STATE OF INDIANA)		ALLEN SUPERIOR COURT
) SS:		
COUNTY OF ALLEN)		CAUSE NO. 02D02-2307-PL-261
DAVID LANKFORD, D.O.,	)	
Plaintiff,	)	
	)	**ORDER GRANTING**
vs.	)	**REQUEST FOR PRELIMINARY**
	)	**INJUNCTION**
LUTHERAN MEDICAL	)	
GROUP, LLC,	)	
Defendant.	)	

INTRODUCTION

On August 11, 2023, Plaintiff David Lankford, D.O. ("Dr. Lankford") appeared in person by attorneys Kathleen Delaney and Alexander Pantos, and Defendant Lutheran Medical Group, LLC ("Lutheran") appeared by attorneys Roger Kanne and Erin Meyers for hearing on Dr. Lankford's request for a preliminary injunction in his Verified Complaint for Declaratory and Injunctive Relief (filed July 5, 2023), Lutheran's Response in Opposition (filed August 8, 2023), and Dr. Lankford's Brief in Support (filed August 8, 2023). Following presentation of evidence on Dr. Lankford's request for a preliminary injunction, the Court took the case under advisement. By agreement, the parties were to submit their Proposed Findings of Fact and Conclusions of Law by September 1, 2023, and the Court was to issue this Order by September 22, 2023. The Court concludes it has jurisdiction over the parties, the cause of action, and the issues in consideration. Having

considered the motion, designations, arguments, and applicable law, the Court now concludes and Orders as follows.

BACKGROUND

Dr. Lankford filed his Verified Complaint for Declaratory and Injunctive Relief with the Court on July 5, 2023. On that same day, Dr. Lankford also filed a separate Request for Hearing on Preliminary Injunction. Five days later, on July 10, 2023, the Court issued an Order Setting Hearing on Request for Preliminary Injunction for July 27, 2023. On July 14, 2023, Lutheran filed a Verified Motion for Extension of Time to respond to Dr. Lankford's request for preliminary injunction and to reset the July 27, 2023 hearing date. After a July 19, 2023 hearing on that Motion, the Court granted the continuance, set the preliminary injunction hearing for August 11, 2023, and ordered pre-hearing briefs to be filed by August 8, 2023. Both parties timely filed pre-hearing briefs, and on August 11, 2023, the Court conducted a hearing in which both parties presented evidence regarding Dr. Lankford's request for a preliminary injunction. At the preliminary injunction hearing, Dr. Lankford presented the following witnesses: Dr. Lankford, Dr. Tamika Rozema, and Megan Smith. At the hearing, Lutheran's witnesses included Lutheran CEO Nicole Rexroth and Kelli Tuttle.

At the close of evidence, Dr. Lankford moved for entry of a temporary restraining order ("TRO"). The Court heard argument on the Motion and took the matter under advisement. On August 14, 2023, the parties submitted briefs in support of and in opposition to Dr. Lankford's request for a TRO.

On August 15, 2023, the Court granted Dr. Lankford's request for a TRO and specifically Ordered the following:

> Defendant Lutheran Medical Group, LLC shall not enforce or threaten to enforce against Plaintiff David Lankford, D.O. the non-compete clause contained in the parties' November 2020 Physician Employment Agreement should Plaintiff David Lankford, D.O. obtain employment with a competitor of Defendant Lutheran Medical Group, LLC as a pediatric hospitalist within the Restricted Area as defined in the Agreement. This Order shall remain in effect until such time as the Court issues a ruling on Plaintiff's Motion for Preliminary Injunction.

On September 1, 2023, Dr. Lankford and Lutheran each filed Proposed Findings of Fact and Conclusions of Law. The Court has reviewed the proposals.

FINDINGS OF FACT

After receiving evidence, and determining the credibility of witnesses, the Court finds the following relevant facts to have been proven by the greater weight of the evidence.

1. Dr. Lankford is a board-certified pediatrician who is board-eligible in pediatric critical care. After graduating from medical school, Dr. Lankford completed a fellowship in pediatric critical care medicine, although he is not currently board-certified in pediatric critical care medicine or any other subspecialty of pediatrics.

2. Pediatric critical care intensivists ("pediatric intensivists") are pediatric subspecialists who care for children that are the "sickest of the sick."

The fellowship Dr. Lankford completed after medical school trained him to care for these critically ill children.

3. Lutheran is a multi-specialty physician group with over forty various specialties. Lutheran serves the northeastern Indiana market and surrounding communities, providing physicians at related hospitals and medical facilities, including Lutheran Hospital, in Fort Wayne.

4. On October 25, 2017, Dr. Lankford and Lutheran entered into the original Physician Employment Agreement ("the 2017 Original Agreement"). The 2017 Original Agreement contains a cover sheet with essential terms and incorporates by reference a Standard Terms and Conditions document. The 2017 Original Agreement was for a term of 36 months, which began on or about August 1, 2018.

5. Section 2 of the 2017 Original Agreement addressed the relationship between the parties. Section 2 stated:

> [Lutheran] and [Dr. Lankford] agree that [Dr. Lankford] shall provide full-time professional medical services ("Services") exclusively on behalf of [Lutheran] during the term of this Agreement. Such Services shall include reasonable, prudent, medically necessary and appropriate medical treatment rendered by Physician to or for patients in the medical office and/or the Hospital, the documentation of the same, and other related services. . .

6. The 2017 Original Agreement described Dr. Lankford's "Duties and Covenants" at Schedule 1.3. Dr. Lankford's duties included, but were expressly not limited to, fifteen (15) paragraphs defining the duties. Significantly, under Schedule 1.3(A)(1), Dr. Lankford agreed to:

> provide full-time medical services, including the examination and care for patients referred to the Hospital for admission. For purposes of this Agreement, full-time is defined as personally working a minimum of ninety-nine (99) twenty-four (24) hour Pediatric Intensive Care Unit Coverage shifts (defined as a minimum of twelve (12) hours on-site at the Hospital and a minimum of twelve (12) hours of on-call coverage) as well as personally working a minimum of forty-two (42) eight (8) hour on-site Sedation shifts per contract year. The schedule for providing such shifts shall be determined by Employer.

