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Outagamie County
2022CV000068

STATE OF WISCONSIN CIRCUIT COURT OUTAGAMIE COUNTY

THEDACARE, INC.,

Plaintiff,

v.

ASCENSION NE WISCONSIN, INC.,

Defendants.

Case No. 22-CV-000068

Case Code: 30704

ASCENSION NE WISCONSIN, INC.'S BRIEF IN OPPOSITION TO THEDACARE, INC.'S MOTION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

INTRODUCTION

"Your failure to prepare is not my personal emergency." This wry observation—a favorite of parents, teachers, coaches, and perhaps a few judges—concisely captures the core concept of personal responsibility most of us learned in childhood: don't blame others for your own mistakes.

Evidently that concept is lost on ThedaCare. With this frantic, last-minute lawsuit, ThedaCare attempts to convert its own poor management into a disruptive personal emergency for everyone—anyone—but itself: Ascension, this Court, and (worst of all) seven essential health care workers who, until Friday, believed they were starting new jobs on Monday morning.

The evidence already emerging[1] confirms that ThedaCare's "emergency" is entirely of its own making. This is true in the ordinary sense of that phrase: Ascension has not "poached" any employees; they left ThedaCare unprompted, and ThedaCare has only itself to blame for failing to maintain a competitive working environment for its medical staff, opting instead to underpay its

[1] The facts in this brief are submitted as an offer of proof of the testimony to be elicited at the hearing on this matter scheduled for January 24, 2022.

essential workers and even refusing to make a matching offer to these employees when given ample opportunity to do so. Moreover, ThedaCare has known of this departure for weeks: the employees announced their employment offers from Ascension on December 21 and their resignations on December 29, and ThedaCare rejected multiple alternatives for retaining or replacing them—some of which are still available to ThedaCare today—opting instead to waste its money and everyone's time on this frivolous lawsuit.

But this emergency is also of ThedaCare's making in a second, much more troubling sense: ThedaCare has *invented* the emergency ostensibly justifying this lawsuit. As the facts will show, allowing seven health care workers to leave ThedaCare for the hospital of their choosing—Ascension's St. Elizabeth Hospital, not even seven miles away—will not plunge the Fox Valley into a critical care crisis, as ThedaCare claims. St. Elizabeth already offers the medical services at issue, just without the fancy designation ThedaCare appears to view as a better use of funds than paying its workers. And Green Bay is and will remain available as a backup option—no need for diversion to Milwaukee or Madison. In short, this emergency is entirely of ThedaCare's making because *ThedaCare is making it up*.

In that sense, it seems ThedaCare missed a second lesson of childhood: the story of the boy who cried wolf. Apparently ThedaCare hoped that if it moved quickly enough and prophesied sufficiently dire consequences, it could get an injunction or perhaps just force a settlement before anyone looked too closely at the merits. Its after-hours court filings and its preemptive media release appear calculated to do just that. But that strategy is now backfiring—and then some—as the truth comes to light.

That childhood story didn't end well for the boy, and this lawsuit shouldn't end well for ThedaCare. Inventing an emergency and then blaming it on others is shameful behavior under any

circumstances; to take advantage of pandemic conditions on top of it is disgraceful. ThedaCare has no legal leg to stand on and the facts clearly support Ascension. The Court should deny the preliminary injunction, vacate the TRO, and leave ThedaCare on its own to fix the mess it made.

RELEVANT FACTS

I. ThedaCare's "emergency" is manufactured.

Reading ThedaCare's court filings, one would think the Fox Valley will be plunged back into the dark ages of medicine if four radiology technologists and three nurses (the "IRC Team") are permitted to leave ThedaCare to work for Ascension. As ThedaCare's entire lawsuit is premised on that professed emergency, Ascension will begin by explaining why that premise is simply false.

The IRC Team leaving ThedaCare's facility in Neenah will be going to Ascension's St. Elizabeth Hospital in Neenah, fewer than seven miles away. St. Elizabeth is a Level III trauma center, meaning it can assess, resuscitate, and stabilize patients on site, as well as perform emergency surgery if necessary. The IRC Team currently performs this role for ThedaCare and will serve in exactly the same role at St. Elizabeth. This should come as no surprise, as the care will be provided by essentially the same team. In addition, no one on the IRC Team is a doctor. Both ThedaCare and Ascension use the same group of radiology providers, Radiology Associates of the Fox Valley. In short: same doctors, same radiology technologists, same nurses—just a different location.

