STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 10

DEAN HEALTH SYSTEMS, INC.,
d/b/a SSM HEALTH DEAN MEDICAL GROUP,

Plaintiff,

v.

JASON SANSONE, M.D.,
BRIAN KEYES, D.O. and
MADISON ORTHOPEDICS, LLC,

Defendants.

Case No. 22-CV-2996
Case Code: 30301, 30303, 30703
Hon. Ryan D. Nilsestuen

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Stripped of its baseless allegations, the Complaint details nothing more than Sansone, Keyes, and their fellow orthopedic surgeons had a difference of opinion with Dean about the future of orthopedic medicine. They met with Dean for months, repeatedly discussing more autonomy and the possibility of partnering with Dean through either an exclusive contract or as an arm of the organization. But, Dean was not interested and only wanted more of the same. So, Sansone, Keyes and the other orthopedic surgeons ended their employment and started an independent practice that more closely aligned with their vision for the future.

There is no claim that Sansone, Keyes or their fellow orthopedic surgeons did anything wrong by terminating their Dean employment and starting an independent practice. There is also no suggestion Sansone, Keyes or their fellow orthopedic surgeons are violating any of the post-employment restrictive covenants Dean imposes on its departing physicians. Instead, Dean is using this suit as part of a larger strategy to denigrate Sansone and Keyes' reputations and suppress their legitimate and lawful competition. This is improper. Moreover, the claims are meritless.

First, Dean failed to name necessary and indispensable parties. The Complaint is replete with allegations that Dean's other orthopedic surgeons engaged in the same alleged wrongdoing as Sansone and Keyes, including orthopedic surgeons Dean still employs. Dean only sued Sansone and Keyes. But all those other surgeons must be named because, in resolving Sansone and Keyes' liability, this Court will necessarily be resolving the liability of the surgeons not named.

Second, neither Sansone nor Keyes breached the Employment Agreement and/or the terms of any such Employment Agreement are unenforceable. The plain language of the Employment Agreement did not prohibit Sansone and Keyes from planning an independent practice, leaving their employment and competing with Dean. To the extent Dean suggests otherwise, the provisions of the Employment Agreement it relies upon are restrictive covenants that cannot withstand legal scrutiny. The same is true of the restrictive covenant Dean relies upon to prevent Sansone from serving in any leadership role in his own business. It is overbroad, not reasonably necessary to protect Dean and lacks any meaningful geographic or temporal scope.

Third, Sansone and Keyes did not interfere with Dean's contractual relationships with the other orthopedic surgeons. Dean conveniently ignores that - like Sansone and Keyes - all the other orthopedic surgeons were free to also leave Dean and join an independent practice.

Fourth, there is no conspiracy between Sansone and Keyes to breach each other's Employment Agreement. Wisconsin law has long recognized that parties cannot conspire to interfere with their own contract.

Fifth, Keyes did not interfere with any existing or prospective contractual relationship. Dean has no right to the existing or future business of patients. Patients are always free to seek care wherever they choose; they are not a contractual commodity used to drive corporate revenue. The law does not recognize any claim for interfering with such a relationship.

Sixth, there is no breach of the duty of loyalty. Keyes is not a "key employee" who owed a fiduciary duty to Dean. Moreover, the law permits even a "key employee" to plan a competing business even while still employed.

Finally, the statutory conspiracy claim is barred by the intra-corporate conspiracy doctrine. Dean also fails to plead any facts to support the basic elements of the claim. In particular, the Complaint confirms that Sansone and Keyes were not motivated by malice. Instead, when it was apparent Dean did not want to work with them, Sansone and Keyes were motivated only by a desire to plan, form and operate a successful, independent practice. Dismissal is proper.

RELEVANT FACTS[1]

I. Dean Asks Sansone, Keyes And The Other Orthopedic Surgeons For Input Regarding Long Range Planning For The Orthopedic Program.

In November 2021, Dean began strategic planning for its orthopedic program and facilities. (Compl., ¶ 31.) Along with its executive leaders, Dean invited Sansone, Keyes and other orthopedic surgeons to participate. (*Id.*) At that time, Sansone and Keyes were Dean orthopedic surgeons and Sansone also served as Dean's Regional Clinical Program Medical Director for the Orthopedics Department and Musculoskeletal Program ("RCPMD"). (*Id.*, ¶¶ 3, 4, 16.) Dean also created a Musculoskeletal Services Accelerated Work Team ("Work Team"). (*Id.*, ¶ 33.) The Work Team's purpose "was to develop plans to address growth and market competition in Dean's service area, identify opportunities to enhance value delivered to patients and to design and implement compensation models and other incentives for Dean's orthopedic surgery providers." (*Id.*, ¶ 36.) Along with other orthopedic surgeons, Dean invited Sansone and Keyes' participation on the Work Team with Dean executive leaders. (*Id.*) Thus, Dean tasked its orthopedic surgeons, including Sansone and Keyes, to strategize about how best to position orthopedics for competition, provide value to patients and incentivize Dean's orthopedic surgeons. (*Id.*, ¶¶ 31, 33, 36.)

II. Sansone Presents Dean With The Surgeons' Planning Results, Including A Desire For More Autonomy And The Possibility Of An Independent Practice.

Sansone, Keyes and the other orthopedic surgeons took the assignment seriously. On April 19, 2022, among other dates, Sansone met with Dr. Mark Thompson, Dean's Chief Clinical Officer ("the April Meeting"). (*Id.*, ¶ 39.) During the April Meeting, Sansone shared with Thompson that the orthopedic surgeons had signed a nondisclosure agreement to "discuss different employment

[1] Referenced throughout the Relevant Facts and Argument sections are exhibits attached to the John N. Giftos Affidavit dated February 3, 2023 ("Giftos Aff.") filed with the brief. (Giftos Aff., ¶¶ 2-9, Exs. A-H.) The Court may consider all of these exhibits without converting the motion to one for summary judgment because the exhibits are: (1) referenced in the Complaint; (2) central to the claims; and (3) the authenticity of the exhibits cannot be reasonably disputed. *Soderlund v. Zibolski*, 2016 WI App, ¶ 38, 366 Wis.2d 579 (2015).

options." (*Id.*) During the April Meeting, Sansone also shared with Thompson the two different models of care that he and his fellow orthopedic surgeons believed made the most sense for Dean, for patients and for them. (*Id.*) Both options involved a continued relationship with Dean, but reflected the orthopedic surgeons' desire to have more professional autonomy. (*Id.*)

First, Sansone raised the option of "the employed orthopedic surgeons being treated as a separate employed division of Dean." (*Id.*) Sansone suggested the separate division could operate under the trade name "Orthopedic Physicians of Wisconsin at SSM Health." (*Id.*) Second, Sansone explored a professional services agreement [("PSA")] with [Dean] pursuant to which the orthopedic surgeons would become independent from [Dean]." (*Id.*) Thus, at least one option Sansone presented to Dean at the April Meeting was the possibility of the orthopedic surgeons leaving as a group, forming a separate entity and that entity partnering by contract with Dean. (*Id.*)

III. THE ORTHOPEDIC SURGEONS' EMPLOYMENT AGREEMENT DID NOT PROHIBIT THEM FROM LEAVING DEAN AND FORMING AN INDEPENDENT PRACTICE.

Nothing in the Employment Agreement of Sansone, Keyes or any other orthopedic surgeon prohibited their departure from Dean.[2] The Employment Agreement was terminable at-will and so each and every orthopedic surgeon was free to "voluntarily terminate [their] employment … by giving at least ninety days written notice." (*Id.*, ¶¶ 2-3, Ex. A-B, § 2.1.) The Employment Agreement purported to impose numerous restrictions on the orthopedic surgeons' ability to compete following their departure, *e.g.* who they may treat, what patients and employees they may solicit, and the information they may use. (*Id.*, ¶¶ 2-3, Ex. A, §§ 5-6, Ex. B, § 7-8.) However,

[2] Sansone and Keyes had identical physician employment agreements. (Giftos Aff., ¶¶ 2-3, Exs. A-B.) The other orthopedic surgeons Dean employed were subject to the same contractual provisions as Sansone and Keyes relating to duties and responsibilities and post-termination restrictive covenants. (Compl., ¶ 33.) Sansone had additional contractual obligations related to his RCPMD position outlined in the First Amendment To Amended and Restated Employment Agreement dated January 1, 2022 (the "Amendment"). (Giftos Aff., ¶ 2, Ex. A.)

nothing in the Employment Agreement prohibited the orthopedic surgeons from opening an orthopedic practice after their departure. (*Id.*, ¶¶ 2-3, Ex. A, § 5, Ex. B, § 7.)

IV. DEAN REJECTS THE ORTHOPEDIC SURGEONS' REQUEST FOR AUTONOMY BUT INDICATES A DESIRE TO WORK COLLABORATIVELY.

At some point after the April Meeting, Dean rejected the model of care options Sansone presented. (*Id.*, ¶ 40.) But, Dean wanted "to collaborate" and "thoughtfully consider" the orthopedic surgeons' wishes to have more autonomy. (*Id.*) Dean created yet another committee: the Musculoskeletal Joint Operating Committee (the "JOC"). (*Id.*) The JOC was comprised mostly of "SSM Wisconsin and [Dean] leaders." (*Id.*) It also included Sansone, but there is no allegation that the JOC included Keyes or other orthopedic surgeons. (*Id.*)

V. SANSONE PRESENTS WRITTEN PROPOSAL TO DEAN ASKING DEAN TO PARTNER WITH OPW.

In June 2022, Sansone again met with Thompson (the "June Meeting"). (*Id.*, ¶ 42.) At or around the June Meeting, Sansone submitted a written proposal to Dean (the "Proposal"). (*Id.*) The Proposal stated as follows:

> Certain employed orthopedic physicians (collectively, Orthopedic Physicians of Wisconsin "OPW") working … for SSM Health of Wisconsin ("SSM-WI") submit this proposal in conjunction with the continued discussions related to OPW's relationship with SSM-WI and to offer a list of terms upon which we believe a new, mutually beneficial partnership can be based.

