NOT TO BE PUBLISHED WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

DEBORAH HEART AND LUNG CENTER, Plaintiffs, vs. OUR LADY OF LOURDES HEALTH CARE SERVICES, INC., d/b/a LOURDES HEALTH SYSTEM, and VIRTUA HEALTH, INC., and JOHN DOES 1-10, Defendants.	SUPERIOR COURT OF NEW JERSEY BURLINGTON COUNTY LAW DIVISION DOCKET NO. BUR-L-1235-19 CIVIL ACTION **OPINION**

Argued: **Argument Waived**
Decided: **May 12, 2023**

Theodora McCormick, Esq., Anthony Argiropoulos, Esq., and Robert Lufrano, Esq. appearing on behalf of Plaintiff Deborah Heart and Lung Center.

Jane Silver, Esq. and Seth Goldberg, Esq. appearing on behalf of Defendants Our Lady of Lourdes Health Care Services, Inc., and Virtua Health Inc.

I. PRELIMINARY STATEMENT

Plaintiff, Deborah Heart and Lung Center (hereinafter "Deborah"), filed a Motion seeking summary judgment on the issue of liability for a variety of its claims asserted in this matter. Defendants, Our Lady of Lourdes Health Care Services, Inc. d/b/a Lourdes Health System (hereinafter "Lourdes"), and Virtua Health Inc. (hereinafter "Virtua"), opposed the Plaintiff's Motion for Summary Judgment and subsequently each filed their own Motions for Summary Judgment seeking to dismiss all of the Plaintiff's claims. Additionally, the Defendants have filed two separate Motions to Bar the expert reports of Dr. David A. Argue, Ph. D, and of Mr. James R. Peterson, CFA.

For the reasons set forth herein, the Court will **DENY** the Plaintiff's Motion for Summary Judgment, **GRANT IN PART AND DENY IN PART** Lourdes' Motion for Summary Judgment, and **DENY** Virtua's Motion for Summary Judgment.

The Court will also **DENY** both of the Defendants' Motions to Bar the expert reports.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

This matter arises from a breach of contract action in which the Plaintiff is alleging the Defendants breached several agreements. After conceding their claims related to a November 21, 2008, Letter of Intent, Plaintiff now asserts the Defendants breached the Master Partnering Agreement (hereinafter the "MPA"), and the Satellite Emergency Department Lease Agreement (hereinafter the "SED Lease") when Lourdes was acquired by Virtua from Lourdes' then parent company, Maxis health, which is a subsidiary of Trinity Health.

Deborah and Virtua were involved in separate litigation that has since concluded. An initial case in Mercer County, Deborah Heart and Lung Center v. Virtua Health, Inc., et al., MER-L-1865-11 (hereinafter the "Mercer Litigation"), was settled shortly after opening statements. The second case, Deborah Heart and Lung Center v. Virtua Health, Inc., et al., No. 11-cv-1290 (D.N.J.), involved a federal antitrust case in the District of New Jersey in which Plaintiff alleged a conspiracy by Virtua and a group of cardiologists, the Cardiology Group, P.A. ("CGPA"), to push Deborah out of the market and deprive patients of competing choices for advanced cardiac interventional ("ACI") procedures in violation of §1 of the Sherman Act, 15 U.S.C. §1. Summary judgment was granted in Defendant Virtua's favor based on the arguments that exclusive relationships between health care providers, like its partnership with CGPA and like the former Deborah/Lourdes partnership at issue in this case, are not anti-competitive. Defendant Virtua relied upon an expert report stating that such "[e]xclusive relationships are common and often pro-competitive."

The case at bar was instituted on April 04, 2019, when Plaintiff filed an Order to Show Cause and Verified Complaint, seeking to enjoin the agreement between Defendants Virtua and Lourdes based on the three related agreements between Plaintiff and Lourdes. On May 24, 2019, the Honorable Paula T. Dow, P.J. Ch. denied Plaintiff's request for a preliminary injunction. On or about June 03, 2019, Judge Dow entered an Order transferring this matter from the Chancery Division to the Law Division. Following the transfer, Plaintiff moved to amend its Complaint to add claims against Defendant Virtua. On January 24, 2020, this Court granted the Plaintiff's Motion for Leave to File an Amended Complaint with respect to its proposed claims for tortious interference and unfair competition and denied Plaintiff's motion with respect to its proposed claims for procurement of breach of contract, unjust enrichment, and equitable disgorgement.

On February 02, 2020, Plaintiff filed the First Amended Complaint, alleging six counts against Lourdes for breach of contract and the implied duty of good faith and fair dealing, and two counts against Virtua for tortious interference and unfair competition. Specifically, Plaintiff alleges Lourdes breached the SED Lease, the MPA, and that it violated the implied duties of good faith and fair dealing. In Counts III and IV of the First Amended Complaint, Plaintiff alleges that "Section 1.5 of the MPA provides that 'during the Term . . . of this Master Partnering Agreement neither party shall enter into any arrangement, partnership or affiliation related in whole or in part to the provision, management, marketing and/or oversight of cardiology services in Burlington County.'" Plaintiff further alleges that "Defendant Lourdes knowingly violated Section 1.5 of the MPA by agreeing to be acquired by Virtua." In Counts V and VI of the First Amended Complaint, Plaintiff alleges that "Defendant Lourdes knowingly violated Paragraph[s] 12.1.7 [and 9.1] of the SED Lease Agreement by agreeing to be acquired by Defendant Virtua."

In Count VII, Plaintiff alleges tortious interference with a contractual relationship and contends that "Deborah had a contractual relationship with Lourdes, by virtue of the November

21, 2008, LOI, the January 15, 2009, MPA, and the February 12, 2009, SED Lease Agreement" and "Virtua knowingly and intentionally induced Lourdes to breach its contractual duties when it acquired Lourdes."

