

STATE OF NORTH CAROLINA

CATAWBA COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

Case No.: 07 CVS 2062

WESTERN PIEDMONT ANESTHESIA,
P.A.,

Plaintiff,

v.

DANIEL C. BARNETTE, M.D.,

Defendant, and Third
Party Plaintiff

v.

RONALD C. GILDERSLEEVE, M.D.,
THOMAS R. HILL, M.D., LARRY T.
WILLIAMS, M.D., and TODD W.
MCKENNEY, M.D.

Third-Party Defendants.

**PLAINTIFF'S BRIEF IN SUPPORT OF
MOTION FOR JUDGMENT ON THE
PLEADINGS**

Plaintiff Western Piedmont Anesthesia, P.A. submits this Brief in Support of its Motion for Judgment on the Pleadings.

BACKGROUND

Plaintiff Western Piedmont Anesthesia, P.A. (hereinafter "WPA") filed this action to require Defendant Daniel C. Barnette (hereinafter "Defendant"), a terminated employee, to tender his shares in WPA to WPA in accordance with the terms of a Stockholders' Agreement entered into on January 1, 2003 between WPA and its Stockholders, including Defendant, a true and accurate copy of which is attached and incorporated herein as Exhibit A.

The pleadings filed in this matter reveal that there exists no question of fact that:

- (a) Defendant entered into a valid and enforceable Employment Agreement with WPA, which is attached and incorporated herein as Exhibit B. (See Compl., ¶ 8; Defendant's Answer, ¶ 8).
- (b) WPA terminated Defendant's employment on December 28, 2006. (See Compl., ¶ 9; Defendant's Answer, ¶ 9¹).
- (c) On or about January 1, 2003, the stockholders of WPA, including Defendant, entered into a valid and enforceable Stockholders' Agreement with WPA. (See Exhibit A; see also Compl., ¶ 6; Defendant's Answer, ¶ 6).
- (d) Paragraph 2 of the Stockholders' Agreement states that if a stockholder "*for any reason* ceases to be employed by the Corporation [WPA], he agrees within thirty (30) days thereafter to offer to sell and the Corporation agrees to buy all of his stock in the Corporation in the manner and at the price set forth in paragraph 1(b) of this agreement." (emphasis added). (See Compl., ¶ 7; Defendant's Answer, ¶ 7).

In his Counterclaim, Defendant claims wrongful termination, alleging that WPA terminated his employment in violation of the Employment Agreement. However, based on the authorities and arguments outlined below and the uncontested facts revealed in the pleadings, WPA is entitled to an order compelling Defendant to tender his shares to WPA regardless of the ultimate outcome of Defendant's wrongful termination counterclaim.

ARGUMENT

A review of the pleadings demonstrates that Plaintiff's and Third-Party Defendants' Motion for Judgment on the Pleadings should be granted under Rule 12(c). A judgment on the

¹ Although Defendant alleges that the termination was wrongful, Defendant does not dispute that he has in fact been terminated and is no longer an employee of WPA.

pleadings is designed to dispose of baseless claims that lack any merit based on the face of the pleadings. See Hedrick v. Rains, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283, aff'd, 344 N.C. 729, 477 S.E.2d 171 (1996). A judgment on the pleadings is proper when all material allegations of fact are admitted in the pleadings and only questions of law remain. Watson v. American Nat'l Fire Ins. Co., 106 N.C. App. 681, 683, 417 S.E.2d 814, 816 (1992), aff'd, 333 N.C. 338, 425 S.E.2d 696 (1992) overruled on other grounds by Iesenhour v. Universal Underwriters Ins. Co., 341 N.C. 597, 461 S.E. 2d. 317 (1995). In deciding a motion for judgment on the pleadings, a court may consider written documents that have been attached as exhibits to the pleadings, including documents attached as exhibits to an answer. Powell v. Bulluck, 155 N.C. App. 613, 573 S.E.2d 699 (2002).

1. WPA IS ENTITLED TO SPECIFIC PERFORMANCE OF THE STOCKHOLDERS' AGREEMENT AS A MATTER OF LAW

A. Specific Performance of the Stockholders' Agreement is the Proper Remedy for Defendant's Refusal to Tender his Shares to WPA

Specific performance is an equitable remedy that is available when damages are an inadequate remedy. Whalehead Properties v. Coastland Corp., 299 N.C. 270, 261 S.E.2d 899 (1980). North Carolina Courts have recognized that specific performance is an appropriate remedy to enforce a Shareholders' Agreement requiring a terminated employee to sell his shares to the corporation. See Crowder Construction Co. v. Kiser, 1998 NCBC 2 (1998), aff'd, 134 N.C. App. 190, 517 S.E.2d 178 (1999); Charlotte Copy Data, Inc. v. Habbal, 1997 NCBC 4 (1997).

WPA, Defendant and Third-Party Defendants voluntarily entered into a Stockholders' Agreement on January 1, 2003. (See Compl., ¶ 6; Defendant's Answer, ¶ 6). In the Preamble to the Stockholders' Agreement, the parties stated their intention for entering into the Stockholders'

Agreement: "...the Stockholders desire to promote their mutual interests and the interest of the Corporation by imposing certain restrictions and obligations on themselves, the Corporation, and on the shares of stock of the Corporation." This is a common purpose for executing a stockholders' agreement in a close corporation like WPA because the stockholders' agreement "is usually the most effective arrangement for regulating the governance and management of the corporation because it can provide specifically for the desired results in essentially the same manner as a partnership agreement." Robinson on North Carolina Corporation Law, § 9.05 (7th ed. 2006). WPA stockholders wanted to maintain control over who owned an interest in WPA, and the Stockholders' Agreement was their method for assuming and maintaining that control. Awarding damages for Defendant's refusal to tender his shares would be an inadequate remedy in achieving the stated purpose of maintaining control over corporate ownership.