(Giftos Aff., ¶ 4, Ex. C, p. 1.) The Proposal then requested that Dean create a division to house OPW that would be branded "OPW at SSM." (*Id.*) The Proposal included nine (9) additional terms designed to give the orthopedic surgeons more say in their medical practice. (*Id.*) Thus, by at least June 2022, the orthopedic surgeons - including Sansone and Keyes - had disclosed and identified themselves as OPW.

VI. DEAN REJECTS THE WRITTEN PROPOSAL.

At some point following the June Meeting, Dean provided a response to the Proposal (the "Dean Response"). (Compl., ¶ 42.) The Dean Response stated that it would not create a separate division for OPW and further stated that the "integrated system model is a tenet we aren't willing to compromise …." (Giftos Aff., ¶ 5, Ex. D.) As to the remainder of the Proposal's terms, Dean either rejected the terms outright or said the newly formed JOC would discuss and consider them at some unspecified later date. (*Id.*)

VII. The Orthopedic Surgeons Submit A Letter Of Intent To Leave Dean And Form An Independent Practice.

On August 1, 2022, Sansone and Keyes, together with fourteen other orthopedic surgeons submitted a letter to Dean (the "August Letter") requesting a discussion to establish a timeline for separating from Dean. (Compl., ¶ 44.) The August Letter stated that the surgeons believed the "best path forward - for improved patient care, enhanced patient access, innovation and physician retention – [was] through an independent model rather than continued employment under [the] current employment agreement." (Giftos Aff., ¶ 6, Ex. E.) The August Letter further stated the surgeons' plan for the "independent model" encompassed "an exclusive [PSA] for the new orthopedic practice with SSM." (*Id.*) Again, in August 2022, the orthopedic surgeons - including Sansone and Keyes - discussed with Dean an independent practice. (*Id.*)

VIII. Dean Terminates Sansone From His RCPMD Position.

After submitting the August Letter, on August 4, 2022, Sansone canceled a meeting with Erin Daniels, SSM Wisconsin's Regional Vice President. (Compl., ¶ 45.) The purpose of that meeting was to "discuss the design of the Sun Prairie ASC addition." (*Id.*) Sansone was confronted about the cancelation. (*Id.*) He responded:

> You also mentioned that I cancelled a meeting with Erin Daniels. Yes, I did. I again reaffirm that I aspire always to act ethically. I found it unethical to help Erin with designing an ASC (for which SSM would be deploying capital to the region) while knowing that the orthopedic surgeons would not be working in it. It seems to me like that would be lying and I will not knowingly commit an act of dishonesty. I believe that making the call to cancel the meeting was, in fact, in the best interests of the organization.

(Giftos Aff., ¶ 7, Ex. F.) Nevertheless, on August 15, 2022, Dean removed Sansone from his RCPMD position. (Compl., ¶ 47.) In the termination letter, Thompson explained that Sansone was removed from his role because "considering the PSA proposal which you have been advocating for" "[i]t is my perception that you are conflicted and cannot continue in both roles." (Giftos Aff., ¶ 8, Ex. G.) Dean offered no other reasons for its decision. (*Id.*) Certainly, there is no suggestion that Sansone failed to meet any other duties and responsibilities of his RCPMD position or any of his physician duties and responsibilities. (*Id.*)

IX. THE ORTHOPEDIC SURGEONS RESIGN FROM DEAN.

On September 23, 2022, Sansone, Keyes and thirteen other orthopedic surgeons[3] sent a letter to Dean, resigning effective December 31, 2022. (Compl., ¶ 49.) Consistent with their messaging to Dean since at least April 2022, the surgeons indicated they were pursuing "an independent physician practice." (*Id.*) The effective dates of Sansone and Keyes' resignations were later moved forward to November 9 and November 14, respectively. (*Id.*, ¶¶ 3, 4.)

X. DEAN COMMENCES SUIT AGAINST SANSONE, KEYES AND MADISON ORTHO.

On November 30, 2022, Dean filed suit against Sansone, Keyes and Madison Orthopedics, LLC ("Madison Ortho").[4] (Dkt. 2.) Dean sued Sansone and Keyes for breach of their Employment Agreements. (Compl., Counts I, III.) Dean alleges that Sansone and Keyes violated contractual obligations owed during employment to (1) "devote [their] professional time and effort to the medical practice of [Dean]" and (2) faithfully and diligently perform the duties required of [them] [and] … not engage directly or indirectly in any business, calling or enterprise which may be contrary to the welfare, interest or benefit of [Dean]…." (*Id.*, ¶¶ 56-60, 69-74.) Dean also brought

[3] One of the original fourteen orthopedic surgeons who had previously indicated a desire to leave, decided to remain employed at Dean.

[4] Although Madison Ortho is the party Dean sued, it is not the entity that will be providing care and treatment to patients. That entity is Orthopedic and Spine Centers of Wisconsin, S.C. ("OSCoW").

a separate action against Sansone for breaching a post-termination, non-compete provision specific to his RCPMD position. (*Id.*, Count II.) Dean also sued Sansone and Keyes for tortious interference with the employment contracts of the other orthopedic physicians, conspiracy to tortiously interfere with each other's employment agreements and breach of duty of loyalty. (*Id.*, Counts IV-V, VII.) Dean sued only Keyes for tortious interference with Dean's patient relationships. (*Id.*, Count VI.) Lastly, Dean sued Sansone, Keyes and Madison Ortho for statutory conspiracy to injure its business. (*Id.*, Count VIII.)

Each cause of action rests on conduct comprised in whole or in part of allegations that Sansone and Keyes - alone - decided to leave Dean, that they secretly planned a competing business, that they used some unspecified "Confidential Information", that they encouraged the other orthopedic surgeons to join that competing business, that they told the newspaper about the business and that they told patients they were leaving and their plans for their future practice. (*Id.*, *e.g.*, ¶¶ 32-35, 37.) But, this version of reality cannot be reconciled with the rest of Dean's Complaint, wherein Dean pleads that Sansone, Keyes and the other orthopedic surgeons had candidly discussed with Dean a desire for autonomy that included leaving Dean to form an independent practice. (*Id.*, ¶¶ 36, 38-40, 42.) Dean's claims are unsupported by the Complaint's allegations and are without legal merit.

ARGUMENT

I. STANDARD GOVERNING DEFENDANTS' DISMISSAL MOTION.

A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. *John Doe 67C v. Archdiocese of Milwaukee,* 2005 WI 123, ¶ 19, 284 Wis.2d 307. To survive dismissal, a plaintiff must allege facts that suggest more than a "mere possibility" of a claim. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 27, 356 Wis.2d 665, 679 (*quoting Bell Atlantic v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007)). "[T]he sufficiency of a complaint depends on [the] substantive law that underlies the claim made because it is the substantive law that drives what facts must be pled." *Data Key Partners*, 356 Wis.2d 665, ¶ 31. "It is the sufficiency of the facts alleged that control[s] the determination of whether a claim for relief is properly [pled]." *Strid v. Converse,* 111 Wis.2d 418, 422-23 (1983). Facts are evidenced by statements that describe "who, what, where, when, why and how." *Id.* at ¶ 21, n. 9 (*quoting State v. Allen*, 2004 WI 106, ¶ 23, 274 Wis.2d 568). On a motion to dismiss, a court must accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom. *Kaloti Enters., Inc. v. Kellogg Sales Co.,* 2005 WI 111, ¶ 11, 283 Wis.2d 555.

In contrast, bare legal conclusions set out in a complaint provide no assistance in warding off a motion to dismiss. *John Doe 67C,* 284 Wis.2d at ¶ 19. "[P]laintiff's pleading obligation requires 'more than labels and conclusions and a formulaic recitation of the elements of a cause of action'." *Data Key Partners*, 356 Wis.2d 665, ¶ 25 (*quoting Twombly*, 550 U.S. at 555). Courts cannot accept as true any legal conclusions stated in the complaint. *Id.* at ¶ 19. Rather, courts must distinguish pleaded facts from pleaded legal conclusions. *Id.* Applying that standard here, Dean's Complaint must be dismissed in its entirety.

II. DEAN FAILED TO NAME NECESSARY AND INDISPENSABLE PARTIES.

Dean's Complaint must be dismissed for failure to name necessary and indispensable parties.[5] A person or entity is a necessary party when "as a practical matter the absent person's ability to protect their interests will be impaired or impeded by an adjudication." Wis. Stat. § 803.03(1)(b)1. Dean has alleged that fourteen "other employed orthopedic surgeons" had the same contractual provisions as Sansone and Keyes relating to their physician duties and restrictive covenants. (Compl., ¶ 33.) Dean alleges that these other surgeons agreed to assist Sansone and

[5] The fourteen other orthopedic surgeons are identified by name in the August Letter. (Giftos Aff., ¶ 6, Ex. E.)

Keyes with the new business and violated their own respective employment agreements by agreeing to use work time and Dean property to do so. (*Id.*) Dean alleges they joined Sansone and Keyes in stating their intent to resign their employment to pursue an independent practice, and they informed patients about their impending departures and their ability to treat existing patients after leaving Dean. (Compl., ¶¶ 44, 53.)

Based on these allegations, the fourteen other orthopedic surgeons are all necessary and indispensable parties. When this Court makes its legal determination as to Sansone and Keyes' rights and obligations pursuant to the Employment Agreement, the Court is also determining the contractual rights and obligations of the fourteen other orthopedic surgeons. Likewise, when this Court determines any liability for tortious conduct, it will also resolve the liability of the fourteen orthopedic surgeons not named here. These findings would impair or impede the interests of the absent orthopedic surgeons. The Complaint must be dismissed for failure to join all those surgeons as necessary and indispensable parties.

