

IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

JERRY N. BLACK, M.D.,

Plaintiff,

v.

Civil Action No. 15-C-15

ST. JOSEPH'S HOSPITAL OF  
BUCKHANNON, INC.,

Defendant.

**ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT ST. JOSEPH'S  
HOSPITAL OF BUCKHANNON, INC. TO PLAINTIFF'S COMPLAINT AND  
COUNTERCLAIMS AGAINST JERRY N. BLACK, M.D.**

Defendant, St. Joseph's Hospital of Buckhannon, Inc. ("STJ" or "Defendant"), by and through counsel, Robert M. Sellards, Nathan I. Brown, Sarah B. Massey and the law firm of Nelson Mullins Riley & Scarborough LLP, hereby respectfully submits its Answer and Affirmative Defenses to Plaintiff's Complaint.

**FIRST DEFENSE**

Plaintiff's Complaint fails to state a claim upon which relief may be granted and should be dismissed pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

**SECOND DEFENSE**

In answering the numbered paragraphs contained in Plaintiff's Complaint, Defendant respectfully states as follows:

1. Answering Paragraph 1 of Plaintiff's Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations contained therein, and said allegations stand denied by operation of law.

2. Answering Paragraph 2 of Plaintiff's Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations contained

therein, and said allegations stand denied by operation of law.

3. Answering Paragraph 3 of Plaintiff's Complaint, Defendant admits the allegations contained therein.

4. Answering Paragraph 4 of Plaintiff's Complaint, Defendant admits that the property, which is discussed in the documents governing the relationship between the parties in this matter, is located in Upshur County, West Virginia. All remaining allegations are denied.

5. Answering Paragraph 5 of Plaintiff's Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations contained therein, and said allegations stand denied by operation of law.

6. Answering Paragraph 6 of Plaintiff's Complaint, Defendant states that the Memorandum Agreement dated June 3, 1982 ("Memorandum Agreement"), attached hereto as **Exhibit A**, speaks for itself, and therefore, no response is required. To the extent the allegations set forth in Paragraph 6 contain allegations which are inconsistent with the Memorandum Agreement, these allegations are denied.

7. Answering Paragraph 7 of Plaintiff's Complaint, Defendant states that there are no allegations set forth in this paragraph, and accordingly, no response is required.

8. Answering Paragraph 8 of Plaintiff's Complaint, Defendant states that the Deed dated June 3, 1982 ("Deed"), attached hereto as **Exhibit B**, speaks for itself, and therefore, no response is required. To the extent the allegations contained in Paragraph 8 set forth allegations which are inconsistent with the Deed, these allegations are denied.

9. Answering Paragraph 9 of Plaintiff's Complaint, Defendant states that the Deed speaks for itself, and therefore, no response is required. To the extent the allegations contained in Paragraph 9 set forth allegations which are inconsistent with the Deed, these allegations are

denied.

10. Answering Paragraph 10 of Plaintiff's Complaint, Defendant admits that the Deed and the Memorandum Agreement were drafted and prepared by Terry D. Reed, Post Office Box 310, 23 West Main Street, Buckhannon, WV 26201. Defendant further admits that Terry D. Reed notarized the Deed and Memorandum Agreement. As to the remaining allegations of Paragraph 10 of Plaintiff's Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations contained therein, and said allegations stand denied by operation of law.

11. Answering Paragraph 11 of Plaintiff's Complaint, Defendant states that because of the vagueness of the words used, in particular "sophisticated," "auspices," and "competent," Defendant is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations contained therein, and said allegations stand denied by operation of law.

12. Answering Paragraph 12 of Plaintiff's Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations contained therein, and said allegations stand denied by operation of law.

13. Answering Paragraph 13 of Plaintiff's Complaint, Defendant denies that Dr. Black or STJ believed a "right of first refusal" was intended or created but admits that an option to repurchase existed. The remaining allegations are denied.

14. Answering Paragraph 14 of Plaintiff's Complaint, Defendant denies the allegations contained therein.

15. Answering Paragraph 15 of Plaintiff's Complaint, Defendant admits the allegations contained therein. By way of further response, Defendant states that the Complaint for Declaratory Judgment in the Circuit Court of Upshur County, West Virginia, Civil Action

No. 12-C-52 ("Complaint for Declaratory Judgment") speaks for itself. To the extent the allegations contained in Paragraph 15 contain allegations which are inconsistent with the Complaint for Declaratory Judgment, these allegations are denied.

16. Answering Paragraph 16 of Plaintiff's Complaint, Defendant states that the Complaint for Declaratory Judgment speaks for itself, and therefore, no response is required. To the extent the allegations contained in Paragraph 16 contain allegations which are inconsistent with the Complaint for Declaratory Judgment, these allegations are denied.

17. Answering Paragraph 17 of Plaintiff's Complaint, Defendant states that the Option to Repurchase, attached hereto as **Exhibit C**, speaks for itself, and therefore, no response is required. To the extent the allegations contained in Paragraph 17 set forth allegations which are inconsistent with the Option to Repurchase, these allegations are denied.

18. Answering Paragraph 18 of Plaintiff's Complaint, Defendant admits the allegations contained therein.

19. Answering Paragraph 19 of Plaintiff's Complaint, Defendant admits the allegations contained therein.

20. Answering Paragraph 20 of Plaintiff's Complaint, Defendant admits that its counsel drafted the Order Denying Defendant Jerry N. Black's Motion to Dismiss Plaintiff's Complaint ("Motion to Dismiss Order"), and that the Court entered the Order on October 9, 2012. Defendant further states that Dr. Jerry Black did not object to the Motion to Dismiss Order. Moreover, Defendant states that the Motion to Dismiss Order speaks for itself. To the extent the allegations contained in Paragraph 20 contain allegations which are inconsistent with the Motion to Dismiss Order, these allegations are denied. Further, to the extent Plaintiff alleges

any wrongdoing against Defendant and/or Defendant's counsel, Defendant denies the Plaintiff's allegations.

21. Answering Paragraph 21 of Plaintiff's Complaint, Defendant incorporates by reference the transcript of the October 1, 2012 hearing. A true and correct copy of the transcript of the October 1, 2012 hearing is attached hereto as **Exhibit D**. To the extent the allegations contained in Paragraph 21 contain allegations which are inconsistent with the October 1, 2012 hearing transcript, these allegations are denied. By way of further response, Defendant admits that during this hearing was the first time that Dr. Black, through counsel, conceded that the Option to Repurchase was an option contract.

22. Answering Paragraph 22 of Plaintiff's Complaint, Defendant incorporates by reference the transcript of the October 1, 2012 hearing. *See Exhibit D*. To the extent the allegations contained in Paragraph 22 contain allegations which are inconsistent with the October 1, 2012 hearing transcript, these allegations are denied. Defendant further states that the Motion to Dismiss Order speaks for itself. To the extent the allegations contained in Paragraph 22 contain allegations which are inconsistent with the Motion to Dismiss Order, these allegations are denied.

23. Answering Paragraph 23 of Plaintiff's Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations contained therein, and said allegations stand denied by operation of law. Without admitting any of the letter's content, Defendant further states that Dean Fisher's letter speaks for itself. To the extent the allegations contained in Paragraph 23 set forth allegations which are inconsistent with Dean Fisher's letter, these allegations are denied.

24. Answering Paragraph 24 of Plaintiff's Complaint, Defendant states that the

allegations set forth therein are legal conclusions, to which no response is required. To the extent a response is required, the allegations are denied.

25. Answering Paragraph 25 of Plaintiff's Complaint, Defendant admits the allegations contained therein.

26. Answering Paragraph 26 of Plaintiff's Complaint, Defendant admits the allegations contained therein.

27. Answering Paragraph 27 of Plaintiff's Complaint, Defendant admits that Judge Henning ruled that the contract in question is an option contract. Defendant further incorporates by reference the transcript of the June 21, 2013 hearing. A true and correct copy of the transcript of the June 21, 2013 hearing is attached hereto as **Exhibit E**. To the extent the allegations contained in Paragraph 27 set forth allegations which are inconsistent with the June 21, 2013 hearing transcript, these allegations are denied. Defendant denies any remaining allegations.

28. Answering Paragraph 28 of Plaintiff's Complaint, Defendant states that the Order entered on August 8, 2013, ("August 8, 2013 Order") speaks for itself. To the extent the allegations contained in Paragraph 28 set forth allegations which are inconsistent with the August 8, 2013 Order, these allegations are denied.

29. Answering Paragraph 29 of Plaintiff's Complaint, Defendant admits the allegations contained therein.

30. Answering Paragraph 30 of Plaintiff's Complaint, Defendant denies the allegations contained therein.

31. Answering Paragraph 31 of Plaintiff's Complaint, Defendant states that the August 8, 2013 Order speaks for itself. To the extent the allegations contained in Paragraph 31 contain allegations which are inconsistent with the August 8, 2013 Order, these allegations are

denied.

32. Answering Paragraph 32 of Plaintiff's Complaint, Defendant admits the allegations contained therein.

33. Answering Paragraph 33 of Plaintiff's Complaint, Defendant admits that during oral argument before the Supreme Court of Appeals of West Virginia, Defendant took the position that the narrow issue before the trial court was only whether the "Option to Repurchase" was an option contract or a right of first refusal. Defendant further admits that the Supreme Court of Appeals of West Virginia ordered that the word "valid" be removed from the entered Order but affirmed the trial court's decision that the "Option to Repurchase" was an option contract. Defendant denies the remaining allegations.

34. Answering Paragraph 34 of Plaintiff's Complaint, Defendant states that the Supreme Court of West Virginia's Opinion filed on September 30, 2014 ("Opinion") speaks for itself. To the extent the allegations contained in Paragraph 34 set forth allegations which are inconsistent with the Opinion, these allegations are denied.

35. Answering Paragraph 35 of Plaintiff's Complaint, Defendant admits that Dr. Jerry Black filed a Motion on November 21, 2014 ("Motion"). Without admitting any of its allegations or conclusions, Defendant further states that the Motion speaks for itself. To the extent the allegations contained in Paragraph 35 set forth allegations which are inconsistent with the Motion, these allegations are denied.

36. Answering Paragraph 36 of Plaintiff's Complaint, Defendant admits the allegations contained therein.

37. Answering Paragraph 37 of Plaintiff's Complaint, Defendant admits the allegations contained therein.

38. Answering Paragraph 38 of Plaintiff's Complaint, Defendant admits that it requested oral argument on Plaintiff's November 21, 2014 Motion. Defendant further admits that the Court did not hear oral argument on Plaintiff's November 21, 2014 Motion during the December 1, 2014 hearing. Any remaining allegations are denied.

39. Answering Paragraph 39 of Plaintiff's Complaint, Defendant admits that it requested oral argument on Plaintiff's November 21, 2014 Motion. Defendant further admits that the Court did not hear oral argument on Plaintiff's November 21, 2014 Motion during the December 1, 2014 hearing. Any remaining allegations are denied.

40. Answering Paragraph 40 of Plaintiff's Complaint, Defendant admits the allegations contained therein.

41. Answering Paragraph 41 of Plaintiff's Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations contained therein, and said allegations stand denied by operation of law.

42. Answering Paragraph 42 of Plaintiff's Complaint, Defendant, without admitting any of the contents of Dr. Black's "Objection to Proposed Order and Renewed Motion," states that such document speaks for itself, and no response is required. To the extent a response is required, Defendant denies the allegations contained therein.

43. Answering Paragraph 43 of Plaintiff's Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations contained therein, and said allegations stand denied by operation of law.

