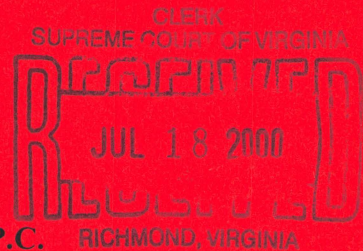


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IN THE  
SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NO. 000558



COUNTRYSIDE ORTHOPAEDICS, P.C.

RICHMOND, VIRGINIA

and

RAYMOND LOWER, D.O.,

*Defendants-Appellants,*

v.

RANDALL S. PEYTON,

*Complainant-Appellee.*

JOINT APPENDIX

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Raymond Lower, D.O.*

July 18, 2000



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VIRGINIA:

IN THE CIRCUIT COURT OF LOUDOUN CIRCUIT COURT

RANDALL S. PEYTON

Complainant

v.

Case No. CH-18157

COUNTRYSIDE ORTHOPAEDICS, P.C.

Serve: Raymond F. Lower, D.O., President

44055 Riverside Parkway, #104

Lansdowne, VA 20176

and

DR. RAYMOND LOWER, Individually

Serve at: c/o Countryside Orthopaedics, P.C.

44055 Riverside Parkway, #104

Lansdowne, VA 20176

Defendants.

AMENDED

BILL OF COMPLAINT FOR SPECIFIC PERFORMANCE, ACCOUNTING,  
BREACH OF CONTRACT, TORTIOUS INTERFERENCE, AND  
TEMPORARY AND PERMANENT INJUNCTIONS

COMES NOW the Complainant, RANDALL S. PEYTON, by counsel, and files this Bill of Complaint for Specific Performance, Accounting, Beach of Contract, Tortious Interference, and Temporary and Permanent Injunction against Countryside Orthopaedics, P.C., a Professional Corporation, Dr. Raymond Lower, Individually, and Integrated Medical Management, Inc., a Virginia corporation.

I. Factual Background.

1. Dr. Randall Peyton (hereinafter referred to as "Dr. Peyton"), the Complainant in this cause, is a resident of the County of Loudoun and at all times pertinent to this proceeding



has been licensed as a medical doctor by the Commonwealth of Virginia, practicing medicine in this state and specializing in orthopaedic medicine and surgery.

2. Countryside Orthopaedic (hereinafter referred to as "Countryside") is a Virginia corporation whose principal place of business is located at 44055 Riverside Parkway, Suite 104, Lansdowne, Virginia 20176, and is a firm who specializes in the practice of orthopaedic medicine.

3. Dr. Raymond Lower (hereinafter referred to as "Dr. Lower") is a resident of the Commonwealth of Virginia and is licensed by the Commonwealth of Virginia to practice medicine. At all times pertinent to this cause, Dr. Lower was either the sole shareholder of Countryside or a fifty percent shareholder during the time when Dr. Peyton was also a fifty percent shareholder of Countryside.

4. Integrated Medical Management, Inc. (hereinafter referred to as "IMM") is the firm retained by Countryside for the purpose of collecting receivables and as such, exercises possession and control over those receivables which Countryside is collecting as a result of services rendered by Dr. Peyton. At all times pertinent to this cause, IMM obeyed the directives of Countryside and Lower and therefore acted as the agent of Countryside and Lower.

5. IMM, pursuant to its agreement with Countryside, collected receivables which were allocated to either Dr. Lower or Dr. Peyton. The process would initiate by either Dr. Peyton or Dr. Lower completing an "EOB" which detailed the patient's name, the nature of the service, and the charge. This information was encoded by IMM in order that either Dr. Peyton or Dr. Lower would get credit for the services. IMM, therefore, generated and retained a comprehensive

receivables list which detailed fees generated by Dr. Peyton and by Dr. Lower for the months during which Dr. Peyton was employed at Countryside.

6. In addition, IMM would then undertake to bill for the services and receive payment from the individual patients or their insurance carrier. Upon this occurrence, these payments would then be collected by IMM and delivered to Countryside for deposit into Countryside's money market account. As the payments were received, IMM would allocate payment to either Dr. Lower or to Dr. Peyton, depending upon which physician actually rendered the service.

7. As the contract between Countryside and IMM provided for billings as well as collections in which Dr. Peyton had a proprietary and possessory interest as a fifty percent shareholder of Countryside and as the physician for whose benefit IMM was billing and collecting receivables, Dr. Peyton was a third party beneficiary of the agreement between IMM and Countryside.

8. On or about August 1, 1995, Dr. Peyton had joined Countryside on or about August 1, 1995 as an orthopaedist pursuant to an employment agreement which is attached hereto and incorporated herein as Complainant's Exhibit A.

9. From or about August 1, 1995, until June 1997, Dr. Peyton was a physician employed by Countryside, and he rendered medical service to various patients, enjoyed surgical privileges at the local hospitals, devoted his full time and attention to developing his medical practice, and generally discharged his duties in connection with his employment by Countryside in a conscientious, diligent, and professional manner.

10. In January 1997, Dr. Peyton was offered an opportunity by Countryside to purchase fifty percent of its stock, and after extensive negotiation, in June 1997, retroactive to

January, Dr. Peyton executed a stock purchase agreement which gave him certain rights and remedies as a shareholder of Countryside.

11. From the inception of his employment, Dr. Peyton experienced difficulty in determining the manner and method of accounting used by Countryside in ascertaining its receivables and in allocating expenses. In addition, Dr. Peyton began to notice a pattern of charges and expenses which Dr. Lower would allocate to Countryside but which were not believed by Dr. Peyton to be proper expenses or deductions.

12. In addition, Dr. Peyton's salary was often arbitrarily and capriciously adjusted by Countryside in order to reflect the whims of the corporation.

13. After becoming a shareholder of Countryside, the method of accounting employed by Countryside and Dr. Lower did not change, notwithstanding the fact that Dr. Peyton was now a fifty percent shareholder and had additional rights with regard to the financial affairs of Countryside.

14. During his tenure as a shareholder of Countryside, Dr. Peyton observed that the pattern of miscellaneous deductions being made from income of the corporation continued without a sufficient response or accounting by Dr. Lower or Countryside. In addition, Dr. Peyton noticed that charges and expenses which he believed to be the personal expenses of Dr. Lower were being paid by the corporation without Dr. Peyton's knowledge or acquiescence.

15. During the summer and fall of 1997, without a meeting of the board of directors and without Dr. Peyton's authorization, Dr. Lower entered into a lease for professional space, prepaid rent from Countryside, incurred legal and accounting fees, and incurred various furnishing and leasehold improvements expenses, all without Dr. Peyton's knowledge and acquiescence.



16. Upon information and belief, the various charges which were being made against the corporation's capital assets depleted the value of the corporation and of Dr. Peyton's stock, all to his detriment as a fifty percent shareholder of Countryside.

17. Given what he perceived to be a irregularities in the manner in which the financial affairs of Countryside were being handled, on October 3, 1997, Dr. Peyton elected to tender his resignation as an employee of Countryside.

18. Upon becoming a shareholder of the corporation, Dr. Peyton entered into a stock purchase agreement by which his stock in the corporation would be restricted, and the shareholders agreement executed by Dr. Peyton provided that upon Dr. Peyton's withdrawal from the corporation, the corporation would purchase his stock based upon the book value of the corporation for the preceding fiscal year.

19. In addition, Paragraph (e)(1) of the Employment Agreement by which Dr. Peyton worked for Countryside provided that income would be allocated to the physicians by a formula which would be determined by charging each physician's receivables account with fifty percent of the expenses common to the corporation and then deducting expenses deemed to be personal. The balance, after these deductions, would be income to the respective physician. As such, Dr. Peyton had a vested interest in his receivables and any irregularity in billing his receivables, collecting his receivables, or making deductions from his receivables account would divest him of his proprietary interest.

20. In addition, Paragraph (e)(1) of the Employment Agreement provided that upon withdrawal from the employment of Countryside, Dr. Peyton would receive eighty percent of income allocated to his practice, less expenses charged to him.

21. Following Dr. Peyton's notice of resignation, Dr. Lower continued a practice of allocating unjustifiable expenses to the corporation as well as incurring personal obligations for which he sought reimbursement from the corporation.

22. Although Dr. Peyton had received various billing information from IMM prior to submitting his resignation to Countryside, following his letter of resignation on October 3, 1997, IMM and Countryside stopped making available to him accounting information by which he could determine the extent of his billables as well as fees being collected on his behalf.

23. On one occasion, a representative of IMM placed a post-it on financial materials which it delivered to Countryside and advised Dr. Lower to remove any materials which he did not want Dr. Peyton to see.

24. In addition, Dr. Lower began exhibiting hostility and animosity toward Dr. Peyton, notwithstanding the fact that the employment agreement required Dr. Peyton to continue to perform services during the period of time prior to the date when his withdrawal would become effective.

25. On one occasion, Dr. Lower maligned and defamed Dr. Peyton in front of a patient by engaging in a physical altercation with Dr. Peyton, accusing him of unprofessional conduct, and then stating to the patient, "he's crazy."

26. Notwithstanding the fact that Dr. Peyton's patients have an absolute right to continue seeking medical care and treatment from Dr. Peyton, upon information and belief, Dr. Lower and Countryside have engaged in a pattern of conduct designed to impair and inhibit Dr. Peyton's ability to effectively and professionally render treatment to his patients which

include not making patient medical files available and refusing to make medical files available to Dr. Peyton, notwithstanding the express request of patients to do so.

27. The failure of Countryside and Lower to facilitate Dr. Peyton's continued practice of medicine as well as their intentional interference with his ability to render treatment to those individuals who have elected to have him continue as their treating physician is particularly onerous in light of the fact that Dr. Lower and Dr. Peyton drafted a joint letter to be sent to Dr. Peyton's patients which gave them notice of Dr. Peyton's leaving. A copy of this letter is attached hereto and incorporated herein as Complainant's Exhibit B.

28. Upon information and belief, various patients of Dr. Peyton have not received notification of his leaving Countryside Orthopaedics as Countryside and Dr. Lower have refused to make available to him a complete listing of those patients whom Dr. Peyton has treated while associated with Countryside, including current patients who require post-operative follow-up.

29. In addition, upon information and belief, the corporate account of Countryside which contains receivables generated by Dr. Peyton to which he is entitled pursuant to the employment agreement has been depleted as a result of various deductions which have been made which should not have been made.

30. In addition, upon information and belief, Dr. Peyton has perceived a course of conduct which has resulted in unauthorized expenses and deductions having been made from his physicians' account in order to deplete the receivables to which he is entitled pursuant to the employment agreement.



31. Although as of the filing of this cause, Dr. Peyton has withdrawn from Countryside as an employee, he has not received any indication as to the amount which Countryside would acknowledge is in his receivables account.

32. IMM collects receivables on behalf of Countryside, and in this role, disburses receivables. As such, it has the capacity to allocate to Countryside and distribute funds which belong to Dr. Peyton pursuant to the employment agreement.

33. Given Dr. Lower's and Countryside's pattern of depleting corporate assets by paying unauthorized and unjustified expenses, upon information and belief, the corporate account which contains those receivables to which Dr. Peyton is entitled, will be depleted if such conduct is not enjoined by this Court.

34. Dr. Peyton will suffer irreparable harm and injury if the corporate assets are not protected in order that he may recover his receivables, if various patient files are not made available to him, if Dr. Lower and Countryside are not enjoined from interfering with Dr. Peyton's ability to treat his patients and practice medicine, and if such other relief as may be proper is not granted by this Court.

