

CAUSE NO. _____

AMERICAN ACADEMY OF EMERGENCY MEDICINE AND HUMBLE EMERGENCY PHYSICIANS, P.A.	§ § § §	IN THE DISTRICT COURT OF
V.	§ §	HARRIS COUNTY, TEXAS
MEMORIAL HERMANN HEALTHCARE SYSTEM, INC., TEAM HEALTH, INC. AND ACS PRIMARY CARE PHYSICIANS-SOUTHWEST, P.A.	§ § §	_____ JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION

COME NOW, Plaintiffs, American Academy of Emergency Medicine and Humble Emergency Physicians, P.A. and file this Plaintiffs' Original Petition as follows:

DISCOVERY PLAN

1. Plaintiffs believe this case should be governed as a Level 3 case.

PARTIES

2. Plaintiff AMERICAN ACADEMY OF EMERGENCY MEDICINE ("AAEM") was and is a non-profit corporation organized under the laws of the State of Wisconsin and formed to promote greater professionalism in emergency medicine. AAEM has a national membership of approximately 5,000 emergency physicians, with many physician members practicing emergency medicine in the State of Texas. AAEM has a direct interest in the outcome of the proceeding in that they represent many practicing physicians in Texas and the nation with professional interest in the enforcement of the corporate practice of medicine prohibition found in Texas law, the use of non-competition and non-solicitation agreements for emergency physicians and in the market for emergency physician services in the State. AAEM may be served with papers and other service at the address of its counsel of record, Mel Smith & Associates, P.C., 4201 FM 1960 West, Suite 235, Houston, Texas 77068.

3. Plaintiff HUMBLE EMERGENCY PHYSICIANS, P.A. (“HEPPA”) is a Texas professional association composed exclusively of licensed emergency physicians who are all board certified practitioners in emergency medicine. HEPPA may be served with papers and other service at the address of its counsel of record, Mel Smith & Associates, P.C., 4201 FM 1960 West, Suite 235, Houston, Texas 77068.

4. Defendant TEAM HEALTH, INC. is an entity incorporated under the laws of the State of Delaware and doing business in Texas with its principal headquarters at 1910 Winston Road, Knoxville, Tennessee 37919. Team Health, Inc. may be served with process through its registered agent, Corporation Service Company d/b/a CSC-Lawyers Incorporating Service Company at 701 Brazos Street, Suite 1050, Austin, Travis County, Texas 78701.

5. Defendant MEMORIAL HERMANN HEALTHCARE SYSTEM, INC. is a Texas nonprofit corporation and may be served by serving its registered agent for service of process, V. Randolph Gleason at 7737 Southwest Freeway, Suite 200, Houston, Harris County, Texas 77074.

6. Defendant ACS PRIMARY CARE PHYSICIANS-SOUTHWEST, P.A. (“ACS”) is an entity registered with the Secretary of State of Texas as a professional association doing business in Houston, Harris County, Texas. ACS may be served with process and other papers by serving its registered agent for service of process, Corporation Service Company d/b/a CSC-Lawyers Incorporating Service Company at 701 Brazos Street, Suite 1050, Austin, Travis County, Texas 78701.

VENUE & JURISDICTION

7. Venue is proper in Harris County, Texas pursuant to TEX. CIV. PRAC. & REM. CODE § 15.002(a) in that the facts giving rise to this case occurred in Harris County, Texas. The claims and damages sought herein exceed the minimum jurisdictional limits of the Court.

INTRODUCTION

8. This case seeks redress from an illegal business practice used by TEAM HEALTH to usurp and displace Plaintiff HEPPA from an existing contract with Northeast Medical Center Hospital in Humble, Texas. The regulation and practice of medicine in the State of Texas are subject to extensive regulatory control. The corporate practice of medicine prohibition, Texas Medical Practices Act § 165.156 and TEX. OCCUP. CODE § 164.052 *et seq.*, prohibits non-licensed persons or entities from practicing medicine, employing physicians, assisting in the unlicensed practice of medicine or sharing of professional fees with physicians.

9. Emergency departments of hospitals in the State of Texas are, with the exception of narrowly specified exempt entities, staffed by physicians and groups which work under agreements commonly known as exclusive emergency services contracts. These agreements are between the hospital and a medical group of physicians and generally provide that the medical group will treat all of the patients which present to the hospital's emergency department. Such agreements provide emergency departments with continuous physician coverage. Hospitals are generally able to choose among competing physician groups in awarding such exclusive contracts. The contracts are usually for two or four years in duration. The physicians or group of physicians who receive the contract have the exclusive right to treat patients at the emergency department. Physicians who are not members of the group holding the exclusive contract are excluded from treating patients in such emergency departments.