In Count VIII, Plaintiff alleges unfair competition against Virtua and contends that Virtua induced Lourdes' breach of the agreements and that doing so "is an unlawful method of competition, and a continuation of the plan to 'shutter Deborah' about which the Appellate Division spoke in its July 16, 2019, Opinion."

Plaintiff filed its Motion for Summary Judgment on March 31, 2023, to which the Defendants jointly filed an opposition. Defendants also filed their individual Motions for Summary Judgment and both Motions to Bar on March 31, 2023. The Plaintiff objected to each of the Defendant's Motions.

The Discovery End date in this matter elapsed on February 3, 2023, and, after three trial date adjournments, trial is currently scheduled for May 31, 2023. The matter is currently four years and one month old and involved 1387 days of discovery. On May 9, 2023, the Court distributed a tentative decision on the motions which was subsequently accepted by all parties who then waived oral argument on the pending motions.

III. LEGAL STANDARD

a) Expert Opinions

The admissibility of expert testimony is guided by N.J.R.E. 702 and 703. N.J.R.E. 702 provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Under N.J.R.E. 702, in order for an expert's testimony to be admitted:

> (1) The intended testimony must concern a subject matter that is beyond the keen of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.

Creanga v. Jardal, 185 N.J. 345, 355 (2005) (quoting Landrigan v. Celotex Corp. 127 N.J. 404, 413(1992)); see also Hisenaj v. Kuehner, 194 N.J. 6, 24 (2008).

An expert must be "suitably qualified and possessed of sufficient specialized knowledge to be able to express [an expert opinion] and to explain the basis of that opinion." Agha v. Feiner, 198 N.J. 50, 62, (2009). "When the subject matter of the testimony falls distinctly within the province of a particular profession, the witness should generally be a licensed member of that profession." State v. Frost, 242 N.J. Super. 601, 615 (App. Div. 1990). "An expert should not be permitted to testify when he possesses neither professional expertise in the field that he has been proffered for nor facts that would raise his testimony beyond mere conjecture." SMR v. Fairlawn Board of Adjustments, 152 N.J. 309, 334 (1998).

N.J.R.E. 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

N.J.R.E. 703 requires an expert "to give the why and wherefore" of his or her opinion rather than a mere conclusion. Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div.), certif. denied, 145 N.J. 374 (1996). Therefore, experts "must be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are scientifically reliable." Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992).

Particularly, they must relate their conclusions to generally accepted, objective standards of practice, and "not merely to standards personal to the witness." Fernandez v. Baruch, 52 N.J. 127, 131 (1968).

An expert's conclusion is inadmissible as a net opinion when it is a bare conclusion unsupported by factual evidence. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981); see also Johnson v. Salem Corp., 97 N.J. 78, 91 (1984). "The failure of an expert to explain a causal connection between the act or incident complained of, and the injury or damage allege resulting therefrom, renders the expert opinion inadmissible." Vuocolo v. Diamond Shamrock Chemical Co., 240 NJ Super. 289, 300 (App. Div. 1990). However, the failure of an expert to give weight to a factor thought important by an adverse party does not reduce his testimony to an inadmissible net opinion if he otherwise offers sufficient reasons which logically support his opinion. Rosenberg v. Tavorath, 352 N.J. Super. 385, 402 (App. Div. 2002). Rather, such an omission merely becomes a proper subject of exploration and cross-examination at a trial. Id.

b) Motion for Summary Judgment Standard

A motion for summary judgment is governed by R. 4:46-2 of the New Jersey Court Rules. The rule provides that summary judgment shall be "rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law." R. 4:46-2.

The case of Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995), set forth a new standard for a trial court to apply when determining whether an alleged disputed issue should be considered "genuine" for the purposes of R. 4:46-2. The Brill court stated that:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent

> evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

142 N.J. at 540.

The Brill court further clarifies that, "[i]f there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of R. 4:46-2." Id. Rather, when the evidence "is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment." Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)).

IV. ANALYSIS

1) Motions for Summary Judgment

The Plaintiff and both Defendants now move for summary judgement. Specifically, Plaintiff is seeking summary judgment on liability for several of its claims including its breach of contract claims and its claims for breach of the covenant of good faith and fair dealing implied within the MPA and SED Lease. Defendants both oppose the Plaintiff's Motion and move for summary judgment seeking to dismiss all of the Plaintiff's claims.

a. Plaintiff Concedes Counts I and II

To start, Plaintiff consents to the dismissal of Counts I and II as the parties agree that the MPA supersedes all prior agreements and understandings. Accordingly, the Court will **GRANT** the Defendants' Motions for Summary Judgment as to Counts I and II of the Plaintiff's First Amended Complaint.

b. Breach of Section 1.5 of the MPA

The central issue raised in this case involves the Defendants' alleged breach of the MPA that existed between Deborah Heart and Lung Center and Our Lady of Lourdes Health Care Services, Inc. The MPA outlined the partnering relationship that existed between Deborah and Lourdes and controlled how the two parties would "consider, negotiate, and memorialize as Component Agreements … certain Partnering Opportunities." (MPA ¶1.1). The MPA specifies that the Term of the agreement is defined as follows:

> The initial Term of this Master Partnering Agreement shall be for a ten (10) year period commencing on the Effective Date [January 15, 2009]. Thereafter, the Master Partnering Agreement shall automatically renew for additional terms of five (5) years … unless, as of sixty (60) days prior to the end of the Term, there are no Essential partnering Agreements still in effect between the parties, for whatever reason, in which case, the term shall only renew for a five (5) year Renewal Term upon mutual agreement of the Parties.

(MPA ¶4.1).