## II. Specific Performance of Employment Agreement.

35. Paragraphs 1 through 34 are incorporated herein by reference as if fully set forth.

36. The Employment Agreement entered into between Dr. Peyton and Countryside specifically provides that Dr. Peyton shall be entitled to all of his accounts receivables generated by him prior to January 1, 1998, minus expenses allocated to him.

37. Although demand has been made upon Countryside for payment of his receivables, as of the filing of this cause, no payment has been made.

38. In addition, despite repeated requests for an accounting as to those sums to which he is entitled, Countryside and Dr. Lower have specifically refused to provide Dr. Peyton with any type of accounting which would accurately depict the amount of his receivables and those expenses, if any, which Countryside contends are properly chargeable to Dr. Peyton.

39. The agreement further provides that Dr. Peyton shall receive eighty percent of his accounts receivables collected subsequent to his withdrawal on December 31, 1997 from Countryside, and as of the filing of this cause, notwithstanding repeated demands for information regarding the extent of these receivables, Countryside and Dr. Lower have failed and refused to provide Dr. Peyton with an accounting as to those sums which would be due under this provision of the employment agreement.

40. As part of Dr. Peyton's withdrawal as an employee of Countryside and his sale of his fifty percent interest back to the corporation, it was agreed that various patient files on those patients who elected to have Dr. Peyton continue as their treating physician would be made available to him in order that he would be able to continue giving appropriate care to his patients.

41. Notwithstanding repeated demands for this client information as well as an affirmative indication by counsel for Countryside and Dr. Lower that "getting the charts would not be a problem," as of the filing of this cause, Dr. Peyton has not received those files which are necessary in order to treat those patients who have elected to have him continue as their physician.

42. At this time, Complainant is aware of approximately 180 individuals who wish to continue having Dr. Peyton treat them, and notwithstanding the fact that Countryside has been well aware of a number of those patients who wish to continue with Dr. Peyton and the obvious need for medical files, only 24 files have been produced as of the filing of this cause.

43. Failure to properly account for Dr. Peyton's receivables and to pay him the sums to which he is entitled as well as failure to make client files available is a specific breach of the employment agreement.

44. As part of the equity powers of this Court, the Court can order and decree that, subject to an accounting, Countryside disburse those sums to which Dr. Peyton is entitled and that it produce medical files for those individuals who have elected to have Dr. Peyton continue as their treating physician.

WHEREFORE, Dr. Peyton asks this Court to enter an order specifically enforcing the terms of the employment agreement which will require Countryside to pay to Dr. Peyton those sums to which he is entitled under the employment agreement, subject to an accounting, and to make client charts and information available to Dr. Peyton in accordance with the express agreement reached with Countryside and Dr. Lower.

III. Prayer for an Accounting.

45. Paragraphs 1 through 44 are incorporated herein by reference as if fully set forth.

46. Upon information and belief, various expenses have been charged or will be charged against Dr. Peyton's accounts receivable which are not properly chargeable to him.



47. In addition, upon information and belief, the actual amount of those accounts receivable which are as a result of services and surgery rendered by Dr. Peyton and are therefore sums to which he is entitled pursuant to the employment agreement have not been properly accounted for.

48. In order to determine the actual amount of those sums in his receivables account as well as expenses which are properly chargeable to him, Dr. Peyton asks this Court to order an accounting of any and all income generated by him and to make a determination as to chargeable expenses.

49. Dr. Peyton has no adequate remedy at law in order to determine the actual amount of those sums to which he is entitled pursuant to the employment agreement, as well as those expenses properly chargeable to him.

WHEREFORE, Dr. Peyton asks that this Court to order an accounting of any and all income generated by him and to make a determination as to chargeable expenses.

IV. Breach of Contract as to Countryside.

50. Paragraphs 1 through 49 are incorporated herein by reference as if fully set forth.

51. Countryside and Dr. Lower have specifically breached the terms and conditions of the employment agreement entitling Dr. Peyton to his portion of the accounts receivables.

52. As a result of this breach, Dr. Peyton has incurred various expenses, including but not limited to attorney's fees and accountants' fees, on his behalf expended.

53. Upon information and belief, as a result of the breach of the employment agreement, Dr. Peyton is entitled to his receivables less properly allocable expenses, and this sum is believed to be between \$100,000.00 and \$150,000.00.

WHEREFORE, Dr. Peyton asks that a judgment be entered against Countryside in at least the sum of \$150,000.00 and that this sum be adjusted upward in the event that an accounting reveals that the sum to which he is entitled is actually more.

VI. Prayer for Temporary Injunction.

54. Paragraphs 1 through 53 are incorporated herein by reference as if fully set forth.

55. IMM is the entity who is collecting Dr. Peyton's accounts receivables, and upon information and belief, IMM will distribute these receivables as directed by Countryside and/or Dr. Lower.

56. In order to protect his receivables, it is imperative that IMM be enjoined from distributing these receivables except as otherwise ordered by this Court.

57. Dr. Peyton has no adequate remedy at law in order to protect his receivables, and this Court may order such extraordinary relief.

58. There is a strong probability that Dr. Peyton will prevail upon the merits of this cause, thus justifying the issuance of a temporary restraining order by this Court protecting Dr. Peyton's receivables pending an accounting as requested.

WHEREFORE, Dr. Peyton asks that this Court enjoin IMM from disbursing any and all accounts receivables to Countryside and/or Dr. Lower until an accounting can be performed and a determination made as to those receivables allocable to Dr. Peyton.

**VII. Temporary Injunction as to Client Files.**

59. Paragraphs 1 through 58 are incorporated herein by reference as if fully set forth.

60. Dr. Peyton is being damaged in his ability to effectively treat patients in light of Countryside and/or Dr. Lower's arbitrary refusal to provide client files as requested.

61. Notwithstanding the fact that many of the patients who have been seen by Dr. Peyton and are now making appointments for treatment had specifically requested, either verbally or in writing, that their files be made available to Dr. Peyton, §32.1-127.1:03(d)(7) provides that "records of a patient may be disclosed, where necessary, in connection with the care of the patient."

62. In addition, the cited Code section at sub-section (d)(8) also provides that records may be made available, "in the normal course of business in accordance with accepted standards of practice within the health services setting."

63. It is respectfully submitted that the failure of Dr. Lower and Countryside to provide medical records as requested specifically violates not only the Code of Virginia but also accepted standards of practice in the medical industry.

64. Dr. Peyton has no adequate remedy at law, and this Court may specifically order the production of those records necessary in order to treat patients who have elected to continue care with Dr. Peyton.

WHEREFORE, Dr. Peyton asks this Court to order an immediate production by Countryside of those files needed to care for patients who have elected to have Dr. Peyton continue as their treating physician.



**VIII. Breach of Fiduciary Duty by Countryside.**

65. Paragraphs 1 through 64 are incorporated herein by reference as if fully set forth.

66. Pursuant to the employment agreement, Dr. Peyton has a proprietary interest in his accounts receivable which were collected by Countryside and IMM.

67. In addition, as a shareholder of the corporation during the time of his employment, Countryside and Dr. Lower owed Dr. Peyton a duty of care and fidelity which would extend to protecting his accounts receivables and not diverting them or depleting them for improper purposes.

68. The Employment Agreement between Countryside and Dr. Peyton provided that he would have an interest in his receivables up to and including his day of departure, and then after his withdrawal as an employee of Countryside, he would receive eighty percent of those receivables collected by Countryside and IMM.

69. Dr. Peyton has a vested interest in all of those receivables which were collected prior to December 31, 1997, and he has a vested interest in receivables to be collected by IMM and Countryside in the future.

70. Upon information and belief, various unjustified expenses have been allocated to Dr. Peyton's accounts receivable in order to effect their depletion and decrease the sum he would actually receive.

71. Countryside and Dr. Lower owed Dr. Peyton the fiduciary duty as an employee and 50% shareholder of the corporation to protect his accounts receivable and to not make unjustified or unpermitted deductions.

72. Upon information and belief, there have been unjustifiable and unauthorized deductions made from Dr. Peyton's receivables, and this conduct is a breach of the fiduciary duty owed to Dr. Peyton to Countryside and Lower.

73. As previously alleged, upon at least two occasions, patients of Dr. Peyton's have been billed for services rendered by him but the billing has been under Dr. Lower's name which would presumably cause the receivable to go into Dr. Lower's receivables account and for him to get the credit for it.

74. In addition, the shareholder agreement by which Dr. Peyton became a 50% shareholder provided that no expenditures of corporate funds would exceed \$5,000 without the unanimous consent of Dr. Peyton and Dr. Lower as shareholders of Countryside, but upon information and belief, various expenditures exceeding \$5,000 were made without the authorization of Dr. Peyton, and as such, upon information and belief, these expenditures have depleted Dr. Peyton's accounts receivables to which he is entitled pursuant to the employment agreement.

WHEREFORE, Dr. Peyton asks that judgment be entered against Countryside, IMM, and Dr. Lower jointly and severally, in the sum of \$100,000.00.

IX. Interference with Lawful Business by Countryside and Dr. Lower.

75. Paragraphs 1 through 74 are incorporated herein by reference as if fully set forth.

76. The actions of Countryside and Dr. Lower are a tortious interference with the right of Dr. Peyton to pursue his lawful business.

77. Countryside and Dr. Lower are aware of Dr. Peyton's profession and his attempts to continue practicing medicine following his withdrawal from Countryside.

78. By failing and refusing to provide needed medical charts to Dr. Peyton, by making disparaging comments about Dr. Peyton to his patients, by suggesting to patients who have been treated by Dr. Peyton that they should continue with Countryside as their care provider and not Dr. Peyton, by having caused the cancellation of Dr. Peyton's participation with Blue Cross/Blue Shield Capital Care without advising him of this fact which resulted in one of his patients being denied treatment for a lumbar condition, and by other acts and omissions, Countryside and Dr. Lower have evidenced a purposeful intent to interfere with Dr. Peyton's lawful business and the practice of his profession.

79. Since starting his own practice, Dr. Peyton has learned that Countryside has on occasion discouraged patients from continuing to see Dr. Peyton and encouraged patients to see Dr. Lower notwithstanding the fact that Dr. Peyton had been their treating physician. In addition, on at least one occasion, Countryside has intentionally misrepresented to a patient of Dr. Peyton's that Dr. Peyton has left the area, implying that he is no longer practicing medicine in Northern Virginia, but that Dr. Lower would be willing to treat this patient.

80. Upon information and belief, these improper and tortious acts of Countryside have caused Dr. Peyton to lose patients and the resultant economic benefit which he would have otherwise received.

81. For the foregoing reasons, Countryside and Dr. Lower were aware of the existence of a business relationship between Dr. Peyton and a third party, was well aware of the existence of a reasonable probability of future economic benefit to Dr. Peyton. Improper methods were used

to divert this business opportunity from Dr. Peyton by making misrepresentation about his continued practice of medicine. These actions by Countryside and Dr. Lower were for the specific purpose of interfering with and causing the disruption of Dr. Peyton's anticipated economic benefit which would result from his continued treatment of his patients. But for the actions of Countryside, Dr. Peyton's unimpeded relationship with his patients would have continued.

82. As a direct and proximate result of the actions of Countryside and Dr. Lower, Dr. Peyton has sustained damages.

83. In addition, the foregoing acts of interference have proximately caused impairment of Dr. Peyton's ability to pursue his business and practice his profession.

84. As a result of the foregoing, Dr. Peyton has sustained damages.

WHEREFORE, Dr. Peyton asks that a judgment be entered against Countryside in the sum of \$100,000.00 together with interest from the date of judgment.