Defendant owns one hundred (100) shares of WPA's stock. (See Compl., ¶ 5; Defendant's Answer, ¶ 5). Paragraphs 1(b) and 2 of the Stockholders' Agreement require Defendant to tender his shares to WPA for the stated price of \$1.00 per share. Pursuant to ¶¶ 1(b) and 2, WPA tendered \$100.00 to Defendant to purchase his shares on or about February 16, 2007. (See Compl., ¶ 11; Defendant's Answer ¶ 11). Defendant has failed and refused to tender his shares in WPA in accordance with the Stockholders' Agreement.

B. Defendant's Pleadings Assert No Defense to Specific Performance of the Stockholders' Agreement

Defendant acknowledges that his refusal to comply with the Stockholders' Agreement is based on his position that his employment by Plaintiff was wrongfully terminated. (See Defendant's Answer, ¶ 10). Paragraph 2 of the Stockholders' Agreement requires Defendant to sell his shares to WPA if he ceases to be employed by WPA "*for any reason.*" (emphasis added). This clear and unequivocal language reveals that these parties did not intend for a party to avoid

the requirements of the Stockholders' Agreement by initiating a dispute as to the grounds for termination. Defendant acknowledges in his Answer that his employment with WPA was terminated. (See Defendant's Answer, ¶ 9) Specifically, WPA terminated Defendant's employment pursuant to his Employment Agreement with WPA on December 28, 2006; thus, Defendant was required to sell back his shares to WPA as of January 27, 2007, thirty days from the date of termination of his employment.

Defendant cannot avoid judgment on the pleadings and specific performance of the Stockholders' Agreement by including a demand for "reinstatement" in his Counterclaim. In Defendant's Answer to WPA's claim for specific performance of the Stockholders' Agreement, Defendant claims that his employment was wrongfully terminated and that he is entitled to be reinstated to his employment with all back benefits paid retroactively. (See Defendant's Answer, Second Affirmative Defense) Reinstatement of Defendant's employment by WPA would amount to specific performance of his Employment Agreement, which is prohibited by law. See Hayes v. Railroad, 143 N.C. 125, 55 S.E. 437 (1906) ("[w]hile for manifest reasons we could not compel specific performance of the contract of employment, the plaintiff could recover damages for its breach"); see also Fitzpatrick v. Michael, 9 A.2d 639 (Md. 1939) ("court can no more compel [employer] to accept [employee's] services...than it could compel her to render them if he demanded them and she were unwilling to give them"); H.W. Gossard Co. v. Crosby, 109 N.W. 483 (Iowa 1906) (it is a "universally recognized general rule" that damages are the sole remedy for breach of a "contract to perform personal service").

Moreover, it continues to be the stated rule of law that specific performance of a contract will not be decreed unless the remedy in money damages is an inadequate one. See Christie v. Christie, 59 N.C. App. 230, 296 S.E.2d 26 (1982) (reversing trial court's decree of specific

performance because plaintiff did not show that her remedy at law was inadequate). Defendant's pleadings do not allege that money damages would be an adequate remedy for the purported breach of the Employment Agreement, nor do they allege any facts that would support that position. Further, in his Counterclaim, Defendant alleges a claim for breach of his Employment Agreement and claims damages in excess of \$10,000.00 as a result of this alleged breach of contract. (See Defendant's Counterclaim and Third-Party Complaint, ¶¶ 25, 27) Thus, Defendant clearly considers money damages to be an adequate remedy if he prevails on his claim for breach of the Employment Agreement.

The ultimate resolution of Defendant's claim for breach of the Employment Agreement has no relevance to Plaintiff's entitlement to enforce the Stockholders' Agreement. In conclusion, Paragraph 2 of the Stockholders' Agreement requires Defendant to sell his shares back to WPA upon termination "*for any reason.*" Defendant's pleadings articulate no defense to enforcement of the Stockholders' Agreement, and therefore this Court should enter an Order granting Plaintiff and Third-Party Defendants judgment in their favor as a matter of law and requiring Defendant to sell his shares back to WPA pursuant to the Stockholders' Agreement.

CONCLUSION

For the foregoing reasons, Plaintiff is entitled to judgment on the pleadings and respectfully requests the Court enter an Order compelling Defendant to tender his shares to Plaintiff for value as stated therein.

This the 27th day of August, 2007.

SMITH, ANDERSON, BLOUNT, DORSETT,
MITCHELL & JERNIGAN, L.L.P.

By: Courtney H. Mischen

Susan H. Hargrove

N.C. State Bar No. 18771

Courtney H. Mischen

N.C. State Bar No. 35453

P.O. Box 2611

Raleigh, North Carolina 27602

(919) 821-1220

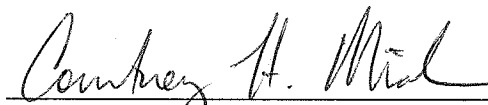
(919) 821-6800

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the foregoing document in the above-entitled action upon all other parties to this cause electronically and/or by depositing a copy thereof, postage paid in the United States mail, addressed to the attorney or attorneys for said parties as follows:

Paul E. Culpepper, Esq.
Young Morphis Back & Taylor, LLP
400 Second Avenue, NW
Post Office Drawer 2428
Hickory, North Carolina 28603-2428
paulc@hickorylaw.com
Attorney for Defendant

This the 27th day of August, 2007.



Courtney H. Mischen

EXHIBIT A

NORTH CAROLINA)
)
CATAWBA COUNTY)

STOCKHOLDERS' AGREEMENT

THIS AGREEMENT, made and entered into as of the 1st day of January, 2003, among DANIEL C. BARNETTE, M.D., LARRY THOMAS WILLIAMS, M.D., THOMAS ELLIOTT GOODIN, III, M.D., C. MURRAY BARTLEY, M.D., THOMAS R. HILL, M.D. AND RONALD CLARK GILDERSLEEVE, M.D., hereinafter called "Stockholders", and WESTERN PIEDMONT ANESTHESIA, P.A., a North Carolina corporation with its principal office and place of business in Hickory, North Carolina, hereinafter called the "Corporation";

WITNESSETH:

Whereas, the Stockholders are the owners of all of the issued and outstanding capital stock of the Corporation; and

Whereas, the Stockholders desire to promote their mutual interests and the interest of the Corporation by imposing certain restrictions and obligations on themselves, the Corporation, and on the shares of stock of the Corporation;

NOW, THEREFORE, it is mutually agreed as follows:

1. No Stockholder shall dispose of or encumber any part of his stock in the Corporation, except under the following conditions:

(a) The party desiring to dispose of or encumber all or any part of his stock in the Corporation must first obtain the written consent of all the other Stockholders.