The MPA also outlined several ways in which the Agreement could be terminated. The Agreement specifies that "[e]ither party may terminate this Master Partnering Agreement if there is no Component Agreement still in effect covering an Essential Partnering Opportunity because such Component Agreements have expired or otherwise terminated for a reason other than a default or breach by Deborah or Lourdes." (MPA ¶4.2.2). The Agreement also notes that either party would have the right to immediately terminate the MPA, upon notice to the other party, if a "Component Agreement governing any Essential Partnering Arrangement is terminated by [Deborah or Lourdes] based upon an "Event of Default" by [Deborah or Lourdes] as that term is defined by the Component Agreement governing the Essential Partnering Agreement…" (MPA ¶4.2.3.5; MPA ¶4.2.4.5).

However, the center of contention in this matter is Section 1.5 of the MPA which reads as follows:

> Primary Partner in Burlington County. The Parties agree that during the Term … of this Master Partnering Agreement neither party shall enter into any arrangement, partnership or affiliation related in whole or in part to the provision, management, marketing and/or oversight of cardiology services in Burlington County with another hospital located in Burlington County as of the Effective Date ("Other Hospital") or an affiliate of an Other Hospital regardless of whether such affiliate is located in Burlington County.

(MPA ¶1.5).

Plaintiff contends that Lourdes breached Section 1.5 when Lourdes entered into a "Member Substitution" with Virtua and asserts that such an agreement constitutes an "arrangement, partnership or affiliation" related in part to the "provision, management, marketing and/or oversight of cardiology services in Burlington County with another hospital located in Burlington County." In opposition, Defendants contend that Lourdes did not enter into an agreement with Virtua. Instead, the Membership Transfer Agreement at issue involved Lourdes' parent company, Maxis, and Virtua. Defendants contend that Lourdes therefore was not a party to any arrangement, partnership or affiliation and had no control or authority over a membership substitution between Virtua and Maxis. (Def. Opp. Br., 7). Additionally, Defendants argue that the MPA did not prohibit a change in ownership of Lourdes and that even if it did, the MPA did not renew and was terminated before the Membership Transfer Agreement closed.

As noted above, the MPA became effective on January 15, 2009, and began with an initial 10-year term that would automatically renew for an additional 5 years unless, as of 60 days prior to the end of the term, no "Essential Partnering Agreements" were still in effect between the parties. In that case, the term of the agreement would only renew for an additional 5 years upon the mutual agreement of the parties. (MPA ¶4.1). Accordingly, the initial 10-year

term would have expired on January 15, 2019, and the agreement would automatically renew for an additional 5 years so long as there were "Essential Partnering Agreements" in effect as of November 16, 2018. Additionally, Section 4.2.2 of the MPA states that either party could terminate the MPA if there were no "Component Agreements" still in effect because such "Component Agreement" "expired or otherwise terminated for a reason other than default or breach by Deborah or Lourdes." (MPA ¶4.2.2).

One of the primary issues in the breach of contract claim here is the date upon which the "Member Substitution" was consummated between the Defendants. Defendants assert that consummation occurred on July 1, 2019, when the deal officially closed. Plaintiff contends that Defendants "entered into" the deal in 2018 when it took "affirmative steps" to effectuate the acquisition between Virtua and Lourdes and therefore engaged in an arrangement, partnership, or affiliation with one another contrary to Section 1.5.

The problem for both parties here is the language of the MPA. While both parties assert that the language of the MPA is clear and unambiguous, both parties set forth vastly different interpretations of Section 1.5 which undermines their assertions that it is in fact clear and unambiguous. The terms "arrangement," "partnership," and "affiliation" are not defined within the MPA.

When contract terms "are clear and unambiguous, there is no room for construction and the court must enforce those terms as written" and do so by "giving them their plain, ordinary meaning." Barr v. Barr, 418 N.J. Super. 18, 32 (App. Div. 2011). "However, if the terms of the contract are susceptible to at least two reasonable alternative interpretations, an ambiguity exists. In that case, a court may look to extrinsic evidence as an aid to interpretation." Id. "The construction of a written contract is usually a legal question for the court, but where there is uncertainty, ambiguity, or the need for parol evidence in aid of interpretation, then the doubtful

provision should be left to the jury." Great Atlantic & Pacific Tea Co., Inc. v. Checchio, 335 N.J. Super. 495, 502 (App. Div. 2000).

Here, the parties advance two very different interpretations of the terms "arrangement," "partnership," and "affiliation" and because they are susceptible to alternative interpretations, the Court finds that the terms within Section 1.5 of the MPA are ambiguous. The parties have pointed to no extrinsic evidence related to the intention of the parties at the time of the formation of the MPA which could help the Court understand the meaning of the words in question; as such, the Court will look to the plain and ordinary meaning of the terms. Merriam-Webster's Dictionary defines the terms accordingly:

- Arrangement:
    - The state of being arranged;
    - The act of arranging;
        - Arrange:
            - To put into proper order or to correct a suitable sequence, relationship, or adjustment;
            - To make preparations;
            - To bring about an agreement or understanding.
- Partnership:
    - The state of being a partner;
    - A legal relation existing between two or more persons contractually associated as joint principals in a business;
    - A relationship resembling a legal partnership and usually involving close cooperation between parties having specified and joint rights and responsibilities.
- Affiliation:
    - The state or relation of being closely associated or affiliated with a particular person, group, party, company, etc.

Neither party cites relevant or binding case law which could shed light on whether the steps taken by Lourdes and Virtua legally constitutes an "arrangement, partnership, or affiliation." While the Court agrees that the "Membership Substitution" between Lourdes and Virtua did not go into effect until the closing date of July 1, 2019, the language of the MPA does not require that any "agreement, partnership, or affiliation" necessarily be an enforceable

contract. Instead, the plain meaning of the terms "agreement, partnership, or affiliation" suggests that the prohibited conduct could include entering into an "agreement to make preparations" with another hospital, entering into a "relationship resembling a legal partnership involving close cooperation" with another hospital, or entering into a "state or relation of being closely associated or affiliated" with another hospital. Given this, the facts of this case will determine whether one of these instances occurred, therefore requiring a fact finder to make the ultimate determination. Because there is a litany of disputed facts within this case relating to plans and preparations made in anticipation for the "Member Substitution" between Virtua and Lourdes which appear to have occurred before the expiration of the initial Term of the MPA, a jury must determine if those plans and preparations constitute conduct which was prohibited by the MPA, and whether that conduct occurred during the Term of the MPA.