X. Tortious Interference with Contract by Countryside and Dr. Lower.

85. Paragraphs 1 through 84 are incorporated herein by reference as if fully set forth.

86. The conduct of Countryside and Dr. Lower amounts to a claim for tortious interference with contract for the following reasons:

a. Countryside and Dr. Lower are aware and have knowledge of the agreement which Dr. Peyton has to render care to his patients, as well as the fact that he has continued to treat those patients who have expressed an interest in having him continue to provide care to them after leaving Countryside.

b. By misrepresenting to patients of Dr. Peyton that he is no longer in the area, Countryside and/or Dr. Lower committed a wrongful and intentional act for the sole purpose of interfering with Dr. Peyton's agreement with his patients to provide medical care.

c. The facts and circumstances alleged in this Complaint evidence an intent by Countryside and Dr. Lower to cause a disruption of Dr. Peyton's contractual relationship with his patients to render medical care, and as a result of these actions, Dr. Peyton has sustained damages.

d. This interference has proximately caused Dr. Peyton to sustain damages.

WHEREFORE, Dr. Peyton asks for judgment against Countryside and Dr. Lower in the sum of \$100,000.00.

#### XI. Interference with Economic Opportunity.

87. Paragraphs 1 through 97 are incorporated by reference as if fully set forth.

88. The continuation of his professional practice presents to Dr. Peyton an economic opportunity which is proprietary in nature.

89. For the reasons set forth in this Complaint, the conduct of Countryside and Dr. Lower amount to an intentional interference with Dr. Peyton's economic opportunity to continue the practice of medicine.

90. As a result of the interference with this economic opportunity, Dr. Peyton has proximately sustained damages.

WHEREFORE, Dr. Peyton asks that judgment be awarded in the amount of \$100,000.00.



**XII. Punitive Damages.**

91. Paragraphs 1 through 90 are incorporated herein by reference as if fully set forth.

92. The acts of Dr. Lower and Countryside evidence a malicious, willful, and wanton desire to injure Dr. Peyton, and therefore justify an award of punitive damages.

93. The alleged breach of the employment contract and the depletion of Dr. Peyton's accounts receivable is willful, wanton, and egregious conduct which justifies an award of punitive damages.

94. Upon information and belief, Countryside and Dr. Lower, with the complicity of IMM, have diverted receivables from Dr. Peyton to Dr. Lower by intentional and erroneous billings.

95. As the only means whereby Dr. Peyton's receivables can be accurately billed, collected, and allocated to his receivables account is under the exclusive control of Countryside, Dr. Lower, and IMM, Countryside and Dr. Lower owe Dr. Peyton an independent duty, as alleged in this Complaint, to protect his receivables by assuring that they are accurately billed and not intentionally diverted to Dr. Lower's account, that they are diligently collected, and that no improper or unauthorized deductions are made from his receivables account.

96. To the extent the Defendants are failing to adequately protect Dr. Peyton's receivables in which he has a vested interest, they are converting to their own use Dr. Peyton's property to which he would otherwise be entitled.

97. As a fifty percent shareholder of Countryside, Dr. Lower owed Dr. Peyton as a fifty percent shareholder an duty independent and separate from any agreement regarding his employment to protect his receivables, to see that they are accurately and effectively collected,

and not to engage in unauthorized deductions which would deplete Dr. Peyton's receivables account

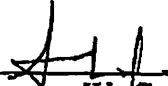
98. These actions by Dr. Lower and Countryside are wilful and wanton and evidence an intent to injure Dr. Peyton, independent of any failure to comply with any agreements between the parties regarding Dr. Peyton's employment.

99. On the facts and circumstances of this case, an award of punitive damages would be appropriate.

WHEREFORE, Dr. Peyton asks that a judgment be awarded for punitive damages of \$350,000.00, the statutory maximum.

RANDALL S. PEYTON  
Complainant  
By Counsel

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George W. Campbell, Jr.  
Counsel for Complainant

V I R G I N I A :

IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

RANDALL S. PEYTON,	)	
	)	
Complainant,	)	
	)	
v.	)	In Chancery No. 18157
	)	
COUNTRYSIDE ORTHOPAEDICS, P.C.,	)	
RAYMOND LOWER, D.O., AND	)	
INTEGRATED MEDICAL MANAGEMENT,	)	
INC.,	)	
	)	
Defendants.	)	

AMENDED ANSWER AND GROUNDS OF DEFENSE OF DEFENDANTS  
COUNTRYSIDE ORTHOPAEDICS, P.C. AND RAYMOND LOWER, D.O.

Without waiver of or prejudice to their demurrer filed to the Amended Bill of Complaint herein, but relying expressly thereon, defendants Countryside Orthopaedics, P.C. ("Countryside") and Raymond Lower, D.O. ("Dr. Lower"), by and through their undersigned counsel and pursuant to the Rules of the Supreme Court of Virginia, hereby provide their answer and grounds of defense to the Amended Bill of Complaint for Specific Performance, Accounting, Breach of Contract, Tortious Interference, and Temporary and Permanent Injunctions (the "Amended Bill") as follows.

FIRST DEFENSE

The Amended Bill fails to state a claim against these defendants for which relief can be granted.

## SECOND DEFENSE

For answer to the separately-numbered paragraphs of the Amended Bill, these defendants respond as follows:

1. Admitted.

2. Admitted.

3. Admitted.

4. Denied.

5. Denied.

6. Denied.

7. Denied.

8. These defendants admit the allegations contained in ¶ 8 of the Amended Bill, but cannot admit or deny that Exhibit "A" is complete, relevant, or accurate, since no such exhibit was attached to the Amended Bill.

9. Denied.

10. Admitted. For further answer, three separate documents were signed by Peyton on or about June 27, 1997: an Employment Agreement, a Stockholders' Agreement, and a Stock Purchase Agreement. Those agreements speak for themselves.

11. These defendants are without information sufficient to admit or deny the allegations contained in ¶ 11 of the Amended Bill, the legal effect of which is to deny the same and to demand strict proof thereof.

12. Denied.

13. Denied.

14. These defendants are without information sufficient to admit or deny the allegations contained in ¶ 14 of the Amended Bill, the legal effect of which is to deny the same and to demand strict proof thereof.

15. Denied.

16. Denied.

17. These defendants are without information sufficient to admit or deny the allegations contained in ¶ 17 of the Amended Bill, the legal effect of which is to deny the same and to demand strict proof thereof.

18. Denied. For further answer, the agreements referenced in ¶ 18 of the Amended Bill speak for themselves.

19. Denied.

20. Denied.

21. Denied.

22. Denied.

23. Denied.

24. Denied.

25. Denied.

26. Denied.

27. Denied. For further answer, a copy of Exhibit B was not attached to the Amended Bill served upon these defendants.

28. Denied.



29. Denied.

30. These defendants are without information sufficient to admit or deny the allegations contained in ¶ 30 of the Amended Bill, the legal effect of which is to deny the same and to demand strict proof thereof.

31. It is admitted that Peyton has withdrawn voluntarily from Countryside, but these defendants deny that Peyton has not received complete financial information to which he is entitled concerning Countryside for 1997. Peyton has also received information from IMM in discovery in this case.

32. Denied.

33. Denied.

34. Denied.

35. No response required.

36. Denied. For further answer, the referenced agreement speaks for itself.

37. Denied.

38. Denied.

39. Denied.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

44. Paragraph 44 of the Amended Bill states legal conclusions for which no response is required. To the extent that a response may be required, the allegations contained in ¶ 44 of the Amended Bill are denied.

45. No response required.

46. Denied.

47. Denied.

48. Paragraph 48 of the Amended Bill contains statements as to the relief requested by the Complainant, for which no response is required. To the extent that a response may be required, the allegations contained in ¶ 48 of the Amended Bill are denied.

49. Denied.

50. No response required.

51. Denied.

52. Denied.

53. Denied.

54. No response required.

55. Denied.

56. Denied.

57. Denied.

58. Denied.

59. No response required.

60. Denied.

61. Paragraph 61 of the Amended Bill contains legal conclusions for which no response is required. To the extent that a response may be required, these defendants state that the referenced statute speaks for itself. Moreover, although these defendants believe that the statute is applicable in this case, these defendants note that the citation of the statute contradicts Complainant's counsel's representation in open Court in this matter that the statute has no application in this matter. To the extent that a further response may be required, these allegations are denied.

62. Paragraph 62 of the Amended Bill contains legal conclusions for which no response is required. To the extent that a response may be required, these defendants state that the referenced statute speaks for itself. Moreover, although these defendants believe that the statute is applicable in this case, these defendants note that the citation of the statute contradicts Complainant's counsel's representation in open Court in this matter that the statute has no application in this matter. To the extent that a further response may be required, these allegations are denied.

63. Denied.

64. Denied.

65. No response required.

66. Denied.

67. Denied.

68. Denied.

69. Denied.

70. Denied.

71. Denied.

72. Denied.

73. Denied.

74. Denied.

75. No response required.

76. Denied.

77. Admitted.

78. Denied.

79. Denied.

80. Denied. For further answer, these defendants demand strict proof of any alleged "loss of patients" and "resultant economic benefit."

81. Denied.

82. Denied.

83. Denied.

84. Denied.

85. No response required.

86. Denied.

87. No response required.

88. These defendants are without information sufficient to admit or deny the allegations contained in ¶ 88 of the Amended Bill, the legal effect of which is to deny the same and to demand strict proof thereof.

89. Denied.

90. Denied.

91. No response required.

92. Denied.

93. Denied.

94. Denied.

95. Denied.

96. Denied.

97. Denied.

98. Denied.

99. Denied.

100. All allegations not herein expressly admitted are denied.

#### THIRD DEFENSE

The relief requested in the Amended Bill is rendered moot, or is otherwise barred, in whole or in part, by virtue of the Decree entered by this Court on January 15, 1998.

#### FOURTH DEFENSE

Complainant is barred from obtaining the relief requested in the Amended Bill by the doctrines of estoppel, waiver,

unclean hands, laches, and the equitable maxim that one "who seeks equity must do equity."

#### FIFTH DEFENSE

These defendants reserve the right to assert that Complainant is barred, in whole or in part, from obtaining the relief requested in the Amended Bill by virtue of the applicable Statute of Limitations.

#### SIXTH DEFENSE

Complainant is barred from obtaining the relief requested in the Amended Bill, in whole or in part, by the defense of justification or privilege, including legitimate business competition, financial interest, responsibility for the welfare of another, directing business policy, and the giving of requested advice.

#### SEVENTH DEFENSE

The damages sought by the Complainant in this matter were not reasonably foreseeable by the parties.

#### EIGHTH DEFENSE

The damages sought by the Complainant in this matter are barred, in whole or in part, by the single satisfaction rule.

#### NINTH DEFENSE

Complainant is barred, in whole or in part, from obtaining the relief requested in this matter by virtue of ¶ 3(e)(4) of Complainant's Employment Agreement.

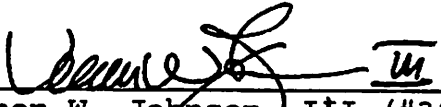
WHEREFORE, defendants Countryside Orthopaedics, P.C. and Raymond Lower, D.O. respectfully request that this Court:

- a. Enter judgment in favor of these defendants and against plaintiff on all of Complainant's claims;
  - b. Dismiss this action with prejudice;
  - c. Award these defendants their costs of this proceeding;
- and
- d. Award such other and further relief as justice may require.

Respectfully submitted,

COUNTRYSIDE ORTHOPAEDICS, P.C.  
and RAYMOND LOWER, D.O.  
By Counsel

JACKSON & CAMPBELL, P.C.

  
\_\_\_\_\_  
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Counsel for Defendants  
Countryside Orthopaedics, P.C.  
and Raymond Lower, D.O.