III. SANSONE AND KEYES' CONDUCT DURING EMPLOYMENT DID NOT BREACH THE EMPLOYMENT AGREEMENT (COUNTS I & III).

Dean alleges that Sansone and Keyes engaged in conduct during their employment that breached sections 1.1 and 1.2 of the Employment Agreement. (Compl., Counts I, III.) Dean alleges each doctor breached these provisions by (i) using Dean equipment and email to plan a competing business; (ii) recruiting other surgeons to leave Dean and join the competing business; and (iii) using or disclosing Dean's Confidential Information to assist with planning the competing business. (*Id.*, ¶¶ 57, 59, 60, 70, 71, 74.) Dean alleges Sansone's interview to the Wisconsin State Journal before his last day of work also violated the Employment Agreement. (*Id.* ¶¶ 54, 58.) Dean alleges that Keyes breached the Employment Agreement by telling certain patients about his departure and his plans for a future medical practice. (*Id.* ¶¶ 53, 71, 72.)

Dean's claim that Sansone and Keyes breached sections 1.1 and 1.2 falls short. Properly understood, section 1.1 requires physicians to devote their medical practice to Dean. But there are no allegations Sansone and Keyes failed in this respect. Section 1.2 governs a physician's participation in another organization that harms Dean. It does not prohibit planning a future business or giving a newspaper interview. Moreover, when read in conjunction with the entire Employment Agreement, section 1.2 does not govern patient solicitation, employee solicitation or use of Confidential Information. That conduct is subject to separate, more specific provisions of the Employment Agreement that either (a) do not prohibit the conduct alleged or (b) violate the law governing restrictive covenants. But if, as Dean insists, sections 1.1 and 1.2 are applicable and prohibit such conduct, then sections 1.1 and 1.2 are invalid restrictive covenants. Counts I and III must be dismissed.

A. The Rules Governing Contract Construction.

The interpretation of a contract and whether it is enforceable are questions of law. *Star Direct, Inc. v. Dal Pra*, 2009 WI 76, ¶ 18, 319 Wis.2d 274. Contract language must be construed consistent with "what a reasonable person would understand the words to mean under the circumstances." *Seitzinger v. Community Health Network,* 2004 WI 28, ¶ 22, 270 Wis.2d 1. Contract provisions must not be read in isolation and must be read "with reference to the contract as a whole." *Tempelis v. Aetna Cas. & Sur. Co.,* 169 Wis.2d 1, 9 (1992). Additionally, a contract cannot be read to make provisions redundant or superfluous. *DeWitt Ross & Stevens v. Galaxy Gaming & Racing Ltd.*, 2004 WI 92, ¶ 44, 273 Wis.2d 577. To that end, more specific contractual language controls over more general language that may bear on the same topic. *Cap. Invs., Inc. v. Whitehall Packing Co.*, 91 Wis.2d 178, 195 (1979). And, finally, the Court may not "insert what has been omitted or rewrite a contract made by the parties." *Danbeck v. American Family Mut.*

Ins. Co., 2001 WI 91*,* ¶ 10, 245 Wis.2d 186. Applying these principles, Dean has not alleged Sansone or Keyes breached sections 1.1 and 1.2 of the Employment Agreement.

B. Sansone And Keyes Did Not Violate Section 1.1 Of The Employment Agreement.

Section 1.1 of the Employment Agreement provides in relevant part:

> Doctor shall devote his or her professional time and effort to the medical practice of [Dean] unless an other [sic] than full-time arrangement has been authorized by [Dean] and shall perform such duties as [Dean] may from time to time prescribe …. Doctor shall not undertake any professional practice or treat or care for any patient over the objection of [Dean] … All monies earned by [Dean] or Doctor resulting from Doctor's performance of services related to medicine shall belong to [Dean] ...

(Giftos Aff, ¶¶ 2-3, Exs A-B, § 1.1.) By its plain terms, section 1.1 obligates each doctor during the term of the contract to provide full-time medical services to patients for Dean. (*Id.*) This is evident by the fact that the monies earned by "performing" "services" relating to medicine - not performing other work - belong to Dean. It is also supported by the fact that Dean's ability to object to a Doctor's outside work is limited to patient-related practice, treatment, or care. In addition, the Complaint recognizes that a full-time doctor's compensation is "dependent solely" on "clinical production (which is subject to fluctuating patient volumes)." (Compl., ¶ 20.)

Dean has not alleged Keyes or Sansone failed to work full time, properly treat all patients, complete all notes or charting, provide timely consults, bill for patient care, or fully participate in clinic activities relating to patient care. There is no allegation that Dean profited less during the workdays Sansone and Keyes allegedly planned their independent practice or that Sansone and Keyes failed to meet productivity requirements on those days. Instead, Dean appears to believe that Sansone and Keyes' obligation to "devote [their] professional time and effort" to the practice of medicine restricted each from engaging in *any* activity other than work during work hours. Dean's position rests on a poor construction of section 1.1. No reasonable physician would understand section 1.1 to preclude handling non-work tasks during work down time. *Seitzinger,* 270 Wis.2d 1, ¶ 22. Sansone and Keyes are trained professionals, capable of managing their time during the workday to ensure they meet or exceed productivity expectations. The absurdity of Dean's implied construction is that it would prevent doctors from responding to an email from the school nurse on a Dean email account or taking a call from a spouse to make dinner plans between surgeries. Section 1.1 has not been violated.

C. Sansone And Keyes Did Not Violate Section 1.2 Or Any Other Applicable Provision Of The Employment Agreement.

Dean alleges that Sansone and Keyes breached section 1.2 of the Employment Agreement by (1) soliciting Dean patients (in Keyes' case); (2) soliciting Dean employees and using Confidential Information; and (3) planning a competing business and talking to the press about the same. This breach of contract theory is also without merit. Section 1.2 provides in relevant part:

> Doctor agrees that, during the term of his [] employment hereunder, he … will not engage directly or indirectly in any business, calling or enterprise which may be contrary to the welfare, interest or benefit of [Dean]….

(Giftos Aff, ¶¶ 2-3, Exs A-B, § 1.2.) Standing alone, section 1.2 prevents Sansone and Keyes from acting in any manner that may be contrary to the welfare, interest or benefit of Dean that is (1) done during the employment term; (2) involves the doctor actively engaging in a business, calling or enterprise; and (3) causes Dean harm.[6]

But section 1.2 cannot be read in isolation. Much of the complained-of conduct giving rise to Dean's claim is expressly governed elsewhere in the Employment Agreement. With respect to patient solicitation, the Employment Agreement provides as follows:

> Doctor agrees that, for a period of two years after Doctor's employment with the Corporation ends for any reason, Doctor will not:
>
> ***

[6] Though conduct that "may be contrary" to Dean's welfare arguably violates the agreement, to be actionable, the conduct must actually result in damage to Dean. *Brew City Redevelopment Group, LLC v. The Ferchill Group*, 2006 WI App 39, ¶11, 289 Wis.2d 795 (damages are essential element of breach of contract claim).

> (2) directly or indirectly solicit or encourage any [existing patient] to obtain medical care from a physician or other health care professional who is not employed by the Corporation where such medical care is available from the Corporation.

(Giftos Aff., ¶¶ 2-3, Ex. A, § 5.1, Ex. B, § 7.1.) As for employee solicitation, the Employment Agreement states:

> In addition, Doctor shall not indirectly or directly solicit or encourage any physician or licensed health care professional employed or otherwise affiliated with [Dean] during the twelve (12) months preceding Doctor's termination to terminate their employment or affiliation with [Dean].

(*Id.*, ¶¶ 2-3, Ex. A., § 5.2, Ex. B., § 7.2.) And the provision governing Confidential Information provides:

> Doctor also agrees not to use any Confidential Information in connection with any other business or activity and that the restrictions on disclosure and use apply while Doctor is employed by the Corporation and after the termination of such employment for any reason.

(*Id.*, ¶¶ 2-3, Ex. A., § 6.2, Ex. B., § 8.2.)

Section 1.2 (or section 1.1 for that matter) cannot be construed to extend to conduct more specifically addressed elsewhere in the contract. *Cap. Invs., Inc.*, 91 Wis.2d at 195. To conclude otherwise would violate the most basic canon of construction that prohibits a contract construction that renders provisions superfluous or redundant. *DeWitt Ross & Stevens*, 273 Wis.2d 577, ¶ 44. Against this backdrop, the Court must analyze the claim.

1. Keyes' Alleged Solicitation Of Patients During Employment Does Not Violate The Employment Agreement.

There is no violation of the Employment Agreement arising from Keyes' alleged solicitation of patients because the parties did not contract for a prohibition on soliciting "existing patients" *while* employed at Dean. This is evidenced by the fact that Dean included a restrictive covenant in the Employment Agreement that governed patient solicitation. (Giftos Aff., ¶ 3, Ex. B., § 7.1(2).) However, by its plain terms, that patient solicitation provision only applies *after* Keyes' employment with Dean ends. Dean knew how to and, in fact, chose to make other restrictive covenants apply to Keyes both during and after his employment. (*Id.*, §§ 7.2 and 8.2)(barring solicitation of employees and the use and disclosure of Confidential Information during and after his employment).) Had Dean wanted to bar Keyes from soliciting "existing patients" during his employment, it could have drafted the patient solicitation provision to do so. It did not. Thus, Keyes' alleged patient solicitation does not violate the contract.

2. The Employment Agreement Provisions That Actually Govern Employee Solicitation and Use of Confidential Information Are Invalid And Unenforceable.

There is also no violation of the Employment Agreement arising from either employee solicitation or the use of "Confidential Information". Indeed, section 1.2 is entirely inapplicable to such conduct. And, the provisions that do apply to such conduct are invalid and unenforceable.