Defendants also argue that Lourdes cannot be liable for violation of the MPA because Maxis, not Lourdes, entered into an agreement with Virtua for the "Membership Substitution." The problem with this argument is again the plain language of the MPA. Section 1.5 does not say that neither party shall enter into a contract with another, it says that neither party shall "enter into any arrangement, partnership, or affiliation" with another hospital located in Burlington County. While a contract between two hospitals surely would fall within the categories of prohibited conduct, the MPA does not specifically require that such conduct be memorialized by a contract. Accordingly, a jury could find that Lourdes' conduct fell within one of the prohibited categories of conduct regardless of whether it was a party to the "Membership Substitution."

Lastly, Defendants argue that Section 1.5 of the MPA was unenforceable as it violated public policy. Defendants contend that, because the Attorney General and Judge Dow signed off on the "Member Substitution" and found that such an acquisition was in the public's interest pursuant to CHAPA, Section 1.5, precluding such an acquisition, is not in the public's interest

and therefore unenforceable. This argument is a logical stretch unsupported by any authority. Defendants point to no case law which substantiates this notion that the Attorney General's approval of an acquisition under CHAPA voids any prior contracts that may have encumbered such an acquisition. The purpose of the Attorney General's review of an acquisition under CHAPA is to ensure that "appropriate steps have been taken to safeguard the value of charitable assets of the hospital and to ensure that any proceeds of the proposed acquisition are irrevocably dedicated for appropriate charitable health care purposes…" N.J.S.A. 26:2H-7.11. The fact that the Attorney General and Judge Dow found that Lourdes and Virtua took the appropriate steps to safeguard charitable assets during the acquisition of Lourdes has nothing to do with the public policy considerations surrounding the provisions in Section 1.5 of the MPA. To the contrary, there is ample evidence in the record demonstrating that agreements like the MPA are commonplace within the healthcare industry and the Defendants have failed to point to any caselaw which asserts otherwise.

Accordingly, the Court will **DENY** both the Plaintiff's and Defendants' Motions for Summary Judgment on the issue of breach of the MPA. Without any supporting authority to rely on, this Court cannot determine whether a breach of the MPA occurred when Lourdes and Virtua planned and took steps to effectuate the "Member Substitution" between the two while the MPA was in force. Instead, a jury will need to determine whether the Defendants' conduct constitutes an "arrangement, partnership, or affiliation," and whether that conduct occurred during the Term of the MPA.

c. Breach of the SED Lease

Count V and Count VI of the Plaintiff's First Amended Complaint allege that Lourdes breached both the SED Lease and the implied covenant of good faith and fair dealing when

Lourdes allegedly violated Section 12.1.7 of the SED Lease agreement by agreeing to be acquired by Virtua.

The Satellite Emergency Department Lease went into effect on February 12, 2009, and was entered into between Our Lady of Lourdes Health Care Services, Inc., as the tenant, and Deborah Heart and Lung Center as the landlord. The Lease included an initial term of ten years, with the tenant reserving the right to extend the Lease for three additional five-year terms. (SED Lease ¶1.2). Renewal of the lease is provided for as follows:

> If Tenant desires to extend the Term of this Lease for any Renewal Term, it shall provide Landlord with written notice (the "Renewal Notice") no later than the day which is nine (9) months prior to the expiration of the Term or the then current Renewal term, as the case may be, time being of the essence … If the Term of this Lease is not extended for the First Renewal Term, Tenant shall have no right to extend the Term of hereof for any subsequent Renewal Term.

(SED Lease ¶1.2).

The SED Lease also includes a provision which prevents Lourdes from assigning the Lease or subletting the property "without prior written consent of the landlord, which consent shall be in the sole discretion of the Landlord…" (SED Lease ¶9.1).

Primarily at issue in this case is the section of the SED Lease which governs default of the agreement. Specifically, Plaintiff points to Section 12.1.7 of the Lease which provides that a default of the SED Lease shall occur in the event of "[a] default by Tenant under the Master Partnering Agreement, provided there has not been an Event of Default by Landlord." Plaintiff asserts that Lourdes' agreement with Virtua constitutes a breach of the MPA and therefore constitutes a breach of the SED Lease. Plaintiff also asserts that Lourdes breached the anti-assignment provision at Section 9.1 when Lourdes "attmpt[ed], without Deborah's consent, to assign the SED Lease Agreement." (Pl. Opp. Br., 12). Plaintiff points to a presentation presented

to Virtua's Board of Trustees which Plaintiff asserts expressly states that Virtua would make the transfer of the SED to Virtua a closing condition of the "Membership Substitution."

First, the Court looks to the Term of the SED Lease. The parties agree that initial term of the SED Lease expired 10 years after the consummation of the lease. Lourdes did not receive approval from the Department of Health to amend its license until April 16, 2009, and therefore the parties now agree that the lease did not go into effect until that time. Accordingly, the initial term of the lease was set to expire on April 15, 2019, at 11:59 pm. The Lease could have been renewed for an additional five-year term so long as Lourdes provided Deborah with written notice 9 months prior to the expiration date of the first term which would have been on July 16, 2018.