The only relevant difference between a Level II and a Level III trauma center is what happens *after* a trauma patient is assessed, resuscitated, and stabilized, including completion of any emergency surgery. If, *at that point*, a Level III trauma center cannot provide definitive surgical and intensive trauma care for the patient, they are diverted to the next available Level II

trauma center. Even if ThedaCare were to lose its Level II certification (a prospect nowhere near as imminent as ThedaCare claims, as discussed below), Green Bay has two Level II trauma centers a 20-minute ambulance ride (or a 5-minute helicopter flight) away: Aurora BayCare and Bellin. So when ThedaCare paints a nightmarish picture of acute trauma victims clinging to life as they struggle to reach Madison or Milwaukee (Detterman Aff., ¶ 25), ThedaCare is crying wolf.

II. Ascension did not poach anyone; ThedaCare lost the IRC Team all on its own.

Based on just two facts on the record—(1) the IRC Team left ThedaCare at the same time, for the same new employer, and (2) some of the IRC Team communicated with each other about leaving—ThedaCare insinuates that Ascension designed and executed a coordinated poaching intended to cripple ThedaCare's radiology function overnight. The reality is much less dramatic, and reveals only ThedaCare's own managerial ineptitude.

Ascension posted for these positions publicly. It was seeking to fill a large number of positions, due in part to the same staffing shortages affecting the entire health care industry during the pandemic. Ascension did not target or reach out to anyone at ThedaCare specifically. Mr. Scott Fischer, Ascension's hiring R.N., will testify to this. So will every member of the IRC Team.

When Ascension posted the positions, one radiology technologist Ms. Kailey Young, applied via the normal process.[2] She was granted an interview; Ascension found her to be qualified, and made her an offer with better compensation and benefits than she was receiving at ThedaCare, as well as a better working experience and work-life balance.

Ms. Young, who had been working for ThedaCare since graduating from tech school in 2011, accepted the offer. Then she informed her fellow radiology technologists. The IRC Team is a very close-knit group and had become increasingly dissatisfied with ThedaCare's management

[2] Ms. Young is the individual whose emails ThedaCare attached to its complaint as Exhibits A through C.

over the past several years. Previously, the team received a notice that ThedaCare management had completed a compensation survey and discovered that the team had been underpaid for years. ThedaCare's answer to this was to give the team a small raise, but no back compensation.

Then, in March of 2021—a year into the pandemic—ThedaCare fired two nurses on the IRC Team, citing a trivial policy violation. These two nurses were viewed as excellent workers and their loss was a negative turning point for many on the IRC Team. The team's reaction was that ThedaCare did not care about how these losses would impact the remaining team members' workload or patient care. In fact, it was this decision by ThedaCare that caused Ms. Young to begin looking for other employment that same month.

When Ms. Young informed her fellow radiology technologists of her new opportunity with Ascension—where positions remained unfilled—what happened next is no surprise. Each of the remaining three radiology technologists likewise applied to Ascension; each was interviewed in turn, found to be qualified, and offered a job. Mr. Paul Winter, Mr. Timothy Briester and Michael Preissner, the other radiology technologists on the IRC Team, will corroborate these facts. They each applied after hearing from Ms. Young that Ascension had openings and the pay was higher. Ascension offered each a wage increase and signing bonus. After years of working for ThedaCare at below market wages, each accepted the offer.

The nurses on the IRC Team were hired similarly. Andrew and Amber Kohler, a husband-wife R.N. duo on the IRC Team, had been trying to get an Ascension nurse to join them at ThedaCare when the Kohlers learned of open positions at Ascension. Again, there was no recruiting by Aurora; the Kohlers each applied in the ordinary course. Like the radiology technologists, Ascension gave them a better offer that included higher compensation and signing bonuses. Like the radiology technologists, the Kohlers readily accepted. To be clear, both the

signing bonus and compensation offered to the IRC Team are part of Ascension's standard market compensation in this environment, and were in-line with compensation for Ascension's existing employees.