Dean alleges that Sansone and Keyes breached their Employment Agreement by, during work hours, "soliciting and encouraging other orthopedic physicians employed by Dean to terminate their employment …" (Compl., ¶¶ 59, 73.) This is the exact conduct section 5.2 - not section 1.2 - prohibits. (Giftos Aff., ¶ 2, Ex. A, § 5.2)("shall not … solicit or encourage any physician or licensed health care professional employed … to terminate their [Dean] employment....") Dean then alleges that Sansone and Keyes breached the Employment Agreement by "using or disclosing" "Confidential Information". (Compl.,¶¶ 60, 74.) This is the express prohibition in section 6.2, not section 1.2. (Giftos Aff., ¶ 2, Ex. A, § 6.2). If Dean is going to rely on the language of sections 5.2 and 6.2 to support its breach of contract action, and because the provisions are the more specific provisions relative to the conduct, it is these provisions the Court must analyze to determine whether any breach occurred. *Cap. Invs., Inc.*, 91 Wis.2d at 195. In so doing, the Court will reach the inescapable conclusion that those provisions are restrictive covenants that are invalid as a matter of law.

a. Standard of Review for Restrictive Covenants.

Wis. Stat. § 103.465 governs the enforceability of restrictive covenants:

> A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant, described in this section, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.

"[T]he explicit purpose of [the statute] … is to invalidate covenants that impose unreasonable [trade] restraints on employees … regardless what the restriction is labeled." *Manitowoc Co., Inc. v. Lanning*, 2018 WI 6, ¶ 29, 379 Wis. 2d 189, 204. Thus, Wisconsin courts have long concluded that covenants falling within the purview of Wis. Stat. § 103.465 are not limited to traditional covenants in which an employee agrees not to compete with a former employer. *See e.g.*, *Lakeside Oil Co. v. Slutsky*, 8 Wis. 2d 157 (1959). Instead, Wis. Stat. § 103.465 extends to covenants not to solicit an employer's customers. *Star Direct, Inc. v. Dal Pra*, 2009 WI 76, ¶¶ 19-41, 319 Wis.2d 274. The statute also governs covenants not to solicit an employer's employees. *Manitowoc Co., Inc.*, 379 Wis.2d 189, ¶ 35. And, the statute also applies to agreements restricting the use and disclosure of the employer's confidential information. *Gary Van Zeeland Talent, Inc. v. Sandas*, 84 Wis.2d 202, 218 (1978). Thus, there is little doubt that sections 5.2 (non-solicitation of employees) and 6.2 (non-disclosure of confidential information) are subject to and must satisfy the requirements of Wis. Stat. § 103.465.

Wis. Stat. § 103.465 reflects a legislative policy choice that, because restrictive covenants restrain trade, they are disfavored and must withstand close scrutiny. *Star Direct*, 319 Wis.2d 274, ¶ 19. To be enforceable, a covenant not to compete must be "reasonably necessary to protect the employer." Wis. Stat. § 103.465. A restrictive covenant cannot be used to shield the employer from "ordinary competition of the type a stranger could give." *Lakeside Oil Co.*, 8 Wis.2d at 163.

To that end, there are five prerequisites that a restrictive covenant must meet to be enforceable:

> (1) be necessary for the protection of the employer, that is, the employer must have a protectable interest justifying the restriction imposed on the activity of the employee;
>
> (2) provide a reasonable time limit;
>
> (3) provide a reasonable territorial limit;
>
> (4) not be harsh or oppressive as to the employee; and
>
> (5) not be contrary to public policy.

Star Direct, 319 Wis .2d 274, ¶ 20. If the restrictive covenant fails to satisfy even one of these five prerequisites, the entire covenant is unenforceable. *Manitowoc Co., Inc.*, 379 Wis.2d 189, ¶ 60.

When determining whether a restrictive covenant satisfies the five prerequisites, courts first look at the plain language of the agreement itself. *Mutual Serv. Cas. Ins. Co. v. Brass*, 2001 Wi App 92, ¶¶ 2, 15, 242 Wis.2d 733. As such, an overbroad provision is not reasonable and enforceable because the employer seeks to enforce it in a reasonable manner. *Manitowoc Co., Inc.*, 379 Wis.2d 189, ¶ 61. Instead, if the plain language of the restrictive covenant has any hypothetical application that renders it unreasonable, then it is unenforceable in all respects. (*Id.*)

Applying this standard, Dean's contractual prohibitions on employee solicitation and the use of Confidential Information cannot withstand scrutiny.

b. The Anti-Solicitation Of Employees Provision Is Unenforceable.

The Employment Agreement prohibits Sansone and Keyes from "solicit[ing] or encourag[ing] any physician or licensed healthcare professional employed or otherwise affiliated with [Dean] … to terminate their employment or affiliation with [Dean]." (Giftos Aff., ¶¶ 2-3, Ex. A, § 5.2, Ex. B, § 6.2). The Wisconsin Supreme Court has already concluded that an almost identical employee non-solicitation provision was not reasonably necessary to protect the employer's stated interests. *Manitowoc Co., Inc.*, 379 Wis.2d 189, ¶ 60.

In *Manitowoc*, the Wisconsin Supreme Court was asked to consider the enforceability of an employee non-solicitation provision that stated in relevant part as follows:

> I agree that during my Employment by Manitowoc and for a period of two years from the date my Employment ends… I will not (either directly or indirectly) solicit, induce or encourage any employee(s) to terminate their employment with Manitowoc or to accept employment with any competitor, supplier or customer of Manitowoc.

Manitowoc Co., Inc, 379 Wis. 2d 189, ¶ 25. The employer asserted the provision was necessary to protect its employee base from being poached by "a former employee who has full awareness of the talent and skill set of [that] employee base." *Id.* at ¶ 48. The Wisconsin Supreme Court concluded that the employer failed to satisfy the first prerequisite for enforceability of a restrictive covenant. *Id.* at ¶ 60. It held that the plain language of the non-solicitation provision went far beyond what was necessary to protect the employer's stated protectable interest and invaded the legitimate right of the departing employee to compete with the employer in the labor pool. *Id.* at ¶ 32.

In support of its conclusion, the court emphasized that the provision covered employees throughout the company's entire geographic footprint. *Id.* at ¶ 47. It extended to soliciting someone with whom the departing employee had no familiarity whatsoever or with whom the familiarity was the result entirely of a personal friendship. *Id.* The court also stressed that the provision included soliciting employees to work for businesses that did not compete with or pose a unique competitive risk to the employer. *Id.* at ¶ 56. In fact, the provision prohibited having discussions with employees about leaving the workforce altogether. *Id. Manitowoc* concluded the "sweeping prohibition" on employee solicitation failed legal scrutiny. *Id.* Dean's non-solicitation provision is equally flawed.

As a primary matter, section 5.2 is broader than the provision in *Manitowoc* because it has no temporal or geographic scope. (Giftos Aff., ¶¶ 2-3, Ex. A, § 5.2, Ex. B, § 6.2.) By its plain language, the non-solicitation of Dean's employees lasts forever and it has a limitless reach far beyond Dean's 18-county footprint in Wisconsin. Section 5.2 must fail because it does not meet the second and third prerequisites to enforceability which require that the restrictive covenant must provide "a reasonable territorial limit" and "a reasonable time limit." *Manitowoc Co., Inc.*, 379 Wis.2d 189, ¶ 60.

Moreover, the substantive flaws that doomed the *Manitowoc* provision are also present here. Dean claims the purpose of the restrictive covenant "is to permit Dean to maintain patient relationships without competition from Doctor." (Giftos Aff., ¶¶ 2-3, Ex. A., § 5.3, Ex. B, § 7.3.) The provision does not reasonably protect this interest. Like in *Manitowoc*, the provision extends to "*any*" Dean physician and licensed healthcare professional across Dean's entire 18-county footprint, regardless whether those individuals had any working relationship with Sansone or Keyes and regardless whether Sansone and Keyes ever met, heard of, or interacted with those employees. In such a case, Sansone and Keyes pose no greater threat to Dean than any other competitor. Restrictive covenants cannot protect against such competition. *Manitowoc Co., Inc.*, 379 Wis.2d 189, ¶ 49.

Even if protecting its patient base from "all" physician competition was a legitimate, protectable interest, the provision goes far beyond that stated goal. It is not limited to soliciting a physician or licensed health care professional from going to work for a practice that competes with Dean for its patient base. Rather, like in *Manitowoc*, it prohibits Sansone and Keyes from soliciting covered employees to terminate their employment for any reason whatsoever. Thus, Sansone and Keyes would violate this provision by encouraging someone to leave Dean to go work for a practice across the country where there is little to no chance Dean would lose a patient to that employee. It would prohibit Sansone and Keyes from supporting the decision of a coworker to be a stay-at-home parent, a registered nurse to go back to school to become a doctor, or a physician colleague to simply retire. In no sense is this burdensome and broad restriction reasonable, necessary and permissible to protect Dean's competitive interest. Indeed, *Manitowoc* counsels the provision is unenforceable. *Manitowoc Co., Inc.*, 379 Wis.2d 189, ¶ 58.[7]

Bottom line: this provision lacks a geographic and temporal scope and is far broader than necessary to achieve Dean's stated purpose. The provision is invalid and unenforceable.

c. Article 6 Is An Unreasonable And Invalid Restrictive Covenant Governing The Use And Disclosure Of Confidential Information.

Dean alleges that Sansone and Keyes also breached their Employment Agreement by "using or disclosing [Dean's] Confidential Information to assist with the development of a competing business." (Compl.,¶¶ 60, 74.) Article 6 governs Sansone and Keyes' use and disclosure of Dean's Confidential Information. But nowhere in Article 6 is there a temporal or geographic limitation. Indeed, Sansone and Keyes are precluded from using and disclosing Confidential Information anywhere in the world – even with non-competitors – from now until the end of time. (*Id.*, ¶¶ 2-3, Ex. A., § 6.2, Ex. B., § 8.2.) And the absence of either (let alone both) a temporal and geographic scope is fatal to the enforceability of this restrictive covenant. *Manitowoc Co., Inc.*, 379 Wis.2d 189, ¶ 60; *see also Metso Minerals Industries, Inc. v. FLSmidth-Excel LLC*, 733 F.Supp.2d 980, 985 (E.D. Wis. 2010).

