breach by the employer in *Hadden* as this court has found existed in the instant case in which Dr. Cooper refused to distribute the NAAR pool pursuant to the Employment Agreement.

What makes this case dramatically different than any other, including *Hadden*, is that the funds which Dr. Glassman withheld from ProHealth were those obtained from providing anesthesiological services outside the ambulatory surgery center, services which this court has found to have been illegally conducted. (Decision dated February 3, 2004, Motion Sequence #002) (affirmed by the Appellate Division in a decision dated November 21, 2005 and leave to appeal denied by the Appellate Division). Thus, ProHealth admittedly cannot claim it is due any monies from Dr. Glassman from the off-site activities. However, Dr. Glassman was <u>unaware</u> that his off-site anesthesiologist services were being performed beyond the scope of the license

issued to ProHealth by the Department of Health at the time they were performed. Thus, when he withheld part of the proceeds from these services from ProHealth, he was withholding funds which he believed, at least partially, belonged to his employer. His actions were apparently in response to the employer's failure to make distributions from the NAAR pool and were in breach of the Agreement. Thus, he used self-help to balance the equities within the ASC.

The court finds, primarily, that a fraudulent concealment claim does not lie in this matter in that it was never plead as a counterclaim or affirmative defense, nor was there even a request to amend the answer to include an affirmative defense of fraudulent concealment.

Furthermore, the court finds that even if plead (it would have had to have been plead with particularity), the defendants have failed to prove "fraudulent concealment" by "clear and convincing" evidence. *Gaidon*, supra.

It should also be noted that the elements of fraudulent concealment as drawn from *Morse/Diesel*, supra, involved a case with a claim for recission of a contract, making those elements difficult to apply to our specific facts and have not been proven by the defendants. ProHealth has labeled Dr. Glassman's actions as "flagrant acts of dishonesty", which leads us to defendants' final defensive claims.

UNCLEAN HANDS

The final argument of defendants, made for the first time in its Post Trial Memorandum of Law, is that the equitable doctrine of "unclean hands" precludes the plaintiff from recovering under his Employment Agreement any severance pay or other benefits.

> The Court of Appeals had held that the doctrine of unclean hands is applicable to preclude a plaintiff from obtaining relief when such plaintiff is guilty of immoral, unconscionable conduct. There is a caveat that the conduct must be directly related to the subject matter in litigation and the party seeking to invoke the doctrine must have been

injured by such conduct. *National Distillers Chemical Corp. v. Seyopp Corp.*, 17 N.Y.2d 12, 267 N.Y.S.2d 193 (1966).

Defendants admit it is constrained to disregard the issue of Dr. Glassman's retention of fees from the outside anesthesiological services, but urges the court to consider the "nature of the [plaintiff's] conduct, its inherent self-dealing dishonest vis-a-vis ProHealth" in considering the unclean hands argument.

Dr. Glassman withheld fees that should have been paid over to ProHealth and would have gone into the NAAR pool - the same pool that Dr. Cooper refused to distribute to the employees pursuant to their contracts.

Any claim that the alleged undisclosed relationship between Dr. Levin and Dr. Glassman precludes a Dr. Glassman recovery is rejected by the court. Apparently, everyone but Dr. Cooper knew of Dr. Levin and his relationship to the outside practice of the anesthesiologists at ProHEALTH ASC, an outside practice that Dr. Cooper expected Dr. Glassman to perform for the benefit of ProHealth. Dr. Levin's referrals were a prime source of income to the ASC and it was expected by Dr. Cooper that Dr. Glassman would do exactly what he did.

Any claim by ProHealth that the Dr. Levin referrals engendered discord and divisiveness in the staff is rejected outright by the court. All the evidence adduced at trial indicated it was Dr. Cooper's refusal to distribute the NAAR pool and his threats to fire the staff if they did not sign new agreements contributed to the discord and divisiveness of the staff. Thus, all that remains of this lengthy case, its trial and appeals, is whether the acts of Dr. Glassman in failing to turn over the ProHealth part of the fees earned from off-site anesthesia work constitute "unclean hands" and preclude his enforcement of all or any part of the Employment Agreement.

There is a major problem with the defense argument of "unclean hands." Dr. Glassman's complaint is entirely an action at law. "Unclean hands" is an "equitable defense" that has no applicability to an action at law that seeks money damages. See *Greenpoint Mortgage Funding, Inc.*, 12 Misc. 3d 1194A (Sup. Ct., Nassau County, August 11, 2006); *Manshion Joho Center Co., Ltd. v. Manshion Joho Center, Inc.*, 24 A.D.3d 189, 190 (1st Dept. 2005); *Hasbro Bradley v. Coopers & Lybrand*, 128 A.D.2d 218 220 (1st Dept. 1987) lv dismissed 70 N.Y.2d 927 (1987).

Thus, any claim by ProHealth that seeks the equitable relief that may be provided by the "unclean hands" doctrine is denied. Furthermore, "unclean hands" was never asserted prior to the summation stage of trial and in that it is an affirmative defense it is waived if not raised in the pleadings. *Morgan v. Morgan*, 21 A.D.3d 1068 (2d Dept. 2005).

CONCLUSION

The court finds ProHealth breached its agreement with Dr. Glassman without just cause and without notice to cure. Dr. Glassman is, therefore, entitled to his share of the NAAR pool in the amount of $374,825.00; contractual severance of $350,000.00; unpaid pension contribution of $10,000.00. Dr. Glassman is also entitled to a judgment that will allow him to purchase 3% of the issued and outstanding stock of the ASC in the event there is a "sale of all of the issued and outstanding stock or substantially all other assets of ProHEALTH, ASC to a third party purchaser." (Employment Agreement, Sec. 7). Pursuant to the Agreement (Section 11(E)), attorney's fees are provided to "the prevailing party" with respect to any contended breach of the restrictive covenant. Dr. Glassman has prevailed in this regard and is entitled to legal fees for defending and defeating the claim of breach of the restrictive covenant.

Section 31 of the Agreement provides that if either party brings litigation to enforce the terms of the Agreement, the prevailing party shall be entitled to all expenses incurred including reasonable attorney's fees and court costs.

In that Dr. Glassman has prevailed in this litigation, he is entitled to reasonable attorney's fees and court costs to be determined at hearing to be held before Court Attorney/Referee Thomas Dana. Both sides are to contact Mr. Dana to arrange for the hearing and a timetable to submit any attorney fee documentation to Mr. Dana.

The court awards pre-judgment interest to plaintiff from April 3, 2001 to the date of the decision.

Submit judgment on notice.

Dated: February 7, 2007

J.S.C.