44. Answering Paragraph 44 of Plaintiff's Complaint, Defendant admits that the Court entered an Order dated January 13, 2015 ("January 13, 2015 Order"). Defendant further states that the January 13, 2015 Order speaks for itself. To the extent the allegations contained in



Paragraph 44 set forth allegations which are inconsistent with the January 13, 2015 Order, these allegations are denied. As to the remaining allegations of Paragraph 44 of Plaintiff's Complaint, Defendant states that the allegations contained therein are legal conclusions to which no response is necessary. To the extent a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations contained therein, and said allegations stand denied by operation of law.

45. Answering Paragraph 45 of Plaintiff's Complaint, Defendant states that the January 13, 2015 Order speaks for itself. To the extent the allegations contained in Paragraph 45 set forth allegations which are inconsistent with the January 13, 2015 Order, these allegations are denied.

46. Answering Paragraph 46 of Plaintiff's Complaint, Defendant states that the allegations are simply a statement by Plaintiff as to his intentions in filing the Motion of November 21, 2014, to which no response is required. To the extent a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations contained therein, and said allegations stand denied by operation of law. Further, to the extent Plaintiff alleges any wrongdoing against Defendant and/or Defendant's counsel, Defendant denies the Plaintiff's allegations.

47. Answering Paragraph 47 of Plaintiff's Complaint, Defendant states that the allegations are simply a statement by Plaintiff as to his intentions in not asking for oral argument on his Motion of November 21, 2014, to which no response is required. To the extent a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations contained therein, and said allegations stand denied by operation of law.

48. Answering Paragraph 48 of Plaintiff's Complaint, Defendant states that the allegations contained therein are legal conclusions to which no response is necessary. To the extent a response is required, Defendant denies the allegations contained therein

49. Defendant further denies that Plaintiff is entitled to the judgment and relief sought in the unnumbered paragraphs beginning with "NOW, THEREFORE," set forth after Paragraph 48.

50. Defendant denies any and all allegations not specifically admitted herein.

### **THIRD DEFENSE**

To the extent supported by the facts and circumstances of this case, Defendant asserts all defenses relating to the expiration of the applicable statute of limitations and/or statutes of repose.

### **FOURTH DEFENSE**

Defendant hereby invokes and pleads any and all affirmative defenses applicable in the defense of the claims asserted in the Plaintiff's Complaint as may be relevant or pertinent and justified and established by the facts and circumstances hereof or may be developed through discovery. Such affirmative defenses are as contemplated and/or set forth in Rules 8 and 12 of the West Virginia Rules of Civil Procedure and any and all matters constituting an avoidance or affirmative defense as contemplated by Rules 8 and 12 of the West Virginia Rules of Civil Procedure, including, but not limited to, the affirmative defenses of waiver, estoppel, accord and satisfaction, fraud, contributory negligence, illegality, laches, expiration of the statute of limitations, or any other matter constituting an avoidance or affirmative defense.

### **FIFTH DEFENSE**

To the extent supported by the facts and circumstances of this case, Defendant preserves

all defenses pertaining to jurisdiction, venue, failure to join one or more indispensable parties, and failure to mitigate damages.

#### **SIXTH DEFENSE**

To the extent supported by the facts in this case, Plaintiff cannot recover because there has been a lack of consideration.

#### **SEVENTH DEFENSE**

To the extent supported by the facts in this case, Plaintiff cannot recover because there has been a failure of consideration.

#### **EIGHTH DEFENSE**

To the extent supported by the facts in this case, Plaintiff claims may be barred, in whole or in part, because Plaintiff failed to perform his contractual obligations and by the doctrine of unclean hands or *in pari delicto*.

#### **NINTH DEFENSE**

Plaintiff's claims are barred by the doctrines of *res judicata*, claim preclusion, collateral estoppel, and issue preclusion, including, but not limited to, the final resolution of such claims and issues.

#### **TENTH DEFENSE**

Any actions taken by Defendant in this matter were taken in good faith, in a reasonable manner, and/or authorized by statutes, and therefore, Plaintiff cannot recover from Defendant.

#### **ELEVENTH DEFENSE**

To the extent supported by the facts in this case, Defendant states that it met all contractual, statutory, and/or common law obligations it may have owed Plaintiff.

#### **TWELFTH DEFENSE**

To the extent supported by the facts in this case, Plaintiff has waived or is estopped from asserting the claims in the Complaint.

#### **THIRTEENTH DEFENSE**

To the extent supported by the facts in this case, Plaintiff has suffered no legally cognizable harm, for which he is entitled to compensation.

#### **FOURTEENTH DEFENSE**

At all times, and with respect to all matters alleged herein, Defendant acted reasonably, prudently, in good faith, with good cause, and within the parties' reasonable expectations.

#### **FIFTEENTH DEFENSE**

Plaintiff's claims are barred or limited by the terms and conditions contained in the signed agreements between Plaintiff and Defendant.

#### **SIXTEENTH DEFENSE**

Pursuant to W. Va. Code § 36-1A-4(5), the Uniform Rule Against Perpetuities is not applicable to "[a] nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision."

#### **SEVENTEENTH DEFENSE**

If the Court determines that the Rule Against Perpetuities applies, the documents should be reformed pursuant to W. Va. Code § 36-1A-3.

#### **EIGHTEENTH DEFENSE**

To the extent supported by the facts in this case, Plaintiff's claims are barred, in whole or in part, because there was no meeting of the minds.

### **NINETEENTH DEFENSE**

This Defendant reserves the right to assert such claims, whether they be cross-claims, counter-claims, third-party claims, or other claims for indemnification and contribution, as investigation and discovery may prove applicable, and hereby reserves the right to any such claim or potential claim.

### **TWENTIETH DEFENSE**

Defendant asserts the American Rule as a complete bar to Plaintiff's claim for attorney fees and costs.

### **TWENTY-FIRST DEFENSE**

To the extent that the Complaint asserts that Plaintiff is entitled to recover punitive or exemplary damages, this Defendant asserts the following defenses:

1. Plaintiff's claim for punitive damages violates, and is therefore barred by, the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States of America on grounds including the following:

- (a) it is a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution to impose punitive damages, which are penal in nature, against a civil defendant upon the Plaintiff satisfying a burden of proof which is less than the "beyond a reasonable doubt" burden of proof required in criminal cases;
- (b) the procedures pursuant to which punitive damages are awarded may result in the award of joint and several judgments against multiple defendants for different alleged acts of wrongdoing, which infringes upon the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States

Constitution;

- (c) the procedures to which punitive damages are awarded fail to provide a reasonable limit on the amount of the award against defendant, which thereby violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution;
- (d) the procedures pursuant to which punitive damages are awarded fail to provide specific standards for the amount of the award of punitive damages which thereby violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution;
- (e) the procedures pursuant to which punitive damages are awarded result in the imposition of different penalties for the same or similar acts, and thus violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution;
- (f) the procedures pursuant to which punitive damages are awarded permit the imposition of punitive damages in excess of the maximum criminal fine for the same or similar conduct, which thereby infringes upon the Due Process Clause of the Fifth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution;
- (g) the procedures pursuant to which punitive damages are awarded permit the imposition of excessive fines in violation of the Eighth Amendment of the United States Constitution;
- (h) the award of punitive damages to the Plaintiff in this action would constitute a deprivation of property without due process of law; and

- (i) the procedures pursuant to which punitive damages are awarded permit the imposition of an excessive fine and penalty.

2. Plaintiff's claim for punitive damages violates and is, therefore, barred by the provision of the Constitution of the State of West Virginia, including, but not limited to, Article III, Sections 4, 5, 6 and 10, on grounds including the following:

- (a) it is a violation of the Due Process and Equal Protection Clauses to impose punitive damages, which are penal in nature, against a civil defendant upon the Plaintiff satisfying a burden of proof which is less than the "beyond a reasonable doubt" burden of proof required in criminal cases;
- (b) the procedures pursuant to which punitive damages are awarded may result in the award of joint and several judgments against multiple defendants for different alleged acts of wrongdoing;
- (c) the procedures to which punitive damages are awarded fail to provide a limit on the amount of the award against defendant;
- (d) the procedures pursuant to which punitive damages are awarded fail to provide specific standards for the amount of the award of punitive damages;
- (e) the procedures pursuant to which punitive damages are awarded result in the imposition of different penalties for the same or similar acts;
- (f) the procedures pursuant to which punitive damages are awarded permit the imposition of punitive damages in excess of the maximum criminal fine for the same or similar conduct;
- (g) the procedures pursuant to which punitive damages are awarded permit the imposition of excessive fines;

- (h) the award of punitive damages to the Plaintiff in this action would constitute a deprivation of property without due process of law; and
- (i) the procedures pursuant to which punitive damages are awarded permit the imposition of an excessive fine and penalty.

### **TWENTY-SECOND DEFENSE**

Defendant reserves the right to assert additional affirmative defenses as discovery progresses.

**WHEREFORE**, Defendant St. Joseph's Hospital of Buckhannon, Inc. respectfully demands that the Plaintiff's Complaint in this action be dismissed with prejudice, that judgment be entered on behalf of Defendant St. Joseph's Hospital of Buckhannon, Inc., that Defendant St. Joseph's Hospital of Buckhannon, Inc. be awarded the reasonable costs and attorney fees necessarily incurred in the defense of this action, and that Defendant St. Joseph's Hospital of Buckhannon, Inc. be granted such other relief as may seem appropriate.

### **COUNTERCLAIMS AGAINST PLAINTIFF JERRY N. BLACK, M.D.**

Defendant, St. Joseph's Hospital of Buckhannon, Inc. ("STJ" or "Defendant"), by and through its undersigned counsel, pursuant to W. Va. R. Civ. P. 13, hereby states the following Counterclaims against Plaintiff, Jerry N. Black, M.D:

#### **BRIEF STATEMENT OF FACTS**

1. STJ is a West Virginia non-profit corporation with its principal place of business located at 1 Amalia Drive, Buckhannon, West Virginia 26201.
2. Upon information and belief, Jerry N. Black, M.D. ("Dr. Black"), is a resident of Upshur County, West Virginia, with a business address of 10 Amalia Drive, Buckhannon, West Virginia 26201.



3. On June 3, 1982, STJ and Dr. Black entered into a "Memorandum Agreement." See Exhibit A.

4. Pursuant to the Memorandum Agreement, STJ transferred real property to Dr. Black by Deed dated June 3, 1982 and recorded at Book 306 Page 144. See Exhibit B. The deeded property is located in Upshur County, West Virginia.

5. In exchange for the transfer of land, as more fully set forth in the attached documentation, Dr. Black granted to STJ an "Option to Repurchase." See Exhibit C.

6. Subsequently, Dr. Black had formally taken the position that STJ did not possess an option contract but rather a right of first refusal. In fact, Dr. Black informed STJ that a buyer had made an offer to purchase the property and offered STJ the right of first refusal. However, despite requesting information about the purported offer, STJ never received verification that an offer to purchase was actually made.

7. A right of first refusal is significantly different from an option contract. A right of first refusal does not ripen into an executed contract until the condition precedent, the existence of an offer by a *bona fide* purchaser, is met. Alternatively, an option contract can be exercised by the optionee within the agreed-upon time frame, and regardless of the existence of an offer by a *bona fide* purchaser.

8. Dr. Black attempted to modify the rights of STJ under its option contract by inferring a condition precedent that does not exist and was not bargained for. Moreover, such an arrangement was never contemplated by the parties.

9. Therefore, based on Dr. Black's position that the "Option to Repurchase" created a "right of first refusal," STJ brought a previous action pursuant to the West Virginia Uniform

Declaratory Judgment Act, W. Va. Code § 55-13-1, *et seq.* and W. Va. R. Civ. P. 57 against Dr. Black in the Circuit Court of Upshur County, West Virginia, Civil Action No. 12-C-52.

10. In the previous action, STJ sought the declaration that STJ possessed an option to repurchase rather than a right of first refusal.