(b) In the absence of such written consent, the party desiring to dispose of or encumber all or any part of his stock shall give written notice of such intention to the Corporation, and such notice shall contain an offer to sell such stock to the Corporation in accordance with the terms of this Agreement. On the required closing date, as hereinafter defined, the Corporation shall be obligated to purchase such stock. The purchase price for each share of stock shall be One Dollar (\$1.00) per share. The required closing date shall be within thirty (30) days of receipt of the notice by Corporation on a date selected by the parties or on such later date as set by the parties. All parties hereto shall take such action as may be required to effect such purchase and the transfer of the shares to Corporation.

2. If a Stockholder retires or for any reason ceases to be employed by the Corporation, he agrees within thirty (30) days thereafter to offer to sell and the Corporation agrees to buy all of his stock in the Corporation in the manner and at the price set forth in paragraph 1(b) of this agreement.

3. Upon the death of a Stockholder, and within ten (10) days after the qualification of a legal representative for his estate, or within thirty (30) days after his death, whichever first occurs, the estate of the deceased Stockholder shall offer to sell and the Corporation agrees to

buy all of the deceased stockholder's stock in the Corporation in the manner and at the price set forth in paragraph 1(b) of this Agreement.

4. Upon the execution of this Agreement, the certificates of stock subject hereto shall be endorsed as follows:

"This certificate is transferable only upon compliance with the provisions of a Stockholders' Agreement dated as of January 1, 2003, among Daniel C. Barnette, M.D., Larry Thomas Williams, M.D., Thomas Elliott Goodin, III, M.D., C. Murray Bartley, M.D., Thomas R. Hill, M.D. and Ronald Clark Gildersleeve, M.D., Stockholders and Western Piedmont Anesthesia, P.A., a copy of which is on file in the office of the Secretary of the Corporation."

After endorsement, the certificates shall be redelivered to the Stockholders who shall, subject to the terms of this Agreement, be entitled to exercise all rights of ownership of such stock. All stock hereafter issued by the Corporation shall bear the same endorsement. A similar endorsement shall be made on the stock books of the Corporation.

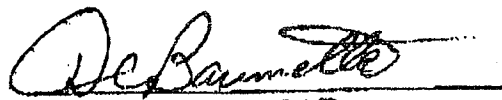
5. This Agreement shall apply to any additional stock issued by the Corporation whether on account of any stock dividend, stock split, recapitalization or issuance of additional shares during the life of this Agreement. Further, no stock of the Corporation may be issued or transferred hereafter to an individual not a party hereto unless the intended owner first agrees to be bound by the terms of this Agreement.

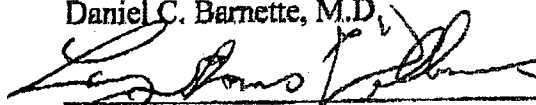
6. It is specifically agreed that this Agreement shall be enforceable by a suit for specific performance.


7. No change or modification of this Agreement shall be valid unless the same be in writing and signed by all of the parties hereto and any subsequent owner of stock in the Corporation.

8. This Agreement shall be binding upon the parties hereto, their heirs, legal representatives, successors and assigns.

IN WITNESS WHEREOF, the parties have executed this Agreement.

 (SEAL)
Daniel C. Barnette, M.D.

 (SEAL)
Larry Thomas Williams, M.D.

 (SEAL)
Thomas Elliott Goodin, III, M.D.

C. Murray Bartley MD (SEAL)
C. Murray Bartley, M.D.

Thomas R. Hill (SEAL)
Thomas R. Hill, M.D.

Ronald Clark Gildersleeve (SEAL)
Ronald Clark Gildersleeve, M.D.

WESTERN PIEDMONT ANESTHESIA, P.A.

By: D. C. Barnette
Daniel C. Barnette, President

ATTEST:

Larry Thomas Williams
Larry Thomas Williams, M.D., Secretary

PFID#251735

NORTH CAROLINA

AGREEMENT

CATAWBA COUNTY

THIS AGREEMENT, made and entered into this the 1st day of September, 2005, by and among DANIEL C. BARNETTE, M.D., LARRY THOMAS WILLIAMS, M.D., THOMAS R. HILL, M.D., RONALD CLARK GILDERSLEEVE, M.D., hereinafter called "Stockholders", TODD W. MCKENNEY, M.D., hereinafter called "McKenney" and WESTERN PIEDMONT ANESTHESIA, P.A., a North Carolina corporation with its principal office and place of business in Hickory, North Carolina, hereinafter called the "Corporation";

WITNESSETH:

WHEREAS, the Stockholders and McKenney are now the owners of all the issued and outstanding capital stock of the Corporation; and

WHEREAS, Stockholders and the Corporation entered into a Stockholders' Agreement on January 1, 2003 providing for certain terms and conditions relating to the ownership of the stock in the Corporation; and

WHEREAS, pursuant to Paragraph 5 of said Stockholders' Agreement, no stock of the Corporation may be issued or transferred thereafter to an individual not a party thereto unless the intended owner first agrees to be bound by the terms of this Agreement; and

WHEREAS, McKenney will this date become a shareholder in the Corporation subject to his agreement as herein set forth to be bound by the terms of the Stockholders' Agreement as herein provided.

