October 19, 2012

Re: MUSC Physicians Non-compete Clause

Dear Mr. Satterfield:

This letter is to follow up on a number of conversations and communications you and I have had this week regarding the procedural handling of the proposed MUSC Physicians (hereafter “UMA”) non-compete clause and to set out a list of the substantive issues we have with the proposed non-compete which must be addressed by UMA.

First, I want to thank you for your assistance in negotiating the withdrawal of UMA’s October 15, 2012 deadline for the signing of the non-compete. While I understand that UMA has set new deadlines for the filing of any appeals (November 2nd) and for the signing of the non-compete (November 15th), I want to be very clear that the Faculty Senate does not agree with the unilateral setting of any deadline for this matter. Instead, we believe that any non-compete agreement must be entered into only after all affected parties have had a full opportunity to review the proposed agreement, seek legal advice and negotiate any necessary changes. UMA’s unilateral deadline serves only to put artificial pressure on the affected clinicians. Given the inequality of bargaining power, the inconsistent manner in which the proposed non-compete was presented and the threats of loss of membership, benefits and salary we believe that a transparent negotiation without artificial deadlines pressuring the parties is necessary to avoid the appearance of duress in this process. I ask that you forward this request to UMA’s Executive Board for consideration.

Second, a number of the Faculty Senate’s procedural questions remain unanswered. Attached to this letter is a list of those questions. Note that these questions have been forwarded to the Faculty Senate from concerned UMA members and are issues that have a direct bearing on the application of the non-compete and appeal process. Because UMA has placed deadlines upon the faculty for appeal and/or signing of the non-compete we respectfully request answers to these questions no later than Friday October 26, 2012. Without answers to these important procedural questions UMA members will be unable to make informed decisions as
to the non-compete. Please let me know if UMA is unwilling or unable to provide answers to these questions by the requested date.

Despite the urgent need for answers to these questions, I have forwarded your request to the Faculty Senate that they take no action and wait for UMA’s position statement on the non-compete which I understand will be released no later than Monday, October 22nd. Obviously, the Faculty Senate cannot agree to cease to discharge its duties including advising the faculty. Also, as we discussed, it will be necessary for UMA to address both the procedural and substantive issues (see below) related to the non-compete if we are to make any progress.

As you know, In South Carolina a covenant not to compete will be upheld only if it is: 1) necessary for the protection of the legitimate interest of the employer; 2) reasonably limited in its operation with respect to time and place; 3) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood; 4) reasonable from the standpoint of sound public policy, and 5) supported by valuable consideration. See Faces Boutique, Ltd. v. Gibbs, 318 S.C. 39, 42, 455 S.E.2d 707, 709 (Ct. App. 1995).

The following is a list of the substantive issues contained in the proposed non-compete that we believe are inconsistent with South Carolina law as overly broad, unduly harsh and oppressive and/or unreasonable from a standpoint of public policy. Most if not all of these issues have previously been communicated to UMA by the Faculty Senate or by individual MUSC clinicians. I have included a comparison of the current proposed language with the prior language of UMA’s non-compete agreement for the purpose of demonstrating UMA’s systematic broadening of the non-compete language, thereby refuting UMA’s representation that the proposed agreement is a “narrowing” of the restrictions existing in prior agreements. This list may not be comprehensive as we continue to receive objections and additional issues from clinicians daily and we reserve the right to amend this list:

1. THE DEFINITION OF TERMINATION – The proposed agreement states that it will apply upon “termination” but makes no distinction between voluntary termination, retirement or instances in which a faculty member may be involuntarily terminated. This presents a change and broadening of the prior UMA non-compete language which restricted the application of the non-compete to instances in which faculty voluntarily terminate employment. This broadening of the language is of particular concern to more senior faculty who plan to continue to practice medicine after they retire from MUSC.

2. RESTRICTED AREA – The “Restricted Area” now purports to include the “area within a fifteen (15) mile radius of any “Service Location” at which the clinician rendered services in his or her specialty with the last twelve (12) months of their employment. The proposed agreement specifies the “Tri-county area” and that UMA/MUSC need not now lease/operate the facility from which the radius is measured. Given that many of the MUSC faculty members provide service in their specialty area at multiple MUSC “Service Locations” across the Low Country, the
effect of the new proposed “Restricted Area” is a substantial broadening of the geographic area affected by the non-compete. Based upon the Stringer holding this is an overly broad geographic boundary which will render the non-compete clause unenforceable. See Stringer v. Herron, 309 S.C. 529, 424 S.E. 2d 547 (SC.App.2002) (holding a 15 mile restricted area surrounding the location of three veterinarian practices was overly broad and un-enforceable as most of the patients were within that area.)