11. By Order dated, August 8, 2013, the Court declared that STJ did possess an option contract rather than a right of first refusal and granted summary judgment, after Dr. Black and his counsel suddenly no longer disputed that the "Option to Repurchase" created an option contract.

12. However, Dr. Black objected to the order granting summary judgment because it stated that the "Option to Repurchase" was valid, and subsequently, he appealed to the Supreme Court of Appeals of West Virginia, which ultimately affirmed the trial court's decision that the Option to Repurchase created an option contract, as opposed to a right of first refusal, but agreed that the word "valid" should be removed. After the Supreme Court of Appeals of West Virginia issued its opinion, Dr. Black's counsel filed ethics complaints with the West Virginia State Bar against STJ's trial and appellate counsel, and these complaints remain pending.

13. On January 13, 2015, after a remand hearing, this Court entered an order granting STJ summary judgment and finding the "Option to Repurchase" to be an option contract.

14. On February 5, 2015, Plaintiff filed an appeal of this Court's January 13, 2015 Order to the Supreme Court of Appeals of West Virginia, which remains pending.

15. On February 10, 2015, Plaintiff initiated this lawsuit against STJ by filing the present Complaint.

**COUNT ONE**  
**(Breach of Contract Against Plaintiff)**

16. STJ incorporates Paragraphs 1-15 by reference as if fully set forth herein.

17. Under the terms of the Deed, STJ conveyed to Plaintiff "all of that certain tract, lot or parcel of land situate in the City of Buckhannon, Buckhannon District, Upshur County, West Virginia, and being more particularly described" in the Deed. *See Exhibit B.*

18. This conveyance was made "subject to all terms and provisions contained and set forth in [the Memorandum Agreement] dated 3<sup>rd</sup> day of June 1982" by and between STJ and Dr. Black. *See Exhibits A and B.*

19. Further, this conveyance was made "subject to [the Option to Repurchase]" by and between STJ and Dr. Black. *See Exhibits B and C.*

20. Pursuant to the Option to Repurchase, Plaintiff granted STJ an option to purchase the conveyed property.

21. Plaintiff has failed and refused to acknowledge that he has obligations under the Option to Repurchase and STJ has rights granted to it under the Option to Repurchase, including initially asserting that STJ had only a right of first refusal and not an option contract and now through the current litigation asserting that STJ can never assert its rights under the Option to Repurchase.

22. As articulated herein, Plaintiff's conduct constitutes a violation of his duty to act in good faith and with fair dealing. Accordingly, his conduct amounts to a material breach of the Deed and Option to Repurchase.

23. Pursuant to the Memorandum Agreement and related documents, STJ may immediately exercise the Option to Repurchase.

24. Moreover, Plaintiff's breach of the Deed and Option to Repurchase contract have directly and proximately caused damage to STJ.

25. Plaintiff is liable for damages that he has directly and proximately caused to STJ.

WHEREFORE, STJ is entitled to judgment against the Plaintiff, including, the recovery of its damages related to Plaintiff's conduct and the ability to immediately exercise its rights under the Option to Repurchase, and any other such relief as this Court may deem just and proper.

**COUNT TWO**  
**(Unjust Enrichment Against Plaintiff)**

26. STJ incorporates Paragraphs 1-25 by reference as if fully set forth herein.

27. Plaintiff has received benefits under the terms of the executed Deed and Memorandum Agreement, including, but not limited to, the continuing use of the property conveyed in the Deed pursuant to the terms of the Memorandum Agreement and the Option to Repurchase. *See Exhibits A and B.*

28. Should the Court find that the Rule against Perpetuities applies and invalidates the Option to Repurchase, Plaintiff will have been unjustly enriched by having the use of the property at issue and receiving the property free from STJ's interest without having paid fair and reasonable consideration. Alternatively, regardless of this Court's ruling on the relief sought in Plaintiff's Complaint, Dr. Black has enjoyed the use of the property without having paid fair and reasonable consideration.

29. As a direct and proximate result of Plaintiff's wrongful refusal to compensate STJ for the benefit he has received and continues to receive under the Deed and Memorandum Agreement, STJ has been, and continues to be, harmed, and Dr. Black has been unjustly enriched.

30. Plaintiff is liable for damages that he has directly and proximately caused to STJ and for the benefits that he has unjustly received.

WHEREFORE, STJ is entitled to judgment against the Plaintiff, including compensation

for Dr. Black's use and enjoyment of the property now and potentially in the future, and any other such relief as this Court may deem just and proper.

**COUNT THREE**  
**(Trespass Against Plaintiff)**

31. STJ incorporates Paragraphs 1-30 by reference as if fully set forth herein.

32. The conduct of Plaintiff, including the actions described herein, constitute unlawful interference with STJ's rights to possession of the real property conveyed in the Deed.

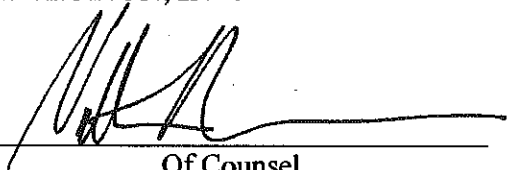
33. As a direct and proximate result of Plaintiff's wrongful conduct, STJ has been harmed.

34. Plaintiff is liable for damages that he has directly and proximately caused to STJ.

WHEREFORE, STJ is entitled to judgment against the Plaintiff, including, the ability to immediately exercise its rights under the Option to Repurchase, actual damages, including attorney fees and costs, and any other such relief as this Court may deem just and proper.

**THIS DEFENDANT DEMANDS A TRIAL BY JURY.**

**ST. JOSEPH'S HOSPITAL OF  
BUCKHANNON, INC.**

By:   
Of Counsel

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Nathan I. Brown, Esquire (WVSB #11900)  
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IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

JERRY N. BLACK, M.D.,

Plaintiff,

v.

Civil Action No. 15-C-15

Hon. Jacob E. Reger

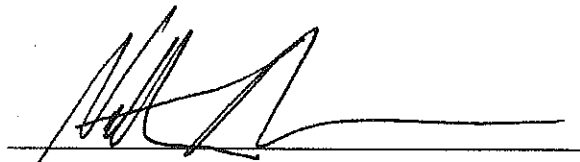
ST. JOSEPH'S HOSPITAL OF  
BUCKHANNON, INC.,

Defendant.

**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that the foregoing "*Answer and Affirmative Defenses of Defendant St. Joseph's Hospital of Buckhannon, Inc. to Plaintiff's Complaint and Counterclaims Against Jerry N. Black, M.D.*" was served upon the following individuals by mailing true copies thereof by regular manner in the United States mail, postage prepaid, at Huntington, West Virginia, on the 13<sup>th</sup> day of March, 2015 to:

J. Burton Hunter, III, Esq.  
J. Burton Hunter, III and Associates, PLLC  
One West Main Street  
Buckhannon, WV 26201

A handwritten signature in black ink, appearing to be "J. Burton Hunter, III", is written over a horizontal line.

# **Exhibit A**

*Exhibit B*

BOOK 306 PAGE 134

MEMORANDUM AGREEMENT BY AND BETWEEN

JERRY N. BLACK AND ST. JOSEPH'S HOSPITAL

This Agreement made and entered into this 3rd day of June, 1982, by and between Jerry N. Black (physician), hereinafter referred to as Physician and Sisters of the Pallottine Missionary society, a corporation, dba St. Joseph's Hospital, hereinafter referred to as Hospital.

Whereas, Hospital owns and operates a hospital located at Amalia Drive, Buckhannon, Upshur County, West Virginia, and

Whereas, Physician will construct a one story medical office building, on 13,069 square feet of land west of and adjacent to St. Joseph's as more fully appears from the Deed between Physician as Owner and Hospital, a copy of which is attached hereto and made a part hereof, and,

Whereas, Hospital has agreed to provide parking adjacent to the aforesaid Physician Office Building at no cost to Physician and to increase the parking capacity for patients, visitors, employees, and staff of St. Joseph's Hospital and for the use of the physicians, patients, visitors and employees of the Physician Office Building, and,

Whereas, Physician has agreed to maintain the exterior and common areas of the interior of the Physician Office Building in first class condition and repair and to otherwise carry out the agreements.

Now, therefore, witnesseth: That for and in consideration of the foregoing which are not to be construed as mere recitals



but as an integral part hereof, and other good and valuable considerations, the receipt and sufficiency of which are hereby acknowledged and the mutual covenants hereinafter contained, the parties do agree as follows:

1. Physician will construct at his own cost a Physicians Office Building in accordance with the construction contract aforesaid of said Physicians Office Building which shall be commenced on or before September 1, 1982, and completed no later than May 31, 1983.

2. Hospital will promptly commence and diligently prosecute the construction at its own cost of extending the water and sewer lines to Physician's property line and extend the parking lot in order that it will, in total, accommodate approximately 160 automobiles on said lot and shall be made available to the physicians, patients, visitors and employees in the Physicians Office Building as they are made available to the physicians, patients, visitors, employees and staff of St. Joseph's Hospital.

3. Physician agrees that Hospital will be furnished with copies of all plans, specifications and contract documents pertaining to any remodeling or other changes to the exterior of the Physician's Office Building for its advance approval which shall not be unreasonably withheld.

4. Physician agrees that the Unit within the building will be used and occupied only by members of the medical, surgical and oral surgical staff at St. Joseph's Hospital hereinafter

referred to as Physician. In addition, only those activities reasonably related to the practice of the Physician shall be permitted in the Unit provided and further, only if such activities are performed in conjunction with or are supportive of the practice of the Doctors. If a supported doctor is unable to continue his practice, his related supportive personnel may continue to practice in the building for two years. Every effort will be made to recruit a new supported doctor for the building by mutual agreement with the hospital. In the event any of the Doctors shall lose their staff privileges for any reason at said Hospital and make an honest and sincere effort to regain said staff privilege, such Physician shall be permitted to retain his usage of the Unit. Any failure to comply with this provision shall be enforceable in a court of law by Physician, any Unit Owner or Hospital.

5. Physician agrees to maintain the common areas and all other properties belonging to Physician, including the exterior of the building, in first class shape and repair and to abide by all covenants and agreements which are incorporated by reference and made a part hereof. In the event the Physician fails to maintain the common areas and all other properties, including the exterior of the building, in the manner deemed proper by the Hospital, then and in that event the Hospital shall have the right to maintain the common areas and such other properties belonging to the Physician and to charge the expense related thereto to the Physician, his successors and assigns. The Physician, his successors and assigns shall pay such expense within thirty (30) days after presentment of a bill for the

total amount thereof. Nothing herein, however, shall impose an obligation upon the Hospital to maintain such common areas and office building.

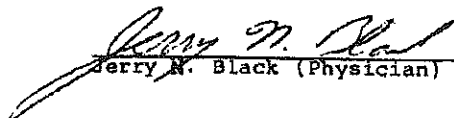
6. It is agreed that the parties hereto are not engaged in a joint venture or in any other type of partnership activity, and that each of the parties hereto are acting independently of the other. The Physician does hereby agree to save and hold harmless the Hospital from any loss or liability arising out of any act or omission which occurs within the property owned by the Physician.

7. Hospital or its successors is hereby granted the first option to purchase the land for the sum of \$1.00 and the Physicians Office Building pursuant to the terms and conditions shown on the option agreement attached hereto as Exhibit A and made a part hereof. In the event the Physician, his successors and assigns, is in default of any provision of this agreement, the Hospital shall have the right to declare a breach of this agreement and give notice thereof, in writing, to the Physician, his successor or assign. In the event such breach is not cured within thirty (30) days after the date such notice was given, then and in that event, the Hospital may, at its option, seek such injunctive relief or other remedies it deems appropriate in any Court of competent jurisdiction or it may terminate this agreement and exercise immediately the option to repurchase which is set forth as Exhibit A, attached hereto and made a part hereof.