NOW, THEREFORE, in consideration of the agreements herein contained and other valuable consideration, the parties do agree as follows:

1. McKenney hereby ratifies that he has reviewed the Stockholders' Agreement and agrees to be bound by all of the terms and conditions contained in said Stockholders' Agreement from and after the date hereof to the full extent as if he had been an original party to said Agreement; and,

2. Corporation and Stockholders do hereby ratify and affirm the Stockholders' Agreement and do hereby agree that from and after the date hereof that McKenney shall be considered a party to said Agreement.


This the 1st day of September, 2005.

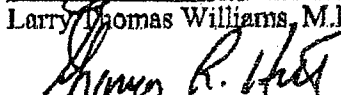
Western Piedmont Anesthesia, P.A.

By:

Daniel C. Barnette, M.D., President

 (SEAL)
Daniel C. Barnette, M.D.

 (SEAL)
Larry Thomas Williams, M.D.

 (SEAL)
Thomas R. Hill, M.D.

 (SEAL)
Ronald Clark Gildersleeve, M.D.

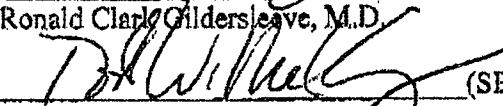
 (SEAL)
Todd W. McKenney, M.D.

EXHIBIT B

PHYSICIAN EMPLOYMENT AGREEMENT

THIS PHYSICIAN EMPLOYMENT AGREEMENT (this "Agreement") shall be effective the 1st day of January, 2003 (the "Effective Date") between **WESTERN PIEDMONT ANESTHESIA, P.A.**, a professional corporation duly organized under the laws of the State of North Carolina ("Corporation"), and **DANIEL C. BARNETTE, M.D.**, a physician duly licensed to practice medicine in the State of North Carolina ("Physician");

WITNESSETH

WHEREAS, the Corporation is engaged in the practice of medicine in the State of North Carolina as a professional corporation and desires to employ the Physician; and

WHEREAS, the Physician is licensed to practice medicine in the State of North Carolina and desires to accept employment to practice medicine as an employee of the Corporation.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties do hereby agree as follows:

1. Terms of Employment.

The Corporation shall employ the Physician beginning on the Effective Date. The term of this Agreement shall be one (1) year, and shall automatically renew for additional one year periods unless earlier terminated pursuant to the provisions herein.

2. Duties of the Physician.

The Physician is employed to exclusively and actively practice medicine on behalf of the Corporation and in furtherance of the Corporation's best interests on a full-time basis as determined by the Board of Directors, subject to the Employee's right additionally to practice medicine on a "moonlighting" basis as set forth in Paragraph 7 below. The Corporation shall have the exclusive power and authority to determine who will be accepted as a patient, to determine the matters to be assigned to the Physician, to assign the specific duties to be performed by the Physician, and to establish the standards of performance to be maintained by Physician. Subject to the regulations adopted by the Corporation, and all other applicable standards and protocols, the Corporation shall have the following powers:

- a. To assign patients to the Physician;
- b. To review all work performed by the Physician;
- c. To determine the time and manner of performance of all services rendered by the Physician; and
- d. To determine standards of performance and, within reason, the necessary hours of work.

The Corporation shall not impose upon the Physician any duties or responsibilities that would cause the Physician to be in violation of professional ethics or applicable law.

3. Professional Standards.

The Physician agrees to abide by and perform Physician's duties in accordance with the ethics of Physician's profession, and all federal, state, and local laws, regulations, and ordinances regulating the practice of medicine and all bylaws, rules and regulations of the Corporation which may, from time to time, be promulgated by the Corporation.

4. Fees, Collection and Billing.

The Board of Directors shall establish and modify from time to time all professional fees for services rendered by Physician or any other employee of Corporation. Corporation shall bill and collect all practice revenues for professional services rendered by Physician. Corporation shall own and control all collections and billings arising pursuant to the rendering of medical services by Physician or any other employee of Corporation. All Fees and compensation received or realized by Corporation as a result of the rendering of services by Physician and other employees of Corporation on its behalf shall belong, be paid and be delivered to Corporation. The Board of Directors shall from time to time establish and/or modify policies regarding the treatment of honoraria, royalties, reasonable gifts, military reserve duty compensation, and other activities of physician employees of Corporation. Unless otherwise expressly determined by the Board of Directors, Physician shall be responsible for professional liability insurance coverage for any professional activities performed other than on behalf of Corporation and shall indemnify and hold harmless Corporation from any claims, costs and expenses pertaining to the same.

5. Custodial Responsibility With Respect to Medical and Financial Records and Accounts.

Physician shall keep full and accurate accounts and records of all professional work done by Physician or under Physician's supervision in a timely fashion in accordance with guidelines established by the Board of Directors. All such accounts and related medical records and patient histories are the exclusive property of Corporation. Physician holds such records in trust for Corporation and shall promptly relinquish such records to the Board of Directors upon demand. Subject to applicable laws, rules and regulations, upon termination of this Agreement, Corporation shall provide copies of records of those patients who provide written consent to transfer of their records to Physician, which copies shall be made at Physician's expense. In the event that the Physician's employment is terminated, all patient records for which the Physician has responsibility must be brought current before final payment of compensation or other benefits due the Physician shall be paid by the Corporation. The provisions of this section shall survive the termination or expiration of this Agreement for any reason.

6. Compensation.

For all services rendered by the Physician pursuant to this Agreement, the Corporation shall compensate the Physician as follows:

6.1 Basic Compensation. Subject to the provisions of Section 6.3, the Employee shall be paid for his services hereunder during the Term a salary at the rate of \$240,000.00 per year (the "Basic Compensation"). The Corporation shall deduct and withhold all necessary Social Security taxes and all necessary federal and state withholding taxes and any other similar sums required by law to be withheld from the Employee's Basic Compensation. The parties to this Agreement understand and agree that the amount of Basic Compensation to be paid by the Corporation to the Employee is subject to review by the parties at least annually and may be adjusted from time to time by agreement of the parties, any such adjustment to be reflected in the minutes of the Board of Directors of the Corporation and to constitute an amendment to this Agreement as of the effective date of such adjustment. Salary shall be paid in such periodic installments as determined by the Board of Directors, but not less often than monthly.