3. RESTRICTED WORK ACTIVITIES – The prior UMA non-compete restricted “practicing medicine” within the restricted area. The proposed UMA non-compete has changed the restricted activities to a long list of other types of work (consultant, contractor, etc.) This broadening of the restricted activities has the effect of unreasonably restricting the clinicians’ ability to earn a living and is an overly broad and unenforceable restriction.

4. RESTRICTION ON SOLICITATION OF PATIENTS – The prior UMA non-compete included no restriction regarding the solicitation of patients. The proposed UMA non-compete apparently restricts any communication with patients upon termination. This presents a number of problems including but not limited to the fact that the proposed provision appears to prevent patients from being advised of the clinician’s departure and whereabouts in the event that their care provider leaves MUSC which in turn does not allow for the patients choice or continuity of care. We believe this is a fatal flaw in the proposed non-compete which renders the entire agreement unenforceable as against public policy.

5. RESTRICTION ON REFERRAL SOURCES – The proposed non-compete purports to restrict clinicians from contacting any MUSC’s referral sources. There is no such restriction in the prior UMA non-compete and this restriction is overly broad as referral sources extend across many states. Moreover, the clause does not limit this restriction to referral sources with which individual clinicians have had direct contact while employed at MUSC. See Fournill v. Turbeville Insurance Agency, Inc., 2009 U.S.Dist. LEXIS 16303(D.S.C.2009) (striking down a non-compete that did not limit restriction of referral sources to those that employees had actual contact with during employment.)

6. RESTRICTION ON ADVERTISING – While the proposed non-compete allows “general advertising” it also notes that advertising cannot interfere with, diminish or impair any relationships MUSC has with referral sources. We believe that this language is inconsistent and vague as advertising of one’s services could be viewed as interference with MUSC’s referral sources and relationships. As noted above, we believe the restriction on referral sources is unenforceable.

7. ENFORCEMENT – The proposed non-compete has added “enforcement” language that strengthens and broadens the penalties for perceived violations of the non-compete. The additions include injunctive relief, attorney’s fees incurred in enforcing the agreement, and any damages allowed by common law or equity. In addition,
neither 1x or 1.5x total compensation would be considered reasonable when compared with those stated in non-compete clauses offered in other peer medical groups. Penalties and buy-outs, when specified, are more typically 25-50% annual salary. If a penalty or buy-out is to be specified, it must be reasonable.

8. SEVERABILITY – The proposed non-compete requires clinicians to agree that if any part of the agreement is deemed invalid or overbroad, the remainder of the agreement is unaffected. The prior UMA non-compete did not include this language and the attempt to make the provisions of the non-compete severable is inconsistent with South Carolina Law. See *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 42, 455 S.E.2d 707, 709 (Ct. App. 1995) (Holding that if a covenant not to compete is defective in any one of the necessary factors, the covenant is totally defective and cannot be saved).

9. LACK OF CONSIDERATION – The proposed non-compete sets out four types of alleged consideration in return for the signing of the non-compete: 1) New offer of employment, 2) Renewal of MUSC Faculty Contract; 3) Renewal of MUSC Physicians membership and 4) "Narrowing" of the restrictive covenants from prior agreements. As you and I have discussed at length and as set out in my October 12, 2012 letter, we believe that the only proper consideration listed in the proposed non-compete is a new offer of employment. See *Poole v. Incentives Unlimited, Inc.*, 345 S.C. 378, 548 S.E.2d 207 (2001). This obviously would apply only to new employees whereas the proposed non-compete is apparently being presented as a requirement to all clinicians no matter their date of hire. The remaining three areas of consideration listed in the non-compete are illusory at best and outright misrepresentations at worst.

I look forward to receiving UMA’s position statement and response to the issues addressed herein and appreciate your continued willingness to openly discuss these issues in an attempt to avoid an extended dispute and court involvement. As always, please contact me directly if you wish to discuss this.

Respectfully,

s/Mike Gruenloh

Wm. M. Gruenloh

cc: MUSC Faculty Senate
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