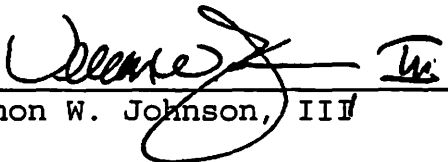


CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing of Amended Answer and Grounds of Defense of Defendants Countryside Orthopaedics, P.C. and Raymond Lower, D.O. was mailed, by first class mail, postage prepaid, this 22nd day of April, 1998, to:

George W. Campbell, Jr., Esq.  
George W. Campbell, Jr. & Associates  
1401 Wilson Boulevard  
Suite 1007  
Arlington, Virginia 22209

Counsel for Plaintiff

  
\_\_\_\_\_  
Vernon W. Johnson, III

V I R G I N I A :

IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

RANDALL S. PEYTON,	)	
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Complainant,	)	
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v.	)	In Chancery No. 18157
	)	
COUNTRYSIDE ORTHOPAEDICS, P.C.,	)	
AND RAYMOND LOWER, D.O.,	)	
	)	
Defendants.	)	

FIRST AMENDED CROSS-BILL OF COMPLAINT

Defendants Countryside Orthopaedics, P.C. ("Countryside") and Raymond Lower, D.O. ("Dr. Lower"), without waiver of or prejudice to their Demurrers filed herein and their Answer and Grounds of Defense filed herein, but relying expressly thereon, by and through their undersigned counsel and pursuant to the Rules of the Supreme Court of Virginia, hereby state their First Amended Cross-Bill of Complaint against the Complainant in this matter as follows.

Introduction

1. Countryside and Dr. Lower are two of the defendants in this case and Randall S. Peyton ("Dr. Peyton") is the plaintiff.

2. Countryside is a health-care provider located in Leesburg, Virginia.

3. Dr. Lower is a health-care provider employed by Countryside and is President of Countryside. At all times

relevant to this Cross-Bill, Dr. Lower was a shareholder of Countryside.

4. Dr. Peyton was employed by Countryside from approximately August 1995 through December 31, 1997.

5. Dr. Peyton was a purported shareholder of Countryside from January 1, 1997 through December 31, 1997.

#### Factual Background

6. As a non-shareholder employee of Countryside from August 1995 through at least January 1, 1997, Peyton's relationship with Countryside was governed by a written Employment Agreement, a copy of which is attached hereto and made a part hereof as Exhibit "A".

7. Dr. Peyton's acquisition of an ownership interest in Countryside was the subject of extended negotiations in approximately late 1996 through the middle of 1997.

8. Ultimately, Dr. Peyton agreed to acquire an ownership interest in Countryside subject to certain terms and conditions.

9. Specifically, on or about June 27, 1997, Peyton signed an Employment Agreement dated January 1, 1997, a copy of which is attached hereto and made a part hereof as Exhibit "B"; a Stockholders' Agreement dated January 1, 1997, a copy of which is attached hereto and made a part hereof as Exhibit "C"; and a Stock Purchase Agreement dated January 1, 1997, a copy of which is attached hereto and made a part hereof as Exhibit "D".

10. Countryside and Dr. Lower entered into the Employment Agreement, Stockholders' Agreement, and Stock Purchase Agreement with Peyton in consideration of the agreements entered into by Peyton in those documents, as well as in consideration of Peyton's agreement to fulfill the obligations imposed upon him by those documents.

11. In connection with the negotiation and execution of the Employment Agreement, Stockholders' Agreement, and Stock Purchase Agreement, the parties had the benefit of consultation with their own respective independent legal counsel and accountants.

12. The Employment Agreement entered into by the parties as of January 1, 1997 contained several modifications of Peyton's employment arrangement with Countryside, including, among other things, a modification of a restrictive covenant, a \$50,000.00 increase in Peyton's annual draw against the compensation portion of his Entitlement, an increase in potential severance pay, an increase from two weeks to thirty days of vacation time, and an increase in the share of Collections payable to Peyton.

13. Countryside and Dr. Lower would not have agreed to these modifications in Dr. Peyton's employment arrangement absent Peyton's agreement to and compliance with all terms of

the Employment Agreement, Stockholders' Agreement, and Stock Purchase Agreement signed in June 1997.

14. At the time of his signing the Employment Agreement, Stockholders' Agreement, and Stock Purchase Agreement, Dr. Peyton had no intention of complying with the terms of those agreements or of staying with Countryside for any extended period of time. Rather, Peyton entered into the Employment Agreement, Stockholders' Agreement, and Stock Purchase Agreement primarily to eliminate the restrictive covenant contained in his prior Employment Agreement (Exhibit "A" hereto) and to enjoy the benefits of the other modifications in the terms of his employment. Dr. Peyton did not disclose this to Countryside or Dr. Lower and he concealed it from Countryside and Dr. Lower.

15. Under the Stock Purchase Agreement, Dr. Peyton agreed to purchase fifty shares of Countryside (representing 50% of the issued and outstanding shares of the capital stock of Countryside) from Dr. Lower for a total Purchase Price of \$94,258.00.

16. Under the Stock Purchase Agreement, the Purchase Price was payable by Peyton to Dr. Lower without interest in 48 equal monthly payments of \$1,963.71 beginning on January 1, 1997.

Peyton's Default of the Stock Purchase Agreement

17. When the Stock Purchase Agreement was signed on June 27, 1997, Peyton did not immediately make the payments for the

months of January, February, March, April, May, and June 1997, but Peyton and Dr. Lower agreed that Peyton would be allowed a reasonable opportunity to bring the payments current.

18. In or about July 1997, Dr. Lower inquired of Peyton as to the status of the payments due under the Stock Purchase Agreement. At that time, Peyton stated that he was having cash-flow difficulties as the result of having built a deck on his home and paid for school for his children.

19. On or about August 7, 1997, after repeated inquiries from Dr. Lower, Dr. Peyton made a payment to Dr. Lower of \$13,745.97, bringing the payments current through July 1, 1997. Payments due from Dr. Peyton for the months of August, September, October, November, and December were never made.

#### Peyton's Resignation

20. On or about October 3, 1997, only approximately three months after the Employment Agreement, Stockholders' Agreement, and Stock Purchase Agreement were signed, Dr. Peyton tendered his voluntary resignation to Countryside. See Letter dated October 3, 1997 from Randall S. Peyton, M.D. to Raymond F. Lower, D.O., a copy of which is attached hereto and made a part hereof as Exhibit "E."

21. Shortly after delivering his resignation, and at the request of Dr. Lower, Dr. Peyton delivered to Countryside and Dr. Lower a list of the purported reasons for the resignation, a

copy of which is attached hereto and made a part hereof as Exhibit "F."

22. Pursuant to Section III(A) of the Stockholders' Agreement, upon the termination of Dr. Peyton's employment with Countryside, Countryside had the right to repurchase the 50 shares of Countryside stock that Dr. Peyton had agreed to purchase.

23. Pursuant to Section III(B) of the Stockholders' Agreement, the repurchase price was set at the amount of the purchase price paid by Dr. Peyton to Dr. Lower to purchase the stock.

24. Pursuant to Section III(c) of the Stockholders' Agreement, the repurchase price was payable as follows: (1) 15% payable within 90 days; and (2) the balance payable in 24 equal monthly payments, with 8.5% simple interest per year.

25. Since Dr. Peyton had paid \$13,745.97 for the stock prior to confirming his default under the Stock Purchase Agreement, he was entitled, at most, to be paid \$13,745.97 pursuant to the repurchase, pursuant to the Stockholders' Agreement.

26. Countryside, at that time, exercised its right to repurchase the stock, pursuant to Section III(A) of the Stockholders' Agreement, and notified Peyton, through his counsel, of that decision.



27. At the time of the notification of Countryside's right to repurchase, neither Peyton nor his then counsel objected to Countryside's exercise of its right of repurchase.

28. On December 31, 1997, Countryside delivered to Peyton a check in the amount of \$2,061.90, representing 15% of the repurchase price, as well as Countryside's Promissory Note for the \$11,684.07 balance due.

29. Dr. Peyton deposited the check and has received the funds representing 15% of the repurchase price.

30. Thereafter, Dr. Peyton has received and accepted further monthly payments thereafter for the repurchase price.

31. In making various allegations in this lawsuit, which was filed on January 9, 1998, Dr. Peyton has, however, called into question whether he recognizes Countryside's right of repurchase, Countryside's valid exercise thereof, and the terms of such repurchase.

COUNT I  
(Fraud and Fraudulent Inducement)

32. Paragraphs 1-31, inclusive, are incorporated herein as if fully set forth.

33. By signing the Employment Agreement, Stockholders' Agreement, and Stock Purchase Agreement in June 1997, Peyton indicated his intention to be bound by these agreements and thereby made a misrepresentation of a material fact.

34. The very act of executing the Employment Agreement, Stockholders' Agreement, and Stock Purchase Agreement was an independent misrepresentation of a material fact.

35. At or about the time that he signed the Employment Agreement, Stockholders' Agreement, and Stock Purchase Agreement in June 1997, Dr. Peyton made further misrepresentations of other material facts, stating to Dr. Lower that he intended to remain with Countryside for the long term and representing to Dr. Lower that he would comply with his obligations under the new agreements.

36. Upon signing the Employment Agreement, Stockholders' Agreement, and Stock Purchase Agreement, Dr. Peyton stated to Dr. Lower "we are a good team" and that Countryside would be "the orthopaedic group in Loudoun." At or about the same time, Dr. Peyton agreed that he and Dr. Lower would officially "toast" their partnership upon Dr. Lower's return from vacation.

37. The foregoing representations, including the signing of the agreements, were false and constituted actionable misrepresentations, since, at the time, Dr. Peyton did not actually intend to remain with Countryside and his primary goal in signing the agreements was to avoid the application of the restrictive covenant contained in paragraph 13 of his original Employment Agreement, which provision was not contained in the

Employment Agreement signed in June 1997, and to obtain other modifications of the terms of his employment with Countryside.

38. In or about March 1997, Dr. Lower wrote Dr. Peyton a lengthy letter indicating Dr. Lower's concerns with respect to the then ongoing negotiations concerning the agreements. Dr. Lower and Dr. Peyton had a lengthy discussion concerning the letter, during which Dr. Peyton stated that he valued being associated with Dr. Lower due to his reputation in the community. These comments were designed to dispel Dr. Lower's reservations about the agreements.

39. Dr. Peyton participated in meetings and preparations for the relocation of Countryside's offices in the summer of 1997, again implying thereby that he intended to remain with Countryside for the long term.

40. Prior to signing the agreements, Dr. Peyton also participated in further extensive negotiations and meetings concerning these agreements, thereby further falsely indicating his intention to enter into a long term arrangement as a shareholder of Countryside, with resultant benefits and perquisites of employment not afforded him previously.

41. Dr. Peyton did not disclose to Dr. Lower or Countryside the fact that, as of June 1997, Dr. Peyton did not actually intend to remain with Countryside and that his primary goal in signing the agreements was to avoid the application of the

restrictive covenant contained in paragraph 13 of his original Employment Agreement. This omission constituted an actionable failure to disclose and/or concealment of a material fact.

42. The foregoing misrepresentations and omissions were made intentionally and knowingly. The misrepresentations made by Peyton were done with knowledge of their falsity. In the alternative, to the extent that the foregoing misrepresentations and omissions were not intentional, Peyton is subject to liability for constructive fraud in making these misrepresentations and omissions.

43. The foregoing misrepresentations and omissions were material, since, based on those misrepresentations and omissions, Countryside and Dr. Lower, on their own part, entered into the Employment Agreement, Stockholders' Agreement, and Stock Purchase Agreement in June 1997.

44. The foregoing misrepresentations and omissions were intended to induce reliance on the part of Dr. Lower and Countryside.