Like Dean's non-solicitation of employees provision, Dean's provisions governing Confidential Information are invalid and unenforceable. Thus, neither Sansone nor Keyes violated the Employment Agreement by soliciting employees or using Confidential Information.

[7] The provision is also too vague to be enforceable. *Crowley v. Knapp*, 94 Wis.2d 421, 435 (1980) (restrictive covenant may not be enforced unless it is "expressed in clear, unambiguous, and peremptory terms"). Sansone and Keyes have no reasonable understanding as to what they can and cannot do or say. What words or actions constitute "indirect encouragement"? Simply listening to a former colleague vent their frustrations about Dean as an employer – without standing up for Dean or encouraging that colleague to stay at Dean – might constitute "indirect encouragement". And being "otherwise affiliated" with Dean could include physicians from other independent practices who already compete with Dean, but also moonlight at Dean. In neither instance is there any nexus between the prohibited conduct and the goal of protecting a patient base from competition.

3. Planning A Competing Business And Giving A Newspaper Interview Do Not Violate The Employment Agreement.

Sansone and Keyes also did not violate the Employment Agreement, including section 1.2, by either planning a competing business or talking to the press about Dean or the competing business.

First, *planning* a future business - Dean's allegations - is a far cry from "engaging" in a business - what section 1.2 regulates. Dean has not alleged Sansone or Keyes opened the new practice or treated patients; to the contrary, Dean alleges they planned to treat patients and compete against Dean *after* they were no longer with Dean. (Compl., ¶¶ 32-33, 53.) Sansone and Keyes were always free to leave Dean and start a competing practice. (Giftos Aff., ¶¶ 2-3, Exs. A-B, § 2.1.)

Second, the Complaint alleges that planning an independent practice occurred during the time Dean assigned the orthopedic surgeons, including Sansone and Keyes, with the task of coming up with options to improve or enhance patient care and incentivize Dean's orthopedic surgery providers. (Compl., ¶¶ 31, 33, 36.) The orthopedic surgeons, as a group, identified professional autonomy as an option that was best for Dean, the patients, and the surgeons. (Compl., ¶ 39.) Section 1.2 does not *prohibit* this planning. Quite the opposite. Section 1.2 required Sansone and Keyes to "diligently perform duties" that Dean assigned. And in the context of the pled facts, diligently contributing to Dean's assigned planning efforts *required* Sansone and Keyes to explore how an independent practice would operate and be prepared to put that plan into action. Importantly, Dean concedes that Sansone and Keyes initially wanted this practice to be an arm of Dean's business to provide services *to Dean's patients* and for Dean's benefit. (*Id.*, ¶¶ 39, 42.)

The only other allegation of a section 1.2 breach is Sansone's interview with the Wisconsin State Journal (Count I only). But, as explained at length in Section IX.B.3., below, Sansone said nothing injurious about Dean. Rather, Sansone affirmed only that a competing business would be launched after his Dean departure and that the business might disrupt the existing market. (Giftos Aff., ¶ H.) Sansone then shared his hope that the competing business would be a leader in delivering value to its patients. (*Id.*) In sum, Dean's Complaint lacks any allegations to show Sansone's interview was contrary to Dean's welfare, interest or benefit. Sansone's interview did not breach Section 1.2 of the Employment Agreement. Thus, Dean has simply failed to establish any facts to support a breach of the Employment Agreement.

D. Sections 1.1 And 1.2 Are Restrictive Covenants That Fail To Satisfy Wis. Stat. § 103.465.

If this Court agrees that Dean can rely on the language of sections 1.1 and 1.2 to prohibit during employment (1) the solicitation of employees; (2) the solicitation of patients; and (3) the use and disclosure of Confidential Information, then sections 1.1 and 1.2 are restrictive covenants that cannot withstand scrutiny under Wis. Stat. § 103.465.

Whether a particular agreement constitutes a restraint of trade is based not upon how the agreement is labeled but upon the effect of the agreement on employees and competition. *Manitowoc Co., Inc.*, 379 Wis.2d 189, ¶ 29. Indeed, "it would be an exercise in semantics to overlook § 103.465 merely because [a provision] of the agreement is not labeled a 'covenant not to compete.'" *Id.*, ¶ 5 (quoting *Tatge v. Chambers & Owen*, *Inc.*, 219 Wis.2d 99, 112 (1998)). Here, Dean wants to use sections 1.1 and 1.2 to prohibit customer solicitation, patient solicitation and the use and disclosure of Confidential Information during employment. Thus, sections 1.1 and 1.2 are restrictive covenants. *Star Direct,* 319 Wis. 2d 274, ¶¶ 19-41 (provision barring solicitation of an employer's customers is restrictive covenant); *Manitowoc Co., Inc.*, 379 Wis.2d 189, ¶ 35 (employee non-solicitation provision is a restrictive covenant); *Gary Van Zeeland Talent, Inc.*, 84 Wis.2d at 218 (non-disclosure/confidentiality agreement between an employer and employee is a restrictive covenant). These "during employment" restrictive covenants are subject to and governed by Wis. Stat. § 103.465. The statute applies equally to covenants governing conduct during employment as it does to those applicable only after the employment relationship ends. Wis. Stat. § 103.465.

Sections 1.1 and 1.2 cannot pass muster under Wis. Stat. § 103.465 because they do not contain any of the indicia necessary for this Court to conclude that they are reasonable restraints on trade. Together, sections 1.1 and 1.2 state nothing more than during employment Sansone and Keyes must (1) "devote [their] professional time and effort to the medical practice of [Dean]" and (2) faithfully and diligently perform the duties required of [them] [and] … not engage directly or indirectly in any business, calling or enterprise which may be contrary to the welfare, interest or benefit of [Dean]…." (Giftos Aff., ¶¶ 2-3, Exs. A-B, §§ 1.1, 1.2.) Indeed, other than having the temporal scope of applying only during employment, there is nothing else set forth in the plain language of sections 1.1 or 1.2 that would allow this Court to conclude that the provisions are reasonable in any way.

Rather, the scope of these provisions is virtually limitless. They can be invoked any time that a physician engages in some conduct associated with another business, calling or enterprise that Dean thinks may be against its best interests. For example, Dean could:

- Prevent a physician from soliciting *any* employee - not just a physician or licensed health care professional - at Dean to terminate their employment with Dean to join a non-medical business endeavor the physician is planning, *e.g.*, a restaurant, a sports complex, an investment firm, a legal expert consulting business.

- Prevent a physician from serving as a professional mentor, and in that role provide a reference for any employee who chooses to leave Dean for their own reasons to practice elsewhere or write a letter of recommendation for any Dean employee who might be applying for graduate school or medical school.

- Prevent a physician from referring a pediatric patient to Shriner's Hospital for needed specialty care when the physician believes Shriner's is better qualified to provide the

> care if the physician also sits on the board of or volunteers time with the Shriner's Hospital.

The foregoing prohibitions could never pass muster under a traditional Wis. Stat. § 103.465 analysis. *Manitowoc Co., Inc.*, 379 Wis.2d 189, ¶ 60; *Star Direct*. 319 Wis.2d 274, ¶ 58. Yet, by relying on the generalized, vague language in sections 1.1 and 1.2, Dean could seek to enforce such unlawful prohibitions.

Dean will argue that it seeks to apply sections 1.1 and 1.2 only to the specific "during employment" conduct of this case, *i.e.*, soliciting fellow orthopedic physicians to go to a competing business, soliciting patients at Dean to go to a competing business and using Confidential Information (albeit unidentified Confidential Information). Dean will then argue that such application of sections 1.1 and 1.2 is reasonable in time, geography and purpose. The Wisconsin Supreme Court has soundly rejected this case-by-case approach to analyzing restrictive covenants. *Manitowoc Co., Inc.*, 379 Wis.2d 189, ¶ 61 (concluding that an overbroad provision is not reasonable and enforceable simply because the employer seeks to enforce it in a reasonable manner). Instead, this Court must look at the plain language of the restrictive covenant and if it has any application that is unreasonable (as the examples above clearly show), then sections 1.1 and 1.2 are unenforceable in their entirety. (*Id.*)

By enacting Wis. Stat. § 103.465, the legislature made a clear policy choice to place the burden of drafting a clear, narrowly tailored, reasonable restrictive covenant on the employer. *Manitowoc Co., Inc.*, 379 Wis.2d 189, ¶ 41. Dean has failed in that regard. Sections 1.1 and 1.2 are invalid and unenforceable and the breach of contract actions against Sansone and Keyes fail.

E. Dean Has Failed To Allege Any Actionable Harm.

Even if Dean could maintain a claim for breach of sections 1.1 and 1.2 of the Employment Agreement, and identify conduct that violated the plain language of those provisions, the contract claim still fails because Dean has not alleged any facts showing it has been damaged by the alleged conduct. *Brew City Redevelopment Group, LLC*, 289 Wis.2d 795 ¶ 11 (damages essential element of breach of contract claim).

There is no damage arising from Keyes telling a patient of his departure and where he is going because there is no allegation that any patient chose to forgo care at Dean, let alone any suggestion that any patient has left Dean to go seek care from Sansone or Keyes or that Sansone and Keyes are even treating "existing patients."

There is also no explanation for how accessing Confidential Information hurt Dean. Indeed, there is no description at all as to what Confidential Information was accessed, how it was used and why that caused Dean damage. *See* also Section VIII, B, pp. 34-35.