6.2 Bonus. Subject to the provisions of Section 4.3 and Article 16, in addition to the Basic Compensation provided for in Section 4.1 of this Article 4, the Employee may receive a bonus or bonuses during the Term as determined by the Board of Directors. The Corporation shall deduct and withhold all necessary federal and state withholding taxes and any other similar sums required by law to be withheld from any such bonus. Nothing in this Section 6.2 is intended, or shall be construed, to require the Corporation to pay any bonus to the Employee.

6.3 Total Disability. Should the Employee suffer a Total Disability (as defined below), the provisions of Section 6.1 and 6.2 of this Article 6 shall become inoperative during the period beginning on the first day of the month next following the month in which the Employee's Total Disability commences (the "Commencement Month") and ending with the date he resumes his regular duties with the Corporation following a period of Total Disability; provided, however, that Employee shall be paid Basic Compensation through the end of the calendar quarter in which the Employee's Total Disability commences. Total Disability shall mean the inability, by reason of physical or mental infirmity, or both, of the Employee to perform his regular and customary duties with the Corporation. The total and irrevocable loss of the sight of both eyes, or the use of both hands, or of both feet, or of one hand and one foot, or of speech or hearing shall be considered total disability.

6.4 Partial Disability. Notwithstanding anything in this Article 6 to the contrary, if the Employee because of sickness or injury is unable to perform all of the Employee's duties as an anesthesiologist, or is unable to spend the Employee's full time and efforts in the Employee's employment with the Corporation ("Partial Disability"), but is able to devote a part of the Employee's time and efforts thereto and, in fact, does so, he shall be entitled to continue the Employee's employment with the Corporation during the period of the Employee's Partial Disability except as otherwise provided in this Section 6.4. The Basic Compensation payable to the Employee during the period of the Employee's Partial Disability shall be reduced by the Corporation to an amount that will fairly reflect the reduced time to be expended and responsibilities to be assumed by the Employee. The Employee, if a member of the Board of Directors, shall have no right to vote with respect to the decision by the Corporation to reduce the Employee's Basic Compensation to a particular amount; provided, that the Employee shall, if necessary to secure valid corporation action, attend a meeting of directors or sign a written consent to the resolutions or other actions adopted or taken without a meeting of the directors with regard to such decision.

6.5 Termination Pay. If this Agreement is terminated under the provisions of Paragraph 18 or Paragraph 19, Physician shall receive termination pay equal to his prorata share of the Corporation's net revenue for services provided by all physicians employed by the Corporation through the date of his termination, whether or not such services are billed before or after the termination date, but subject to the limitations contained in this Paragraph. Physician's prorata share of the Corporation's net revenue shall be a fraction thereof, the numerator of which is the number of shares owned by Physician in the Corporation and the denominator of which is the total number of shares of the Corporation issued and outstanding as of the date this Agreement terminates. Net revenue shall be defined as the total revenue received by the Corporation within one (1) year of the termination date for the above referenced services, less any overpayments or refunds due for the same and after deducting or reserving for all other obligations of the Corporation through the date this Agreement terminates. The Corporation shall be responsible for billing all such services and Physician agrees to cooperate and assist Corporation as reasonably needed to properly bill the services. Physician's prorata share of such receivables shall be paid to Physician by Corporation within ten (10) days of the end of the calendar quarter in which they are received by the Corporation, less applicable tax deductions. The termination pay provided for in this Paragraph shall continue for a period of one (1) year after Physician's last date of employment, but shall cease on the anniversary date thereof and Physician shall receive no prorata share of any net revenue for receivables received after such anniversary date. Corporation shall have no additional responsibilities for collection of these receivables than it otherwise expends on the collection of the Corporation's other receivables. However, any breach of Paragraphs 21 or 22 of this Agreement by Physician shall negate all remaining obligations of Corporation hereunder.

7. Service To Corporation.

In devoting Physician's full-time and attention to rendering professional services on behalf of the Corporation and in furtherance of its best interests, the Physician shall comply with all reasonable policies, standards, and regulations of the Corporation now or hereafter promulgated; provided, however, that such policies, standards, and regulations imposed upon the Physician shall be imposed upon all professional employees of the Corporation, including shareholders who are professional employees. Physician shall further comply with the policies, standards and regulations adopted from time to time for the practice location where Physician works. However, it is specifically agreed that Physician may engage in the practice of medicine on a "moonlighting" basis without any further consent or notice thereof to the Corporation being required so long as such activities do not interfere with Physician's full-time responsibilities hereunder.

8. Working Facilities.

Corporation shall furnish, as the Board of Directors deems necessary and appropriate, office space within the State of North Carolina, equipment, instruments, supplies, medicines, and support personnel for the practice of Physician under the terms of this Agreement. Physician may, with the consent of the Board of Directors, provide at Physician's own expense, any additional items Physician may deem necessary for Physician's practice.

9. Personnel, Work Schedule, and Travel Policies.

The Physician shall be subject to the Corporation's personnel, work schedule, and travel policies established for professional employees of the Corporation. It is agreed that all Physician employees shall share in "on-call" time as agreed on by a majority vote of the Board of Directors.

10. Vacation, Paid Time Off.

The Physician shall be entitled, during the term of this Agreement, to such vacation time per year as Physician shall desire to take consistent with Corporation vacation policies, provided that (i) such vacation time does not threaten the Corporation's ability to ensure an adequate numbers of physicians during business hours; and (ii) Physician coordinates such vacation time with the other physician employees of the Corporation to ensure adequate call coverage at all times. Vacation time shall include all time for attendance at continuing medical education seminars.

11. Leaves of Absence.

The Board of Directors in its sole discretion may grant the Physician a leave of absence, with or without pay, at such times as may be mutually agreed upon by the parties.