10. Since exclusive emergency services contracts guarantee a continuous flow of patients to the group which has the contract, the granting of such a contract constitutes a “referral of patients” under Texas and Federal law. Such contracts may not therefore be sold by the hospital or purchased by physicians, nor may consideration be exchanged for the granting or renewal of such agreements.

11. In 2006 and continuing into 2007, Defendants embarked upon an illegal, unfair and deceptive business practice aimed at fee splitting with emergency physicians in violation of Texas law and at restraining trade in the emergency medicine profession. Plaintiffs assert that Memorial Hermann and Team Health entered into agreements whereby a phony and fraudulent bidding scheme would be employed which would “select” TEAM HEATH as the winner to replace the existing emergency departments at eight hospitals under the Memorial Healthcare System. Plaintiffs have been informed and believe that TEAM HEATH holds and has an interest in hospital and physician contracts at the following facilities in Houston, Harris County, Texas: Memorial Hermann – Northwest, Memorial Hermann – Northeast, Memorial Hermann – Southeast, Memorial Hermann – Memorial City, Memorial Hermann – The Woodlands, Memorial Hermann – Katy, Memorial Hermann – Sugarland and Memorial Hermann – Southwest.

12. HEPPA was formed by several emergency department physicians to provide emergency department services to Northeast Medical Center Hospital (k/n/a Memorial Hermann Northeast Hospital) in Houston, Harris County, Texas. The contract between Northeast Medical Center Hospital and HEPPA was renewed several times over the years for over two decades. At all times relevant hereto, Northeast Medical Center Hospital owed HEPPA fiduciary duties. In August, 2006, HEPPA was informed that Memorial Hermann Hospital System had affected

some kind of acquisition of Northeast Medical Center Hospital (believed to be a lease of the physical premises). Thereafter, HEPPA was invited to bid on a proposal to staff all eight (8) of MEMORIAL HERMANN's emergency departments.

13. In response to the request, HEPPA expended tens of thousands of dollars to prepare its proposal and enlisted the aid of consultants to design the information content needed to fulfill MEMORIAL HERMANN's requirements. TEAM HEALTH, Emergency Consultants, Inc., EMCare, Inc. and Greater Texas Emergency Physicians were also asked to submit bids. HEPPA and the other candidates, including TEAM HEALTH, made a presentation to MEMORIAL HERMANN and, after some delay, MEMORIAL HERMANN selected TEAM HEALTH to be the "sole staffing and management service provider for the emergency centers" at the eight (8) Memorial Hermann hospitals.

14. In order to staff the emergency departments, TEAM HEALTH needed a corporate entity which was owned only by physicians as TEAM HEALTH employs lay persons, as do most for profit corporations, and could not be qualified to practice medicine in Texas on that basis. ACS is ostensibly owned by one physician in Florida, William Heymann, M.D. TEAM HEALTH employs physicians as "independent" contractors under the terms of the agreement set forth as Exhibit "A" which purports to be an independent contractor agreement between ACS and the prospective doctor. TEAM HEALTH does not directly enter into such arrangement, but rather, uses its alter ego, ACS, to execute the "independent" contractor agreement with the physicians. Under TEAM HEALTH's illegal arrangement, MEMORIAL HERMANN pays TEAM HEALTH for the services provided by the physicians and the physicians are required to assign their rights to receive the monies they earn. TEAM HEALTH controls all aspects of the practice, including all management, administrative and financial services, recruiting, billing,

coding collection, regulatory compliance, scheduling physician times, malpractice insurance and quality assurance. TEAM HEALTH, through its alter ego, ACS, has the exclusive right to hire, terminate, manage, employ independently, contract or otherwise control the practice of the physicians at the MEMORIAL HERMANN hospitals by virtue of the emergency services agreement embodied in a letter of understanding between MEMORIAL HERMANN and TEAM HEALTH.

15. ACS was acquired in order to provide a shell to permit TEAM HEALTH, INC. and its division, TEAM HEALTH WEST to illegally employ physicians, acquire and hold emergency services and physician contracts, such as those of Plaintiffs and to split professional fees of physicians.

16. On information and belief, ACS' owner, William Heymann, MD, does not practice medicine in Texas and is not on staff at any of the MEMORIAL HERMANN hospitals. Rather, Dr. Heymann simply lent his medical license to TEAM HEALTH, INC. in order to facilitate TEAM HEALTH, INC.' s illegal employment of Texas physicians and fee splitting. In furtherance of this scheme, William Heymann M.D. represented to the Texas Medical Board that his address is at 6750 W. Loop Road, Bellaire, Texas 77401 although it is believed that Dr. Heymann actually practices medicine in Florida.