Schedule 1.3(A)(14) also noted that Dr. Lankford's duties included "all other duties as reasonably specified by Employer and within the scope of Physician's training and/or capabilities[.]"

7. Schedule 1.2 of the 2017 Original Agreement detailed Dr. Lankford's compensation. Dr. Lankford was compensated on a per-shift basis. Specifically, Lutheran agreed to pay Dr. Lankford $2,964 per twenty-four (24) hour "Pediatric Intensive Care Unit Coverage shift, and Dr. Lankford agreed to "provide a minimum of ninety-nine (99)" Pediatric Intensive Care Unit Ccverage shifts annually. Lutheran further agreed to pay Dr. Lankford $1,536 "per eight (8) hour on-site sedation shift," of which he was to provide a minimum of forty-two (42) annually under the Original Agreement.

8. Schedule 1.4 of the 2017 Original Agreement contained a noncompetition provision.

9. Dr. Lankford began practicing under the 2017 Original Agreement on or about August 1, 2018.

10. On November 3, 2020, approximately nine months before the

Original Agreement ended, Dr. Lankford and Lutheran entered into a "Physician Employment Agreement (Renewal)" (hereinafter "the 2020 Renewal Agreement"). The 2020 Renewal Agreement commenced December 1, 2020, and was to terminate December 1, 2023.

11. Lutheran drafted the 2020 Renewal Agreement, and Dr. Lankford retained an attorney to review the 2020 Renewal Agreement before signing it.

12. The 2020 Renewal Agreement constituted a new employment contract between the parties. However, the 2020 Renewal Agreement was largely a continuation of the 2017 Original Agreement. Most of the material terms in the 2020 Renewal Agreement are the same as those in the 2017 Original Agreement. The "Noncompetition and Nonsoliciation" provision at Schedule 1.4 of the 2020 Renewal Agreement was similar to the "Noncompetition and Nonsolicitation" provision found in the 2017 Original Agreement, and the 2020 language provides:

> As a material inducement for Employer to enter into this Agreement, Physician agrees that during the Term and for a period of one (1) uninterrupted year following this Agreement, Physician shall not, without the prior written consent of Employer, either (i) engage in the practice of medicine including surgery within the Restricted Areas (as defined below) for Physician and/or on behalf of any person and/or entity other than Employer or (ii) have any sort of ownership, debt, and/or contractual relationship directly or indirectly with any person and/or entity which owns or operates a health care provider doing business in competition with Hospital or Employer in the Restricted Area. The term "Restricted Areas" means the following geographic areas: (i) within a thirty (30) mile radius of any Medical Office at which Physician performed professional services during the immediately preceding twelve (12) months or, upon the

occurrence of a Restriction Period Event (ii) within linear thirty (30) mile radius of the Hospital.

13. The definition of "Services" is the same in the two Agreements. Dr. Lankford's duty to provide full-time medical services was altered in 2020 to mean "a minimum of ninety-three (93) twenty-four (24) hour Pediatric Intensive Care Unit Coverage shifts" and "sixty-five (65) eight (8) hour Sedation shifts per contract year." Dr. Lankford's compensaticn for these shifts remained the same. The duties and covenants listed in the 2020 Renewal Agreement slightly differed from the duties and covenants contained in the 2017 Original Agreement, insofar as Schedule 1.3(A)(2) and (3) of the 2017 Original Agreement specifically referenced the "intensivist team" and "intensivist service," while the 2020 Renewal Agreement did not include any such references.

14. The 2020 Renewal Agreement allows both Lutheran and Dr. Lankford to terminate the Agreement upon the other party's material breach of the Agreement and failure to cure. Specifically, Section 4.4 of the 2020 Renewal Agreement states:

> Material Breach. In addition to the termination provisions listed above, if either party materially breaches any provision in this Agreement, and after receipt of the non-breaching party's written notice to cure, fails to cure such material breach to the satisfaction of the non-breaching party within thirty (30) days, then the non-breaching party thereafter may immediately terminate this Agreement upon written notice to the breaching party.

15. While Dr. Lankford worked for Lutheran, Lutheran Hospital had three pediatric care units—the general pediatric floor, staffed by Lutheran's

three pediatric hospitalists; the pediatric intensive care unit ("PICU"), staffed by Dr. Lankford and Lutheran's other pediatric intensivists; and the neonatal intensive care unit ("NICU"), staffed by neonatologists provided to Lutheran by a third party.

16. For the first four years of his employment with Lutheran, from August 2018, to October 2022, under both contracts, Dr. Lankford worked solely as a pediatric intensivist in the PICU, and never worked in the NICU, or on the general pediatric floor as a hospitalist, or in an outpatient office. For the first four years of his employment with Lutheran, Dr. Lankford provided call coverage solely for Lutheran's pediatric intensivists.

17. The parties agree that caring for general pediatric floor patients as a pediatric hospitalist fell within Dr. Lankford's training and capabilities.

18. Dr. Lankford also performed various administrative tasks related to his employment with Lutheran, including heading monthly pediatrics sub-group meetings, serving on a physician in need committee, serving as the vice chair of pediatrics from 2018-2020 and the chair of pediatrics from 2020-2022, and outreach work.

19. Dr. Lankford's understanding at the time the parties entered each respective Agreement was that his duties would only include covering the PICU and performing sedation shifts.

20. Over the five-year period Dr. Lankford was employed with Lutheran, Lutheran Hospital significantly reduced its pediatric service lines. Specifically, Lutheran Hospital eliminated its pediatric pulmonology, pediatric

endocrinology, pediatric gastroenterology, pediatric cardiology, pediatric hematology, pediatric burn unit, pediatric hospitalist, and pediatric oncology services. Lutheran Hospital also downsized its pediatric emergency room, downgraded its NICU, and closed its pediatric hospitalist service at Dupont Hospital.