12. Professional Dues; Continuing Medical Education.

The Corporation acknowledges the fact that membership in local, state, and national medical organizations is important for the purposes of continuing education and acceptance in the community. Therefore, the Corporation shall pay all expenses incident to maintaining the Physician's membership in such additional professional organizations as may be authorized from time to time by the Board of Directors. Additionally, the Corporation shall advance all costs of the Physician associated with his continuing medical education, but Physician shall be responsible for reimbursing the Corporation for all such costs by deduction from his bonus, if any, next payable.

13. Other Employee Benefits.

Physician shall participate in all employee benefits as are provided by Corporation to its physician-employees as long as Physician is otherwise eligible to participate and desires to be covered and so participate. Nothing contained in this Section shall be construed to obligate Corporation in any manner to put into effect any plans not presently in existence or to provide special benefits to Physician. All such benefits paid by Corporation shall be tracked and deducted from Physician's bonus, if any, next payable.

14. Professional Liability Insurance.

The Corporation shall pay for and maintain professional liability insurance coverage insuring the Corporation and the Physician for professional errors, omissions, negligence, incompetence, and malfeasance with the limits of liability equal to that of the other professional employees of the Corporation. In the event that the Physician desires excess coverage beyond the coverage provided by the Corporation, it shall be the Physician's responsibility to obtain and pay for such coverage.

In the event that the Physician's employment by the Corporation terminates for any reason, other than the death of the Physician, the Physician shall be obligated to purchase an extended reporting endorsement to his professional liability insurance coverage previously provided by the Corporation ("Tail Coverage"). At the Corporation's option, the Corporation may procure such Tail Coverage for Physician and deduct the cost of such Tail Coverage from any amounts owed by the Corporation to the Physician at the time of termination. In the event of the death of the Physician while in the employ of the Corporation, the Corporation shall obtain and pay for tail coverage.

15. Uninsured Claims.

If any claim should be asserted against Corporation for Physician's unsanctioned activities occurring during Physician's employment, whether arising out of alleged malpractice, third party payor (e.g. Medicare, Medicaid, or private insurance) reimbursement, tax deficiencies relating to disallowed business expenses incurred by Physician, or otherwise, Physician (or Physician's estate) shall bear the financial responsibility therefor to the extent any such claim is not covered by insurance, and Physician shall indemnify and hold harmless Corporation against said claims and all costs and expenses related thereto. Notwithstanding the above, (i) to the extent other physician employees of Corporation received financial benefit from the reimbursement from which such claim arose, all such physician employees shall contribute pro rata to payment of such claim, and (ii) Corporation may, in its discretion, waive its right to indemnification hereunder.

16. Physician/Patient Relationship.

The Physician acknowledges the practice of medicine as an employee of the Corporation shall not affect the physician/patient relationship. Nothing in this Agreement shall be deemed to modify the physician/patient relationship or the confidential relationship between a physician and patient specified by the statutes of North Carolina or any other comparable doctrine.

17. Medical Staff.

The Physician shall apply for and maintain in good standing medical staff membership and clinical privileges at such hospital(s) and in such specialty or specialties as reasonably requested by the Corporation ("Medical Staff Privileges").

18. Voluntary Termination.

This Agreement may be terminated by Physician, without cause, at any time upon ninety (90) days' written notice to the Corporation.

19. Involuntary Termination.

This Agreement may be terminated, and the employment relationship between the Corporation and the Physician thereby shall be deemed to be severed, by the non-defaulting party without notice upon the occurrence of any of the following events of default:

- a. The death of the Physician;
- b. The total and permanent disability of the Physician (as defined below);
- c. The suspension, revocation, or cancellation of the Physician's license to practice medicine in the State of North Carolina;
- d. The imposition of any restrictions or limitations by any governmental authority having jurisdiction over the Physician to such an extent that Physician cannot engage in a professional practice for which Physician was employed;
- e. The Physician is found guilty of unprofessional or unethical conduct by any board, institution, organization or professional society having any privilege or right to pass upon the conduct of the Physician;
- f. The permanent revocation of Medical Staff Privileges at Catawba Valley Medical Center;
- g. The Physician fails or refuses, as determined by the Corporation, to faithfully and diligently perform the usual and customary duties of Physician's employment and to adhere to the provisions of this Agreement and such failure or refusal continues for a period of fifteen (15) days after notice from Corporation;
- h. The failure of Physician to comply with reasonable directives of the Board of Directors or the policies, standards and regulations established from time to time by the Board of Directors, including failure to comply with quality assurance, quality management, and utilization review practices and/or procedures and such failure or refusal continues for a period of fifteen (15) days after notice from Corporation;
- i. The failure of Physician to respond to treatment for alcoholism or other substance abuse and such failure or refusal continues for a period of fifteen (15) days after notice from Corporation and approved by the Board of Directors;
- j. Loss, suspension or restriction of Physician's DEA number;
- k. Inability of the Corporation to obtain malpractice insurance for Physician with an insurance carrier approved by the Corporation;
- l. Resignation by Physician from the medical staff of any hospital or from any other professional organization under the threat of disciplinary action;
- m. Conviction of Physician of or plea of *nolo contendere* by Physician to any felony charge;
- n. The Physician engages in conduct which all of the other physicians employed by the Corporation deem in their reasonable judgment to be inimical to the reputation or

best interest of the Corporation and Physician fails to discontinue or correct such conduct within ten (10) days of Physician being notified of the conduct deemed inimical; or,

- o. The Physician's practice skills or level of competency falls below the quality or competency standards set for the Corporation by the Board of Directors as reasonably determined by a majority of the physicians then employed by the Corporation.

For the purposes of this Agreement, "total and permanent disability" shall mean a physical or mental condition of the Physician which renders the Physician incapable of performing Physician's regular employment duties, with or without reasonable accommodation, and which condition shall be medically determined to be of permanent duration.