On December 3, 2018, Joseph Chirichella sent a letter to Dr. Reginald Blaber which outlined that a notice to renew would have been due on July 16, 2018, Lourdes did not issue said notice, and therefore "Deborah intend[ed] to terminate the Lease upon the termination of the Initial Term on April 15, 2019, at 11:59 p.m." (Def. Appendix 827). Thereafter, Dr. Blaber sent a letter to Mr. Chirichella stating that, in their interpretation, the Department of Health did not approve Lourdes' license to operate the SED until March 2, 2010, and therefore Lourdes did not need to provide notice to renew the Lease until April 1, 2019. (Def. Appendix 829). However, Dr. Blaber expressed that Lourdes intended to renew the lease, stating that "I believe that the focus at this point should be on finding common ground so that the SED can continue to operate for the benefit of all involved." Id. at 830. Lourdes then sent a formal renewal notice on January 11, 2019, stating that it is "exercising its option to renew and extend the Lease for the First Renewal Term of five (5) years as provided by Section 1.2 of the Lease." (Def. Appendix 835). On February 18, 2019, Deborah then sent a letter to Lourdes in response to the renewal notice, stating that "Deborah … rejects Lourdes' January 11, 2019 'Renewal Notice' as untimely." (Def.

Appendix 843). Therefore, according to the plain language of the SED Lease and the conduct of the parties, the Court finds that the initial term of the lease expired on April 15, 2019, at 11:59 p.m.

Plaintiff asserts that the effect of the lease continued beyond the termination date because Lourdes was allegedly a holdover tenant. As Plaintiff notes, "[i]t is well settled that when a tenancy for a stated term of a year or more is converted to a holdover month-to-month tenancy by reason of expiration of a written lease without execution of a renewal lease, the holdover tenancy is ordinarily subject to all the terms and conditions of the written lease other than its durational term." Center Ave. Realty, Inc. v. Smith, 264 N.J. Super. 344, 348 (App. Div. 1993). While the Court notes that the SED Lease included a liquidated damages provision for any such holdover provision and Lourdes paid said liquidated damages, that does not refute the notion that all of the terms and conditions of the written lease continued during the length of the holdover. Thus, while the Defendant's payment of the liquidated damages goes against any potential damages asserted by Deborah, it does not change the fact that Section 12.1.7 of the Lease would remain in effect while Lourdes was operating as a holdover tenant.

Therefore, because it is undisputed that Lourdes constituted a holdover tenant of the SED, the provisions of the SED Lease continued on until Lourdes vacated the SED on June 30, 2019. Accordingly, if the MPA was still in effect at the time that the SED Lease was in effect, "[a] default by Tenant under the Master Partnering Agreement" would constitute an event of default under the SED Lease. (SED Lease, ¶12.1.7). However, as noted above, the Court cannot determine whether or when the MPA was breached and therefore cannot determine whether Section 12.1.7 of the Lease was triggered. Instead, such questions will need to be answered by a jury.

Plaintiff also argues that the "Member Substitution" amounts to an assignment of the Lease and therefore violates Section 9.1. Defendant asserts that a transaction like the "Member Substitution," where one corporation acquires a parent corporation's ownership interest in a subsidiary, does not result in an assignment of the subsidiary's underlying liabilities.

Section 9.1 of the SED Lease outlines the prohibition on assignments by Lourdes and specifically notes that, for the purposes of the SED Lease, "any mortgage, conveyance, transfer or encumbrance of this Lease Agreement and any transfer by operation of law shall be deemed an assignment."

While Plaintiff asserts that the SED Lease's definition of an assignment is considerably broader and more encompassing than the provision contemplated in Segal v. Grater Val. Terminal Corp., 83 N.J. Super. 120 (App. Div. 1964), the language of the Lease does not override the applicable law on the issue. As noted by the Defendants, the Appellate Division ruled that "the sale of shares of stock of a lessee corporation to another company, resulting in the relationship of parent and wholly-owned subsidiary, does not constitute an assignment of the lease or an underletting of the premises." Id. at 123. Additionally, anti-assignment provisions which restrict transfers by operation of law are not viewed favorably. "A covenant not to assign, being in restraint on alienation, is subject to the doctrine of strict construction which tends to limit its operation. Implied covenants against transfer by operation of law are disfavored, and courts are astute in finding ways to avoid even an express provision restricting transfer by operation of law." Id. at 124. Accordingly, the Court cannot find that the Defendants can be liable for breach of the SED Lease due to any assignment by operation of law. As such, the Court will **DENY** all Motions for Summary Judgment as to the Plaintiff's claims for breach of the SED Lease.

d. Fee Shift Under the SED Lease

Plaintiff asserts that breach of the MPA entitles Deborah to fee shifting under the SED Lease. Defendant asserts that any alleged breach of the MPA is not "an enforcement of the Tenant's obligations under the lease."

Section 12.3 of the SED Lease governs enforcement fees and states as follows:

> Cost of Enforcement. Tenant shall pay to Landlord, *as Additional Rent upon demand*, all of Landlord's costs, charges and expenses including without limitation the reasonable fees of counsel, agents, and others retained by landlord *for the enforcement of Tenant's obligations under this Lease* and also any such costs, charges, expenses or fees incurred by Landlord in any litigation in which Landlord, without Landlord's fault, becomes involved or concerned by reason of this Lease or the relationship of Landlord and Tenant under this Lease.

(SED Lease, ¶12.3 emphasis added).

The problem for the Plaintiff's fee shift argument is the fact that the Court must strictly construe fee shift provisions. While New Jersey allows for contractual fee shifting, any provisions within a contract relating to a fee shift must be strictly construed in light of the State's general policy disfavoring an award of attorney's fees. McGuire v. City of Jersey City, 125 N.J. 310, 326 (1991). The fee shift provision under Section 12.3 allows for fees in two situations. First, for "enforcement of Tenant's obligations under this Lease." And second, for "any such costs, charges, expenses or fees incurred by Landlord in any litigation in which Landlord, without Landlord's fault, becomes involved or concerned by reason of this Lease or the relationship of Landlord and Tenant under this Lease."

When strictly construing the language of the first clause, the Court cannot find that the violation of a separate contract constitutes an obligation under the SED Lease. While Section 12.1.7 of the SED Lease states that default by Lourdes under the MPA constitutes an "event of default" under the SED Lease, there is no language within the Lease which states that an event of

default constitutes an "obligation" under the lease. And when strictly construing the language of the fee shift provision, the Court cannot make any leaps or inferences.