45. The foregoing misrepresentations and omissions were intended to induce Dr. Lower and Countryside to sign the Employment Agreement, Stockholders' Agreement, and Stock Purchase Agreement in June 1997 and to perform their obligations under these agreements thereafter. The foregoing misrepresentations and omissions were thus intended to induce

Countryside and Dr. Lower to take actions that they would not otherwise have taken.

46. The foregoing misrepresentations and omissions did induce reliance on the part of Dr. Lower and Countryside, in that Dr. Lower and Countryside signed the Employment Agreement, Stockholders' Agreement, and Stock Purchase Agreement in June 1997 and performed their obligations under these agreements thereafter. Therefore, as a direct result of the foregoing misrepresentations and omissions, Countryside and Dr. Lower took actions that they would not otherwise have taken.

47. The reliance on the part of Countryside and Dr. Lower upon the foregoing misrepresentations and omissions was reasonable and/or justifiable under the circumstances.

48. Countryside and Dr. Lower sustained damages as a result of their reliance upon the foregoing misrepresentations and omissions.

WHEREFORE, Countryside Orthopaedics, P.C. and Raymond Lower, D.O. respectfully pray that this Court:

a. Adjudicate, decree, and declare that the Employment Agreement, Stockholders' Agreement, and Stock Purchase Agreement signed in June 1997 are voided based on Peyton's fraud and fraudulent inducement;

b. Adjudicate, decree, and declare that the Employment Agreement dated April 24, 1995, Exhibit "A" hereto, is restored to full effect;

c. Adjudicate, decree, and declare that the Employment Agreement dated April 24, 1995 governed the relationship of the parties herein for the entire year of 1997, as well as any remaining obligations between the parties which may exist after December 31, 1997;

d. Adjudicate, decree, and declare that the Restrictive Covenant contained in Paragraph 13 of the Employment Agreement dated April 24, 1995 be reinstated as of the date of entry of judgment, and that the Restrictive Covenant be enforced and applied for the twenty-four month period following the date of entry of judgment;

e. Award damages to Countryside and Dr. Lower and against Peyton for damages which were the direct and proximate result of Peyton's fraud and fraudulent inducement in an amount to be proven at trial, but approximately \$150,000.00;

f. Award Countryside and Dr. Lower their reasonable attorneys' fees and costs incurred in this lawsuit;

g. Award punitive damages in favor of Countryside and Dr. Lower in the amount of \$50,000.00;

h. Award Countryside and Dr. Lower prejudgment and postjudgment interest; and

i. Award such other and further relief as this Court deems proper.

COUNT II  
(Declaratory Judgment)

49. Paragraphs 1-48, inclusive, are incorporated herein as if fully set forth.

50. Due to Peyton's actions in this lawsuit, there is an actual controversy between the parties as to the repurchase of stock from Peyton by Countryside.

51. As a result of the fraud and/or fraudulent inducement of Peyton, these defendants are entitled to an order declaring that the Stockholders' Agreement is void. In connection therewith, these defendants remain willing to repay to Peyton sums he paid to the defendants under the Stockholder's Agreement.

52. In addition and/or in the alternative, pursuant to the terms of the Stockholders' Agreement, Countryside and Dr. Lower are entitled to an Order directing that Countryside has exercised its right to repurchase the stock, that Peyton is no longer a shareholder in Countryside (as of December 31, 1997), and that Countryside has agreed to pay the repurchase price provided by Section III(C) of the Stockholders' Agreement, under the terms provided in that Section of the Stockholders' Agreement.

53. Such order would terminate the insecurity and uncertainty surrounding the rights of the parties on these matters.

WHEREFORE, Countryside Orthopaedics, P.C. and Raymond Lower, D.O. respectfully pray that this Court:

- a. Adjudicate and declare the rights of the parties pursuant to the Stockholders' Agreement;
- b. Adjudicate and declare that the Stockholders' Agreement and Stock Purchase Agreement signed in June 1997 are voided based on Peyton's fraud and fraudulent inducement;
- c. Adjudicate and declare, in the alternative, that Countryside has effectively exercised its right of repurchase on the terms provided by the Stockholders' Agreement;
- d. Award Countryside and Dr. Lower their reasonable attorneys' fees and costs incurred in this lawsuit; and
- e. Award such other and further relief as this Court deems proper.

COUNT III  
(Breach of Fiduciary Duty)

54. Paragraphs 1-53, inclusive, are incorporated herein as if fully set forth.

55. In the event that the agreements signed in June 1997 were not voided, as a shareholder of Countryside, between January 1, 1997 and December 31, 1997, Peyton owed Countryside and Dr.



Lower (the other shareholder of Countryside) a fiduciary duty to act in good faith and in the best interests of Countryside and Dr. Lower.

56. In the event that the agreements signed in June 1997 were voided, as an employee of Countryside, Peyton owed Countryside and Dr. Lower a fiduciary duty to act in good faith and in the best interests of Countryside and Dr. Lower.

57. Peyton breached the fiduciary duty owed by him to Countryside and Dr. Lower by, inter alia:

- a. soliciting employees of Countryside to leave their employ and join Peyton in his new practice;
- b. encouraging employees who did decide to leave Countryside not to give advance notice of their intentions to Countryside, and/or to give Countryside limited advance notice;
- c. postponing surgery and/or other medical treatment for patients until after December 31, 1997, so as to ensure that his new practice, rather than Countryside, would receive payment for these services;
- d. soliciting patients to receive their medical care and treatment with him in his new practice;
- e. communicating with patients regarding his plans to leave Countryside by means other than the joint letter authorized by Paragraph 12 of the Employment Agreement;

f. charging legal fees and other personal expenses to his corporate American Express card; and

g. photocopying portions of Countryside patient charts;

h. disclosing to third parties confidential and proprietary information of Countryside in connection with his search for alternative employment prior to departing from Countryside;

i. failing and refusing, without justification, to fill out certain forms so as to permit Countryside to collect approximately \$38,000.00 in charges for patient care rendered by Peyton on behalf of Countryside in 1997.

58. Countryside and Dr. Lower have sustained damages as a direct and proximate result of Peyton's breach of fiduciary duty in an amount to be proven at trial, plus the reasonable attorneys' fees and costs incurred by Countryside and Dr. Lower in this lawsuit.

WHEREFORE, Countryside Orthopaedics, P.C. and Raymond Lower, D.O. respectfully pray that this Court:

a. Award damages to Countryside and Dr. Lower and against Peyton for damages which were the direct and proximate result of Peyton's breach of fiduciary duty in an amount to be proven at trial, but approximately \$100,000.00;

b. Award Countryside and Dr. Lower their reasonable attorneys' fees and costs incurred in this lawsuit;

c. Award Countryside and Dr. Lower prejudgment and postjudgment interest; and

d. Award such other and further relief as this Court deems proper.

COUNT IV  
(Breach of Contract)

59. Paragraphs 1-58, inclusive, are incorporated herein as if fully set forth.

60. If not invalidated by this Court pursuant to Count I of this First Amended Cross-Bill, under the Employment Agreement, Stockholders' Agreement, and Stock Purchase Agreement, Exhibits "B," "C," and "D" hereto, Peyton owed various contractual obligations to Countryside and Dr. Lower.

61. In the alternative, Peyton owed various contractual obligations to Countryside and Dr. Lower under the original Employment Agreement, Exhibit "A" hereto.

62. Peyton breached those contractual obligations by, inter alia:

a. contacting patients regarding his impending departure from Countryside, as prohibited by the original Employment Agreement, or, in the alternative, by means other

than the joint letter permitted by Paragraph 12 of the Employment Agreement;

b. failure to devote full time and effort to the performance of his obligations to Countryside as required by paragraph 7 of the original Employment Agreement, or, in the alternative, Paragraph 6 of the Employment Agreement;

c. soliciting employees of Countryside to leave their employ and join Peyton in his new practice;

d. encouraging employees who did decide to leave Countryside not to give advance notice of their intentions to Countryside, and/or to give Countryside limited advance notice;

e. postponing surgery and/or other medical treatment for patients until after December 31, 1997, so as to ensure that his new practice, rather than Countryside, would receive payment for these services;

f. soliciting patients to receive their medical care and treatment with him in his new practice;

g. communicating with patients regarding his plans to leave Countryside or, in the alternative, by means other than the joint letter;

h. charging legal fees and other personal expenses to his corporate American Express card;

i. photocopying portions of Countryside patient charts;

j. refusing to acknowledge Countryside's right of repurchase under the Stockholders' Agreement and Countryside's exercise of same;

k. failing and refusing to return all property of Countryside upon termination of his employment;

l. disclosing to third parties confidential and proprietary information of Countryside in connection with his search for alternative employment prior to departing from Countryside;

m. failing and refusing, without justification, to fill out certain forms so as to permit Countryside to collect approximately \$38,000.00 in charges for patient care rendered by Peyton on behalf of Countryside in 1997.

63. The foregoing breaches were material.

64. In addition, even in the event that the Employment Agreement is not voided pursuant to Count I of this First Amended Cross-Bill, pursuant to Paragraph 3(e)(4) of the Employment Agreement, "full, timely, and continuing compliance in all material respects with every material term with this Agreement and of every other written agreement between" Peyton and Countryside "is a condition precedent to" Countryside's obligation to pay Severance Pay to Peyton under Paragraph 3(e). Thus, if the Employment Agreement is not invalidated, by virtue of the material breaches by Peyton of his contractual

obligations to Countryside, Countryside is relieved of any obligation to pay Severance Pay to Peyton.

65. Countryside and Dr. Lower have sustained damages as a direct and proximate result of Peyton's breach of his contractual obligations in an amount to be proven at trial, plus the reasonable attorneys' fees and costs incurred by Countryside and Dr. Lower in this lawsuit.

WHEREFORE, Countryside Orthopaedics, P.C. and Raymond Lower, D.O. respectfully pray that this Court:

- a. Enter judgment in favor of Countryside and Dr. Lower for Peyton's breach of his contractual obligations;
- b. Adjudicate and declare that Peyton is not entitled to severance pay under the original Employment Agreement;
- c. Adjudicate and declare, in the alternative, that, as a result of Peyton's breach of his contractual obligations, Countryside is relieved of any obligation to pay Peyton "Severance Pay" under the Employment Agreement effective January 1, 1997 between Peyton and Countryside;
- d. Award damages to Countryside and Dr. Lower and against Peyton for damages which were the direct and proximate result of Peyton's breach of his contractual obligations in an amount to be proven at trial, but approximately \$150,000.00;
- e. Award Countryside and Dr. Lower their reasonable attorneys' fees and costs incurred in this lawsuit;


f. Award Countryside and Dr. Lower prejudgment and postjudgment interest; and

g. Award such other and further relief as this Court deems proper.

Respectfully submitted,

COUNTRYSIDE ORTHOPAEDICS, P.C.  
and RAYMOND LOWER, D.O.  
By Counsel

JACKSON & CAMPBELL, P.C.

  
\_\_\_\_\_  
Vernon W. Johnson/ III (#30354)  
Jackson & Campbell, P.C.  
1120 Twentieth Street, N.W.  
South Tower  
Washington, D.C. 20036-3437  
(202) 457-1613

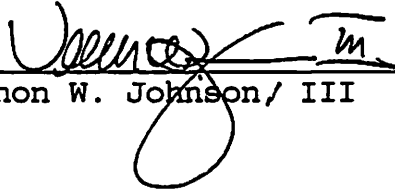
Counsel for Defendants  
Countryside Orthopaedics, P.C.  
and Raymond Lower, D.O.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing First Amended Cross-Bill of Complaint was hand-delivered this 21st day of August, 1998, to:

George W. Campbell, Jr., Esq.  
George W. Campbell, Jr. & Associates  
1401 Wilson Boulevard  
Suite 1007  
Arlington, Virginia 22209

Counsel for Plaintiff

  
\_\_\_\_\_  
Vernon W. Johnson, III



## EMPLOYMENT AGREEMENT

THIS AGREEMENT made effective as of the 1st day of January, 1997, by and between Countryside Orthopaedics, P.C., a Virginia professional corporation (the "Corporation"), and Raymond F. Lower, D.O., F.A.A.O.S. (the "Physician").