And there is also no harm alleged from employee solicitation other than the fact that a competing business now exists where those employees have now gone. But Sansone, Keyes and the other orthopedic surgeons were always free to leave Dean, start their own orthopedic practice and compete with Dean. And before departing Dean, the orthopedic surgeons offered Dean a chance to partner with them. (Compl, ¶¶ 39, 42.) But Dean was not interested in a partnership or the alternative business model.

Lastly, there is simply no meaningful effort on Dean's part to explain how Sansone's innocuous comments to the Wisconsin State Journal had any impact on Dean whatsoever. *See* Section IX.B.3, below. Dean's breach of contract claim fails.

IV. SANSONE'S MANAGEMENT RESTRICTIVE COVENANT IS INVALID (COUNT II).

At Count II, Dean alleges that Sansone breached the noncompete provision set forth in the Amendment because he is currently serving as the chairperson and president of the independent practice. (Compl. ¶ 65.) Section 6 of the Amendment provides in relevant part:

> **RCPMD Covenant Not To Compete.** Upon the termination of the [Employment] Agreement … [Sansone] shall not, for a period of one (1) year) from the date of such termination, be employed directly or indirectly as a Medical Director or in any other like administrative or management capacity or position, by any health care organization, including but not limited to, medical clinics, hospitals, HMOs, surgery centers or health care management companies … where [Sansone's] office or the headquarters of the health care organization … would be located within a radius of forty-five (45) miles of Madison, Wisconsin. … [T]he objective of these covenants is to permit [Dean] to retain or increase [Dean's] patient base without competition from [Sansone].

This management restrictive covenant is invalid and unenforceable.

A. The Management Restriction Is Unreasonable.

Th management restrictive covenant cannot satisfy the first prerequisite under Wis. Sat. § 103.465 because it is not reasonably necessary to protect Dean's stated interest in retaining and increasing its patient base. First, the provision is not limited to restricting competition. Dean describes itself as a "multi-specialty network of physician clinics [that] provides primary and specialized medical care throughout eighteen counties in south central Wisconsin." (Compl., ¶ 2.) Yet, the provision prohibits Sansone from working for companies that do not even provide medical care. For example, Sansone is expressly prohibited from working for an HMO insurance company. But Dean is not in the insurance business. (*Id.*) The covenant would also prevent Sansone from working for Epic because it creates software that is used in health care management and thus may be a health care management company. And yet, Dean is not in the medical software business. A covenant that prevents Sansone from working for companies that do not even compete with Dean is *per se* invalid. *Star Direct*, 319 Wis.2d 274, ¶ 58.

Second, a restrictive covenant aimed at protecting Dean's patient base would appear to be *unnecessary* for a doctor that transitioned to management because in that management role, the physician has *less* access to patients and *less* ability to build the type of physician-patient relationships that might be adversely impacted if the physician left Dean. Indeed, as described in the Amendment, when Sansone accepted the medical leadership role at Dean, he *reduced* the time he spent with patients by 50%. (Giftos Aff., ¶ 2, Ex. A, Amend., § 1.) So, Sansone's ability to interface with patients and develop patient relationships decreased as a result of his management position.

Third, it is difficult to see how prohibiting Sansone from holding a management position with a "competing" business further protects Dean's patient base given that Dean had already taken a "belt and suspenders" approach to limiting Sansone's ability to compete after termination. When Sansone signed the Amendment, he was already subject to the Employment Agreement which contained a provision that purportedly restricted his ability to solicit patients after termination. There was also a provision in the Employment Agreement that purported to prohibit Sansone from soliciting employees. And Dean had also already tried to prohibit Sansone from using or disclosing Confidential Information. Thus, the management restrictive covenant appears to be entirely unnecessary to protect Dean from competition for its patient base. The management restrictive covenant is overbroad, not tailored to protect Dean's patient base, and thus invalid.

B. The Management Restriction Does Not Have a Reasonable Temporal Scope.

The management restriction also fails because it lacks a reasonable temporal scope. Pursuant to section 2 of the Amendment, Sansone or Dean could terminate the RCPMD position for any reason upon 30-days notice. In such a case, Sansone would transition back to practicing orthopedic medicine full-time for Dean. (Giftos Aff., ¶ 2, Ex. A, Amend., §§ 2-3.) However, Sansone's 1-year restriction on taking a manager position does not run from when his manager position is terminated. Instead, it does not begin to run until he has ended his entire Dean employment relationship. (*Id.*, § 6.) Accordingly, by the Amendment's plain language, Sansone could accept the role of manager at Dean, hold the position for only 30 days (hardly enough time to learn any important management skills or important strategic information), transition back to practicing medicine full-time for the next 20 or 30 years, then end his Dean employment. And at that point, years after ever holding the management position, and barely holding it long enough to develop what would certainly now be outdated management skills and strategic information, Sansone would still be prohibited from taking a management position at another company. That is overbroad and unreasonable. For this reason, the restrictive covenant is invalid.

C. The Management Restriction Does Not Have a Reasonable Geographic Scope.

The management restriction also fails because it lacks a reasonable geographic scope. It prohibits Sansone from taking a job with the enumerated class of employers if his office or the employer's headquarters are located within 45 miles of Madison. (Giftos Aff., ¶ 2, Ex. A, § 5.6.) Dean will argue the 45-mile radius around Madison is a reasonable geographic restriction because it ensures Sansone is only restrained from working for Dean's competitors. But it does no such thing.

By its plain terms, the management restriction prohibits Sansone from working in a leadership capacity for companies regardless where they are located in the world and regardless whether they compete with Dean so long as they request or allow Sansone to work from his Madison home office. For example, Sansone could be offered a Medical Director position with MD Anderson Cancer Center located in Texas, far beyond Dean's 18 county footprint. And MD Anderson could agree - as many companies now do - to let Sansone work remotely to avoid uprooting his family with a move to Texas. If Sansone takes this employment, he is violating his covenant because he works in an office within 45 miles of Madison, even though MD Anderson does not compete with Dean. Similarly, Sansone could not take a job with a company that provides no services in Wisconsin, but for any number of business reasons has chosen Madison (or a location 45 miles therefrom) as its headquarters. In either instance, Sansone cannot work for a company - Dean competitor or not - anywhere in the world because Sansone or his employer has an office near Madison. This is not a proper geographic scope. The provision is invalid and unenforceable. The breach of contract action against Sansone fails.

V. Defendants Did Not Tortiously Interfere With Contracts Between Dean And Other Orthopedic Surgeons (Count IV).

Dean has alleged that Sansone and Keyes tortiously interfered with the employment contracts of the other orthopedic surgeons. (Compl., Count IV.) This claim fails.

The elements of a claim for tortious interference with a contract are: (1) the plaintiff had a contract or a prospective contractual relationship with a third party; (2) the defendant interfered with that relationship; (3) the interference by the defendant was intentional; (4) there was a causal connection between the interference and damages; and (5) the defendant was not justified or privileged to interfere. *Briesemeister v. Lehner*, 2006 WI App 140, ¶ 48, 295 Wis.2d 429.

Here, Dean alleges that Sansone and Keyes "induced and encouraged other orthopedic surgeons … to breach their respective employment agreements" by getting those other physicians to help plan the independent orthopedic practice during work hours and using Dean equipment. (Compl. ¶ 78.) Planning an independent practice during work hours and using Dean equipment is the same conduct that forms the basis for Dean's breach of contract claims against Sansone and Keyes at Counts I and III. There can be no tortious interference because, as set forth in Section III above, this conduct does not constitute a breach of contract and thus there is no contractual interference.

VI. Defendants Cannot Conspire To Interfere With Their Own Contracts (Count V).

In its "common law conspiracy to commit tortious interference with contract" at Count V, Dean alleges that Sansone and Keyes conspired with each other to interfere with the other's employment contract. (Compl., ¶¶ 81-85.) The law does not recognize such a claim.

Tortious interference with a contract occurs when someone "intentionally and improperly interferes with the performance of a contract … between another and a third person by inducing or otherwise causing the third person not to perform the contract." *Charolais Breeding Ranches, Ltd. v. FPC Secur. Corp.,* 90 Wis.2d 97, 105, (Ct.App.1979)(quoting Restatement (Second) of Torts § 766 at 7 (1979)). Thus, parties cannot tortiously interfere with their own contract. *Wausau Med. Ctr., S.C. v. Asplund*, 182 Wis.2d 274, 297 (Ct. App. 1994). By logical extension, then, parties cannot conspire to tortiously interfere with their own contract. *Joseph P. Caulfield & Assoc., Inc. v. Litho Prods., Inc.*, 155 F.3d 883, 889 (7th Cir. 1998)(applying Wisconsin law and concluding that parties cannot tortiously interfere with their own contract). There is no basis in law for this claim.

VII. DEAN'S TORTIOUS INTERFERENCE CLAIM AGAINST KEYES FAILS AS A MATTER OF LAW (COUNT VI).

In Count VI, Dean alleges Keyes "intentionally and willfully and without justification or privilege interfered with Dean's business relationships with patients identified as existing patients in Keyes' Employment Agreement." (Compl., ¶ 88.) But these patient relationships cannot support a claim for tortious interference.

Wisconsin does not protect against interference with every business relationship. Wisconsin only recognizes the tort of intentional interference as it relates to either an existing or prospective contract. *Brew City Redevelopment Group*, 297 Wis.2d at ¶ 37 n. 9. Here, Dean claims to have what it calls a "continuing business relationship" with its "existing patients." (Compl., ¶ 87.) Under Wisconsin law, a tortious interference claim will only extend to an existing business relationship if it is "some bargained-for right" or "sufficiently certain, concrete or definite" such that it constitutes a prospective ***contractual*** relationship. *Shank v. William R. Hague, Inc.*, 192 F.3d 675, 689 (7th Cir. 1999)(applying Wisconsin law).