The Kohlers will also testify that no one at Ascension asked about hiring other team members, and they had no idea that the radiology technologists on their team had applied to or received offers from Ascension. Samantha Baltus, the remaining IRC Team member involved, applied for an open position once she learned her friends and colleagues on the IRC Team planned to leave for Ascension. Other witnesses will corroborate this testimony: each member of the IRC Team independently sought out Ascension after hearing of the better opportunities available to them there. Ascension didn't poach or even recruit the IRC Team, as a whole or individually, because it didn't need to: ThedaCare made the decision to leave independently attractive to each member of the team.

Start dates for Ascension's new employees were agreed upon in the ordinary course. Despite their dissatisfaction with ThedaCare, the IRC Team members are professionals, and wished to give notice to ThedaCare. Ascension did not ask the IRC Team members when they would resign from ThedaCare, and made no effort to coordinate their departure *en masse*. This was left entirely up to the individual employees. Indeed, Mr. Fischer will testify that he had no idea how big the IRC Team was, and did not know he was hiring away all of ThedaCare Neenah's neurointerventional-trained radiology technologists until this lawsuit was filed.

III. ThedaCare, despite ample opportunity, failed to convince the IRC Team to stay.

By December 21, the four radiology technologists on the IRC Team each had received offers to work for Ascension and decided to give ThedaCare the opportunity to retain them. That day, they provided the details of their offers to ThedaCare management and requested a

counteroffer. They received no response until December 28, when they were told by Interim Director of Cardiovascular Service Line Ron Schumaker that ThedaCare would not be making any counteroffer. As he put it, the short term expense of retaining the radiology technologists was not worth the long term expense, because if ThedaCare paid to keep these employees, it would have to offer raises to everyone.

Mr. Schumaker was clear that this message came from senior management at ThedaCare, whom he had apprised of the problem posed by all four technologists' potential resignation. Mr. Shumaker told the technologists that any coverage issues were not their concern, that he had raised the issue with senior management, and he had to trust that management had a plan in light of their decision to not retain the technologists. Mr. Shumaker also candidly told them that if he was their grandparent, he would tell them that it as a good offer, and they had to do what was right for them.

The four technologists met directly after this meeting and, in light of the response from ThedaCare leadership, accepted Ascension's offers. They then submitted their formal resignations the following day. The group's resignation—*en masse*, as ThedaCare would have it—was not the result of some subterfuge by Ascension, but rather the near-inevitable result of ThedaCare telling its employees they were not valuable enough to retain.

By contrast, the Kohlers did not bring Ascension's offer back to ThedaCare. They are nurses, and in their view ThedaCare treated nurses as fungible. In addition, ThedaCare has a very well-known reputation for not countering, perhaps for the reasons stated to the radiology technologists on December 28. Once they had learned of the decision by their technologist teammates, the Kohlers provided their notice on December 29, effective January 14. Ms. Baltus provided notice on January 7, effective January 21, after a confounding period of silence from ThedaCare leaders on how they intended to address workload going forward.

True to its word—at least in this—ThedaCare did not attempt to negotiate with anyone on the IRC Team until just days before their final day of employment with ThedaCare. (Detterman Aff., ¶ 31). And even then, although ThedaCare fails to explain why it "could not reach an agreement" with the IRC Team, the reason is obvious: ThedaCare made only a half-hearted attempt to retain the departing team members.

Also on January 14, the IRC Team members were locked out of their ThedaCare email and other internal systems. ThedaCare refused to accept their resignations, and changed their status to "PRN Associate"—an on-call designation—without their consent. For the most part, none of the seven have worked since January 14, either. Ms. Young provided "on call" coverage on January 19 and 20, but there were no calls. Andrew Kohler took one shift on January 20—the day this lawsuit was filed—as a courtesy, but will not be doing that again. Ms. Baltus' resignation was effective January 21, and that was her last shift worked. And Ms. Young offered to provide coverage this weekend, but ThedaCare told her she was not needed. She will not be repeating that offer, either. Indeed, while the departing seven showed varying degrees of willingness to assist ThedaCare through the transition before ThedaCare filed this suit, this evaporated the moment ThedaCare attempted to use the power of the courts to force them to return to their old jobs. So if one thing is clear, it is that none of the seven will be returning to ThedaCare—period.