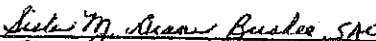
8. Physician agrees that the covenants contained herein shall be binding upon his heirs, successors, and assigns, including but not limited to Physicians Office Building,

9. Purchasers and/or unit owners need not be restricted to members of the medical, surgical and oral surgical staff at St. Joseph's Hospital. Although ownership need not be restricted to members of the medical, surgical or oral surgical staff at St. Joseph's Hospital, the use of such facilities shall be controlled by Section 4 of this Agreement.

In witness whereof, the parties have hereunto caused their corporate names to be signed the day and year first hereinafter written.

  
Jerry N. Black (Physician)

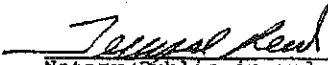
Sisters of the Pallottine Missionary  
Society, a corporation, dba St.  
Joseph's Hospital

By   
Its Provincial Superior

STATE OF WEST VIRGINIA,  
COUNTY OF UPSHUR, TO-WIT:

The foregoing instrument was acknowledged before me this  
15<sup>th</sup> day of June, 1982, by Jerry N. Black (Physician).

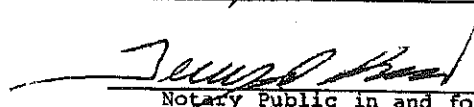
My commission expires Oct. 4, 1986.

  
Notary Public in and for Upshur  
County, West Virginia

STATE OF WEST VIRGINIA,  
COUNTY OF UPSHUR, TO-WIT:

The foregoing instrument was acknowledged before me, this  
3<sup>rd</sup> day of June, 1982, on behalf of Sisters of the Pallottine  
Missionary Society, a corporation, by Sister M. Diane Rusher SAG  
its Provincial Superior.

My commission expires Oct. 4, 1986.

  
Notary Public in and for Upshur  
County, West Virginia

*This instrument was  
prepared by Terry D. Reed,  
Attorney at Law*

## **Exhibit B**

This deed, made this ~~2nd~~<sup>3rd</sup> day of ~~October~~<sup>JUNE</sup>, 1982, by and between the Sisters of the Pallottine Missionary Society, a corporation, party of the first part, and Jerry N. Black, party of the second part, witnesseth:

That for and in consideration of the sum of One Dollar (\$1.00) cash in hand paid and for other good and valuable consideration, the receipt and sufficiency of all of which is hereby acknowledged, the said party of the first part does hereby grant and convey unto the party of the second part, with covenants of general warranty, all of that certain tract, lot or parcel of land situate in the City of Buckhannon, Buckhannon District, Upshur County, West Virginia, and being more particularly bounded and described as follows:

Beginning at a point in the blacktop located 74.00 feet westerly from the existing hospital building and 29.00 feet southerly from an extension of the northerly line of the existing hospital building and being located S. 41-15 E. 61.37 feet from a railroad spike corner of an 8.42 acre tract of the Sisters of the Pallottine Missionary Society (D.B. 111/340) which originally called for "a stake in C. L. Barlow's line"; thence running parallel with the westerly line of the existing hospital building S. 37-14 E. 76.00 feet to a point in the blacktop; thence perpendicularly S. 52-46 W. 87.67 feet to a point in the blacktop; thence perpendicularly S. 37-14 E. 3.75 feet to a point in the blacktop; thence perpendicularly S. 52-46 W. 80.33 feet to a point in the blacktop; thence perpendicularly N. 37-14 W. 79.75 feet to a point in the blacktop; thence perpendicularly N. 52-46 E. 168.00 feet to the point of beginning, containing 13,069 square feet, more or less, as surveyed in October, 1982, by Smith Engineering Company, Buckhannon, West Virginia, Burl J. Smith, RPCE #6988 and as shown on a plat attached hereto and made a part of this description.

There is reserved from the 13,069 square foot parcel the eastern portion of a 40-foot right of way which lies east of the "N. 37-14 W. 79.75 feet" line and which intersects the "N. 52-46 E. 168.00 feet" line at a point 9.44 feet from the western endpoint and which intersects the "S. 52-46 W. 80.33 feet" line at a point 0.63 feet from the western endpoint. The maximum overlap of the 40-foot right of way onto the 13,069 square foot parcel is 9.44 feet at the north side and 0.63 feet at the south side. The 40-foot right of way was originally formed in a Chancery Order dated November 13, 1913 between Edward Carper, Plaintiff vs Frank Carper and others, Defendants, which is recorded in Deed Book 58, at page 503, in the office of the Clerk of the County Commission of Upshur County, West Virginia.

The 13,069 square foot parcel is part of an 8.42 acre parcel conveyed by the Right Reverend John J. Swint, Bishop of Wheeling to the Sisters of the Pallottine Missionary Society by deed dated April 26, 1945, and recorded in Deed Book 111, at page 340, in the office of the Clerk of the County Commission of Upshur County, West Virginia.

This conveyance is also made subject to all terms and provisions contained and set forth in that certain memorandum agreement dated the 3rd day of June, 1982, by and between the Sisters of the Pallottine Missionary Society, a corporation, dba St. Joseph's Hospital, and the said Jerry N. Black, a copy of which said memorandum agreement is attached hereto and made a part hereof as if fully set forth herein and is marked for identification as Exhibit B. Reference to said Exhibit B is made for all pertinent purposes, terms and provisions thereof being a part of the consideration for this deed of conveyance.

There is also hereby granted and conveyed unto the party of the second part, his heirs, personal representative, successors and assigns, the right to the use, in conjunction with the



authorized use of the property hereby conveyed, in common with others entitled thereto, of the parking area, common areas and service roads, together with the appurtenant right of way for ingress and egress to and from any and all structures and improvements erected or to be erected upon said premises and the necessary right of way for the installation, maintenance, repair and renewal of all utilities as contemplated by said Exhibits A and B hereto.

This conveyance is further made subject to that certain "Option to Repurchase," heretofore executed by the party of the second part wherein certain rights are granted unto the party of the first part herein. Said Option to Repurchase is to be recorded in the office of the Clerk of the County Commission of Upshur County, West Virginia, simultaneously with the recordation of this deed. Further, a copy of said option is attached hereto and made a part hereof as if fully set forth herein, and is marked for identification as Exhibit A. Reference to said Exhibit A is hereby made for all pertinent purposes.

This conveyance is made subject to all rights of way and easements, if any, of record in said Clerk's office or which would be disclosed by a visual inspection of the premises herein conveyed.

#### DECLARATION OF CONSIDERATION

Under the penalties of fine and imprisonment as provided by law, the party of the first part does hereby declare that this deed is exempt from excise tax on the privilege of transferring real estate as provided by West Virginia Code 11-22-1, it being conveyed from a non-profit charitable corporation.

Witness the following signature:

SISTERS OF THE PALLOTTINE MISSIONARY  
SOCIETY, a corporation

BY Sister M. Diane Buehler, SAC.


ITS: President

STATE OF W. Va.

COUNTY OF Upshur, TO-WIT:

The foregoing instrument was acknowledged before me this  
28<sup>th</sup> day of October, 1982, on behalf of Sisters of  
the Pallottine Missionary Society, a corporation, by Sister  
M. Diane Bushee, SAC, its President

My commission expires Oct 9, 1986.

  
Notary Public in and for  
Upshur County, West Virginia

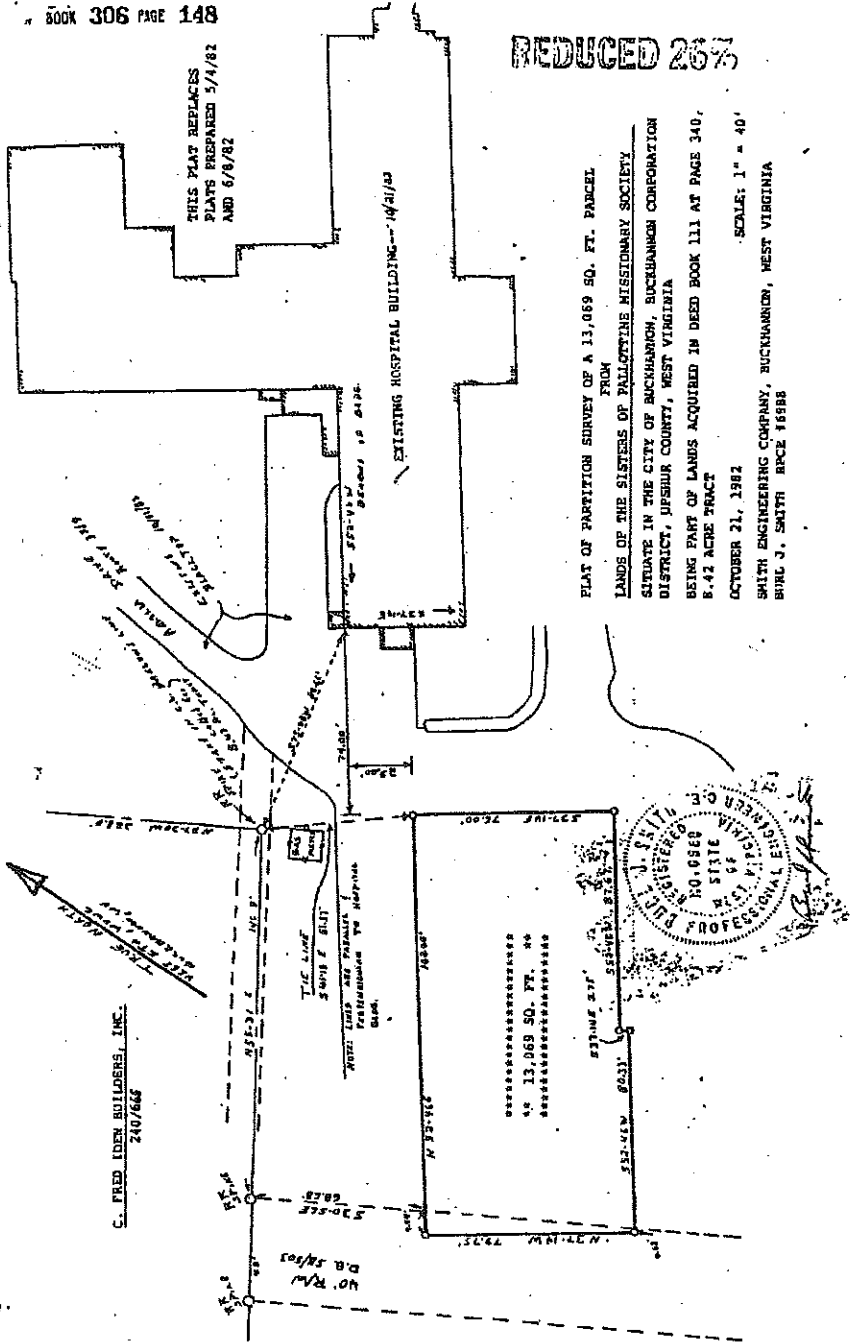
The foregoing deed was prepared by  
Terry D. Read of the Law Firm of  
Hymes and Coonts, Attorneys at Law  
Buckhannon, WV 26201 (11f)

REDUCED 25%

THIS PLAT REPLACES  
PLATS PREPARED 5/4/82  
AND 6/8/82

EXISTING HOSPITAL BUILDING--10/21/82

PLAT OF PARTITION SURVEY OF A 13,069 SQ. FT. PARCEL  
FROM  
LANDS OF THE SISTERS OF PALLOTTINE MISSIONARY SOCIETY  
SITUATE IN THE CITY OF ROCKHARTON, ROCKHARTON CORPORATION  
DISTRICT, UPCHUR COUNTY, WEST VIRGINIA  
BEING PART OF LANDS ACQUIRED IN DEED BOOK 111 AT PAGE 340,  
8.42 ACRE TRACT  
OCTOBER 21, 1982  
SMITH ENGINEERING COMPANY, ROCKHARTON, WEST VIRGINIA  
BUREAU J. SMITH BRCE 16588  
SCALE: 1" = 40'



C. FRED IDEN BUILDERS, INC.  
240/666

33-157.4

UPSHUR COUNTY  
FILED  
RECORDED

Nov 1 4 32 PM '82

BK PG

STATE OF WEST VIRGINIA, County of Upshur, To-Wit:

I, Ronald J. Pugh, Clerk of the County Commission of said County, do hereby certify that the foregoing writing, with certificate thereto annexed, was this day produced to me in my office and duly admitted to record.  
Witness my hand.