Dean alleges interference with an unspecified number of persons meeting the broad definition of "existing patients", *i.e.*, any patient Keyes saw at any time during his last three years of employment. Dean then alleges that "[Dean] patients tend to be repeat patients … and typically request a substitute provider from [Dean] when their current provider leaves." (Compl., ¶ 87.) But there is nothing alleged to suggest the "existing patients" with whom Keyes allegedly communicated are among the patients who "tend" to be repeat patients or that they would want and request a substitute orthopedic provider from Dean. Regardless, the tentative and noncommittal language Dean uses when describing its patients' propensity to return for treatment, *i.e.*, "tends to" and "typically", shows that these are not the type of "sufficiently certain, concrete or definite" business relationships that the law protects. This is particularly true, given that the definition of an "existing patient" includes patients Keyes may have seen for nothing more than a 15-minute consultation, two and a half years ago and never returned to Keyes or Dean.

Rather, Dean seeks legal protection from interference with a relationship that - at its core - is entirely premised on patient choice. Patients are not and have never been bargained-for contractual rights. Instead, patients have a non-contractual, at-will relationship with their physicians and the practices with whom they work. Patients can and do end that relationship at any time, for any reason, without question. This type of relationship falls far outside the scope of a tortious interference claim. *Shank*, 192 F.3d at 689.

VIII. DEAN'S DUTY OF LOYALTY CLAIM FAILS (COUNT VII).

Dean alleges that Sansone and Keyes breached their duty of loyalty to Dean. Dean alleges no facts showing that Keyes was a "key employee." As such, Keyes owed no duty of loyalty to Dean. And, if Sansone was a "key employee" while serving as RCPMD, he remained free to plan a competing business without running afoul of any fiduciary obligation. The duty of loyalty claims must be dismissed.

A. Keyes Owed No Duty Of Loyalty To Dean.

Not all employees owe their employer a duty of loyalty. Wisconsin recognizes two categories of employees owing such a duty. First, a corporate officer or director is under a fiduciary duty of loyalty in the conduct of the corporate business. *Aon Risk Servs., Inc. v. Liebenstein*, 2006 WI App 4, ¶ 27, 289 Wis.2d 127, 161, *abrogated on different grounds by* Burbank Grease *Services, LLC v. Sokolowski*, 2006 WI 103, ¶ 27, 294 Wis.2d 274, 303. Second, a "key employee" who is not a corporate officer also owes a fiduciary duty of loyalty. *Burbank Grease*, 294 Wis.2d 274, ¶ 42. "Key employees" are employees whose job responsibilities are of such a nature that they may be used to harm the employer. *InfoCorp, LLC v. Hunt*, 2010 WI App 3, ¶ 31, 323 Wis.2d 45, 62. In determining whether an employee is a "key employee", a court may consider whether "[the] employee is vested with policy-making authority or has the ability to make decisions which bind the company." *Aon Risk Servs., Inc.* 289 Wis.2d 127, ¶ 27.

Wisconsin courts have limited "key employees" to those holding key managerial positions or possessing managerial-like authority. *Id.,* ¶ 28; *Burg v. Miniature Precision Components, Inc.,* 111 Wis.2d 1, 4–7 (1983); *Hartford Elevator, Inc. v. Lauer,* 94 Wis.2d 571, 580 (1980); *General Auto. Mfg. Co. v. Singer,* 19 Wis.2d 528, 530–535 (1963); *see also Standard Brands, Inc. v. U.S. Partition & Packaging Corp.,* 199 F. Supp. 161, 171 (E. D. Wis. 1961). The Wisconsin Court of Appeals refused to impose a fiduciary duty on an employee where that employee did not have a corporate title and did not have "responsibilities and authority" that rose to that level or a managerial level. *Modern Materials, Inc.,* 206 Wis.2d at 445-446. If an employee is neither a corporate officer nor a "key employee," no duty of loyalty exists and the inquiry ends. *Burbank Grease Servs., LLC*, 294 Wis.2d 274, ¶ 42.

There is no allegation that Keyes was an officer within the organization. And despite specifically alleging Sansone was a "key employee" while serving as RCPMD, Dean makes no such allegation about Keyes. (Compl., ¶ 18.) Rather, Dean alleges that Keyes participated in initial discussions with the "other orthopedic surgeons" regarding the future of Dean's orthopedic surgery program and attended two additional planning meetings between November 2021 and June 2022. (*Id.*, ¶¶ 31, 38, 41.) But Dean does not allege that Keyes had organizational policy-making or decision-making authority or that Keyes held any managerial role. Dean's allegations do not support an inference that Keyes was a "key employee". The breach of duty of loyalty claim against him must be dismissed.

B. Sansone Was Free To Plan A Competing Business During His Employment.

Dean alleges Sansone was a "key employee" when serving as a RCPMD. (Compl., ¶ 18.) Even if true, the duty of loyalty claim against him still fails. "Key employees" are free to plan and develop a competitive enterprise during the course of their agency, provided the particular planning activity engaged in is not "against the best interests of the employer". *Modern Materials*, 206 Wis.2d at 841. Under Wisconsin law, conduct that is "against the best interests of the employer" while planning a competing enterprise has largely been limited to when employees use their employment position to divert the employer's business to the competing business. *InfoCorp*, 323 Wis.2d 45, ¶ 26. Reaching out to and working with co-workers about a competing business, forming that business and planning that business is insufficient. *Modern Materials*, 206 Wis.2d at 441.

Dean has alleged that sometime after September 23, 2022, Sansone contacted a rural medical center "to negotiate a contract for the delivery of orthopedic services by OPW." (Compl., ¶ 50.) But by this time, Sansone had been removed as RCPMD and was no longer a "key employee" who owed Dean a duty of loyalty. Regardless, Dean does not allege that it had an existing business relationship with the rural medical center, that Dean had invested any resources into securing its business or that there was even the prospect of securing that business in the future. There is nothing in the Complaint showing that Sansone's contact caused any harm to Dean, took work belonging to Dean or was in any way "against [Dean's] best interests." Sansone's contact with the rural medical center comes nowhere near the type of diversionary practices that give rise to a violation of the duty of loyalty.

Dean pleads a handful of additional conduct in support of its claim that Sansone breached his duty of loyalty. First, Dean suggests that any activity in furtherance of forming and planning a competing business violates the duty of loyalty if it uses "[Dean] property" and is done "during work hours". (Compl., ¶ 92). But the law is clear: Sansone was permitted to form and plan a competing business during his employment with Dean without violating his duty of loyalty. *Modern Materials*, 206 Wis.2d at 447 (*citing Standard Brands*, 199 F. Supp at 172.)

Second, Dean alleges that Sansone's failure to disclose the existence of various business entities in certain "conflict of interest" disclosures violated the duty of loyalty. (Compl, ¶¶ 35, 48, 51.) As a preliminary matter, there is no factual support for this argument as the Complaint is replete with references to discussions between Sansone and Dean about the possibility of Dean partnering with an independent practice. (*Id.*, ¶¶ 31, 36, 39-40, 42.) Additionally, the duty of loyalty does not require that Sansone disclose to Dean the existence of the competing business entity he is forming or planning. *Modern Materials*, 206 Wis.2d at 440-441. For Sansone to run afoul of his fiduciary obligation while planning his competing business, the failure to disclose must harm Dean. *Id.* at 447. There is no such allegation.

Third, Dean alleges that Sansone used Confidential Information for his own personal and financial gain and to compete with Dean. (Compl., ¶ 92.) Other than a passing reference to "market data", the Complaint offers no other details about the Confidential Information, when it was accessed, from where it was accessed, the efforts Dean takes to protect this information and why it is considered "confidential". (*Id.*, ¶ 60.) For this reason alone, any duty of loyalty claim involving Confidential Information should be dismissed. *Dynamic Movers, Inc. v. Paul Arpin Van Lines, Inc*, 956 F. Supp. 836, 840 (E.D. Wis. 1997)("[C]omplaint must give the party notice of what it did wrong."). But, additionally, the Complaint fails to explain why or how accessing the Confidential Information was harmful. There is nothing to suggest it helped Sansone with forming the practice, securing patients for the practice, or entering contracts for the practice. Indeed, the catalyst for Sansone (and the others leaving) was that they wanted to do something different than Dean. So it's unclear how Dean's information would be relevant to the model of care being pursued. Thus, without more, there is no way for this Court to conclude that accessing Confidential Information is actionable.

Finally, Dean alleges Sansone violated his duty of loyalty by "[u]pon information and belief" "informing patients about [his] departure[] and [his] ability to continue to treat existing patients after leaving [Dean]." (Compl., ¶ 92.) As an initial matter, the allegations do not suggest Sansone said anything inconsistent with his contractual obligations. Indeed, telling patients about "his ability to continue treating existing patients after leaving [Dean]" is entirely consistent with Sansone telling his patients that he cannot see them or cannot see them for at least two years. Indeed, there are no allegations that any "existing patient" has chosen to follow Sansone or that Sansone is currently treating "existing patients" at the new practice. Without allegations that Sansone's conduct caused actual, concrete harm to Dean, then Dean has done nothing more than allege the type of planning activity the law permits. *Modern Materials*, 206 Wis.2d at 841. The claim must be dismissed.

IX. DEFENDANTS DID NOT VIOLATE WIS. STAT. § 134.01 (COUNT VIII).

Dean alleges that Defendants conspired to injure Dean's business in violation of Wis. Stat. § 134.01. (Compl., ¶¶ 96-103.) The intra-corporate conspiracy doctrine bars the claim, and Dean failed to plead facts to support key elements of the claim.