17. The physician contracts attached hereto contain restrictive covenants which purport to restrain signatory "independent contractor" physicians from working as emergency physicians at MEMORIAL HERMANN for a period of one year after termination, or from working for any other group that acquires the emergency department contract for one year, or working for any competitors of TEAM HEALTH or ACS or soliciting business from any hospital with which TEAM HEALTH had a contract for one year.

18. TEAM HEALTH, INC. and their officers and agents were at all times herein aware that the restrictive covenants were invalid under Texas law, but compelled physicians to adhere to them in order to unfairly and illegally compete for hospital contracts and for physicians. Plaintiffs believe that the independent contractor agreements are disguised employment agreements designed to circumvent Texas law and Federal tax law by allowing TEAM HEALTH to avoid payment of Medicare and Medicaid taxes as required by Federal law, thus giving TEAM HEALTH an unfair advantage in the marketplace and an illegally reduced cost structure benefiting TEAM HEALTH and, in turn, MEMORIAL HERMANN.

19. Plaintiffs assert that adherence to the fiction of the separate existence of the Defendants as entities distinct from each other would permit an abuse of the corporate company privilege and would sanction fraud or promote injustice in that Defendant ACS was intended, and used, by Defendant TEAM HEALTH to circumvent the corporate practice of medicine prohibition and perpetuate other unfair, illegal and deceptive business practices alleged herein and to avoid individual liability and for the purpose of substituting corporations or limited liability companies in the place of Defendants.

20. In the same vein, Plaintiffs assert and believe that the other corporate practice of medicine candidates for the MEMORIAL HERMANN emergency department contracts practice medicine in violation of the Texas law and engage in fee splitting and other illegal activities in order to reduce costs. Moreover, it is believed that the HEPPA's bid proposal was better than Greater Texas Emergency Physicians's bid proposal, the only remaining bidder that did not practice in violation of the statute. Despite having a clearly superior bid, and because Memorial Hermann had already decided who to select in its phony bid request, HEPPA did not obtained the bid.

CAUSE OF ACTION

(Declaratory Judgment)

21. Plaintiffs bring this cause of action pursuant to TEX. CIV. PRAC. & REM. CODE. § 37.001 *et seq.* seeking a declaration of the Court that:

(A) The independent contractor agreements required to be executed by physicians working for TEAM HEALTH, ECI and EMCare are, in reality, employment agreements;

(B) The independent contractor agreements used by TEAM HEALTH, ECI and EMCare and the requisite control over the details and results of the physician's work constitute an employee-employer relationship under Texas law;

(C) The bidding process utilized by MEMORIAL HERMAN was a violation of Texas law because it solicited and accepted illegal bids from entities violating the corporate practice of medicine prohibitions under Texas law;

(D) The financial arrangements between TEAM HEALTH and MEMORIAL HERMANN violate the corporate practice of medicine by allowing fee splitting with an unlicensed corporation;

(E) The contract or understandings between MEMORIAL HERMANN and TEAM HEALTH as to the provision of medical practitioners at MEMORIAL HERMANN are void as they violate the corporate practice of medicine prohibition under Texas law.

(F) A declaration that Defendants purchase medical groups, employing physicians or holding emergency services contracts in the State of Texas are a violation of the corporate practice of medicine and such purchases, agreements, understandings or assignments should be declared void as a matter of law.

(G) A declaration that TEAM HEALTH violates the corporate practice of medicine prohibitions under Texas law and a further declaration that the business bids submitted by ECI AND EMCare are violative of the same prohibitions and should not have been considered by MEMORIAL HERMANN.

22. Plaintiffs seek the forgoing declarations and recovery of the reasonable and necessary attorneys' fees as provided by statute.

(Conspiracy to Breach Fiduciary Duties)

23. At all times relevant hereto, Northeast Medical Center Hospital owed Plaintiff HEPPA a fiduciary duty to act in the best interests of HEPPA and to fully disclose the true state of affairs concerning the business arrangements with MEMORIAL HERMANN. Plaintiff HEPPA asserts that MEMORIAL HERMANN and TEAM HEALTH have conspired to induce Northeast Medical Center Hospital into breaching such duties to HEPPA's damage. Plaintiff HEPPA seeks its actual damages, pre- and post-judgment interest and costs of court.

(Interference with Contract)

24. Plaintiff HEPPA asserts that Defendants have wrongfully interfered with HEPPA's existing contractual relationship to HEPPA's damage. Plaintiff HEPPA seeks recovery of its actual damages, pre- and post-judgment interest and costs of court.