21. On July 7, 2022, Lutheran informed its pediatric healthcare providers via email that it had "decided to modify how [it] provide[s] inpatient care in [Lutheran's] Children's Hospital." Specifically, Lutheran Hospital had decided to eliminate its pediatric cardiologists and hospitalists, and, beginning October 1, 2022, would require "[its] current pediatric intensivists [to] manage all pediatric patients who [were] admitted to Lutheran Hospital." Practically, this meant that Lutheran was reducing its pediatric department from nine to four doctors.

22. Shortly after Lutheran announced the pediatric hospitalist and cardiologist layoffs, Dr. Lankford and his fellow pediatric intensivists met with Lutheran leadership to discuss the upcoming change. Lutheran explained at this meeting that it had decided to eliminate its pediatric hospitalists and pediatric cardiologists as a cost-cutting measure.

23. At this meeting, Lutheran leadership declined to renegotiate Dr. Lankford's employment contract when Dr. Lankford expressed concern that he was about to "tak[e] over the entire job responsibilities of the pediatric hospitalists as well as the job that [he] already had."

24. From July 7, 2022, and October 1, 2022, Dr. Lankford repeatedly raised his concerns with Lutheran's leadership regarding Lutheran's planned

change to its provision of pediatric care. Dr. Lankford made clear that he believed the planned change would conflict with the terms of the Renewal Agreement, including that covering the pediatric hospitalists' jobs exceeded the scope of duties he had agreed to provide in the 2020 Renewal Agreement, that Lutheran had only agreed to provide Dr. Lankford malpractice coverage for work he performed within the scope of the 2020 Renewal Agreement, and that Lutheran had inadequate physician support staff to safely handle the loss of five pediatric physicians in the pediatric department. Lutheran did not act to address any of Dr. Lankford's concerns.

25. Section 6 of the 2020 Renewal Agreement provided that Lutheran would obtain professional malpractice liability insurance on Dr. Lankford's behalf "but only for [Dr. Lankford's] actions as an employee within the scope" of the 2020 Renewal Agreement. Further, Section 6 of the 2020 Renewal Agreement provided that if "physician conducts professional activities outside the scope of th[e] agreement, physician shall maintain at physician's expense insurance, including but not limited to professional malpractice liability insurance covering such activities."

26. On September 30, 2022, Lutheran followed through with its plan and eliminated its pediatric hospitalists. On October 1, 2022, Lutheran began requiring Dr. Lankford and his fellow pediatric intensivists to cover the work the pediatric hospitalists left behind. Dr. Lankford believes that, beginning October 1, he was "[f]undamentally . . . working two jobs, instead of one."

27. After October 1, 2022, Dr. Lankford's patient volume and workload drastically increased as a result of his new additional hospitalist

duties. Dr. Lankford's patient volume went up approximately four to five times, which included the number of patients Dr. Lankford saw per day, the number of admissions Dr. Lankford oversaw, the number of medication reconciliations Dr. Lankford had to conduct, the number of pharmacies Dr. Lankford had to contact, the number of consults Dr. Lankford had, and the amount of time spent in the hospital." Lutheran believes this increase in workload was permitted under the 2020 Renewal Agreement and fundamentally reasonable in comparison with workloads of other pediatric intensivists around the country.

28. Dr. Lankford expressed concern about workload and safety as a result of understaffing, and when these concerns went unaddressed, Dr. Lankford, on December 7, 2022, sent a contractual notice of breach letter to Lutheran, as contemplated by Section 4.4 of the 2020 Renewal Agreement.

29. In his notice of breach letter, Dr. Lankford advised Lutheran that, if it did not cure the breaches he had identified, Dr. Lankford would "consider Schedule 1.4 addressing Noncompetition and Nonsolicitation to be null, void and unenforceable and [that he would] seek new employment without restriction."

30. On December 20, 2022, counsel for Lutheran contacted counsel for Dr. Lankford, and advised that it was Lutheran's position that Lutheran had not breached the agreement, and, that Lutheran had no intention of curing any of the purported breaches identified in Dr. Lankford's December 7, 2022 letter.

31. On December 28, 2022, Dr. Lankford provided Lutheran with a

notice of termination "for cause," to be effective January 7, 2023, following the expiration of the 2020 Renewal Agreement's thirty-day notice and cure period set out in Section 4.4. Dr. Lankford again advised Lutheran that, upon termination of the 2020 Renewal Agreement, Dr. Lankford would "consider Schedule 1.4 addressing Noncompetition and Nonsolicitation to be null, void and unenforceable and [that he would] seek new employment without restriction."

32. On January 4, 2023, counsel for Lutheran sent a letter to counsel for Dr. Lankford, which reiterated Lutheran's position that Lutheran did not believe it was in breach of the 2020 Renewal Agreement, and thus, Lutheran would not engage in any curative measures.

33. On January 5, 2023, Dr. Lankford provided Lutheran written notice that he would be resigning his privileges at Lutheran, effective January 7, 2023.

34. On January 6, 2023, Lutheran provided Dr. Lankford written notice that Lutheran was terminating Dr. Lankford's employment for cause.

35. On February 23, 2023, counsel for Dr. Lankford sent counsel for Lutheran a letter advising that Dr. Lankford "intend[ed] to accept a position to practice medicine with another health care organization in the near future." The February 23, 2023 letter requested that Lutheran inform Dr. Lankford by March 3, 2023, "whether Lutheran intend[ed] to interfere with Dr. Lankford's ability to accept employment and practice medicine within the geographical area included in Schedule 1.4 of the [2020 Renewal Agreement]." Lutheran did not respond.