20. Prohibited Acts.

During the term of this Agreement, the Physician shall not without the express written consent of the Board of Directors of the Corporation:

- a. Assign, transfer, pledge, compromise or release any claims of the Corporation or debts owed to it or enter into any contract for the account of the Corporation, it being understood that such power and authority is vested solely in the Corporation;
- b. Sell, sign, transfer, lease, mortgage, pledge, or otherwise attempt to dispose of any property of the Corporation;
- c. Make, draw, execute, accept, or endorse any bill of exchange, promissory note, commercial paper, or other engagement for the payment of money, or its equivalent, nor pledge the credit of the Corporation, or any other employee or employees thereof. This provision, however, shall not apply to the personal transactions of the Physician in Physician's individual capacity;
- d. Hire or discharge any personnel employed by the Corporation, nor authorize or expend directly funds of the Corporation, it being understood and agreed that any such power or powers are vested solely in the Corporation;
- e. Be an officer, a director, shareholder, or employee of a professional medical association or professional medical corporation, nor the owner of any business, nor a member of a partnership or an employee of a business engaged in the practice of medicine, unless prior written permission is granted by the Board of Directors of the Corporation; or
- f. Subcontract or assign any responsibilities assigned to Physician by the Corporation, whether to another physician employed by the Corporation or not, it being the express purpose of this provision to prohibit Physician from assigning any of his responsibilities hereunder to another physician employed by the Corporation or to a

locum tenens physician unless such delegation or assignment of responsibilities has first been approved by the Board of Directors of the Corporation.

21. Noncompetition; Nonsolicitation of Employees.

a. The parties stipulate that Corporation is engaged in the practice of anesthesiology (the "Business") in the Territory (as defined below). During the eighteen (18) month period immediately following the date of voluntary termination of this Agreement under Paragraph 18 or termination of this Agreement for cause under Paragraph 19 or otherwise as a result of a breach hereof by Physician, Physician shall not Compete (as defined below) with Corporation, or employ or solicit the employment of any Restricted Employee (as defined below). The provisions of this Section 21 shall survive the expiration or termination of this Agreement for any reason. For purposes of this Section of this Agreement, the terms defined herein shall have the respective meaning specified, and the following definitions shall be equally applicable to the singular and plural forms of the terms defined:

- i. "Compete" means directly or indirectly, on Physician's own behalf or on behalf of any other Person, other than at the direction of Corporation and on behalf of Corporation: (i) organizing or owning any interest in a business which engages in the Business in the Territory; (ii) engaging in the Business in the Territory; or (iii) assisting any Person (as a director, officer, employee, agent, consultant, lender, lessor or otherwise) to engage in the Business in the Territory.
- ii. "Person" means any entity, including, without limitation, any natural person, company, partnership, corporation, trust, association, organization or governmental unit.
- iii. "Restricted Employee" means any person that was an employee of or regularly associated with Corporation at any time during the twelve (12) months immediately preceding the termination or expiration of this Agreement.
- iv. "Territory" means the area within a twenty-five (25) mile radius of Catawba Valley Medical Center at any time during the twenty-four months prior to expiration or termination of this Agreement, subject to adjustment as provided below.

22. Covenant Not To Disclose Confidential Information.

Physician acknowledges and stipulates that: (i) during the term of this Agreement, Physician will be placed in a position by Corporation to become acquainted with various aspects of the Confidential Information (defined below); (ii) the use or disclosure of the Confidential Information by Physician except as expressly authorized by the Board of Directors is prohibited and would seriously damage Corporation; and (iii) in addition to being given access to the Confidential

Information, Physician will receive material benefits as a result of this Agreement, including compensation and experience. Therefore, Physician agrees as follows:

a. During the term of this Agreement and thereafter, Physician shall not, without the prior written consent of the Board of Directors, directly or indirectly: (i) divulge, furnish or make accessible to any Person or copy, take or use in any manner any of the Confidential Information; (ii) take any action which might reasonably or foreseeably be expected to compromise the confidentiality or proprietary nature of any of the Confidential Information; or (iii) fail to follow the reasonable suggestions made by the Board of Directors from time to time regarding the confidential and proprietary nature of the Confidential Information.

b. "Confidential Information" means all of the materials, information and ideas of Corporation, including, without limitation: patient names, patient lists, patient records, patient information, operation methods and information, accounting and financial information, marketing and pricing information and materials, internal publication and memoranda, and other matters considered confidential by Corporation.

c. The provisions of this Section 22 shall survive the expiration or termination of this Agreement for any reason.

23. Remedies for Breach of Section 21 or 22.

Remedies shall be available to Corporation in the event of a breach of the provisions of Section 21 or 22 according to the following provisions:

a. In the event that Physician, at his or her option, desires to Compete in violation of the provisions contained in Section 21, Physician shall pay Corporation liquidated damages in advance of Competing in violation of that Paragraph in an amount equal to One Hundred Percent (100%) of Physician's Income. For purposes of this subsection a, "Physician's Income" shall mean Physician's previous year's income as shown on his Corporation W-2 statement for federal income tax purposes; provided, if Physician's most recent Corporation W-2 statement was for a period of employment of less than one full year, then Physician's Income shall mean the MGMA regional average income for Physician's specialty in the year prior to the date of termination of this Agreement. These damages are in partial restitution for the loss or damage which Corporation will suffer as a result of such breach and in partial recovery of its investment in the practice of Physician.

b. In the event Physician, at his or her option, desires to employ or solicit the employment of any Restricted Employee in violation of Section 21, Physician shall pay Corporation liquidated damages in advance of such violation of Section 21 in an amount equal to Fifty Percent (50%) of the value of the annual compensation and benefits for such Restricted Employee in the prior calendar year; provided, if such Restricted Employee was not employed for the full prior calendar year, then the value of such Restricted Employee's compensation and benefits for the prior calendar year shall be stipulated as the amount of compensation and benefits projected for such

Restricted Employee during the current year. These damages are in partial restitution for the loss or damage which Corporation will suffer as a result of such breach and in partial recovery of its investment in the Restricted Employee.