A. The Intra-Corporate Conspiracy Doctrine Bars Dean's § 134.01 Claim.

The intra-corporate conspiracy doctrine holds that "a conspiracy cannot exist solely between the members of the same entity." *Payton v. Rush–Presbyterian–St. Luke's Med. Cntr.,* 184 F.3d 623, 632 (7th Cir. 1999). The doctrine derives from the well-accepted principles that a corporation cannot conspire with itself and that the acts of an agent are the acts of the corporation. *Elbe v. Wausau Hosp. Ctr.*, 606 F. Supp. 1491, 1502 (W.D. Wis. 1985). Wisconsin courts have long-recognized this doctrine. *Wausau Med. Ctr., S.C. v. Asplund*, 182 Wis.2d 274, 296 (Ct. App. 1994) (corporation is "merely the alter ego of Asplund, and thus does not constitute the 'two or more persons' needed to establish a violation of § 134.01."); *Ford Motor Co. v. Lyons,* 137 Wis.2d 397, 426-431 (Ct.App.1987).

Dean alleges Sansone and Keyes formed Madison Ortho. (Compl., ¶ 5.) The Complaint alleges no other members, officers or agents of Madison Ortho. Thus, Madison Ortho acted by and through Sansone and Keyes at all times relevant to this suit and Sansone and Keyes were the "alter ego" of Madison Ortho. *Asplund*, 182 Wis.2d at 296. The intra-corporate conspiracy doctrine bars the claim.

Dean may argue the doctrine is inapplicable because it has plead that Sansone and Keyes acted "individually." (Compl., ¶ 98.)[8] A conclusory allegation of acting "individually" cannot avoid the intra-corporate conspiracy doctrine absent a suggestion that there was no unity of interest between Defendants at the time of the conspiracy. *Brew City Redevelopment Grp., LLC*, 297 Wis. 2d 606, ¶ 50. Dean alleges that together Sansone and Keyes formed Madison Ortho for the purpose of creating an independent orthopedic practice. (Compl., ¶ 5.) Dean then pleads at length that Sansone and Keyes worked to ensure that happened. There is nothing alleged to suggest Defendants ever had any divergent interest. The claim is barred.

B. Dean Has Failed To Plead Key Elements Of A § 134.01 Claim.

Even if the intra-corporate conspiracy doctrine is not a bar, dismissal is still warranted. To prove a claim for conspiracy under Wis. Stat. § 134.01, a plaintiff must establish that (1) two or more defendants acted together; (2) with a common purpose to injure the plaintiff's reputation and business; (3) with malice; and (4) the acts financially injured the plaintiff. *Onderdonk v. Lamb,* 79 Wis.2d 241, 247 (1977); *see also* Wis JI—Civil 2820. Dean cannot satisfy the first three elements.

1. Keyes And Madison Ortho Were Not Involved In The Conspiracy.

Dean claims the Defendants caused the Wisconsin State Journal to publish certain statements that were injurious to Dean. (Compl., ¶ 98.)[9] But, Dean alleges that only Sansone participated in the interview with the reporter. (Compl., ¶ 54.) And Dean attributes the entire content of the article, including quotes, only to Sansone. (*Id.*) There is no allegation that Sansone gave the interview on behalf of Madison Ortho, with the permission of Madison Ortho or in his

[8] If Sansone and Keyes were not acting on Madison Ortho's behalf, this begs the question: how did Madison Ortho do anything, let alone conspire? *Rasmussen*, 335 Wis.2d 1 at ¶ 85.

[9] There is also a single conclusory sentence claiming Defendants conspired "to undermine and compromise Dean's interests and to sabotage and disrupt its orthopedic surgery program." (Compl., ¶ 98.) Even assuming this undeveloped theory of conspiracy is sufficiently plead to warrant consideration, it still fails to state a claim under Wis. Stat. 134.01 because Dean has not pled the type of malice necessary to sustain such a claim. *See* Section IX. B.3.

capacity as “chairperson” of Madison Ortho. Indeed, the article never mentions Madison Ortho. (Giftos Aff., 9, Ex. H.) The article also contains no reference to Keyes other than on a list of the other departing Dean orthopedic surgeons. (*Id.*) There is also no allegation that Madison Ortho or Keyes knew the interview was taking place, or that either Madison Ortho or Keyes arranged the interview, participated in the interview, were present for the interview, contributed to the content given during the interview, or communicated with the reporter taking the interview. There is nothing to suggest that Keyes or Madison Ortho contributed in any way to the article. And since Sansone cannot conspire alone, the first element of the conspiracy claim fails.

2. The Purpose Of The Article Was Not To Injure Dean.

Even assuming *arguendo* Defendants are co-conspirators, Dean alleges no facts to show that the interview was for the purpose of injuring Dean’s business or reputation. (Compl., ¶ 98.) Dean alleges that Defendants caused the Wisconsin State Journal to publish the following injurious statements: (a) “SSM Health/Dean did not provide sufficient value and quality to its orthopedic patients” and (b) “that Defendants’ new business intended to disrupt this lucrative market controlled in part by Dean.” (Compl., ¶ 98.)

As to the latter, Defendants never made the statement. Instead, the article starts with the following: “Eleven orthopedic surgeons are leaving SSM Health Dean to start an independent practice in Madison …” (Giftos Aff., ¶ 9, Ex. H, p. 2.) It then goes on to state that “the move could shake up one of the most lucrative parts of health care in a market dominated by SSM Health and UW Health.” (*Id.*) The statement within the article is not attributed to any one of the three Defendants and, instead, is the language of the article’s author.[10] (*Id.*) Then, it appears like Sansone

[10] The article later references data that appears to support the author’s “lucrative market” description in that it indicates orthopedic surgeons are the second highest revenue generators for hospitals, second only to interventional cardiologists. (Giftos Aff., ¶ 9, Ex. H, p. 3.)

is asked about the health care market and he responds: "We're looking forward to being able to disrupt that market." (*Id.*) Sansone and Keyes were free to practice orthopedic medicine when they left Dean. (Giftos Aff., ¶¶ 2-3, Exs. A-B, §§ 5.1, 7.1.) Statements regarding a future intent to lawfully compete are not actionable and do not give rise to a statutory conspiracy claim. *State of Ill. ex rel. Hartigan v. Panhandle E. Pipe Line Co.*, 730 F. Supp. 826, 908 (C.D. Ill. 1990).

Similarly, Defendants never said "SSM Health/[Dean] [does] not provide sufficient value and quality to its orthopedic patients" (Compl., ¶ 98.) Instead, in reference to the future orthopedic practice, Sansone stated: "We need to lead the charge as it relates to delivering value – better quality, lower cost." (*Id.*) Sansone did nothing more than state the new company's goal to be a leader in "delivering value" to patients, defined as "better quality and lower cost." (*Id.*) Statements about quality or pricing using comparatives or superlatives are not the type of statements giving rise to legal action. *State v. Am. TV & Appliance of Madison, Inc.*, 146 Wis.2d 292, 301 (1988)(Rejecting the idea that use of the words "best" and "finest" are actionable.) The actual statements Sansone made in the article did not intend injury to Dean or its reputation.[11]

3. Defendants Did Not Act With Malice.

Dean has also failed to plead any facts that support a reasonable inference that each Defendant acted with malice. Wis. Stat. § 134.01 requires that each conspiring defendant act "for the purpose of willfully or maliciously injuring" Dean. "Malice is an 'integral element' of a conspiracy claim under Wis. Stat. § 134.01 and 'must be proved in respect to [all] parties to the conspiracy." *Maleki v. Fine-Lando Chartered, S.C.,* 162 Wis.2d 73, 86 (1991) (other citations omitted). In *Maleki*, the Wisconsin Supreme Court explained that "[f]or conduct to be malicious

[11] If Sansone's statements are intentionally injurious, then the Dean quotes contained within the same article are more problematic. Dean expressly stated that the "independent model proposed by [Sansone and the departing surgeons] would weaken [Dean's] [clinically integrated model of care] and not be in the best interest of our patients." (Giftos Aff., ¶ 9, Ex. H, p. 2.)

under the conspiracy law it must be conduct intended to cause harm for harm's sake." *Id.* at 86.

As applied to cases involving business competitors, the *Maleki* court further explained "that competition that incidentally harms another when the purpose is to improve one's competitive advantage does not run afoul of conspiracy laws if there is not a malicious motive." *Id.* at 87. n.9. Thus, "[t]he malice that must be pled to satisfy section 134.01 … must not be based on the defendant's intent to gain a competitive advantage. To be actionable, the defendant's motive is not supposed to make sense. The plaintiff must allege and then prove an irrational desire to harm for harm's sake." *Virnich v. Vorwald*, 664 F.3d 206, 215 (7th Cir. 2011), *as amended* (Jan. 3, 2012).

Dean has failed to plead any facts[12] to support the reasonable inference that Defendants acted with an irrational desire to cause Dean harm for harm's sake. Instead, the Complaint is replete with factual allegations that make clear that the Defendants' conduct - all of it, not just the interview with the Wisconsin State Journal - was motivated entirely by the rational desire to plan, promote and engage in a competing business geared towards improving patient care and not prohibited by any agreement with Dean. Indeed, the Complaint's first allegation states the Defendants took a "series of agreed upon actions … *so that they could open their own competing orthopedic surgery practice to benefit their own personal and financial interests.*" (Compl., ¶ 1)(emphasis added). Therefore, Dean simply has not plead the type of malice required for a statutory conspiracy claim. The claim must be dismissed.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court dismiss the Complaint in its entirety.

[12] The Complaint alleges generally that Defendants acted "maliciously". (Compl., ¶ 99.) But this is nothing more than a legal conclusion the Court must disregard. *Data Key Partners*, 356 Wis.2d 665, ¶ 19; *see also Medline Indus., Inc. v. Diversey, Inc.*, 563 F. Supp. 3d 894, 917–20 (E.D. Wis. 2021)("Adding "intended to harm" and "maliciously" to claims that a defendant acted rationally for the sake of competition is not sufficient to plead a claim under § 134.01."),

Respectfully submitted this 3rd day of February, 2023.

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