36. In early March 2023, Dr. Lankford began providing pediatric intensivist and hospitalist services at Parkview Regional Medical Center ("Parkview RMC") in Fort Wayne, as an independent contractor.

37. Parkview RMC is within the Restricted Area of the 2020 Renewal Agreement's Noncompetition provision. Parkview RMC and Lutheran Hospital are primary competitors in the Fort Wayne healthcare services market.

38. In April 2023, attorneys from Lutheran reached out to Parkview RMC about Parkview RMC employing Dr. Lankford, in potential violation of a noncompetition agreement. At that time, Lutheran indicated it would pursue legal action against Parkview RMC if Parkview RMC continued to schedule Dr. Lankford for work. Parkview RMC chose to remove Dr. Lankford from their schedule so as not to employ Dr. Lankford before the noncompetition agreement was "either resolved or up."

39. Dr. Lankford ultimately filed the present action on July 5, 2023, seeking entry of a preliminary injunction to bar Lutheran from enforcing or attempting to enforce the noncompetition provision contained in the 2020 Renewal Agreement. The Court held an evidentiary hearing on Dr. Lankford's request on August 11, 2023.

40. Lutheran utilizes noncompetition agreements to retain competent physicians to care for the patients in the community, and to protect the significant investments they make in those physicians.

41. When a medical doctor is sidelined for months on end, this takes

a toll on their skillset as a doctor, their reputation amongst the medical community, and their ability to obtain patients by referral.

42. At Lutheran, Dr. Lankford was a hospital-based provider. However, referrals also play a significant role in his practice. Dr. Lankford receives no referrals presently. Dr. Lankford will begin receiving referral patients again if he returns to work within a reasonable time and within a reasonable distance of Fort Wayne.

43. Many of the critically ill patients Dr. Lankford is trained to treat are unfit to travel long distances for care. Even travel from Fort Wayne to Riley Children's Hospital in Indianapolis presents a potentially dangerous, traumatic, stressful, and expensive experience for these critically ill children and their parents.

44. Allen County has a significant and urgent need for both pediatric hospitalists and pediatric intensivists.

45. Megan Smith, Parkview RMC's administrator overseeing its cancer, women's, and children's services, credibly testified that Parkview RMC has an urgent need to hire more pediatric intensivists and pediatric hospitalists.

CONCLUSIONS, DISCUSSION, AND DECISION

Preliminary Injunction Standard

The grant or denial of a preliminary injunction rests with the equitable discretion of the trial court. *Unger v. FFW Corp.*, 771 N.E.2d 1240, 1243 (Ind. Ct. App. 2002). "An injunction is an extraordinary remedy that should be

granted only with caution." *Abercrombie & Fitch Stores, Inc. v. Simon Prop. Grp., L.P.*, 160 N.E.3d 1103, 1108 (Ind. Ct. App. 2020). "The power to issue an injunction should be used sparingly, and such relief should not be granted unless the law and facts are clearly in the moving party's favor." *Unger*, 771 N.E. 2d at 1243.

In addressing the showing required to obtain a preliminary injunction, the Indiana Court of Appeals observed in *Vickery v. Ardagh Glass, Inc.*:

> To obtain a preliminary injunction, the movant must show (1) a reasonable likelihood of success on the merits; (2) the remedies at law are inadequate and there will be irreparable harm during the pendency of the action; (3) the threatened injury to the movant from denying the motion outweighs the potential harm to the nonmovant from granting the motion; and (4) the public interest would not be disserved by granting the injunction.

85 N.E.3d 852, 859-60 (Ind. Ct. App. 2017) (citing *Hannum Wagle & Cline Eng'g, Inc. v. Am. Consulting, Inc.*, 64 N.E.3d 863, 873 (Ind. Ct. App. 2016)); *see also Apple Glen Crossing, LLC v. Trademark Retail, Inc.*, 784 N.E.2d 484, 487 (Ind. 2003). If the moving party fails on any one of these requirements, the motion for a preliminary injunction must be denied. *Clark's Sales and Service, Inc. v. John D. Smith & Ferguson Enters.*, 4 N.E.3d 772, 780 (Ind. Ct. App. 2014).

Additionally, "[i]njunctions must be narrowly tailored, and never more extensive in scope than is reasonably necessary to protect the interests of the aggrieved parties." *U.S. Land Servs., Inc. v. U.S. Surveyor, Inc.*, 826 N.E. 2d 49, 64 (Ind. Ct. App. 2005). "Moreover, the injunction should not be so

broad as to prevent the enjoined party from exercising his rights." *Id.* at 65; *see also Groff v. City of Butler*, 794 N.E.2d 528, 535 (Ind. Ct. App. 2003).

Preliminary injunctions act to prevent irreparable harm (to the moving party) by maintaining the "status quo" during the pendency of an underlying claim. *Kuntz v. EVI, LLC*, 999 N.E.2d 425, 432 (Ind. Ct. App. 2013). In other words, preliminary injunctions function to protect the property and rights of parties from injury until the issues and equities in a case can be determined after a full examination and hearing. *Barlow v. Sipes*, 744 N.E.2d 1, 6 (Ind. Ct. App. 2001). Consequently, preliminary injunctions are prefatory to a hearing on the merits. A mandatory injunction is defined as an injunction that orders an affirmative act or mandates a specified course of conduct. *City of Gary v. Majestic Star Casino, LLC*, 905 N.E.2d 1076, n.6 (Ind. Ct. App. 2009) (citing BLACK'S LAW DICTIONARY 800 (8th ed. 2004). Preliminary injunctions, like the preliminary injunction sought by Lankford, are typically "prohibitory," and act to forbid an action in order to maintain the status quo. *Crossman Cmtys., v. Dean*, 767 N.E.2d 1035, 1040 (Ind. Ct. App. 2002).