WHEREAS, the Corporation renders professional services through its employees who are duly licensed to practice medicine in the Commonwealth of Virginia; and

WHEREAS, the Corporation desires to employ the Physician upon the terms and conditions hereinafter set forth, and the Physician desires to accept such employment.

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

1. Employment. The Corporation employs the Physician, and the Physician accepts employment with the Corporation, to render medical, surgical and other related services for the Corporation as determined by the Board of Directors of the Corporation in the manner and to the extent permitted by the applicable Virginia Professional Corporation statute and the applicable canons of professional ethics as amended from time to time.

2. Scope of Duties. The Physician's duties shall include, but not be limited to, the following:

(a) Keeping and maintaining (or causing to be kept and maintained) appropriate records relating to all professional services rendered by him under this Agreement;

(b) Preparing and attending to, in connection with such services, all reports, claims and correspondence necessary or appropriate in the circumstances, all of which records, reports, claims, and correspondence shall belong to the Corporation;

(c) Promotion of the practice by entertainment or otherwise, as and to the extent permitted by law and the applicable canons of professional ethics, and by the standards of conduct of the professional practice of the Corporation;

(d) Attendance at professional conventions and postgraduate seminars and participation in professional societies so far as is reasonable and practical; and

(e) Performance of all things reasonably desirable to maintain and improve his professional skills.

The Physician's other duties shall be such as the Board of Directors may from time to time reasonably direct, including (a) "on duty" and "on call" assignments at night and on weekends and holidays, and (b) normal duties as an officer of the Corporation.

3. Compensation. As his entire compensation for all services rendered to the Corporation during the term of this Agreement, in whatever capacity rendered, the Physician shall receive:

(a) Base Entitlement. An Entitlement (salary, retirement plan contributions and Additional Benefits, as defined below) which will be the excess of his "Collections" (as defined below) over (i) his proportionate share (initially 50 percent) of the Corporation's "Fixed Expenses", plus (ii) 100 percent of his "Individual Expenses", plus (iii) 100 percent of his "Variable Expenses". "Fixed Expenses", "Individual Expenses" and "Variable Expenses" shall be defined by mutual agreement of the Corporation and the Physician and applied consistently from year to year. The Physician shall receive a draw against the salary portion of his Entitlement which shall be payable in equal payments every month; provided, however, that no such salary shall be paid in respect of any month or portion thereof

subsequent to the termination of this Agreement. On an annual basis the draw will be reconciled with the Physician's actual Entitlement for the preceding twelve months. In the event that Physician receives an Entitlement in any fiscal year which is later determined by the Corporation's accountant to be more than the amount to which the Physician was actually entitled (the "Excess Amount"), the Physician's Entitlement in the first subsequent fiscal year shall be reduced by the Excess Amount.

(b) Definitions. The term "Collections" shall be defined in the same manner as the Corporation normally defines the term, namely cash receipts, net of refunds, actually received by the Corporation for the Physician's services.

(c) Bonus. A bonus, payable prior to the close of the Corporation's taxable year in question, which shall be determined in the sole discretion of the Board of Directors of the Corporation. The purpose of the bonus will be to make the total compensation paid annually to the Physician equal to the reasonable value of his services to the Corporation.

(d) Additional Benefits. The right to receive or participate in any additional "fringe" benefits, including, but not limited to, insurance programs and pension or profit sharing plans, which may from time to time be made available to physicians employed by the Corporation. Any Additional Benefits shall be calculated as part of Physician's Base Entitlement.

(e) Severance Pay. In the event that the Physician dies or otherwise ceases his employment under this Agreement for any reason (including, without limitation, disability, retirement, or voluntary or involuntary termination) the Corporation shall pay the Physician (or his estate) severance pay ("Severance Pay") as follows:

(1) Amount. Severance Pay shall be an amount equal to eighty percent (80%) of his "Collections" less the Physician's Individual Expenses remaining unpaid at the time the cessation of employment occurred reduced by any Excess Amount remaining unrepaid.

(2) Payment. The Severance Pay determined in accordance with Paragraph 3(e)(1) shall be paid no later than ninety (90) days after the cessation of employment occurred, and then every ninety (90) days thereafter. The Corporation's obligation to pay Severance Pay shall completely terminate on the second anniversary of the Physician's cessation of employment.

(3) Interest and Offset. No interest shall accrue on any amount due pursuant to this subparagraph. The Corporation may offset payments due hereunder by amounts owed by the Physician to the Corporation.

(4) Physician's Compliance. The Physician's (or Physician's estate's) full, timely, and continuing compliance in all material respects with every material term with this Agreement and of every other written agreement between the Physician and the Corporation in force after the effective date of termination is a condition precedent to the Corporation's obligation to pay Physician Severance Pay in accordance with this paragraph.

4. Corporate Facilities. The Corporation shall provide and maintain (or cause to be provided and maintained) if appropriate a private, professional office and such facilities, equipment, and supplies as it deems necessary for the Physician's performance of his professional duties under this Agreement. Such facilities shall also include the services of receptionists, x-ray technician, other paraprofessional help as needed, such as secretaries,

bookkeepers, etc.

5. Physician's Responsibilities. The Physician shall have, maintain, and use, where appropriate, an automobile, home telephone and other facilities and equipment (such as reference books, medical equipment and supplies, and space at home for attending to patients) reasonably needed in connection with his employment under this Agreement, all of which shall be at the Physician's expense except as he may from time to time be reimbursed by the Corporation. In the event the automobile is owned by the Physician, he shall also at his expense carry automobile public liability insurance protecting himself and the Corporation against claims arising out of the use of the automobile (or any other motor vehicle) in the course of his employment by the Corporation and he shall keep on deposit with the Secretary of the Corporation a certificate or other evidence that such insurance is in force. Such insurance shall be not less than such amounts as the Board of Directors may from time to time reasonably direct and in any event shall provide coverage of at least \$25,000.00 for property damage, \$100,000.00 for the injury or death of one person, and \$300,000.00 for injuries or deaths arising from one accident.

6. Exclusive Service. The Physician shall devote his full time and best efforts to the performance of his employment under this Agreement. During the term of this Agreement, the Physician shall not, at any time or place, either directly or indirectly, engage in the practice of medicine or surgery to any extent whatsoever, except pursuant to this Agreement. All fees or other income attributable to his professional services during the term of this Agreement shall belong to the Corporation. All volunteer and extra work outside the Physician's scope of employment during the term of this Agreement, if not

expressly authorized by the Board of Directors, is hereby forbidden, but such permission shall not be unreasonably withheld.

7. Professional Standards. The Physician shall perform his duties under the Agreement in accordance with such standards of professional ethics and practice as may from time to time be applicable during the term of his employment hereunder.

8. Vacations. At such reasonable times as the Board of Directors shall in its discretion permit, the Physician shall be entitled, without loss of pay, to absent himself voluntarily from the performance of his employment under this Agreement for thirty (30) days each year. All such voluntary absences shall count as vacation time.

9. Post-Graduate Work. During periods of vacation and leaves of absence, the Physician is encouraged to participate in post-graduate work and other activities conducive to maintaining high professional standards.

10. Illness; Salary Continuation. If the Physician shall be involuntarily absent from the performance of his employment under this Agreement (or unable to perform on a full-time basis) due to illness or physical incapacity, he shall nevertheless continue to receive his compensation under Paragraph 3(a) until his employment permanently ceases.

11. Termination. This Agreement and the Physician's employment hereunder shall be effective upon full execution of this Agreement and shall continue indefinitely, but may be terminated at any time by mutual agreement in writing or by either party giving not less than 90 days' written notice to the other party specifying the date of termination. Notwithstanding the termination of this Agreement, the parties shall be required to carry out any provisions hereof which contemplate performance by them subsequent to such

termination; and such termination shall not affect any liability or other obligation which shall have accrued prior to such termination, including, but not limited to, any liability or loss or damage on account of default. This Agreement shall be deemed to be terminated and the employment relationship between the Corporation and the Physician upon the occurrence of any of the following:

- (a) Upon death during employment of the Physician.
- (b) The Physician fails or refuses to faithfully and diligently perform the usual customary duties of his employment or such as shall be approved by the Board of Directors and adhere to the provisions of this Agreement.
- (c) The Physician fails or refuses to comply with the reasonable policies, standards and regulations of the Employer which from time to time may be established.
- (d) The Physician conducts himself in an unprofessional, unethical, immoral or fraudulent manner.
- (e) The Physician is no longer qualified to practice medicine in the Commonwealth of Virginia.

12. Competition. Upon the termination of the Physician's employment hereunder for any reason whatsoever, the Physician and the Corporation shall send a joint letter to patients who have been treated by the Physician, explaining the patient's rights upon such departure and giving the Physician's new location. Other than by joint letter, the Physician shall not communicate directly with patients of the Corporation. After such termination, he may compete with the Corporation in the practice of medicine and surgery and treat any patients of the Corporation. Should this Agreement be terminated, the records of all

patients seen by the Physician as well as all accounts receivable due the Corporation shall remain the property of the Corporation. Any property of the Corporation must be returned by the Physician no later than the date of termination. It is further agreed in the event of termination of this Employment Agreement that the Physician will pay the Corporation the proportionate share of malpractice (including "tail" coverage), health, and disability insurance premiums for the part of the year not employed if the Corporation is unable to recover from the insurance carrier a pro rated refund. Upon termination, the purchase of any capital stock of the Corporation which may be owned by the Physician shall be governed by provisions with respect thereto in the Bylaws of the Corporation, any Stockholders' Agreement then in effect and by the governing statute.

13. Assignment Prohibited. This Agreement is personal to each of the parties hereto, and neither party may assign nor delegate any of its rights or obligations hereunder without first obtaining the written consent of the other party.

14. Amendments. No amendments or additions to this Agreement shall be binding unless in writing and signed by both parties, except as herein otherwise provided.

15. Governing Law. This Agreement shall be governed in all respects, whether as to validity, construction, capacity, performance or otherwise, by the laws of the Commonwealth of Virginia. The paragraph headings used in this Agreement are included solely for convenience and shall not affect, or be used in connection with, the interpretation of this Agreement.

16. Representation. The parties acknowledge and agree that the Corporation engaged the legal services of Jackson & Campbell, P.C., to render legal advice in connection



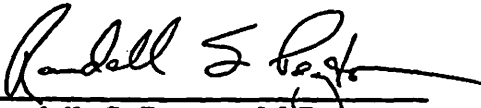
with this Employment Agreement and to draft this Agreement. Physician acknowledges and agrees that he has been given the opportunity to obtain independent legal advice with respect to this Agreement and none of the parties has been entitled to rely upon, or has in fact relied upon the legal or other advice of any other party or any other party's counsel in entering into this Agreement.

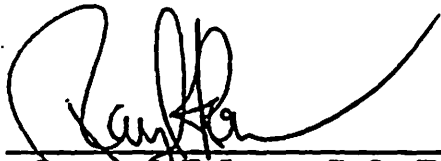
IN WITNESS WHEREOF, the parties have executed this Agreement.