*Ronald J. Pugh*  
Clerk

## **Exhibit C**

EXHIBIT A

OPTION TO REPURCHASE

This option to purchase, granted this 3rd day of June, 1982, by and between Jerry N. Black (Physician) and his successors and assigns including but not limited to Physicians Office Building, hereinafter referred to as Physician and Sisters of the Pallottine Missionary Society, a corporation, dba St. Joseph's Hospital, hereinafter referred to as Hospital.

1. GRANT OF OPTION: In consideration of the sum of Ten Dollars (\$10.00) and other good and valuable considerations, paid by Hospital to Physician, receipt whereof is hereby acknowledged, Physician, on behalf of himself and his successors and assigns including but not limited to Physicians Office Building does hereby grant to Hospital the first option to purchase the premises known as Physicians Office Building and more particularly described in Exhibit 1 attached hereto and made a part hereof.

2. EXPIRATION DATE: This option shall expire at noon on June 3, 2081 unless otherwise extended by the operation of this agreement or consent of the parties hereto, their successors and assigns.

3. NOTICE OF EXERCISE: This option shall be exercised by written notice signed by St. Joseph's and sent by registered mail at least one year prior to the expiration date to Physician or his successor and assigns, including but not limited to

Physicians Office Building at his office located within the Physicians Office Building.

4. PURCHASE PRICE: The purchase price shall be the sum of One Dollar (\$1.00) and the fair market value for the building excluding the value of the land as determined by three arbitrators, one chosen by Hospital, one chosen by Physician, and his successors and assigns, including but not limited to Physicians Office Building and the third to be chosen by the two arbitrators so selected. The purchase price shall be paid in at least equal semi annual installments over a period of not more than five years with the interest accruing thereon at annual percentage rate equal to the annual interest rate for comparable commercial properties which is charged by the Central National Bank of Buckhannon, West Virginia, and the Adrian Buckhannon Bank of Buckhannon, West Virginia, their successors and assigns.

5. TIME DURING WHICH OPTION MAY BE EXERCISED: This first option will be exercised by giving written notice as set forth in paragraph 3 herein which notice can only be given at any time within one year prior to the date of the expiration of this Option, or within ninety (90) days after a notice of default is tendered in the manner and terms required by provision 7 of the "Memorandum Agreement By and Between (Physician) and St. Joseph's Hospital" bearing date of the 3rd day of June, 1982, and executed by the parties hereto.

Further, during the term of this option, if the Physicians Office Building is destroyed or damaged in excess of 50% of the replacement cost of the entire building then the Unit Owners will rebuild unless more than 50% elect not to rebuild, in which case St. Joseph's can require Physician and his successors and assigns including but not limited to Physicians Office Building to remove the debris and sell the real estate back to St. Joseph's for One Dollar (\$1.00).

6. FAILURE TO EXERCISE OPTION: If St. Joseph's does not exercise this option by the 3rd day of June, 2081, as provided above, then the same shall be renewed following such date for an additional ninety-nine year period.

7. ASSIGNMENT: This option and all rights hereunder shall be freely assignable by St. Joseph's and if assigned, all acts required may be performed by such Assignee.

8. BINDING EFFECT: Physician agrees that this option shall be binding upon his successors and assigns including but not limited to Physicians Office Building.

9. Nothing contained herein shall prevent the parties hereto together with all unit owners from at any time mutually agreeing to sell said Physicians Office Building pursuant to the terms and conditions as set forth herein.

In Witness Whereof, the parties have hereunto set their hands and seals the day and year first above written.

Jerry N. Black  
Jerry N. Black (Physician)

SISTERS OF THE PALLOTTINE MISSIONARY  
SOCIETY dba ST. JOSEPH'S HOSPITAL

By \_\_\_\_\_  
Its \_\_\_\_\_

STATE OF WEST VIRGINIA,  
COUNTY OF UPSHUR, TO-WIT:

The foregoing instrument was acknowledged before me this  
\_\_\_\_ day of June, 1982, by Jerry N. Black (Physician).  
My commission expires \_\_\_\_\_.

\_\_\_\_\_  
Notary Public in and for Upshur  
County, West Virginia

STATE OF WEST VIRGINIA,  
COUNTY OF UPSHUR, TO-WIT:

The foregoing instrument was acknowledged before me, this  
\_\_\_\_ day of June, 1982, on behalf of Sisters of the Pallottine  
Missionary Society, a corporation, by \_\_\_\_\_,  
its \_\_\_\_\_.  
My commission expires \_\_\_\_\_.

\_\_\_\_\_  
Notary Public in and for Upshur  
County, West Virginia

33-157-2

UPSHUR COUNTY  
FILED  
RECORDED

Nov 1 4 31 PM '82

— BK — PG —

STATE OF WEST VIRGINIA, County of Upshur, To-Wit:

I, Ronald J. Fugh, Clerk of the County Commission of said County, do  
hereby certify that the foregoing writing, with certificate thereto annexed,  
was this day produced to me in my office and duly admitted to record.  
Witness my hand.

Ronald J. Fugh  
Clerk



## **Exhibit D**

**COPY**

**IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA**

**ST. JOSEPH'S HOSPITAL  
of Buckhannon, Inc.,**

**Plaintiff**

**VS.**

**CASE NO. 12-C-52**

**JERRY N. BLACK, M.D.,**

**Defendant.**

Transcript of the proceedings held in the above noted matter, held in Upshur County, West Virginia, on October 1, 2012, at approximately 1:23 p.m., before the Honorable Thomas H. Keadle, Judge of the Twenty-Sixth Judicial Circuit and duly recorded by Jeannie L. Hyre, Court Reporter for the Twenty-Sixth Judicial Circuit.

**APPEARANCES:**

**For the Plaintiff:**

**ROBERT M. SELLARDS  
RYAN ASHWORTH  
Huntington, WV**

**For the Defendant:**

**J. BURTON HUNTER, III  
Buckhannon, WV 26201**

October 1, 2013  
1:23 p.m.

BY THE COURT: This is the case of St. Joseph Hospital of Buckhannon, Inc., Plaintiff, versus Jerry N. Black – you all can be seated – M.D., 12-C-52.

This matter comes on, according to my docket, on a 12(b)(6) motion. Present is J. Burton Hunter, III, and you represent Jerry N. Black, M.D., the Defendant?

MR. HUNTER: Yes, Your Honor.

BY THE COURT: And he's present.

MR. HUNTER: Yes, Your Honor.

BY THE COURT: And gentlemen, your names are?

MR. SELLARD: I'm Rob Sellards, Your Honor.

MR. ASHWORTH: Ryan Ashworth, representing St. Joseph's Hospital of Buckhannon.

BY THE COURT: All right, I'm ready to hear your motion.

MR. HUNTER: Your Honor, Dr. Black, since the early 1980s, has been an eye surgeon in Buckhannon. There came to be drafted by attorney Terry Reed, the attorney for the Hospital, certain documents, including a deed, an agreement and a repurchase option and the item in dispute, the issue in dispute involves the alleged right to repurchase. There are three, but more tightly focused, two key provisions and I think – I'll read them to you, but, Your Honor, I've got them on a poster, I can bring them up and we can post the sentences, if necessary.

The first provision sets out when the hospital can first notify Dr. Black if it wants to repurchase what he bought, which is a lot upon which he was, by agreement, able to build his offices and other structures, and have parking areas and I'm sure the Court will be familiar, it's the suite of offices over on the right as you come up the hill, and you turn left and you go into the main parking area.

And that notice can be exercised at any time prior to the one year before the repurchase agreement runs out, and that repurchase agreement was for 99 years.

BY THE COURT: Let me ask you a question. Just what's this case about?

MR. HUNTER: They want to buy from Dr. Black what he owns, against his wishes, for a price he does not wish to sell for. He —

BY THE COURT: And that's the building, the whole building over there?

MR. HUNTER: That's another dispute that will not be dealt with today, Your Honor. The question is, is it just the real estate or would it be everything Dr. Black would have to give up, which would include his practice and a surgical center that's there, total value of about five million dollars.

BY THE COURT: And they are all on the same piece of real estate.

MR. HUNTER: Yes, yes.

BY THE COURT: Okay.

MR. HUNTER: So, there isn't any doubt — oh and by the way, we actually agree on something. The response on the — to my motion, their first choice is that

the agreement is, "The repurchase agreement is unambiguous and may be pursued according to its terms.", and we agree with that.

So, if Dr. Black received a notice a day after he finished building the buildings and several months after he received his deed, he would then know that the hospital was going to repurchase, but the key, and it's very unambiguous, is paragraph five, because it sets out, "Time During Which Option May Be Exercised", so there is the notice of intent and the notice to exercise.

Number five says, "The first option will be exercised by giving written notice, as set forth in paragraph three, the same form of written notice, which notice can only be given at any time within one year prior to the date of the expiration of the option." The option expires June 3rd of 2081.

So, and remember now, this was drafted by their attorney and we're agreeing with them, they have three alternatives in their response, but their first alternative, "This is unambiguous and may be exercised as written." That's what we agree with.

And so Dr. Black now knows they intend to repurchase this. That's very helpful to him and his successors, because they'll know that they don't need to go out and try to find a buyer and they are not going to be able to maintain this after the -- 70 more years, after that expires.

But, they will not be able to exercise their option until a time, within one year prior to the date of expiration.

Now, I believe it can be dealt with on the face of the pleadings. I don't believe it needs to be converted to a Rule 56 Motion, Your Honor, but there is a

paragraph nine that indicates that whenever they mutually agree, they can go together and agree to sell it to a third party. That language would be extraneous if they could simply send a notice to Dr. Black to get out, they were taking over. They wouldn't have had to have had a provision that agreed that they and Dr. Black could collaborate in the decision to sell it.

So when we read that, we realized that A, as long as you realize that there has been notice of exercise -- I'm sorry, the notice of intent to exercises, the notice of intent, and a notice actually to exercise, and that those are not inherently inconsistent, because it makes some sense. Let him know they're going to exercise it, but then have a period of time within a -- within when they could.

And if you think about that for a minute, Your Honor, the larger agreement that included a deed and an agreement between the parties, had Dr. Black taking on a tremendous debt and responsibility to actually build a very large structure up there, with an expectation he would spend his career there, which he has. He's only a few years away from retirement at this stage, but he certainly doesn't want to sell now.

He's got something incredibly valuable. He's got either the first or second most profitable ASC, right? Ambulatory Surgical Center in West Virginia, there are only 11 of them, and he has one. And what underlies this whole thing is it's really quite a plum and in this time of depressed real estate values, it's a great time for the hospital to snag it away from the doctor. But his belief was, and I think the agreement clearly shows that he would get a deed and then they would have a 99-year repurchase option and from time to time there's a slip and we tended to call it

a 99-year lease, but it's not. There is deed from the hospital to Dr. Black. He owns that property subject to this repurchase option, which, according to paragraph five, may be given --

BY THE COURT: You interpret that language in that deed -- In that instrument and I don't have it in front of me, but do you interpret that meaning that they entered into this agreement that they had a 99-year repurchase agreement, so he goes in and he builds it and a year after he gets it built and gets his business going up there, that they can notify him that they are going to repurchase it and then the next year, notify him they want to buy it now?