IV. The sky has not fallen since January 14—nor will it.

As noted, the IRC Team's last official day of work was January 14. In the ten days since, has trauma care in the Fox Valley gone off the rails? Not in the least. As of this filing, ThedaCare has not diverted a single trauma patient from the Neenah facility—even to Green Bay. (*Cf.* Detterman Aff., ¶ 22.) To the contrary, as recently as January 20, ThedaCare's stroke coordinator informed Ascension's stroke coordinator that it did not intend to divert patients elsewhere.

Perhaps this is because, as Ms. Detterman avers, "ThedaCare has 180 points of care, including seven hospitals" (Detterman Aff., ¶ 3), and has the ability to shift resources from elsewhere. ThedaCare's filings are conspicuously silent on this point. But even if ThedaCare's network lacks the internal resources to cover the IRC Team's departure, outside traveling help should be available. Referred to in the industry as "agency," this resource is very expensive, but is it worth the expense to maintain quality of care for ThedaCare's patients or—what ThedaCare seems more interested in—its Level II trauma center certification? ThedaCare doesn't say.[3]

What is clear is that, despite being on notice of the IRC Team's potential departure since December 21, ThedaCare waited until January 18 to reach out to Ascension, and didn't speak with leadership until January 19 (Detterman Aff., ¶¶ 32-33). For a hospital truly scrambling to provide patient care, ThedaCare's fully prepared lawsuit, emergency injunction motion, and media statement came *extremely* soon after.

ARGUMENT

I. Legal standard

Courts may grant injunctive relief only when the moving party shows that: (1) it is likely to suffer irreparable harm without the injunction; (2) no other adequate remedy at law exists; (3) a temporary injunction is necessary to preserve the status quo; and (4) it has a reasonable probability of success on the merits. *See Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154) (citation omitted). Courts also evaluate whether an injunction would disserve the public interest. *See Friends of Maple Grove, Inc. v. Merrill Area Common Public Sch. Dist.*, 2021 WI App 26, ¶ 24, 397 Wis. 2d 139, 959 N.W.2d 362.

[3] Regardless of cost, when necessary, Ascension has hired agency personnel to ensure critical care to patients throughout Ascension's network.

"Generally, injunctive relief is addressed to the sound discretion of the trial court; competing interests must be reconciled and the *plaintiff must satisfy* the trial court that on balance equity favors issuing the injunction." *Carlin Lake Ass'n, Inc. v. Carlin Club Properties, LLC*, 2019 WI App 24, ¶ 44, 387 Wis. 2d 640, 929 N.W.2d 228 (internal quotations and citation omitted) (emphasis in original). "This burden reflects that injunctions are not to be issued lightly but only to restrain an act that is clearly contrary to equity and good conscience." *Id.* (internal quotation marks and citation omitted). *See also Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977) ("Injunctions, whether temporary or permanent, are not to be issued lightly. The cause must be substantial.") (citations omitted). Further, "[a] temporary restraining order is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Faust v. Vilsack*, 519 F. Supp. 3d 470, 474 (internal quotation marks and citation omitted). *See also Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of right.") (citation omitted).

II. ThedaCare will not suffer irreparable harm without an injunction, and granting one will hurt—not serve—the public interest.

When it ought to be focusing on the consequences of its own mismanagement, ThedaCare demands that this Court bail it out, peddling a hyperbolic tale of a crumbling health-care system and threats of dead patients. ThedaCare has clearly lied to, or at the very least misled, the Court about this purported emergency. And as usual, actions speak louder than words. Despite refusing to accept the IRC Team's resignations and designating them "PRN associates" so that it could still put them on the schedule, ThedaCare shut them out of the system, including by turning off access to their email accounts, and (with minor exceptions) failed to schedule them since January 14. Clearly, despite not having these employees on staff for the past ten days, ThedaCare has been

able to cover its shifts. Indeed, at the January 21 hearing, ThedaCare's counsel was unable to identify how many patients may have been negatively impacted, and the answer appears to be *none*: ThedaCare has not diverted a single patient since January 14, and has told Ascension it has no intention of doing so.