1. No Reasonable Likelihood Of Success On The Merits

To establish that a party has a reasonable likelihood of success on the merits, the party must establish a *prima facie* case through substantial, probative evidence. *Northern Electric Co., Inc. v. Torma*, 819 N.E.2d 417, 431 (Ind. Ct. App. 2004), *reh'g denied, trans. Denied*; *Indiana High Sch. Ath. Ass'n. v. Martin*, 731 N.E.2d 1, 7 (Ind. Ct. App. 200) (citing *Boatwright v. Celebration Fireworks, Inc.*, 677 N.E.2d 1094, 1096 (Ind. Ct. App. 1997)) "The party is not required to show that he is entitled to relief as a matter of

law, nor is he required to prove and plead a case, which would entitle him to relief upon the merits." *Avemco Ins. Co. v. State ex rel. McCarty*, 812 N.E.2d 108, 118 (Ind. Ct. App. 2004).

Breach Of Contract Claim

To prevail in any contract action under Indiana law, a plaintiff must prove: (1) a contract existed; (2) the defendant breached the contract; and (3) the plaintiff suffered damage as a result of defendant's breach. *Roche Diagnostics Operations, Inc. v. Marsh Supermarkets, LLC*, 987 N.E.2d 72, 85 (Ind. Ct. App. 2013). Contract construction is a question of law for the court, and if the intention of the parties can be ascertained from their written expression, that intention must be carried out by the court. *Eck & Associates. Inc. v. Alusuisse Flexible Packaging,* Inc. 700 N.E. 2d 1163, 1167 (Ind. Ct. App. 1998). If contract language is unambiguous, a court may not look to extrinsic evidence to explain the instrument. *Celadon Trucking Servs., Inc. v. Wilmoth*, 70 N.E.3d 833, 839 (Ind. Ct. App. 2017). If a contract is ambiguous, "the parties may introduce extrinsic evidence of its meaning, and the interpretation becomes a question of fact." *Id.* "A word or phrase is ambiguous if reasonable people could differ as to its meaning." *Id.* Ambiguous language must be construed to determine and give effect to the intent of the parties when they entered into the contract." *Id.* "An ambiguous contract should be construed against the party who furnished and drafted the agreement." *Id.*

"Indiana courts have long recognized and respected the freedom to contract." *Eck & Associates*, 700 N.E.2d at 1167 (quoting Trotter v. Nelson, 684 N.E.2d 1150, 1152 (Ind. 1997)). "Contract construction is a question of

law for the court." *Id.* (quoting *Smart Corp. v. Grider*, 650 N.E.2d 80, 83 (Ind. Ct. App. 1995), *trans. denied*). The courts should interpret contracts as a whole to determine the intent of the parties. *Id.* at 1167. "[T]he general rule of freedom to contract includes the freedom to make a bad bargain." *Indianapolis-Marion County Public Library v. Charlier Clark & Linard, PC*, 929 N.E.2d 838, 852 n. 13 (Ind. Ct. App. 2010) (quoting *Ind. Bell Tel. Co. v. Mygrant*, 471 N.E.2d 660, 664 (Ind. 1984)).

"A party first guilty of a material breach of contract may not maintain an action against the other party or seek to enforce the contract against the other party should that party subsequently breach the contract." *Licocci v. Cardinal Associates, Inc.*, 492 N.E.2d 48, 52 (Ind. Ct. App. 1986). A breach by an employer may prevent enforcement of a noncompetition agreement when that breach is material. *Central Ind. Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 732 (Ind. 2008); *see also Janowiak v. Watcon, Inc.*, 2016 Ind. App. Unpub. LEXIS 920 *10.

In this case, both parties agree that the 2020 Renewal Agreement is enforceable. Therefore, the Court concludes that the 2020 Renewal Agreement is enforceable between the parties. The remaining relevant inquiry is whether the 2020 Renewal Agreement was breached by Lutheran or Dr. Lankford, and whether the breach caused damages to Dr. Lankford.

Dr. Lankford argues that the 2020 Renewal Agreement, taken as a whole, clearly and unambiguously provides that he was to work in the PICU, and only in the PICU. In the alternative, Dr. Lankford argues that the 2020 Renewal Agreement is ambiguous, and extrinsic evidence clearly exhibits

that his duties were limited to PICU services. Lutheran argues that the 2020 Renewal Agreement makes clear that Dr. Lankford was to be compensated based on shifts completed, regardless of unit, and was bound to perform all assigned duties that were within his "training and/or capabilities." Further, Lutheran argues that the only arguably unclear language Dr. Lankford can point to is actually irrelevant. The relevant headings in Schedule 1.2, under which Dr. Lankford's compensation is articulated, are entitled "Pediatric Intensive Care Unit Coverage Compensation" and "Sedation Shift Compensation." These headings are also used to define Dr. Lankford's duties in Schedule 1.3(A)(1). In arguing these headings carry no legal weight, Lutheran points to Section 9 of the 2020 Renewal Agreement, which states:

> The headings set forth herein are for the purpose of convenient reference only, and shall have no bearing whatsoever on the interpretation of this Agreement.

Lutheran argues that the 2020 Renewal Agreement's headings mean nothing and the plain language of the contract means that Dr. Lankford could essentially be given any work that fell within the scope of his "training and/or capabilities."

The relevant language of Schedule 1.2 ("Compensation") of the 2020 Renewal Agreement states as follows:

> 1.2(b) Pediatric Intensive Care Unit Coverage Compensation. Physician shall receive as compensation Two Thousand Nine Hundred Sixty-Four Dollars ($2,964.00 per twenty-four (24) hour shift provided which shall include a minimum of twelve (12) hours on-site at the Hospital and a minimum of twelve (12) hours of on-call coverage. Physician shall be required to provide a minimum of ninety-three (93) twenty-four (24) hour shifts annually.

1.2(c) Sedation Shift Compensation. Physician shall receive as compensation One Thousand Five Hundred Thirty-Six Dollars ($1,536.00) per eight (8) hour on-site sedation shift provided. Physician shall be required to provide a minimum of sixty-five (65) eight (8) hour shifts annually.