(Misrepresentation)

25. MEMORIAL Hermann solicited bids from Plaintiff HEPPA and, expressly or implied, represented that the process of selecting the successful candidate would be fair and above board. Contrary to their representations and assurance, MEMORIAL HERMANN stacked the deck, selected an illegal vendor with which to do business and adopted illegal business practices in the bidding selection. Moreover, MEMORIAL HERMANN did not select the best

bid, choosing instead to select a bidder with whom it had previously agreed to do business. Plaintiff HEPPA relied upon MEMORIAL HERMANN's representations to HEPPA's detriment and seeks recovery of its costs associated with bidding compliance, its damages for the loss of its business opportunity, and a reasonable fee for the time and effort of its constituent doctors in preparing HEPPA's bid for presentation to MEMORIAL HERMANN, together with pre- and post-judgment interest and costs of court.

(Unfair Business Practice)

26. TEAM HEALTH is a for profit business that is statutorily prohibited from practicing medicine in Texas. Under Texas law, it is illegal for a corporation to practice medicine under § 165.156 of the Medical Practice Act. In addition, it is a violation of § 164.052(a)(13) of the Medical Practices Act which authorizes disciplinary action against any practitioner for aiding or abetting, directly or indirectly, the practice of medicine by non-licensed individuals or entities. At all times mentioned herein TEAM HEALTH was a non-licensed entity which could not directly or indirectly practice medicine, or acquire or control professional medical corporations or practices, but nevertheless acquired ACS and presently purports to hold and control such interest through control and ownership of ACS, in violation of Texas law. Defendants' further acts of purchasing emergency department contracts and forcing physicians to split fees as a condition of working in the emergency department constitutes kickbacks and referral fees in violation of Texas law. Defendants' acts constitute an unfair and illegal business practice in violation of TEX. BUS. & COM. CODE § 15.05, *et seq.* as the contractual relationship between MEMORIAL HERMANN and TEAM HEALTH restrains trade and commerce illegally. Pursuant to TEX. BUS. & COM. CODE § 15.21, Plaintiffs are legally entitled to sue to

stop Defendants from such illegal conduct and to recover the damages sustained by them as a result thereof.

27. At all times mentioned herein TEAM HEALTH, INC. was not licensed to practice in Texas and may not permissibly employ physicians, either as employees or independent contractors, but nevertheless engaged in a practice of hiring and retaining physicians such as Plaintiffs alleged above commencing March 2007 for MEMORIAL HERMANN and are informed and believe to similarly employ physicians throughout the State of Texas and presently hold and control such interest through control and ownership in violation of law. This practice, *inter alia*, constitutes unfair and illegal business practices in violation of TEX. BUS. & COM. CODE § 15.05, *et seq.*

28. TEAM HEALTH, INC. is a non-licensed entity which may not exercise control over a medical practice or enter into arrangements tantamount to control of the practice of medicine, but nevertheless plans to exercise complete control over ACS, including but not limited to, hiring and termination of all physicians, selection of the medical director of the emergency department, choosing the patients of physicians by requiring them to adhere to third party contracting obligations, institution of a “Code of Conduct” for physicians (the failure with which to comply with such was punishable by discharge), retention of the right to discharge physicians, quality assurance authority, scheduling authority, complete and exclusive control over the financial side of the medical practice including assignment of all right title and interest in all physician billings, provision of coding services, and salary and benefits control. The existence of actual and potential control over the medical and business aspects of the physician’s practice violated public policy and constituted the illegal corporate practice of medicine in

violation of law. This conduct constitutes an unfair, illegal and deceptive business practice in violation of TEX. BUS. & COM. CODE § 15.05, *et seq.*

29. Plaintiff AAEM is informed and believes that TEAM HEALTH's structure, relationship, coercive practices, unlicensed practice of a medicine and acts alleged herein are substantially identical to its relationship and contracting scheme with each and every of its contracts with hospitals and physicians in the state of Texas, and that TEAM HEALTH engages and proposes to engage in the illegal conduct alleged above throughout the State of Texas in the future by continuing to undertake the illegal contracting practices.

30. At all times Defendants, and each of them, were aware that their contracting practices, fee splitting and other conduct alleged herein was illegal and violated Texas law as its designation of its physicians as "Independent Contractors" of TEAM HEALTH did not render the employment of such physicians permissible under Texas law, but nevertheless continued the practice, and represented to members of the public that the practice was in conformity with the law, and acted maliciously and willfully in undertaking the acts herein alleged.

31. All conditions precedent have been performed or have occurred.

32. Under the authority of *Texas Rule of Civil Procedure* 194.2, Plaintiffs requests the Defendants within fifty (50) days of the service of this Original Petition and Request, produce the information or material described in the relevant rules.

WHEREFORE, Plaintiffs pray that citation be issued commanding Defendants to appear and answer this suit and that, upon a trial on merits, the Court make the declarations set forth above, award Plaintiffs a recovery of their actual damages, reasonable and necessary attorneys' fees, costs of court together with pre- and post-judgment interest, and such other further relief to which they may show themselves justly entitled.

Respectfully submitted,

MEL SMITH & ASSOCIATES, P.C.

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