At the same time, Ascension is more than capable of serving the public by stabilizing trauma patients with the same or higher level of care as ThedaCare, especially now that the *very same technologists* now work for Ascension. Thereafter, stabilized patients can be moved to a higher-level trauma facility if necessary. There are two Level II facilities in Green Bay, a mere 20 minutes away by ambulance and 5 minutes by helicopter. Ascension also effectively provides all the same stroke services as ThedaCare. ThedaCare has not and cannot provide evidence that these present options for care will negatively impact patient outcomes. Put simply, there will be no harm to the public interest if an injunction does not issue. To the contrary: because the IRC Team members have no intention to return to ThedaCare and the Court cannot compel them to do so, an injunction would *only* prevent them from providing critical care *at all*.

Moreover, ThedaCare alone is responsible for its reputation and the potential loss of its Level II trauma verification and its Comprehensive Stroke Center certification. There is no basis—legal, factual, or otherwise—for ThedaCare's apparent belief that other health care facilities have a duty to monitor ThedaCare's accreditation status and avoid hiring decisions that could jeopardize that status, then be subjected to lawsuits if ThedaCare's employees wish to leave anyway.

Ultimately, while ThedaCare touts its significant investment in developing its trauma care program, it failed to invest in its most important asset: its own employees. Even as it made more money as a result of its certifications, ThedaCare failed to adequately compensate its caregivers. Had it done so, perhaps it would not have lost them to another facility. Having lost them now,

ThedaCare can pull resources from other locations, or from outside agencies, just like any other healthcare system. It could hire traveling staff through an outside agency. ThedaCare is simply refusing to spend what it costs, continuing the pattern that led it here in the first place. Instead, it has spent its time and resources planning its legal strategy and filing this lawsuit. From start to finish, the alleged harm—if any—was caused by ThedaCare's own actions and inaction.

III. ThedaCare will not succeed on the merits.

The sole count in ThedaCare's complaint is that Ascension tortiously interfered with its prospective contractual relationships with at-will employees. To succeed on a tortious interference claim the plaintiff must establish five elements: (1) the plaintiff had an actual or prospective contractual relationship with a third party; (2) the defendant interfered with that relationship; (3) the defendant's interference was intentional; (4) there was a causal connection between the interference and damages; and (5) the defendant was not justified or privileged to interfere. *Briesmeister v. Lehner*, 2006 WI App 140, ¶ 48, 295 Wis. 2d 429, 720 N.W.2d 531. At trial, Ascension will bear the burden to show that its acts were privileged or justified. *Finch v. Southside Lincoln-Mercury, Inc.*, 2004 WI App 110, ¶ 38, 274 Wis. 2d 719, 749, 685 N.W.2d 154, 169.

Assuming for instant purposes that ThedaCare had a prospective contract with each member of the IRC Team—which ThedaCare does not bother to allege with any factual specificity (*cf.* Compl., ¶ 51)—*and* that there is a causal connection between Ascension's hiring and ThedaCare's alleged harm, Ascension did not intentionally interfere with ThedaCare's at-will employees. Ascension posted job openings available to the general public. One ThedaCare radiology technologist applied, Ascension interviewed her, she was qualified, and Ascension sent her an offer of employment. The offer was good, so this technologist spoke with coworkers and they, in turn, also applied. This process played out entirely in the ordinary course. Ascension did not actively recruit ThedaCare employees or approach them in a targeted manner in any way. This is a far cry

from the "organized raid" that ThedaCare attempts to paint in its motion. ThedaCare cannot establish that Ascension acted such that it *knew* interference was "certain, or substantially certain, to occur." Ascension never even went to the employees directly—individually or together—to induce them to leave ThedaCare. Ascension's actions simply cannot be described as interference under the circumstances. If the law were otherwise, business would be required to put competitors' interests *ahead of* their own.