ATTEST:

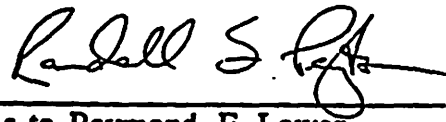
CORPORATION:

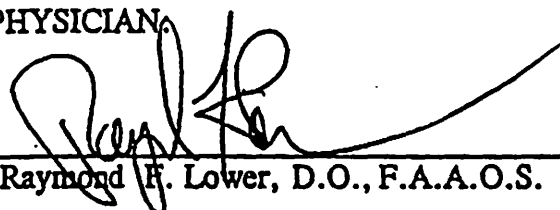
COUNTRYSIDE ORTHOPAEDICS, P.C.

  
Randall S. Peyton, M.D.  
Secretary

By:   
Raymond F. Lower, D.O., F.A.A.O.S.  
President

WITNESS:

  
As to Raymond F. Lower

PHYSICIAN:  
  
Raymond F. Lower, D.O., F.A.A.O.S.

6/27/77

## EMPLOYMENT AGREEMENT

THIS EMPLOYMENT AGREEMENT, made and entered into this 24 day of April, 1995, by and between CountrySide Orthopaedic Associates, P.C., a Virginia Corporation ("EMPLOYER") and Randall Peyton, M.D. ("EMPLOYEE"):

### WITNESSETH:

WHEREAS, the EMPLOYER is engaged in the business of rendering professional services; and

WHEREAS, the EMPLOYER'S business consists of the practice of medicine; and

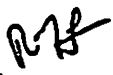
WHEREAS, the EMPLOYEE is not under any contract to perform services for any other employer; and

WHEREAS, the EMPLOYEE is or will be duly licensed and qualified to practice the business of EMPLOYER in all localities served by the EMPLOYER; and

WHEREAS, EMPLOYER's Board of Directors has offered employment to the EMPLOYEE subject to certain terms and conditions hereinafter set forth and the EMPLOYEE has indicated his willingness to accept such employment;

NOW, Therefore, in consideration of the mutual promises and covenants as hereinafter set forth, the parties hereto agree as follows:

1. Employment. The EMPLOYER hereby employs the EMPLOYEE and the EMPLOYEE hereby accepts employment with the EMPLOYER upon the terms and conditions hereinafter set forth.

2. Term. Subject to the provisions for termination as hereinafter provided, the term of this Agreement shall be for the period of two (2) years commencing on August 7, 1995, and thereafter on a year-to-year basis, terminable by either party hereto, upon the giving of written notice to the other party ninety (90) days in advance of the termination date. 

3. Salary. For all services rendered by the EMPLOYEE pursuant to this Agreement, the EMPLOYER shall pay the EMPLOYEE an annual salary. ("Salary"), as defined and set forth in Appendix A of this section, payable biweekly.

4. Bonus. EMPLOYEE shall be entitled to a bonus equal to fifty percent (50%) of net collections in excess of four hundred thousand dollars (\$400,000) per year. Net collections shall be determined based on services rendered by EMPLOYEE each contract

Amended 7 Aug 1995

year (The contract year shall begin on the contract anniversary date and end 365 days later) and include all net collections up to ninety (90) days after the end of each contract year for services rendered during that contract year.

5. Fringe Benefits. EMPLOYER shall provide benefits as defined and set forth in Appendix A.

6. Duties. The EMPLOYEE is engaged to perform professional medical services as an orthopaedic surgeon for and on behalf of the EMPLOYER. The EMPLOYER shall determine the assignment of patients in a fair and equitable manner to the EMPLOYEE and the EMPLOYEE must perform services for patients assigned to him by the EMPLOYER. EMPLOYEE shall be assigned all patients that may need joint replacement surgery unless otherwise requested by patient.

EMPLOYEE shall adhere faithfully to all professional ethics and customs, shall avoid all acts, habits and usage which might injure in any way, directly or indirectly, the professional reputation of EMPLOYER or any other employees of EMPLOYER, and shall follow and abide by all federal, state and municipal ordinances and laws relating to or regulating the practice of medicine.

No person other than the EMPLOYER shall have the right to designate, by name or by description, the EMPLOYEE employed by the EMPLOYER who is to perform the services sought by such patient. All work performed by the EMPLOYEE shall be subject to review by the EMPLOYER.

The EMPLOYEE is engaged to perform professional medical services for and on behalf of the EMPLOYER at EMPLOYER's place of business each week, based upon the normal rotation of the EMPLOYER's professional employees.

The night and weekend call schedule of the EMPLOYEE shall be shared equally with all physician employees of EMPLOYER.

The EMPLOYEE's office and surgical schedule shall be established by the EMPLOYER in consultation with EMPLOYEE.

The EMPLOYEE shall make all reasonable efforts to become board certified in his specialty.

7. Exclusive Service. The EMPLOYEE shall devote his full, entire and undivided professional time and attention to rendering professional services on behalf of the EMPLOYER and shall not, without the prior written consent of the EMPLOYER, during the term of this Agreement, be engaged in the rendering of such services or in any other business activity, whether or not such business activity is pursued for gain, profit or other pecuniary advantage which would interfere with the satisfactory performance of his duties as an employee of the EMPLOYER, but this shall not be construed as preventing the

EMPLOYEE from expending reasonable amounts of time for charitable and professional activities or from investing his assets. The EMPLOYEE further agrees that, during the period of this Agreement, all money earned by the EMPLOYEE from the rendering of professional services (other than the salary herein contemplated) belong to the EMPLOYER as a result of its salary payments to the EMPLOYEE called for by the terms of this Agreement. Any money earned and turned over to EMPLOYER shall be included as "net collections" for purposes of Paragraph 4.

8. Working Facilities. The EMPLOYER, at its own cost, shall furnish the EMPLOYEE with an office, technical and secretarial, personnel, supplies, equipment, hospital fees, medical staff dues and such other facilities and services suitable as determined solely by the EMPLOYER to his position and adequate for the performance of his duties.

9. Expenses. The EMPLOYEE is required as a condition of his employment to provide and/or maintain an automobile for use by EMPLOYEE in connection with any necessary travel in the practice of medicine. EMPLOYEE shall carry automobile liability insurance protecting himself and the EMPLOYER against claims arising out of the use of an automobile in the course of his employment with the EMPLOYER, and he shall keep on deposit with the EMPLOYER a certificate or other evidence that said insurance is in force. Said insurance shall be not less than such amounts as the EMPLOYER may from time to time reasonably direct and in any event, the said insurance shall not be less than \$50,000.00 for property damage, \$500,000.00 for the injury of death of one person, and 1,000,000.00 for injury and death arising from one accident. EMPLOYEE shall be reimbursed in accordance with Appendix A. ~~It said about amounts that employer carries.~~ *OK*

10. Reimbursement for Disallowed Compensation and Expenses. In the event that any salary payment, medical reimbursement, employee fringe benefit, expense allowance payment or the expense incurred by the EMPLOYER for the benefit of the EMPLOYEE shall in whole or in part, upon audit or other examination of the income tax returns of the EMPLOYER, be determined not to be allowable deductions from the gross income of the EMPLOYER and such determination shall be made final by the appropriate state or federal taxing authority or a final judgment of a court of competent jurisdiction, and no appeal shall be taken therefrom, or the applicable period for filing notice of appeal shall have expired, then in such event the EMPLOYEE will repay the EMPLOYER the amount of such disallowed compensations or expenses, or both. This legally enforceable obligation is in accordance with the provisions of Revenue Ruling 69-115 and is for the purpose of entitling such EMPLOYEE to a business expense deduction for the taxable year in which the repayment is made to the EMPLOYER. In this manner, the EMPLOYER shall be protected from having to bear the entire burden of a disallowed expense item.

11. Professional Liability Insurance. The EMPLOYEE shall hold harmless and indemnify the EMPLOYER, its successors and assigns, from and against any and all liabilities, costs, damages, expenses and attorney fees resulting from or attributable to any and all negligent acts and omissions of the EMPLOYEE. At the EMPLOYER's expense, the EMPLOYEE shall obtain and maintain in full force and effect during his employment

under this Employment Agreement, a policy or policies of professional malpractice insurance having an aggregate face amount of not less than \$1,000,000.00/\$3,000,000.00, if such dollar amounts are commercially available and are economically feasible, issued by one or more insurers approved by the EMPLOYER and insuring the EMPLOYER against any and all liabilities, costs, damages, expenses, attorney fees resulting from or attributable to any and all professional error, omissions, negligence and malfeasance of the EMPLOYEE. In the event that EMPLOYEE's employment is terminated for any such reason enunciated in Paragraph 12, or if EMPLOYEE leaves for whatever reason on his own volition, then his malpractice tail is his sole responsibility. If EMPLOYER terminates EMPLOYEE solely for its convenience, then EMPLOYER shall pay for EMPLOYEE's malpractice tail, however, EMPLOYEE shall be responsible for the payment of his malpractice tail for all other terminations.

**12. Involuntary Termination.** This Agreement shall be deemed to be terminated and the employment relationship between the EMPLOYEE and the EMPLOYER shall be deemed to be severed upon the occurrence of any of the following:

- (a) Upon the death of the EMPLOYER during employment.
- (b) The suspension, revocation, or cancellation of the EMPLOYEE's right to practice his profession in the areas served by the EMPLOYER or his loss of his license for whatever reason.
- (c) The imposition of any restrictions or limitations by any governmental authority having jurisdiction over the EMPLOYEE to such an extent that he cannot engage in the professional practice for which he was employed other than required military service.
- (d) The EMPLOYEE fails or refused to faithfully and diligently perform the usual, customary duties of his employment and adhere to the provisions of this Agreement.
- (e) The EMPLOYEE conducts himself in an unprofessional, unethical, immoral, or fraudulent manner, or is found guilty of unprofessional or unethical conduct by any board, institution, organization, or professional society having any privilege or right to pass upon the conduct of the EMPLOYEE or the EMPLOYEE's conduct discredits the EMPLOYER or is detrimental to the reputation, character and standing of the EMPLOYER.
- (f) The EMPLOYEE does not maintain during the course of employment, the necessary staff privileges, permits and credentials to practice medicine in such ambulatory and acute care settings where EMPLOYER has privileges.
- (g) Alcoholism or other substance abuse by EMPLOYEE.
- (h) Chronic illness disability or failing health of EMPLOYEE which affects his ability to practice medicine.

If EMPLOYEE is terminated for the convenience of EMPLOYER, EMPLOYER shall pay EMPLOYEE three months of salary defined in Paragraph 3 as severance.

Upon actual termination of employment in accordance with any of the provisions of this Paragraph 12, the EMPLOYEE shall be entitled to receive such compensation, if any, accrued under the terms of this Agreement, but unpaid as of the date of the actual termination of employment.

### **13. Restrictive Covenant.**

(a) The parties stipulate the EMPLOYER is engaged in the practice of Orthopaedic Surgery (the "Business") in the "Territory" (as defined below).

(b) EMPLOYEE, in the event of termination of employment for any reason whatsoever including but not limited to expiration of the term of employment, except exercising the purchase option in paragraph 18, agrees that, during the twenty-four (24) month period immediately following the termination of employment ("Restricted Period"), EMPLOYEE shall not Compete (defined below) or employ or solicit the employment of any Restricted Employee (defined below).