MR. HUNTER: Well, their theory is just that. I don't want to speak for them, but that's what the pleadings say is that Dr. Black could have built this, young, eager, bright-eyed young surgeon planning to spend his life in Buckhannon and the week after he built it, they could buy it back from him.

BY THE COURT: You could answer that with a "yes" or a "no", Mr. Hunter.

MR. HUNTER: That's a yes.

BY THE COURT: Okay.

MR. HUNTER: That's the theory we're objecting to. We're saying that it's quite clear, and there is no ambiguity to the phrase "at any time within one year prior to the date of expiration", when you've got the date of expiration right there. It's anytime within one year prior to June 3, 2081, which would be either the 2nd or 3rd or 4th of 2080. The notice of execution, according to this, has to be within that one year.

BY THE COURT: Within one year of what?

MR. HUNTER: June 3, 2081. May I show it to the Court?

BY THE COURT: Yes, please, let me see it.

MR. HUNTER: It's right there. The first one is the one that says they can send a notice they intend to do it at any time, but number five says they may only actually send a notice of execution during that one year, within one year of that date.

MR. SELLARDS: Your Honor, if I may, while you're focusing on that language, I didn't want to —

BY THE COURT: Well, as I'm reading it, if I'm reading what he asked me to read, and it's just two paragraphs and I'm sure there is probably more, but it says, "Written notice by at least one year prior to June the 3rd, 2081.", and that's the notice and then they have to give the notice that they're going to exercise it, by giving notice —

MR. HUNTER: At any time within that one year.

BY THE COURT: And that notice can only be given at any time within one year prior to the date of expiration of the option. So what are we talking about here?

MR. SELLARDS: Well, Your Honor, I mean, it doesn't make sense, if you read the — if you read paragraph five from the beginning, it says, "The first option will be exercised by giving written notice as set forth in paragraph three, herein which notice can only be given at any time within one year." The problem is, is that paragraph three talks about notice and exercising it outside of the last year, paragraph five says the only time you can exercise it is by providing the notice and exercising it within one year. They are mutually exclusive.



Let me also raise another point. The standard for a Motion to Dismiss is pretty narrow. What we're talking about is this Court has to determine that there is absolutely not one single fact that merits discovery.

Mr. Black's own counsel provided this Court at least one fact that merits discovery. He represented to this court information that is not supported by the record. He tells this Court that Mr. Reed was the hospital's attorney that drafted this document, without any substance, affidavit, testimony or anything like that. We don't know what the drafter says, we don't know what the intention of the parties are.

Certainly, you know, this – but this all merits discovery, Your Honor. It certainly defeats a Motion to Dismiss. Mr. Hunter is right, this probably is more ripe for a Motion for Summary Judgment, but as this Court is aware that is after discovery.

You know, something else, Your Honor, that I think is significant, that's not raised in Mr. Hunter's Motion to Dismiss, but there is absolutely no requirement in any of these documents that forces the parties to have a written modification, so two and a half years ago when Dr. Black approached the hospital about the repurchase of the ASC, we were in a position where we started down the road of considering it, we looked at the financials.

It manifests itself into a letter that Dr. Black wrote February 1<sup>st</sup>, 2011, to us, that challenges us to exercise our first option to purchase. It cites the Deed Book and the page number, where it's recorded. It goes so far, as part of that letter, and

tells us that if we don't exercise our first option to purchase, then he will deem the property able to be sold to another buyer.

So what happens is, Your Honor, we go out and we get, because there are limited ASCs in this area, the ambulatory surgical centers, we go out and we hire a nationally recognized appraisal group to come in and appraise Dr. Black's facility.

We also come in and we bring in a group that specializes in the valuation and evaluation of physician practices. To the tune of somewhere in the neighborhood of \$30- to \$40-thousand dollars out-of-pocket expense to be able to sit down and talk candidly with Dr. Black about the true value of this facility and of the value of his practice.

At no time, over the last two and a half years, until Mr. Hunter's involvement, was there ever the notion that you couldn't exercise this at this point.

Multiple discussions, up to and including the fact that Dr. Black has previously had other counsel that didn't raise this issue, that had substantive discussions with the hospital about resolution and about values and about everything else that transpired prior to our involvement today and at no time was there ever the suggestion that this hyper-technical read of this agreement was going to opt to preclude the hospital from exercising its option.

The reality is that what I'm telling you is all discoverable. The conversations, the substance of the conversations, the realities, the intentions of the parties, all merits discovery.

Maybe this Court grants summary judgment later. That's certainly what Dr. Black would hope. But the reality of this thing is that for two and a half years and

for years and years prior to that, there are understandings of the parties involved. The actual Pallottine Sister that executed these agreements with Dr. Black still lives. She's still very actively involved with the Pallottine mission. She's actually on the Board of Directors and will be able to shed light on the hospital's position as it entered into these agreements.

Dr. Black is here. This is the best time to vent these issues and to look at this stuff.

I mean, candidly, Your Honor, to throw this case out would be improper. We think that there -- all we have to do is show you one fact, one fact at all that can be turned in any way and the dismissal is overturned -- is denied.

I have shown you that we were either invited by Dr. Black's February, 2011, letter to exercise it, that either operates to create an alteration to the contract, or it certainly could warrant analysis under a waiver argument, all of which is going to require us to discuss this issue with Dr. Black and the people that were involved in the previous discussions and with Dr. Black at the time.

I mean, candidly, Your Honor, the substance and the effect of the letter warrants discovery. The issues related to paragraph three and paragraph five that Mr. Hunter showed this Court, when combined with the fact that, it's our understanding that this was not a contract of adhesion, but an arms length negotiated contract, whether or not Mr. Reed --

BY THE COURT: Let me ask you a question.

MR. SELLARDS: Yes, sir.

BY THE COURT: I haven't read all this here, was going to read it before we came to court, but we got real busy this morning and I didn't get it done.

MR. SELLARDS: Yes, sir.

BY THE COURT: Let's assume that you all give him notice, you all want to buy and he's ready to sell, what's the price? How do we come -- arrive at the price and what if you can't agree on the price?

MR. SELLARDS: That's actually, Your Honor, what led us to file the dec action in the beginning. The discussions stalled after --

BY THE COURT: Giving somebody an option doesn't mean that you all can set the price.

MR. SELLARDS: It absolutely does. In fact, there is language inside of the agreement, in the option, that outline a three panel arbitration group be brought in to value and determine the price. And we are prepared and have formally notified Black and his prior counsel that we would go through the arbitration process.

With that being said, Your Honor, I mean, we've actually already mediated the case since the time that this thing has been filed.

So there are --

BY THE COURT: Who was your mediator?

MR. SELLARDS: Her name was Deborah Schedare.

BY THE COURT: Do any good?

MR. SELLARDS: I think we made headway. I mean, we've not resolved, we're still here on this motion.

BY THE COURT: I understand she is a good mediator.

MR. SELLARDS: I think she did an excellent job. She was selected by Mr. Hunter and we've never used her in the past, but will use her in the future.

But, I mean, Your Honor, candidly --

BY THE COURT: So what's the real issue between you all here now?

MR. SELLARDS: Well, originally --

BY THE COURT: As I understood what you have said, you all want to buy it and he wants to sell it.

DEFENDANT: No, I don't want to sell it.

MR. HUNTER: That's not -- you can't talk.

BY THE COURT: Okay, that's what I'm trying to get straightened out here.

MR. HUNTER: He does not want to sell at this time and my problem, and I think the Court asked me a question, but my problem is my case today is based upon this -- the pleadings that have been filed. We got lots of arguments about the underlying facts, but if they have not pled a case upon which relief can be granted, they've got to lose.

They have pled it and I noticed that they did not quote the operant paragraph to this Court in their pleadings. They didn't tell the Court that the provision that said that the actual execution cannot take place until within one year of 2081. Now, maybe it was inadvertent, but I think it was certainly important and there is a fiduciary responsibility by counsel to plead that. That's in there.

And although - he's talking about all this other stuff, if you don't believe them that it's unambiguous and they win, then it's ambiguous and they get a trial. But the point is, it's unambiguous.

It can be read quite clearly that they get to tell Dr. Black any time that it's their intention to repurchase, but they can only give him the notice of the exercise within one year. That's what I wanted to focus on. The fact that Dr. Black did not approach —

BY THE COURT: In other words, their option is not valid until a year before the 2081 date.

MR. HUNTER: It's all — we believe it's all completely valid, but it's determined by deadlines that are built into the agreement and if they are saying that this wasn't —

BY THE COURT: Well, let me word that differently, then.

MR. HUNTER: Pardon?

BY THE COURT: It's your contention that they are not — they are prohibited from exercising their option until 2080.

MR. HUNTER: Just read number five, that's exactly what it says. That's exactly what it says. They can send out a notice they are going to, at any time. But who in his right mind is going to build a beautiful office suite, investing his own money, knowing that the other side could send him a notice the next week that they are going to buy it back.

MR. SELLARDS: But Your Honor, that is exactly why a Motion to Dismiss fails, because who in his right mind, but for knowing the intention of the parties in 1982. Let's depose him, let's figure that out, let's depose my people, let's — it's got to get into discovery.

MR. HUNTER: Unless that has plain meaning within the document, and if it does, they are bound by their contract, and if there is an assertion that this didn't come out of Mr. Reed's office, I am sure that I've seen Mr. Reed's secretary's signatures on this, and I'm sure the deed that was part of this was prepared by Mr. Reed and when we asked to contact Mr. Reed about the work he did on this, he said he was precluded from talking to us, because he had been hospital's counsel at that time.

Now, I understand that's a little bit outside of the pleadings, but that would only be relevant if the Court determines this is ambiguous, and then we would be looking at who would the ambiguity be resolved against.

MR. SELLARDS: But that's all part of discovery.

MR. HUNTER: But we're not here, we're saying that paragraph five is unambiguous, and not only is it unambiguous, but they put the word "only" in there. It could have just said "within one year". It doesn't, it says, "Only within one year."

MR. SELLARDS: Your Honor —

MR. HUNTER: That's even better than unambiguous.

BY THE COURT: All right, I understand what you are saying. Now, go ahead, sir.

MR. SELLARDS: Your Honor, counsel is pointing to their misplaced reliance on the Twambley case, where our West Virginia Supreme Court, in Roth v. Felice Care Incorporated, affirmatively declined to follow Twambley, stating that West Virginia is, in fact, a notice pleading state and that we're not going to get

married to the specific claims in every single complaint and as long as there is something that we're allowed to go on with discovery.

So I respond to that, the —

BY THE COURT: Well, let me just ask you a question in paragraph five.

"Time during which option may be exercised. This ..." —

MR. SELLARDS: The first option.

BY THE COURT: "... will be exercised by giving written notice as set forth in paragraph three herein, which notice can only be given at any time within one year prior to the date of the expiration of this option."

MR. SELLARDS: Your Honor —

BY THE COURT: In other words, the option expires June the 3<sup>rd</sup>, 2081 —

MR. SELLARDS: But that's not how it reads, Your Honor.

BY THE COURT: Well, let me finish.

MR. SELLARDS: Yes, sir.

BY THE COURT: Well, I just read it, that's what it says.

MR. SELLARDS: Well, but there's no punctuation in — where it says, "...paragraph three herein which can only be given at any time within one year." Had there been punctuation, had there been some other language, then it might clear up what we believe is ambiguous about this.

BY THE COURT: Now wait, are we arguing over a comma?

MR. SELLARDS: We are arguing about throwing out a case that we haven't even had a chance to depose the drafter of yet.



BY THE COURT: It says, "...or within 90 days after a notice of default is tendered in the manner and terms required by provision..." – well, we're not talking about that, as I understand it.