Moreover, even if Ascension's ordinary hiring process for these at-will employees could be deemed "interference" with a "contract," there can be no question that free-market, arm's length hiring in a competitive market is both justified and privileged as a matter of law. "To determine whether conduct is justified or privileged, the trier of fact must weigh all the circumstances." *Briesemeister*, 2006 WI App 140, ¶ 51 (citation omitted). "The factors to be considered include the nature, type, duration and timing of the conduct, whether the interference is driven by an improper motive or self-interest, and whether the conduct, even though intentional, was fair and reasonable under the circumstances." *Id.* (citation omitted). These factors clearly support Ascension and further confirm that ThedaCare's lone claim lacks merit.

Wisconsin has long recognized that competition among market participants is a complete defense to a tortious interference claim. "If the contract involved is one terminable at will, competition is not an improper basis for interference as long as no wrongful means are employed, no restraint of trade occurs, and the purpose of defendant's actions is to advance his or her own competitive interests." Wis. JI 2780 - Restatement, Second, Torts, § 768; *Pure Milk Prod. Coop. v. National Farmers' Org.*, 90 Wis.2d 781, 796, 280 N.W.2d 691 (1979). Interference with prospective contracts is justified and a defense to a charge of interfering with prospective contractual relations if it is "fair competition" and "consistent with antitrust law and other

principles." *Frandsen v. Jensen-Sundquist Agency, Inc.*, 802 F.2d 941, 947 (7th Cir. 1986) (citing Restatement (Second) of Torts § 768 (1979); 2 Harper, James & Gray, The Law of Torts § 6.13, at pp. 355–56 (2d ed.1986)). "One of the most firmly established principles of the common law is that competition is not a tort." *Id.* (citation omitted). "Although competition literally is an intentional interference with competitors' prospective contractual relations, to conclude that it is therefore a tort would be as unsound legally as it would be disastrous economically." *Id.* The competitor must have both a lawful purpose and lawful means. *Briesemeister*, 2006 WI App 140, ¶ 50. The competition justification asks whether the defendant's conduct was "reasonable" in light of all the circumstances. *Id.*

Again, there is no evidence of Ascension using wrongful means or acting unreasonably. Public job postings are inherently reasonable. ThedaCare's only alleged evidence of improper interference is that several employees submitted letters of resignation to ThedaCare *en masse*, but this evidence has nothing to do with *Ascension's* actions and provides no support for any of ThedaCare's allegations regarding Ascension's intentions or conduct. The fact that these employees chose to do this simply cannot be imported to Ascension and is circumstantial, at best. And as to the at-will employees, they were free to do as they chose. As the Wisconsin Supreme Court put it over 100 years ago:

> But the plaintiff had the right to dispose of his labor wherever he could to the best advantage. This is a legal right entitled to legal protection. Such right could be interfered with by one acting in the exercise of an equal or superior right. As against all others, the plaintiff was entitled to go his way without molestation; and, if anyone assumed to meddle in his affairs, he did so at his peril. There is practically little conflict in the cases on this point.

Johnson v. Aetna Life Ins. Co., 158 Wis. 56, 32, 147 N.W. 32, 33 (1914) (citations omitted).

Thus, not only is ThedaCare unable to show that Ascension acted with a wrongful intentional interference, but even if it did interfere, it was justified competition under the law.

IV. ThedaCare has an adequate remedy at law outside of an injunction.

In its brief, ThedaCare fails to adequately address this element. In discussing irreparable harm, it merely states that the injuries it will suffer are without monetary remedy (ThedaCare Br. at 9). However, as explained in Ascension's discussion of irreparable harm, ThedaCare has multiple alternatives; it just appears unwilling to pay for them. That kind of financial harm is why we have damages; courts are not in the business of handing out injunctions to save plaintiffs money. And regardless of the form of relief, Ascension should not be made to pay for ThedaCare's self-caused harm, especially when the remedy is exclusively in ThedaCare's control. Even to the extent ThedaCare loses business to other certified trauma centers,[4] that lost business is compensable with money damages.