The relevant language of Schedule 1.3 ("Duties and Covenants of Physician") of the 2020 Renewal Agreement states as follows:

A. Physician's duties shall include, but not be limited to, the following:

1. Providing the Services as determined by Employer on a full-time basis. "Full-Time" shall mean the devotion by Physician to a minimum of ninety-three (93) twenty-four (24) hour Pediatric Intensive Care Unit Coverage shifts (defined as a minimum of twelve (12) hours on-site at the Hospital and a minimum of twelve (12) hours of on-call coverage) as well as personally worked a minimum of sixty-five (65) eight (8) hour on-site Sedation shifts per contract year.

Without venturing into the legal effect of the clearly suggestive headings, the Court believes it vital to consider the 2020 Renewal Agreement as a whole. The 2020 Renewal Agreement's cover sheet denotes Dr. Lankford's specialty as "Pediatric: Critical Care Intensivist." To the Court, the 2020 Renewal Agreement's express acknowledgment of Dr. Lankford's specialty renders the rest of the 2020 Renewal Agreement's references to "Pediatric Intensive Care Unit Coverage shifts" and "Sedation shifts" ambiguous. These phrases are clear references to work done in an intensive care unit setting. Given the stated intent to hire a pediatric intensivist, those terms regarding a pediatric intensivist's duties and compensation indicate those duties and compensation to be linked to the hospital's PICU. If the parties

intended only for Dr. Lankford's duties and compensation to be measured by a number of hours worked, and not linked to the PICU, the headings that specifically tie the duties and compensation owed to a particular hospital unit are unnecessary. The Court concludes that these terms are ambiguous.

Having found the 2020 Renewal Agreement's terms relating to "Pediatric Intensive Care Unit Coverage shifts" and "Sedation shifts" ambiguous, the Court now considers extrinsic evidence. Whether the 2020 Renewal Agreement was breached by Lutheran becomes a fairly simple question upon the consideration of extrinsic evidence. Dr. Lankford provided services exclusively in the PICU for the first four years of his employment with Lutheran. Four years of uninterrupted, consistent contractual performance between the parties demonstrates a clear intent that Dr. Lankford's duties and compensation would be linked to the PICU. Furthermore, Lutheran's argument that Schedule 1.3(A)(14) bound Dr. Lankford to perform anything specified by Lutheran within the scope of Dr. Lankford's "training and/or capabilities" is unavailing. This catch-all clause must be construed against the drafter, which leads the Court to conclude that this broad language was intended to inform the scope of Dr. Lankford's duties only in the PICU.

There is substantial evidence that Lutheran materially breached the 2020 Renewal Agreement when it began assigning Dr. Lankford to the general hospital floor on October 1, 2022. Furthermore, Section 4.4 of the 2020 Renewal Agreement permitted Dr. Lankford to terminate the Agreement upon Lutheran's material breach and failure to cure within 30 days receipt of Dr. Lankford's written notice to cure. Dr. Lankford complied with the dictates of Section 4.4. Dr. Lankford has also provided substantial evidence that, as

a result of Lutheran's likely breach, Dr. Lankford suffered damage in the form of lost wages, lost referrals, lost skill, and reputational and emotional harm. Thus, Dr. Lankford has shown a likelihood of success on his breach of contract claim.

Dr. Lankford further argues that he terminated his employment with Lutheran for cause, which renders the 2020 Renewal Agreement's noncompetition provision void under new Indiana law. Amended by the Indiana legislature and enacted in 2023, Ind. Code § 25-22.5-5.5-2(b) provides as follows:

> Beginning July 1, 2023, a physician noncompete agreement is not enforceable if any of the following circumstances occur:
>
> (1) The employer terminates the physician's employment without cause.
>
> (2) The physician terminates the physician's employment for cause.
>
> (3) The physician's employment contract has expired and the physician and employer have fulfilled the obligations of the contract.

Section 4.4 of the 2020 Renewal Agreement permitted either party to terminate the 2020 Renewal Agreement upon the other party's material breach. As discussed above, Dr. Lankford had a contractual right to terminate the 2020 Renewal Agreement for cause. However, Dr. Lankford's written notice of termination for cause was sent on January 5, 2023, to be effective January 7, 2023. The Court declines to accept Dr. Lankford's invitation to retroactively apply I.C. § 25-22.5-5.5-2(b) to his for-cause termination that occurred before the statute's specified date of effectiveness. The proper inquiry in this matter, which the Court has addressed above, is whether there is a reasonable likelihood that Dr. Lankford's purported for-

cause termination was indeed the result of a material breach by Lutheran, in light of Section 4.4 of the 2020 Renewal Agreement.

Unreasonable Noncompetition Agreement Claim

Indiana courts have "long held that noncompetition covenants in employment contracts are in restraint of trade and disfavored by the law." *Krueger*, 882 N.E.2d at 728-29. To be enforceable, noncompetition agreements must be reasonable in scope as to the time, activity, and geographic area restricted. *Id.* at 729. The employer bears the burden of establishing the reasonableness of the noncompetition agreement. *Id.* The reasonableness of a noncompetition agreement is a question of law, and unreasonable agreements will not be enforced. *Id.*

Here, Dr. Lankford does not dispute the reasonableness of the scope of the 2020 Renewal Agreement's noncompetition provision as to time or geographic reach. However, Dr. Lankford does contest the reasonableness of the activity Lutheran seeks to prohibit. The plain language of the 2020 Renewal Agreement's noncompetition provision would restrict Dr. Lankford from "engag[ing] in the practice of medicine including surgery" within a thirty-mile linear radius of Lutheran for one year following the Dr. Lankford's employment with Lutheran.