MR. SELLARDS: But what if Mr. Reed comes back and says, "Your Honor, that's not what we intended. That's not what happened. That's not whatever." We don't know that today. But that is a fact that should overcome a Motion to Dismiss. Maybe not summary judgment, I'm not talking about that this is a potential slam-dunk case, but we're talking about this Court deciding that there is absolutely not one single shred of factual evidence that could proceed to discovery.

MR. HUNTER: May I respond to that question counsel asked?

BY THE COURT: Well, now, I'll – I'm going to ask him something.

MR. HUNTER: Okay.

BY THE COURT: I understand that there could be some possible explanations, though when people enter into a contract, both sides, I assume, were represented by attorneys when this was entered into.

MR. HUNTER: Not my client.

BY THE COURT: Well, he represented himself and he had a poor lawyer, if that's the case. Cause nobody that represents themselves has a good lawyer, just all I'm saying there. But I could understand that there is possibly other intent, but when you read this thing, it really concerns me, that it said they can only exercise their option within a year of June the 3<sup>rd</sup>, 2081.

MR. SELLARDS: Then what I would do, Your Honor, is I would proffer to this Court a –

BY THE COURT: Isn't that what it says?

MR. SELLARDS: You – I mean, you are reading the words right, Your Honor, but it's – I truly do believe that this paragraph, paragraph five has an error in it. I don't think that they meant –

BY THE COURT: Okay, well, when do you think that – where do you propose to show that it can be exercised?

MR. SELLARDS: I don't think that's even – I think that that's actually moot as of the fact that Dr. Black has invited us to exercise it.

BY THE COURT: Oh, forget that. Let's just talk about what this contract says. Forget all about that, what's this contract say?

MR. SELLARDS: I think the contract says that we have to exercise it pursuant to paragraph three, which paragraph three can only be given at any time within one year, but that is directly contrary to what paragraph three itself says. That's how it reads, Your Honor, "...set forth in paragraph three herein, which notice can only be given at any time within one year." But, as you know, above that, it says, paragraph three says "at least one year prior".

I mean, the reality is we are struggling over this because there is an ambiguity in it. It may be small, it may be large, but certainly, if there was an attorney involved, a local attorney, even, it still merits discovery, and that's all we are asking for is a chance – not to shut the Courthouse doors on us and let us go talk to these people.

BY THE COURT: Well, I don't – I'm trying to see where they are ambiguous and they contradict each other, because it says in paragraph three, "Notice of

Exercise. The option shall be exercised by written notice signed by St. Joseph's and sent by registered mail at least one year prior to the expiration date." In other words, they've got to do it before -- while there is still more than a year to go.

MR. SELLARDS: Yes, sir.

BY THE COURT: Okay, that's when they have to do it. Then St. Joe could exercise the option, "First option will be exercised by giving written notice as set forth in paragraph three herein, which notice can only be given at any time within one year prior to the date of the expiration of the option." Now, let me read that again.

MR. SELLARDS: Your Honor, I'll proffer I draft contracts for health care facilities all up and down the east coast and this is a formation issue. The language that follows paragraph three herein relates to paragraph three, which is directly opposed to what paragraph three's language says.

There needs -- and we may or may not be talking about an "and" sign or a "or" sign or punctuation or something like that, but we are talking about a multi-million dollar deal here and this document was drafted by nobody -- by people that are not in front of this Court today, in 1982. It certainly warrants a little bit of peeling the onion to check this thing out.

MR. HUNTER: May I respond to that, Your Honor?

BY THE COURT: Well, there are a lot of oil and gas leases running around in this county that people might feel that way about, that we ought to check them out because of something like that, and if we started doing that, we've got problems, big problems.

MR. HUNTER: Your Honor, may I address the specific points that we differ?

BY THE COURT: I'm studying paragraph five. All right, go ahead.

MR. SELLARDS: Your Honor, I'm prepared to answer any other questions. Specifically, I don't think that it's equitable to St. Joseph's Hospital to be able to completely ignore the effect or any legal effect of the February 1<sup>st</sup>, 2011, letter. If Your Honor would like I can present you with a clean copy, but it clearly, it clearly invites St. Joseph's Hospital to exercise its first option to purchase and it clearly says at the end of the letter that failure to exercise this option to purchase shall constitute grounds for free and unimpeded sale to others.

So in 2011, we were allowed to execute it, and we negotiated it, and we went out and got values for it and we got back to the table and he didn't get happy and he got a lawyer and his lawyer told us that this wasn't an option to purchase, but a first right of refusal and based on reliance on our dealings with Black's previous counsel, we filed the dec action in an effort to have this Court determine that the language itself constituted a first option to purchase as opposed to a right of refusal.

And that's what happens. We file the dec action, Dr. Black brings in new counsel, now we're faced with a technical argument, for two years had never ever been raised, not one time, not one letter, not one email, not one phone call did we -- was it ever suggested to us that we were early. And we negotiated, and we negotiated in good faith and we continued to negotiate, up into negotiating even last week on the purchase of this thing.

BY THE COURT: Well, that certainly very well may be what you all did, but I'm still concerned about what this contract says. I still have some concerns there. Mr. Hunter?

MR. HUNTER: I'd like to point out two things, Your Honor. Paragraph five simply said -- I think a little better draftsmanship would have added the word "intent" on number three. I think everything would be abundantly clear, even though I think, as they asserted in their first defense to my motion, that this is unambiguous. It probably should have said "notice of intent to exercise", okay? Because if you read it, then they can file their notice of intent to exercise any time they want to before one year before the expiration and that's fine.

Now, this next one, number five, "This first option will be exercised by giving written notice as set forth in paragraph three.", that doesn't mean before the one year, the last one year starts, that means by registered mail. It simply means the notice of exercise will be filed in the same form, by registered mail, as the notice of intent to exercise.

But the notice of exercise in this clearly can only be within one year prior to that date.

Now, here is what is important. Counsel is proffering a great amount of extraneous fact, much of which we disagree with and the reason that I've tried not to be lured into arguing those facts is that under our theory, Donald Duck could prepare this. Their lawyer in Charleston could prepare it, Mr. Sellard could prepare it, my client could have prepared it. If it's an unambiguous provision, all of

this parole evidence can't come in unless they are going to allege something like fraud.

Now, and Your Honor, the way I understand the rules, they could have come forward with massive affidavits and documents and assertions to try to turn this into a Rule 56 motion. They didn't really do that, they have basically taken the position that it's not ambiguous, then they say it is ambiguous, then they say my clients waived it. In fact, it was approached but --

BY THE COURT: You have represented to me, Mr. Hunter, that both sides agree that this is not ambiguous and --

MR. HUNTER: Well, their answer says that, yes. Their position is it is not ambiguous and it should be enforced on the terms of its face and that's what we agreed to.

BY THE COURT: I think paragraph five is ambiguous. I'm --

MR. HUNTER: Well, you're the Judge, so I'm in trouble.

MR. SELLARDS: Your Honor, put us on a quick docket --

MR. HUNTER: Paragraph five says it can only be exercised at any time within one year.

BY THE COURT: Now, no, no, just read it here, this first option, talking about option, "...will be exercised by giving written notice as set forth in paragraph three herein, which notice...", are they talking about the one in paragraph three? "...can only be given at any time within one year prior to the date of expiration." Well, paragraph three says it has to be given before that one year of expiration.

MR. ASHWORTH: That's right, absolutely.

MR. SELLARDS: I agree, Your Honor.

BY THE COURT: "...of this option, or within 90 days after a notice of default...", and so on and so forth. I think it's ambiguous.

MR. HUNTER: Your Honor --

BY THE COURT: Your motion is --

MR. HUNTER: - what I was trying to say and I understand the Court may be winding up here, at the end, it says that the notice will be sent as the one in paragraph three. All that means is by registered mail.

MR. SELLARDS: But --

MR. HUNTER: but it is completely unambiguous that it can only be exercised within that one year, can only be exercised. Notice can be sent before, it can only be exercised within that one year.

BY THE COURT: Well, as I read paragraph three and five, five is saying that three can be -- paragraph three says it has to be exercised at least a year prior to the expiration date. Paragraph five turns around and says they can do it within that one year.

So I think it's ambiguous. And I so find and deny your Motion to Dismiss.

MR. SELLARDS: Your Honor, would you like us to prepare the Order?

BY THE COURT: Yes, please.

MR. SELLARDS: How -- what time line, Mr. Hunter, to respond to the complaint?

MR. ASHWORTH: Do you want more than ten days, in other words, sir?

MR. SELLARDS: Your Honor, do you want to —

BY THE COURT: Well, the rules say ten days. Ten days. How much you want to give him?

MR. SELLARDS: We'll give him, I mean, to be hospitable, as much time as he believes he needs to —

MR. HUNTER: To do what?

MR. SELLARDS: File your answer. Ten days, 20 days?

MR. HUNTER: 20 days, Your Honor.

BY THE COURT: All right, put that in the Order.

MR. SELLARDS: Yes, sir.

BY THE COURT: This is yours, Mr. Hunter.

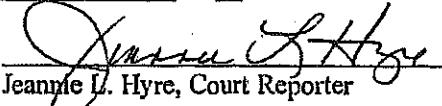
WHEREUPON, the hearing was adjourned at 2:02 p.m.



CERTIFICATE

I hereby certify that the transcript within meets the requirements of the Code of the State of West Virginia, 51-7-4 and all rules pertaining thereto as promulgated by the Supreme Court of Appeals of the State of West Virginia.

Entered this 28<sup>th</sup> day of March, 2013

  
Jeannie L. Hyre, Court Reporter

CERTIFICATE

AND THE COURT here certifies that the foregoing transcript contains all of the proceedings had with any objections, ruling and exceptions thereto as recorded on electronic devices by the Official Court Reporter.

TESTE: This 28<sup>th</sup> day of March, 2013.

  
John L. Henning, Special Judge  
26<sup>th</sup> Judicial Circuit

## **Exhibit E**

**COPY** *Revised* 9/13/13

**IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA**

**ST. JOSEPH'S HOSPITAL  
of Buckhannon, Inc.,**

**Plaintiff**

**VS.**

**CASE NO. 12-C-52**

**JERRY N. BLACK, M.D.,**

**Defendant.**

Transcript of the proceedings held in the above noted matter, held in Upshur County, West Virginia, on June 21, 2013, at approximately 11:39 a.m., before the Honorable John L. Henning, Judge of the Twenty-Sixth Judicial Circuit and duly recorded by Jeannie L. Hyre, Court Reporter for the Twenty-Sixth Judicial Circuit.

**APPEARANCES:**

**For the Plaintiff:**

**ROBERT M. SELLARDS  
RYAN ASHWORTH  
Huntington, WV**

**For the Defendant:**

**J. BURTON HUNTER, III  
Buckhannon, WV 26201**

June 21, 2013  
11:39 a.m.

BY THE COURT: Let's see, counsel, who do we have here for the Plaintiff?

MR. ASHWORTH: Your Honor, it's Ryan Ashworth and Rob Sellards on behalf of St. Joseph's Hospital.

BY THE COURT: Ryan Ashworth and Robert Sellards?

MR. SELLARDS: Sellards.

MR. ASHWORTH: Yes, Your Honor.

BY THE COURT: And we have Mr. Burton Hunter on behalf of Dr. Black. Okay. And I believe we are here on – is it the Motion for Summary Judgment?

MR. ASHWORTH: Yes, Your Honor, it is.

BY THE COURT: Go ahead.

MR. ASHWORTH: Your Honor, on June 3<sup>rd</sup>, 1983, Dr. Black and St. Joseph's Hospital entered into arms lengths negotiations that resulted in a Memorandum Agreement and a document called First Option to Purchase certain real estate that was located on the main campus of the hospital. Everything went fine for several years and then recently, a few years ago, we received correspondence from Dr. Black, that told St. Joseph's Hospital that they must exercise their right of first refusal or lose that right. There were communications back and forth between Dr. Black and St. Joseph's Hospital –

BY THE COURT: Well, now, was that an offer, was that a demand that they exercise their right of first refusal or was that an offer to purchase?