When strictly construing the language of the second clause, the Court cannot find that a violation of Section 12.1.7 of the SED Lease by way of a breach of the MPA constitutes "litigation in which Landlord, without Landlord's fault, becomes involved or concerned by reason of this Lease or the relationship of Landlord and Tenant under this Lease." Had the MPA included a fee shift provision, such a provision may be appropriately triggered by breach of the MPA. However, the Court cannot find that the breach of a separate contract can give rise to the fee shift provision of this Lease, amounting to "Additional Rent," when the breach of the MPA being alleged by the Plaintiff does not arise from the Lease, but rather solely arises from Lourdes' relationship with Virtua. Again, the need to make logical inferences and leaps to find that the fee shift provision applies here goes beyond a strict interpretation of the language and would therefore violate New Jersey's general policy disfavoring the shifting of attorney's fees. Accordingly, the Court will **GRANT** Defendants' Motions relating to the fee shift provision under the SED Lease.

e. Plaintiff's Claimed Damages

Defendants contend that the Plaintiff cannot show damages as a result of either the alleged breach of the SED Lease or the alleged breach of the MPA. However, the Court presently has before it four separate expert reports on the Plaintiff's claims of damages which each exhaustively tease out every possible theory of damages alleged by the Plaintiff and opposed by the Defendants. The issues raised within the Peterson Report and Capps Report inject questions of fact sufficient to preclude summary judgment on the issue of damages.

f. Striking of the Defendants' Affirmative Defenses

Plaintiff asserts that the Defendants' Affirmative Defenses must be struck because they fail to present genuine issues for trial. Defendants contend that the Plaintiff's argument is procedurally improper and lacks basis.

There are several problems with the Plaintiff's requested relief regarding the Defendants' Affirmative Defenses. First, generally, the striking of pleadings is used as a sanction for one party's failure to comply with discovery obligations, and the request for sanctions in that scenario would arise under R. 4:23. Plaintiff points to one unpublished Appellate Division case to assert that such relief can also be sought on summary judgment. However, that case is neither binding on this Court nor directly relevant. In Bank of New York Mellon as Trustee for Certificateholders of CWALT 2004-7T1 v. Brown, No. A-0842-19, WL 221397 (App. Div. January 26, 2022), the Appellate Division affirmed the trial court's decision to grant an unopposed motion to strike defendant's second amended complaint due to the failure to respond to discovery demands. Id. at 2. The Appellate Division noted that "[i]f the defendant's answer in a foreclosure action does not challenge those essential elements [of a claim], the plaintiff is entitled to strike the defendant's answer as non-contesting." Id. at 3. However, in addition to the non-binding nature of the Brown case, the facts at play here are vastly different. First, this is not a foreclosure action. Second, the Defendants have raised defenses that are relevant to the Plaintiff's claims and relate to the essential elements of those claims.

Additionally, affirmative defenses are potential theories of defense that may not necessarily be raised at trial. The Court does not yet know what defenses the Defendants will actually raise at trial and hamstringing the Defendants at this stage would certainly be prejudicial. Moreover, as noted above, there are substantial questions of fact at hand which preclude summary judgment on nearly all of the Plaintiff's claims. Those same questions of fact

apply to the Defendants' Affirmative Defenses as well and preclude any decision now to strike the Defendants' Affirmative Defenses on summary judgment. Thus, Plaintiff's request to strike the Affirmative Defenses is **DENIED.**

g. Plaintiff's Claims for Breach of the Implied Warranty of Good Faith and Fair Dealing

The implied covenant of good faith and fair dealing exists within every contract in New Jersey. Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420 (1997). The implied covenant asserts that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Id. A party can breach the covenant when it "exercises its contractual functions arbitrarily, unreasonably, or capriciously and with an improper motive." Wilmington Savings Fund Society, FSB for Pretium Mortgage Acquisition Trust v. Daw, 469 N.J. Super 437, 452 (App. Div. 2021). The covenant can be utilized "to allow redress for the bad faith performance of an agreement even when the defendant has not breached any express term." Seidenberg v. Summit Bank, 348 N.J. Super. 243, 257 (App. Div. 2002).

Here, Plaintiff asserts that the Defendants breached the covenant of good faith and fair dealing implied within the SED Lease and the MPA when Defendants engaged in discussions for the acquisition of Lourdes without the knowledge of the Plaintiff and by allegedly misrepresenting financial information to regulators in order to procure said acquisition. The Plaintiff has set forth facts which indicate that members of the Defendants knew that a potential acquisition of Lourdes could constitute a breach of the MPA and related contracts but chose to go forward with the acquisition anyway. A jury will need to determine whether the facts presented relating to this alleged knowing breach of the MPA and relating to the Plaintiff's allegations of subterfuge amount to a breach of the implied covenant of good faith and fair

dealing. Accordingly, the Court will **DENY** all Motions for Summary Judgment relating to the implied covenant of good faith and fair dealing.

h. Tortious Interference Claims

Plaintiff alleges that Defendant Virtua engaged in tortious interference with a contractual relationship by entering into the acquisition agreement with Lourdes while the MPA was allegedly still in effect.

"The tort of interference with a business relation or contract contains four elements: (1) a protected interest; (2) malice – that is, defendant's intentional interference without justification; (3) a reasonable likelihood that the interference causes the loss of prospective gain; and (4) resulting damages." Vosough v. Kierce, 437 N.J. Super 218, 234 (App. Div. 2014). When a tortious interference claim is brought against a competitor, that competitor may raise a lawful competition defense. "While a party does have a right to enjoy the fruits and advantages of its own labor without unjust interference, a party has no right to be protected against competition." EZ Sockets, Inc. v. Brighton-Best Socket Screw Mfg. Inc., 307 N.J. Super. 546, 559 (Ch. Div. 1996). New Jersey follows the standard outlined within the Restatement (Second) of Torts §768 when analyzing the lawful competition defense to a claim of tortious interference. See C.R. Bard, Inc. v. Wordtronics Corp., 235 N.J. Super. 168, 174 (Law Div. 1989). According to the Restatement, a competitor "does not interfere improperly with the other's relation if: (a) the relation concerns a matter involved in the competition between the actor and the other; and (b) the actor does not employ wrongful means; and (c) his action does not create or continue an unlawful restraint on trade; and (d) his purpose is at least in part to advance his interest in competing with the other." Restatement (Second) of Torts, §768 (1979).