Indiana courts have found noncompetition agreements "overbroad [when they] effectively prohibit the employee from working for a competitor in any capacity." *Seasonal Heating & Air Conditioning, Inc. v. Taylor*, 2007 Ind. App. Unpub. LEXIS 1664 *15; *see also Sharvelle v. Magnante*, 836 N.E.2d 432, 437-39 (Ind. Ct. App. 2005) (affirming trial court's decision that a

noncompetition agreement was unreasonable in scope of covered activity where it prohibited a physician from practicing "health care of every nature and kind"); *Gleeson v. Preferred Sourcing, LLC*, 883 N.E.2d 164, 175 (Ind. Ct. App. 2008) (finding a noncompetition agreement overbroad when it prohibited a business's former sales manager from working "in any capacity" for a direct or indirect competitor). In *Sharvelle*, the Lafeyette Eye Center ("LEC") asked the court to blue pencil their "Restricted Business" provision, which defined the restricted business as "health care of every nature and kind." 836 N.E.2d at 435. LEC asserted that removing the phrase "of every nature and kind" would render their noncompetition agreement enforceable. *Sharvelle*, 836 N.E.2d at 439. However, the Court of Appeals disagreed, stating: "'Health care' encompasses the spectrum of medical practice, and the phrase 'of every nature and kind' is superfluous." *Id.* Here, as in *Sharvelle*, by prohibiting Dr. Lankford from engaging in the "practice of medicine," Lutheran attempts to bar Dr. Lankford from participating in the spectrum of medical practice during the one-year noncompetion period. The Court concludes that the noncompetition provision's restriction on activity is overbroad and unreasonable.

The Court does agree with Lutheran, that under current Indiana law, Lutheran has a legitimate interest in *reasonably* restricting competition from its outgoing physicians. However, Lutheran's CEO, Nicole Rexroth, testified that if Dr. Lankford worked as a pediatric hospitalist within the noncompetition provision's restricted area, Dr. Lankford would not be competing with Lutheran because Lutheran employs no pediatric hospitalists. While Lutheran attempts to mitigate their CEO's testimony in its briefing, Lutheran does not have a legitimate competitive interest in

restricting Dr. Lankford, a unique subspecialist, from practicing medicine altogether.

Dr. Lankford has shown a reasonable likelihood of success on the merits of his claim that the 2020 Renewal Agreement's noncompetition provision is overbroad, and therefore unreasonable as it relates to the scope of covered activity.

2. Inadequate Remedy

In Indiana, it is well-settled law that "if an award of post-trial damages is sufficient to make the movant whole for its economic injury, then a preliminary injunction is not warranted." *Vickery,* 85 N.E.3d at 863, (*citing Daugherty v. Allen,* 729 N.E.2d 228, 234 (Ind. Ct. App. 2000)). It is the duty of the trial court to determine whether the legal remedy is as full and adequate as the equitable remedy. *Robert's Hair Designers, Inc. v. Pearson,* 780 N.E.2d 858, 864 (Ind. Ct. App. 2002). The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. *Ind. Family & Soc. Servs. Admin. v. Walgreen Co.*, 769 N.E.2d 158, 162 n.4 (Ind. 2002). However, injunctive relief will be granted if it is more practical, efficient, or adequate than that afforded by law. *Barlow v. Sipes*, 744 N.E.2d 1, 6-7 (Ind. Ct. App. 2001).

Lutheran argues that post-judgment money damages would adequately compensate Dr. Lankford for the time he has been sidelined during this contract dispute. However, both Dr. Lankford and Dr. Tamika Rozema testified that the impact of Lutheran's attempted enforcement of the

noncompetition provision harmed and is harming Dr. Lankford in a way that is not remedial at law. The Court finds persuasive that the maintenance of Dr. Lankford's skillset as a unique subspecialist requires him to be in close proximity to the critically ill children to whom he provides care. Further, even assuming Dr. Lankford's skills have not been substantially harmed by his absence, Dr. Rozema testified convincingly that if a physician stops practicing in a community for a year, that absence would negatively affect the physician's referral base due to a variety of concerns regarding physician competence, which naturally arise when a physician does not practice for an extended period of time. Lutheran argues that Dr. Lankford could take a job outside the Restricted Area and avoid suffering the damages he claims are not compensable by money damages. This argument is severely weakened by the Court's conclusions that substantial evidence has been produced that Lutheran breached the 2020 Renewal Agreement and that the 2020 Renewal Agreement's noncompetition provision is unenforceable because it covers an unreasonable scope of activity.

The Court concludes that Dr. Lankford has proven by a preponderance of the evidence that his remedies at law are inadequate.

3. Balance Of Harm

In deciding on whether or not to grant Dr. Lankford's request for a preliminary injunction, the Court "will consider whether a greater injury would be done by granting the injunction than would result from a refusal to do so." *State ex rel. Attorney Gen. v. Lake Superior Court*, 820 N.E.2d 1240, 1255 (Ind. 2005). In weighing the balance of harms, the Court notes that it has concluded that Dr. Lankford has demonstrated a reasonable likelihood of

success on the merits of his breach of contract claim, as well as on the merits of his claim that the noncompetition provision in his 2020 Renewal Agreement was unreasonable and in contravention of Indiana law. With that in mind, Lutheran's remaining allegation of harm that would befall it is that the grant of an injunction would set a harmful precedent, which would allow its physicians to maneuver out of their noncompetition agreements, and deny Lutheran the benefit of its bargains with respect to all Lutheran physicians. That is simply not so. The Court's conclusions today apply only to the particular language of and circumstances surrounding the 2020 Renewal Agreement between Lutheran and Dr. Lankford.

While Lutheran has a general interest in enforcing its physician's noncompetition agreements, sufficient evidence has been presented to show that Lutheran is not genuinely harmed by the inability to enforce *this* noncompetition agreement. For the same reasons, Lutheran's arguments that harm to Dr. Lankford is lessened by his present ability to practice outside the Restricted Area, or Parkview RMC's intent to immediately hire Dr. Lankford when he is without restriction, are unconvincing.