The *only* theoretical harm that could not be remedied with damages would be harm to patients, and despite leading with that point in this Court and in the media, ThedaCare has been unable to back it up. And frankly, even if ThedaCare's dire predictions proved true, this would not be harm *to ThedaCare*, the named plaintiff in this action. Despite ThedaCare's cries that the Fox Valley community will be irreparably damaged, Ascension is only aware of a Wisconsin court granting injunctive relief solely to rectify harm to the public—and then only rarely—when the plaintiff is a public entity and the conduct the plaintiff seeks to enjoin is illegal or contrary to public policy. *Joint Sch. Dist. No. 1, City of Wisconsin Rapids v. Wisconsin Rapids Educ. Ass'n*, 70 Wis. 2d 292, 310–11, 234 N.W.2d 289, 300 (1975); *County of Columbia v. Bylewski*, 94 Wis. 2d 153, 288 N.W.2d 129 (1980) (authorizing a municipality or public entity to seek an injunction in order to enforce compliance with a county zoning ordinance without a showing of irreparable harm). ThedaCare has presented no authority to the contrary. And ThedaCare, a private entity, can't

[4] To be clear, ThedaCare has offered *zero* evidence on this point.

seriously argue that Ascension acted illegally, just as it can't seriously argue that free-market competition is contrary to Wisconsin public policy. Absent non-financial harm *to ThedaCare*, there is no basis for the Court to enter an injunction merely to protect ThedaCare's bottom line.

V. A temporary injunction will change, not preserve, the status quo.

A temporary injunction will only be granted if it is necessary to preserve the status quo. *Milwaukee Deputy Sheriffs' Ass'n*, 2016 WI App 56, ¶ 20. "Fundamentally, the reluctance to disturb the status quo prior to trial on the merits is an expression of judicial humility." *Chicago United Industries, Ltd. v. City of Chicago*, 445 F.3d 940, 945 (7th Cir. 2006). "Moreover, like the doctrine of *stare decisis*, preserving the status quo serves to protect the settled expectations of the parties." *Id.* at 946. "Disrupting the status quo may provide a benefit to one party, but only by depriving the other party of some right he previously enjoyed." *Id.*

ThedaCare admits it learned the first of the departing employees intended to resign their employment with ThedaCare to work for Ascension as early as December 21, 2021. The resignation of these at-will employees was completely within their rights. The status quo is that these employees now work for Ascension and are supposed to start work today. ThedaCare is attempting to disrupt this status quo at the expense of Ascension's right to hire at will and—far more important—the fundamental right of seven essential health care workers to choose for themselves the place of their employment.

And that is what's most fundamentally flawed about ThedaCare's lawsuit: these employees have already made their choice, and it wasn't ThedaCare. Nothing that happens in the remainder of this case, regardless of the Court's decision on this motion, can force those employees to return to ThedaCare to labor against their will. So the only equitable remedy available to the Court is an injunction *prohibiting* these employees from serving trauma patients at Ascension. The Court may

have the power to do that, but the only victims of that decision will be these seven employees and the unknown number of Fox Valley residents who would have been their patients. That, of course, would accomplish exactly the opposite of what ThedaCare says it wants.

CONCLUSION

"[T]he fundamental right of a person to make choices about his or her own employment is well-established." *Manitowoc Co., Inc. v. Lanning*, 2018 WI 6, ¶ 33, 379 Wis. 2d 189, 906 N.W.2d 130 (internal quotations omitted). And "no one has the legal right . . . to deprive a person of the right to labor for whomsoever he will, with the consent of such other." *Heyde Companies, Inc. v. Dove Healthcare, LLC*, 2002 WI 131, ¶ 22, 258 Wis. 2d 28, 654 N.W.2d 830.

ThedaCare's lawsuit blithely ignores—and is fundamentally incompatible with—these bedrock principles. And based on the slim record thus far, ThedaCare has been similarly cavalier with the responsibility entrusted to it as a Level II trauma center, choosing profit over public health. Now facing the consequences of its own managerial ineptitude, ThedaCare elected to ambush both Ascension and the Court with a last-minute filing replete with falsehoods, hoping that the risk of calamity recited in its motion would force a quick resolution before the truth came to light.

Even two days of weekend inconvenience was enough to uncover how truly baseless this lawsuit is. But blaming someone for your own mistakes is always easier than fixing them yourself. The Court should deny ThedaCare's motion.

Dated this 24th day of January, 2022.

s/ Electronically Signed by David P. Muth
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