MR. ASHWORTH: It was a demand to exercise the right, Your Honor, let me quote some of the language from –

BY THE COURT: All right. Or offer to sell, I should say.

MR. ASHWORTH: You could call it that but the language from the communications dated June – excuse me, dated February 1<sup>st</sup>, 2011, says, "Failure to exercise the option to purchase shall constitute the grounds for free and unimpeded sale to other parties." Subsequent communications also said the only obligation that was due is, "The prior notification of a possible intent to sell the properties and the concurrent equal offer and right of first refusal of St. Joseph's Hospital."

So the first communication they use the word "option to purchase", but they were referring to the first option to purchase, which is the title of the document. In the totality of the communications, it was clear Dr. Black used on several occasions the term "right of first refusal", and he wanted us to either purchase the property under the agreement or allow him the unimpeded sale to third parties that may be interested in it.

BY THE COURT: So I go back to my question, I still don't understand, you know, a right of first refusal, I have an offer of a hundred dollars. You have a right of a first refusal, so you can exercise your right to purchase it for a hundred dollars –

MR. ASHWORTH: Yes, Your Honor.

BY THE COURT: A right of first refusal. An offer to purchase, I'm offering it

to you for \$200.00. I don't have any other offers, but I'm offering it to you. Now, which was it in your understanding?

MR. ASHWORTH: Well, from the language of the communication, it was a right – it was them offering us the right, what they believed to be the right of first refusal.

BY THE COURT: Okay, but there hadn't been any other offers. Or had there been?

MR. ASHWORTH: There potentially was another offer from a third party. Excuse me, he had offered – a third party had approached Dr. Black for the purchase of the real estate and potentially the practice and based upon that third party's – or alleged third party's apparent interest in the property, Dr. Black believed or at least the communications from Dr. Black would have led the hospital to believe that he thought he had to offer the property to us first under the first option to purchase before he could engage in arms length communications with this third party and sell it to them. So in other words, he believed that he had an obligation to offer us the right of first refusal and that's what we believe he did was offer us the right of first refusal.

BY THE COURT: Okay, go ahead.

MR. ASHWORTH: Okay. Well, when the hospital saw this communications, when they understood that fact, they looked back at the documents, we looked at the documents and we realized that it's not a right of first refusal, it's an option contract and under the law of the State of West Virginia and

all the laws of all the other jurisprudences in the country, an option contract and a right of first refusal are obviously two completely different things.

So because the hospital was concerned that if this document turned out to be a right of first refusal, there could be a potential loss of some type of property interest, we brought before the Court a complaint for declaratory judgment and we simply asked the Court, "Is the document an option contract or a right of first refusal?", nothing more. We didn't ask when it could be exercised, we didn't ask for the interpretation of it, we just asked the Court to tell us whether it was or wasn't or whether the Court couldn't decide, at which time we would have to go to discovery.

And we sat before this Court months ago and we went over the option contract in detail and this Court ruled unequivocally that it is an option contract.

At that point in time, we had been in litigation for several months if not close to nine months or so. We had gotten, basically, the ruling that we wanted. We understood now, the hospital understood now that it had an option contract. It was a contract that couldn't be revoked is probably not the right word, but it couldn't be alleviated by just a simple offer, it was a contract that withstood a right of first refusal and it existed until the time limit allowed for it, so that the hospital could exercise it if it wanted to, in the future.

It's never exercised, by the way. The land was there for 20 years and he's operated his practice out of it and has a building on it.

But, I digress. I digress. We got the ruling from this Court that it –



BY THE COURT: Don't digress too much cause we've got an awful lot to do right this morning.

MR. ASHWORTH: We had a ruling from the Court that said that this was an option contract and since we had been in discovery for a long time and we understood now what we were trying to find out when we filed the complaint for declaratory judgment, which was simply asking, I refer to it several times, "Is this an option contract or is this a right of first refusal?", the Court's –

BY THE COURT: The Court ruled that it's an option of first refusal, right?

MR. ASHWORTH: And the Court ruled that it was a – the Court ruled that it was an option contract.

BY THE COURT: Option contract, okay.

MR. ASHWORTH: We moved for a summary judgment saying there was no more material facts, the one question that we had asked the Court to declare under the statute, allowing us to bring a declaratory judgment action so that we understand our rights under a contract, the one question that we asked had been answered by the Court, and we moved, pursuant to Rule 56 of the applicable Rules of Civil Procedure, to grant a motion for summary judgment, because, frankly, there wasn't anything left to do. We shouldn't have – we didn't need to go to a trial, we didn't need discovery, the Court ruled.

So, we filed that motion and in response, we have received three responses now that raise everything from how the notice provisions work if we would, in fact, exercise the option, to how a paid expert would interpret this contract in

variegation of the Court's earlier ruling and they have asserted the rule against perpetuities.

But we have our answer and all of that stuff is immaterial. We wanted to know if it was an option contract or a right of first refusal, the Court has ruled on that, and now we have –

BY THE COURT: Did Judge Keadle put that in a written Order?

MR. ASHWORTH: Yes, Your Honor, would you like to see it?

BY THE COURT: Well, it's probably in the file, I would expect, I would hope. Can you tell me about when it was?

MR. ASHWORTH: It was – it's dated October the 9<sup>th</sup>, 2012.

BY THE COURT: All right, well, let's see, then. Would you like to approach, counsel?

MR. ASHWORTH: I certainly would, Your Honor. May I approach?

BY THE COURT: Please come up, yes.

MR. ASHWORTH: It's a three-page document and I'll try to refer to it from memory if I don't have another copy of it, Your Honor, but as you see in the conclusions –

BY THE COURT: Well, I just found it, thanks, you can come and get it now.

MR. ASHWORTH: Thank you, may I approach?

BY THE COURT: This is – you may, sir. Judge Keadle said Hunter filed a complaint for declaratory judgment in April of 2012. The Plaintiff requested a legal declaration of rights. The option was contract. The Defendant responded by filing

a motion to dismiss. Okay, Judge Keadle said, "Finding of fact, conclusions – Dr. Black entered into an option contract, this option contract has been recorded, language in paragraph three of the option contract allows St. Jos. to exercise the option at any time prior to June 3 of 2080, therefore, paragraph five of the option contract is ambiguous, as a matter of law and fact. For the reasons stated herein as well as Plaintiff's ... the Court hereby holds that as stated by ... it denies the Defendant's motion to dismiss."

MR. ASHWORTH: The Defendant moved to dismiss our complaint for declaratory judgment and that's when we became – came before this Court, Your Honor, in a lengthy hearing, that went over the option contract and related documents and we discussed them in detail.

BY THE COURT: Right, that's the motion – Order denying the motion to dismiss.

MR. ASHWORTH: Yes, Your Honor.

BY THE COURT: Okay.

MR. ASHWORTH: Had answered the question. That's why we moved for a summary judgment. The Court had three options to handle the motion to dismiss. The Court could have ruled that it was an option contract and we would have been done. The Court rule that it was a right of first refusal and we would have been necessarily been done, or the Court could have said, "We need to do discovery to determine if it's an option contract or a right of first refusal." Well, the Court ruled that it was an option contract. That's the question, the only question

that we moved for and asked for clarification on in the complaint for declaratory judgment.

The notice provision issues that you see in the Order was a result of issues that were raised on the motion to dismiss.

BY THE COURT: Well, Judge Keadle apparently didn't find it to be the end of the case, because he didn't dismiss the case. In fact, it says, "The Court hereby holds, as stated above, it denies the Defendant's motion to dismiss. Defendant shall have 20 days from the date of this ruling to submit his answer to the Plaintiff's complaint."

MR. ASHWORTH: Yes, Your Honor, and he –

BY THE COURT: So, I mean, he anticipates it going on.

MR. ASHWORTH: Right and – but then the Defendant answered.

BY THE COURT: Okay.

MR. ASHWORTH: And the Defendant said unequivocally in his answer that they do not anymore dispute that it's an option contract.

BY THE COURT: Okay.

MR. ASHWORTH: They said – they actually denied in their answer taking that position and they said, in their answer, they said, the Defendant specifically said, "The determination of whether this document is an option contract is for a determination by the Court and a matter of law." And when the Defendant said that, we agreed. It was something that needed to be determined as a matter of law, but has been, in paragraph one of the Order, this is an option contract, not a right of first refusal.

BY THE COURT: Okay, so you are saying that since they agreed that it was an option contract –

MR. ASHWORTH: That's all we ever asked.

BY THE COURT: And the Court said before it was an option contract, that it's a done deal?

MR. ASHWORTH: Yes, Your Honor, and –

BY THE COURT: I understand your position. Let me hear from Mr. Hunter and see if he agrees with you.

MR. HUNTER: Your Honor, I was in a day or two of mediations where the real issue was discussed in much more candor than we're hearing today.

BY THE COURT: But we don't talk about mediations in Court, do we?

MR. HUNTER: No, I won't –

BY THE COURT: And we're not going to go around it and talk about them in Court.

MR. HUNTER: No, what I want to tell the Court is that the real issue in this case is whether St. Joseph's can exercise that option now or during the last year of a 99-year term and if St. Joseph's is saying –

BY THE COURT: So you're saying –

MR. HUNTER: - they're not seeking a ruling on that issue and they want to take their marbles and go home, I think we would take them up on that. Because I don't think they would ever dare file suit again now that they know that –

BY THE COURT: So you are saying that you agree with them that it's an option contract?

MR. HUNTER: Always have.

BY THE COURT: Period. Done deal. Case dismissed. Right?

MR. HUNTER: Well, if that's what they're saying. But it's our understanding –

BY THE COURT: That's what they are saying and they are saying you agree with them.

MR. HUNTER: As far as it goes.

BY THE COURT: And that's all they want to know.

MR. HUNTER: And if they are not seeking a ruling on whether they can exercise that option now, go on record saying that if they try, we'll resist it.

BY THE COURT: That's not part of the case. That's not part of the case, Mr. Hunter.

MR. HUNTER: I understand that.

BY THE COURT: I'm not deciding that one way or the other. Please prepare an Order which says that the matter was determined by the Court to be an option contract.

MR. SELLARDS: Yes, sir.

MR. ASHWORTH: Which I believe we admitted.

BY THE COURT: I'm telling him to prepare it.

MR. ASHWORTH: I'm sorry.

BY THE COURT: All right? But Mr. Hunter agrees with you, that that is the sole question decided by this Court, case dismissed.

MR. SELLARDS: Thank you, Your Honor.

BY THE COURT: Thank you, sir.

MR. HUNTER: Thank you.

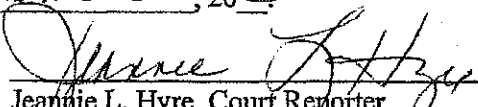
BY THE COURT: Thank you, counsel.

WHEREUPON, the hearing was adjourned at 11:54 a.m.

# CERTIFICATE

I hereby certify that the transcript within meets the requirements of the Code of the State of West Virginia, 51-7-4 and all rules pertaining thereto as promulgated by the Supreme Court of Appeals of the State of West Virginia.

Entered this 13<sup>th</sup> day of September, 2013

  
Jeannie L. Hyre, Court Reporter



**CERTIFICATE**

AND THE COURT here certifies that the foregoing transcript contains all of the proceedings had with any objections, rulings and exceptions thereto, as recorded on electronic devices by the Official Court Reporter.

TESTE: This 13<sup>th</sup> day of September, 2013.

Kurt W. Hall  
Kurt W. Hall, Judge  
26<sup>th</sup> Judicial Circuit