Dr. Lankford has produced credible evidence that he has suffered and will continue to suffer substantial harm in the absence of an injunction. Being sidelined from the medical profession for up to a year has a clear negative impact on a relatively young physician's professional reputation and referral base. Even if actual harm to Dr. Lankford's unique skillset turns out to be slight, others' perception of Dr. Lankford's competence reduces the likelihood that they will refer patients to Dr. Lankford. The balance of harms weighs in favor of injunctive relief. Dr. Lankford has shown by a

preponderance of the evidence that the harm to himself if an injunction is not granted outweighs the potential harm to Lutheran if an injunction is granted.

4. The Public Interest

Finally, the Court must consider the public interest that may be affected by the grant or denial of the requested preliminary relief. *See Mid-America Mktg., Inc. v. Falender Dev. Corp.*, 406 N.E.2d 372, 377 (Ind. Ct. App. 1980). Indiana has long recognized that the public interest is served by permitting and encouraging people's freedom of contract. *Fumo v. Med. Grp. of Mich. City, Inc.*, 590 N.E.2d 1103, 1109 (Ind. Ct. App. 1992). This expressly includes the freedom to enter into contracts containing restrictive covenants. *See Robert's Hair Designers*, 780 N.E.2d at 869-70 (holding that trial court's finding that enforcing the hair stylists' noncompetition agreements would disserve the public interest was clearly erroneous). Parties are "free to choose the terms of their agreements, and Indiana courts firmly defend this freedom of contract by enforcing agreed-upon terms." *Care Group Heart Hospital, LLC v. Sawyer*, 93 N.E.3d 745, 749 (Ind. 2018).

While the above language accurately states the public policy of Indiana regarding the freedom of contract, the Indiana Supreme Court has recognized some policy differences between physician noncompetition agreements and other noncompetition agreements. In *Krueger*, the Supreme Court found that "[t]he parties' arguments regarding whether a preliminary injunction would disserve the public interest are largely the same as those regarding whether physician noncompetition agreements should be void as against public policy." 882 N.E.2d at 734 (Ind. 2008). In discussing the policy

regarding whether physician noncompetition agreements should be void as against public policy, the Supreme Court stated:

> Noncompetition agreements are justified because they protect the investment and good will of the employer. In many businesses, the enforceability of a noncompetition agreement affects only the interests of the employee and employer. A noncompetition agreement by a physician involves other considerations as well. Unlike customers of many businesses, patients typically come to the physician's office and have direct contact with the physician. If an agreement forces a physician to relocate outside the geographic area of the physician's practice, the patients' legitimate interest in selecting the physician of their choice is impaired. Moreover, the confidence of a patient in the physician is typically an important factor in the relationship that relocation would displace. In both respects physicians are unlike employees in many businesses. The legal framework applicable to these relationships needs to take these differences into account.

Id. at 729. In *Krueger*, the Supreme Court ultimately held that a preliminary injunction in favor of Central Indiana Podiatry, P.C. ("CIP"), would not disserve the public interest because "noncompetition covenants are not per se unenforceable and because CIP looked after the needs of its patients" who would have been seen by Krueger. *Id.* at 734.

Here, the evidence has established that Dr. Lankford has a reasonable likelihood of success on his claim that the 2020 Renewal Agreement's noncompetition provision is unenforceable. Generally, the public is not disserved by the non-enforcement of unenforceable contracts. Here, there is substantial evidence that Lutheran is no longer addressing the needs of its critically ill pediatric patients as it had in the past. From the evidence presented at the preliminary injunction hearing, and in light of Lutheran's

Answers to Dr. Lankford's Interrogatories, the Court concludes that Lutheran's decision to downsize its pediatric patient care in Fort Wayne was the result of "legal and business strategic planning that went into making a business decision." In other words, Lutheran's pediatric services were substantially cut back because provision of those services did not generate the income Lutheran desired. While possibly just a "business decision" to Lutheran, its choice to have its intensivists take over the hospitalists' workload could possibly render some patients vulnerable due to resultant understaffing. Additionally, by their own admission, Lutheran has scrambled to find independent contractor physician services to fill the void after the dismissed hospitalists and Dr. Lankford left Lutheran. Furthermore, Dr. Rozema testified that when Dr. Lankford was at Lutheran, she preferred referring patients to Dr. Lankford as opposed to his colleagues, because Dr. Lankford was "a very good intensivist," and Dr. Rozema "had concerns . . . about care . . . that was being provided by some of the other [Lutheran pediatric] intensivists."

Finally, from a practical viewpoint, the most medically vulnerable children of Allen County and northeast Indiana, as well as their families, will be served by Dr. Lankford returning to work immediately. There is a substantial and urgent need for pediatric physicians to serve critically ill children in Allen County. Dr. Lankford is ready, willing, and able to provide this pediatric care, and Parkview RMC is ready, willing, and able to hire Dr. Lankford to perform this service. As a result, the Court concludes that Dr. Lankford has easily carried his burden concerning the public interest factor.

CONCLUSION

The Court concludes that Dr. Lankford has demonstrated by a preponderance of the evidence: a likelihood of success on the merits of Dr. Lankford's claims; a threat of irreparable harm; an inadequacy of legal remedies; that his potential injuries outweigh the potential harm to Lutheran; and that the public interest favors issuing the requested injunctive relief. The Court therefore GRANTS Plaintiff David Lankford D.O.'s request for a preliminary injunction found in his Verified Complaint for Declaratory and Injunctive Relief. Accordingly, Defendant Lutheran Medical Group, LLC and its related entities and agents are preliminarily enjoined from, and shall not enforce or threaten to enforce against Plaintiff David Lankford, D.O. the noncompetition provision contained in either of the parties' employment Agreements.

September 12, 2023

JUDGE CRAIG J. BOBAY