Plaintiff points to alleged misrepresentations made by Virtua to the Attorney General's Office and Judge Dow in order to secure CHAPA approval as the basis for the Plaintiff's claim

for "malice" under the tortious interference elements. Accordingly, there are currently questions of fact related to these claims which must be resolved by a jury. A jury must also determine whether the Defendants' alleged failure to notify the Plaintiff of the planned acquisition constitutes an infringement on the "fruits and advantages" enjoyed by Deborah through its contracts with Lourdes.

Again, the Defendant's reliance on their CHAPA approval is misplaced. The Attorney General's approval of the acquisition and finding that the charitable assets and charitable objectives at play were properly safeguarded does not undermine the questions of fact relating to the alleged misrepresentations made in order to secure said approval. Accordingly, the Court will **DENY** Virtua's Motion as to the Plaintiff's tortious interference claims.

i. Unfair Competition Claim

Plaintiff also brings a claim for unfair competition against Virtua. "The essence of unfair competition is fair play." Ryan v. Carmona Bolen Home for Funerals, 341 N.J. Super. 87, 94 (App. Div. 2001). "The purpose of the law regarding unfair competition is to promote higher ethical standards in the business world … the judicial goal should be to discourage, or prohibit the use of misleading or deceptive practices which renders competition is unfair." Id.

As set forth above, the Plaintiff has advanced questions of fact as to the use of deceptive practices and misrepresentations made to the Attorney General's Office which could also constitute a "misleading or deceptive practice" in the acquisition of a major competitor of the Plaintiff. A jury could find that this renders said competition unfair. Accordingly, due to material disputed questions of fact within the record, the Court will **DENY** Virtua's Motion as to the Plaintiff's unfair competition claims.

j. Punitive Damages

N.J.S.A. 2A:15-5.12(a) states:

> Punitive damages may be awarded to the plaintiff only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.

Clear and convincing evidence is defined as "that standard of evidence which leaves no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is a standard which requires more than a preponderance of evidence, but less than beyond a reasonable doubt, to draw a conclusion." N.J.S.A. 2A:15-5.10. Actual malice is defined as means an intentional wrongdoing in the sense of an evil-minded act. Id. Wanton and willful disregard means a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission. Id.

The awarding of punitive damages is now based on existing circumstances of aggravation and outrage beyond the simple commission of a tort. Pavlova v. Mint Management Corp., 375 N.J. Super. 397, 404-405 (App. Div. 2005). There must be a clear showing with of a deliberate act or omission with knowledge of a high degree of probability of harm or reckless indifference to consequences. Id. General allegations and mere conclusions are insufficient to demonstrate this. See Pavlova, supra, 375 N.J. Super. at 407-409.

The exceptional nature of a given case and the wanton or malicious nature of a defendant's conduct are questions for the finder of fact. Weiss v. Parker Hannifan Corp., 747 F.

Supp. 1118, 1135-1136 (D.N.J. 1990). The decision whether to award punitive damages is solely within the discretion of the finder of fact. Id.

Here, as noted above, the Plaintiff has advanced questions of fact relating to the element of "malice" as required for punitive damages. The ultimate nature of those allegations and whether they rise to the level of wanton disregard or malice as required for punitive damages is ultimately a question for a jury. Accordingly, the Court will **DENY** Virtua's Motion as to punitive damages.

2) **Defendants' Motions to Bar the Report of David. A Argue**

Defendants move to bar the report of Dr. Argue because it does not offer an opinion about Damages based on cardiology services in Burlington County and argues that Section 1.5 is unambiguous and "clear on its face" and therefore Argue's report should be barred because it offers opinions on cardiology services outside of Burlington County.

First, as noted above, the Court finds the language of Section 1.5 is not "clear on its face" and instead squarely falls into the category of ambiguous language based upon the two vastly different interpretations of its meaning by the parties here. As such, the Court cannot rule on its interpretation as a matter of law and instead, a jury will need to determine whether and when a breach occurred.

Defendants point to this Court's prior ruling from March 4, 2022, in which the Court ruled on a motion to quash and a motion to compel. Specifically, the Defendants cite a transcript of the Court's decision in which the Court found that "[t]he allegations, as set forth in the pleadings, relate only to cardiology services in Burlington County and not to cardiac services extending into neighboring counties." (Def. Exhibit D, 13:6-10). This decision was made within the scope of the allegations of the pleadings and the subpoenas propounded by the Plaintiff which, at the time, appeared far broader than what was necessary given the claims outlined

within the Plaintiff's pleadings. Defendants therefore appear to argue that any references by experts to any cardiac care outside of Burlington County are outside the scope of this case. However, the Defendants misinterpret the Court's decision.

First, the Court's March 4, 2022, decision was made on a motion to quash a subpoena and was intended to limit the scope of discovery. That motion was not a dispositive motion nor was the decision on that motion intended to have a dispositive effect on the Plaintiff's claims.