- c. The parties agree that a breach by Physician of any of the provisions of Section 21 or Section 22 of this Agreement would cause irreparable damage to Corporation. Therefore, Corporation shall be entitled to preliminary and permanent injunctions restraining Physician from breaching or continuing any breach of any of the provisions of such Sections. The existence of any claim or cause of action on the part of Physician against Corporation, whether arising from this Agreement or otherwise, shall not constitute a defense to the granting or enforcement of this injunctive relief.
- d. If Corporation is required to enforce any of its rights under this Agreement, Corporation shall be entitled to recover from Physician all attorneys' fees, court costs and other expenses incurred by Corporation in connection with the enforcement of those rights.
- e. The remedies available to Corporation under this Agreement are cumulative. Corporation may, at its sole discretion, elect to pursue all or any of such remedies. Such remedies are in addition to any given by law or equity and may be enforced successively or concurrently.
- f. The provisions of this Section shall survive the expiration or termination of this Agreement for any reason.
- g. Physician has carefully read and considered the provisions of this Agreement and agrees that the restrictions set forth herein, particularly those in Sections 21 and 22, are fair and reasonable required for the protection of Corporation. If any provision of Section 21 relating to the restrictive periods, scope of activity restricted and/or the territory described therein shall be declared by a court of competent jurisdiction to exceed the maximum time period, scope of activity restricted or geographical area such court deems reasonable and enforceable under applicable law, the time period, scope of activity restricted and/or area of restriction held reasonable and enforceable by the court shall thereafter be the restrictive period, scope of activity restricted and/or the territory applicable to the restrictive covenant provisions in this Agreement.

24. Relation Between the Parties.

The parties hereto recognize that the Board of Directors of the Corporation shall manage the business affairs of the Corporation and the relationship between the Corporation and the Physician shall be that of employer and employee. The Physician shall be considered and treated as having the status of an employee and is entitled to participate in any plans, arrangements, or distributions of the Corporation, under the terms of said plans, arrangements, or distributions, and group life, health, accident and disability insurance, or similar employee fringe benefits, for professional employees

of the Corporation as the Corporation may decide to provide to its professional employees from time to time.

25. Prohibition Against Assignment.

The Physician agrees on behalf of Physician and Physician's executors and administrators, heirs, legatees, distributees, and any other person or persons claiming any benefit under Physician by virtue of this Agreement, that this Agreement and the rights, interests, and benefits hereunder shall not be assigned, transferred, pledged, hypothecated in any way by the Physician or any executor, administrator, heir, legatee, distributee, or other persons claiming under the Physician by virtue of this Agreement, and shall not be subject to execution, attachment, or similar process. Any attempt to assign, transfer, pledge, or hypothecate or otherwise dispose of this Agreement or of the rights, interests, or benefits of this Agreement, or any attempt at levy, attachment, or similar process thereon shall be null and void and without effect and shall relieve the Corporation of any and all liabilities hereunder. Notwithstanding the above, Corporation may assign its rights and obligations under this Agreement to a successor entity pursuant to a merger of Corporation into another entity or a transfer of the stock or assets of Corporation to a successor entity.

26. Regulations.

It is expressly agreed by the parties hereto that this Agreement shall be read in conjunction with the Professional Corporation Act, Chapter 55B of the North Carolina General Statutes and the regulations of the North Carolina Board of Medical Examiners, together with all supplements, modifications, amendments and regulations thereunder.

27. Authorization for Agreement.

The execution and performance of this Agreement by the parties hereto have been fully authorized by all necessary laws, resolutions, or corporate action, and this Agreement constitutes the valid and enforceable obligation of the party hereto in accordance with its terms.

28. Notices.

Any and all notices, designations, consents, offers, acceptances, or any other communications provided for herein shall be given in writing by registered or certified mail, return receipt requested, which shall be addressed in the case of the Corporation to its registered office, and in the case of the Physician to Physician's last known address.

29. Governing Law.

This Agreement shall be subject to and governed by the laws of the State of North Carolina regardless of the fact that the Physician may be or may become a resident of a different place.

30. Venue.

The venue for any civil litigation between the parties hereto or arising out of or resulting from this Agreement is Catawba County, North Carolina, and the parties hereto irrevocably submit themselves to the jurisdiction of the General Court of Justice in Catawba County, North Carolina, and waive any right they have or may have to any other jurisdiction.

31. Invalid Provision.

The inability or unenforceability of any particular provision of this Agreement shall not affect any other provisions hereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provisions were omitted.

32. Binding Effect.

This Agreement shall be binding upon and inure to the benefit of the Corporation and the Physician and their respective heirs, legal representatives, executors, administrators, successors, and assigns.

33. Entire Agreement.

This Agreement constitutes the entire Agreement between the parties hereto and contains all of the agreements between the parties hereto with respect to the subject matter hereof and supersedes any and all other agreements, either oral or in writing, between the parties hereto with respect to the subject matter hereof.

34. Amendment.

This Agreement may be amended at any time by a written Agreement executed by the Physician and the Corporation.

35. Headings.

The headings to the various sections of this Agreement have been inserted for convenience only and shall not modify, define, limit, nor expand express provisions of this Agreement.

36. Gender.

Throughout this Agreement wherever the context requires or permits, the neuter gender shall be deemed to include the masculine and feminine and the singular number, the plural and vice versa.

37. Counterparts.

This Agreement may be executed simultaneously in one (1) or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same Agreement.

IN WITNESS WHEREOF, the Corporation has caused this Agreement to be signed by its duly authorized officer, and the Physician has hereunto sets his hand and seal on a day and year first above written.

WESTERN PIEDMONT ANESTHESIA, P.A.

By: Ronald C. Gildersleeve
Ronald C. Gildersleeve, M.D., Vice-President

Daniel C. Barnette (SEAL)
Daniel C. Barnette, M.D.

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