Second, while it remains that cardiac services rendered in other counties are outside the scope of the claims of this case, to the extent that those cardiac services may have a direct impact on cardiac services in Burlington County, they become relevant. This notion is what Dr. Argue's report appears to relate to:

> Based on my analysis of the shares of cardiac procedures accounted for by Deborah and Virtua, I conclude that Virtua being able to develop a full-service, fully integrated cardiology services program through its 2019 acquisition of Lourdes resulted in the significant decline in the share of Burlington County residents' cardiac procedures attributable to Deborah. The Certificate of Need acquired by Virtua enabled Virtua to develop a full-service, fully integrated cardiology services program in a manner it could not otherwise have accomplished. Deborah's decline in share between 2018 and 2021 is highly concentrated in Burlington County, an area from which Virtua also draws substantial numbers of patients. The much smaller changes in Deborah's shares in surrounding counties serves as an empirical control to confirm that Virtua's conduct is the source of Deborah's decline.

(Argue Report, ¶7).

> My analysis of data on patient discharges indicates that Virtua appears to have drawn patients from Burlington County who would have otherwise gone to Deborah. The substantial decline in share for Deborah is consistent with an upheaval in the cardiology services landscape to the detriment of Deborah.

(Argue Report, ¶17).

Part of the Plaintiff's theory of liability stems from the notion that the Defendant's alleged breach of Section 1.5 of the MPA adversely affected the Plaintiff's cardiology services in Burlington County. Accordingly, if the results of the alleged breach of the MPA led to reductions in the amount of people seeking cardiology services at the Plaintiff's hospital in Burlington County, any expert opinions on how and why those reductions occurred would be relevant. And while the Defendants assert that Dr. Argue's report will not assist a jury because it focuses on the market share of patients rather than services, patient numbers are logically the only possible way to determine the performance of cardiology services in Burlington County.

Accordingly, the Court cannot find a basis to strike any portion of the report of Dr. Argue at this time. As noted in this Court's previous decisions related to the expert reports of Dr. Capps and Dr. Friend, the scope and relevancy of the testimony provided by the experts in this case will best be determined during trial. As such, if Dr. Argue attempts to go beyond the scope of this case and give opinions on matters which do not relate to cardiology services rendered in Burlington County, the Court will entertain such objections at that time. Therefore, the Court will **DENY** the Defendants' Motion to Bar the report of Dr. Argue.

3) **Defendants' Motions to Bar the Report of James Peterson**

Defendants next move to strike the Plaintiff's expert report propounded by James Peterson. Defendants primarily take issue with the methods employed by Peterson but also assert that he is not qualified to operate as an expert because he has not calculated damages as an expert witness before.

The New Jersey Supreme Court identified three baseline prerequisites when determining whether expert testimony is permissible: (1) the intended testimony must concern a subject matter that is beyond the ken of an average juror; (2) the field testified to must be at a state of the art such that an expert testimony could be sufficiently reliable; and (3) the witness must have

sufficient expertise to offer the intended testimony. In Re Accutane Litigation, 234 N.J. 340, 349 (2018). "Those requirements are construed liberally in light of Rule 702's tilt in favor of admissibility of expert testimony." State v. Jenewicz, 193 N.J. 440, 454 (2008). "In respect of prong (3) – the individual's expertise to speak on a topic as an expert witness – our trial courts take a liberal approach when assessing a person's qualifications." Id. "[C]ourts allow the thinness and other vulnerabilities in an expert's background to be explored in cross-examination and avoid using such weaknesses as a reason to exclude a party's choice of an expert witness to advance a claim or defense" Id. at 455.

When assessing the methodology utilized by experts, the Court's gatekeeping function is limited to determining that the underlying data utilized in the opinion be sufficiently reliable and that the methodology used to achieve the expert's opinion has a valid scientific basis. In civil cases, New Jersey courts are to apply the Daubert standard articulated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). In applying this standard, the New Jersey Supreme Court held that a trial court may consider several factors including whether the scientific theory advanced by the expert has been tested, whether the scientific theory has been published and been subject to some form of peer review, whether the scientific technique has any "known or potential rate of error," and whether the scientific theory has been widely accepted within the appropriate scientific community. In Re Accutane Litigation, 234 N.J. 340, 384 (2018).

As an initial matter, the Court finds that Mr. Peterson is sufficiently qualified to opine on damages. Mr. Peterson is qualified as a Chartered Financial Analyst who specializes in "general financial advisory, valuation, mergers and acquisitions, reorganization, and dispute support." (Peterson Report, ¶3) Mr. Peterson is purportedly Deloitte's "Health Care and Valuation and Financial Modeling leader" who is "focused on valuation and financial modeling in the healthcare industry." Id. Accordingly, the Court finds that Mr. Peterson is sufficiently qualified

as an expert by education, knowledge, training, and experience in the specific field of finance at issue in this case. Defendants have pointed to no case law which advances their argument that an expert is not qualified to provide an opinion merely because he has not calculated damages as an expert witness before.

As noted above, the Court is required to take a liberal approach to expert testimony and assess, under the Daubert standard, whether the methodology is scientifically valid and whether the methodology can be applied to the facts in issue. Given that standard, the Court finds no basis to bar the report offered by James Peterson at this time. While the Defendants object to every aspect of Peterson's expert report, the Court cannot find that any of the methods advanced by Peterson are invalid or based upon conjecture. Additionally, the Court finds that Peterson appropriately bases his opinions on the facts presented in this case and that his use of valid methods in calculating damages precludes a finding that his opinions are mere net opinions.

The objections raised by the Defendants as to Peterson's methodology are the exact types of issues that should be raised on cross-examination. The appropriateness of certain methodologies, assumptions of facts and figures, and the source of data used to formulate Peterson's opinions all can be refuted and challenged on cross-examination and by testimony provided by the Defendants' rebuttal experts. Accordingly, the Court will **DENY** the Defendants' Motion to Bar the expert report of James Peterson.

V. CONCLUSION

For the foregoing reasons, the Court will **DENY** the Plaintiff's Motion for Summary Judgment, **GRANT IN PART AND DENY IN PART** Lourdes' Motion for Summary Judgment, and **DENY** Virtua's Motion for Summary Judgment.

The Court will also **DENY** both of the Defendants' Motions to Bar the expert reports.