(c) For all purposes of this Agreement, the terms defined below shall have the respective meaning specified, and the following definitions shall be equally applicable to the singular and plural forms of the terms defined:

i. "Compete" means, directly or indirectly, on EMPLOYEE's own behalf or on behalf of any other Person, other than at the direction of EMPLOYER and on behalf of the EMPLOYER: (A) organizing or owning any interest in a business which engages in the Business in the Territory; (B) engaging in the Business in the Territory; (C) assisting any Person (as a director, officer, employee, agent, consultant, lender, lessor or otherwise) to engage in the Business in the Territory; (D) engaging in the Business (whether as an employee, partner or in any other affiliation including, but not limited to, being employed by a common employer, or being affiliated through a common management arrangement with a Management Services Organization) in the Territory with any EMPLOYEE previously employed by EMPLOYER; or (E) engaging in the Business in the Territory with any EMPLOYER that employs or is otherwise affiliated (including, but not limited to, and affiliation through a common management arrangement with a MSO) with any EMPLOYEE previously employed by EMPLOYER. Notwithstanding the above, EMPLOYEE shall be allowed to continue using all surgical hospitals in the Territory.

ii. "Person" means any entity, including, without limitation, any natural person, company, partnership, corporation, trust, association, organization or governmental unit.

iii. "Restricted Employee" means any person that was an employee or regularly associated with the EMPLOYER at any time during the twelve (12) months immediately preceding the termination of this Agreement.

iv. "Territory" means the ~~5~~ 2 mile radius from any practice location(s) of the EMPLOYER where the EMPLOYEE treated patients in the twelve-month period immediately preceding commencement of the "Restricted Period".

(d) The provisions of this Paragraph 13 shall survive the expiration or termination of this Agreement for any reason.

14. Covenant Not to Disclose Confidential Information. Physician acknowledges and stipulates that: (A) during the term of this Agreement, EMPLOYEE will be placed in a position by the EMPLOYER to become acquainted with various aspects of the Confidential Information (defined below); (B) the use or disclosure of the Confidential Information by EMPLOYEE except as expressly authorized by the EMPLOYER is prohibited and would seriously damage the EMPLOYER; (C) in addition to being given access to the Confidential Information, EMPLOYEE will receive material benefits as a result of the Agreement, including compensation and experience. Therefore, EMPLOYEE agrees as follows:

(a) During the term of this Agreement and thereafter, EMPLOYEE shall not, without the prior written consent of EMPLOYER, directly or indirectly:

i. divulge, furnish or make accessible to any Person or copy, take or use in any manner any of the Confidential Information;

ii. take any action which might reasonably or foreseeable be expected to compromise the confidentiality or proprietary nature of any of the Confidential Information; or

iii. fail to follow the reasonable suggestions made by EMPLOYER from time to time regarding the confidential and proprietary nature of the Confidential Information.

(b) "Confidential Information" means all of the materials, information and ideas of EMPLOYER, including, without limitation: patient names, patient lists, patient records, patient information, operation methods and information, accounting and financial information, marketing and pricing information and materials, internal publications and memoranda, and other matters considered confidential by the EMPLOYER.

(c) In the event this Agreement is terminated, EMPLOYEE shall be entitled at his own expense, to copies of patient records and x-rays for which the patient has made written request for such copies to be given to EMPLOYEE.

(d) The provisions of this Paragraph shall survive the expiration or termination of this Agreement for any reason.

15. Remedies. Remedies shall be available to EMPLOYER in the event of a breach of the provisions of Paragraphs 13 or 14 according to the following provisions:

(a) The parties agree that a breach by EMPLOYEE of any of the provisions of Paragraphs 13 or 14 of this Agreement would cause irreparable damage to the EMPLOYER. Therefore, EMPLOYER shall be entitled to preliminary and permanent injunctions restraining EMPLOYEE from breaching or continuing any breach of any of the provisions of Paragraphs 13 and 14 of this Agreement. The existence of any claim or cause of action on the part of EMPLOYEE against EMPLOYER, whether arising from this Agreement or otherwise, shall not constitute a defense to granting or enforcement of this injunctive relief.

(b) The Restricted Period shall be extended by a period equal to the time period during which EMPLOYEE is in breach of any of the provisions of Paragraph 13.

(c) The remedies available to EMPLOYEE under this Agreement are cumulative. EMPLOYER may, in its sole discretion, elect to pursue all or any of such remedies. Such remedies are in addition to any given by law or equity and may be enforced successively or concurrently.

(d) The provisions of this Paragraph shall survive the expiration or termination of this Agreement for any reason.

16. Acknowledgment of Reasonableness. Physician has carefully read and considered the provisions of this Agreement and agrees that the restrictions set forth herein, particularly those in Paragraphs 13 and 14, are fair and reasonably required for the protection of the EMPLOYER. If any provision of Paragraph 13 relating to the restrictive period, scope of activity restricted and/or the territory described therein shall be declared by a court of competent jurisdiction to exceed the maximum time period, scope of activity restricted or geographical area such court deems reasonable and enforceable under applicable law, the time period, scope of activity restricted and/or area of restriction held reasonable and enforceable by the court shall thereafter be the restrictive period, scope of activity restricted and/or the territory applicable to the restrictive covenant provisions in this Agreement.

17. Additional Understandings. Notwithstanding, any other provisions of the Agreement, EMPLOYER and EMPLOYEE agree that:

(a) Nothing in this Agreement shall contravene professional ethics or the medical judgment of the EMPLOYEE.

(b) This contract is contingent upon EMPLOYEE obtaining, in an expendi-



tious manner either before or after becoming an EMPLOYEE, and continuing his Virginia medical license and hospital privileges to professionally practice medicine at any hospital where the EMPLOYER has privileges. If EMPLOYEE is denied hospital privileges at any such medical institution after becoming an employee, EMPLOYER shall have the option to terminate this Agreement. *Already having the privileges etc. [Signature]*

(c) EMPLOYER shall establish, and modify from time to time, all professional fees for services rendered by Physician. EMPLOYER shall own and control all collections and billings arising pursuant to the rendering of medical services by EMPLOYEE. All fees and compensation received or realized by EMPLOYER as a result of the rendering of services by EMPLOYEE shall belong, be paid and be delivered to EMPLOYER.

(d) EMPLOYEE shall keep full and accurate accounts and records of all professional work done by EMPLOYEE or under Physician's supervision in a timely fashion in accordance with guidelines established by the EMPLOYER. All such accounts and related medical records and patient histories are the exclusive property of EMPLOYER. EMPLOYEE holds such records in trust for EMPLOYER and shall promptly relinquish such records to the EMPLOYER upon demand.

(e) EMPLOYER shall have full and complete authority and responsibility with respect to the administration of the business, the hiring of, or contracting with, physicians and all other personnel for the operations of the EMPLOYER.

(f) If either party is required to enforce any of its rights under this Agreement, the prevailing party shall be entitled to recover from the other party all attorneys' fees, court costs and other expenses incurred by the prevailing party in connection with the enforcement of those rights.

*parties* (g) Both parties acknowledge that the services to be rendered ~~by EMPLOYEE~~ *EMPLOYEE* are unique and personal. Accordingly, EMPLOYEE may not assign ~~any of EMPLOYEE's~~ *either* rights or delegate any of ~~EMPLOYEE's~~ *other parties* duties or obligations under this Agreement. *[Signature]*

#### 18. Purchase Option.

(a) In the event EMPLOYEE has not been terminated under Article 12, and EMPLOYEE has billed charges in excess of \$500,000 during the preceding contract year, EMPLOYEE shall then have the option to purchase fifty percent (50%) of EMPLOYER's stock upon completion of either year one or year two of this employment agreement. EMPLOYEE and EMPLOYER agree in good faith to negotiate and execute a stock purchase agreement acceptable to both parties. EMPLOYEE and EMPLOYER shall also negotiate and execute a Stockholder's Agreement and Employment Agreement, dealing with issues including but not limited to compensation, employee termination, buyout upon death, restrictions on transfer of stock etc.

(b) Upon purchase of said stock EMPLOYEE shall execute all documents making EMPLOYEE a co-guarantor of all the corporation's reasonable loans, leases or other liabilities which EMPLOYER has personally guaranteed.

(c) The purchase price for the stock shall be determined as follows:

i. One-half of the "Book Value" of the EMPLOYER ("Book Value" shall be determined based on the EMPLOYER's most recent month end financial statements determined on tax basis applied consistently with prior periods.) plus:

ii. One hundred thousand dollars (\$100,000) for the intangible value of the EMPLOYER. Goodwill includes medical records, physician network, office systems, trained personnel, etc. that are necessary for a successful practice.

iii. The total of Paragraphs 18 (c) i and 18(c) ii shall not exceed one hundred thousand dollars (\$100,000). Payment shall be made through equal payroll deductions over a four year period.

19. Notices. Any notice required or permitted to be given under this Agreement shall be sufficient if in writing and if sent by registered or certified mail, in the case of the EMPLOYEE to his residence, and in the case of the EMPLOYER, to its principal office.

20. Construction.

(a) This Agreement shall be governed by the laws of the state of Virginia. This waiver by any party hereto of a breach of any provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach by any party. This instrument contains the entire agreement of the parties concerning employment and may not be changed except by written agreement duly executed by the parties hereto. This Agreement shall inure to the benefit of and be binding upon the parties, their successors, heirs and personal representatives. This Agreement shall not be assignable.

(b) Where so applicable words in the masculine shall include the feminine, words in the neuter shall include the masculine and the feminine, and words in the singular shall include the plural.

(c) If any one or more of the provisions of this Agreement is declared void by an authority having legal jurisdiction or is determined to be inconsistent with the primary purpose of this Agreement, such declaration or determination shall not be construed so as to impair the validity of the remaining provisions, it being the intent of the parties that this Agreement is to be executed and is to remain effective as if the void or inconsistent provisions had not been included herein.

(d) In the event any state or federal laws or regulations, now existing or enacted or promulgated after effective date of this Agreement, are interpreted by judicial

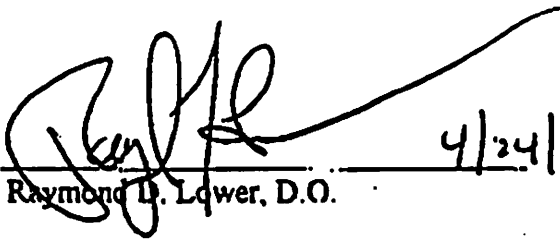
decision, a regulatory agency or legal counsel to a party hereto in such a manner as to indicate that the structure of this Agreement may be in violation of such laws or regulations, EMPLOYER and EMPLOYEE shall amend this Agreement as necessary. To the maximum extent possible, any such amendment shall preserve the underlying economic and financial arrangements between EMPLOYER and EMPLOYEE.

(e) This Agreement sets forth the entire understanding between the parties with respect to subject matter hereof and cannot be amended except by a writing signed by both by both parties. No waiver of any subsequent breach of such term or this Agreement shall be deemed to be a waiver of any subsequent breach of such term or provision of this Agreement. This Agreement supersedes and replaces in their entirety any and all other employment agreements, oral or written, if any, between the parties hereto.

**WITNESS THE FOLLOWING SIGNATURES AND SEALS**

**EMPLOYER: COUNTRYSIDE ORTHOPAEDICS, P.C.**  
a Virginia Corporation

By:

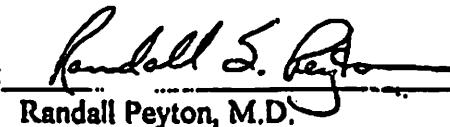


4/24/95

Raymond D. Lower, D.O.

**EMPLOYEE:**

By:



4/25/95

Randall Peyton, M.D.

## **APPENDIX A**

### **SALARIES AND BENEFITS**

**Salary:**                      Year 1 - \$140,000  
                                    Year 2 - \$160,000

**Fringe Benefits:**        A.   Paid Leave  
                                    (i) Two weeks vacation  
                                    (ii) One week continuing education  
                                    (iii) All holidays observed by the corporation  
                                    B.   Paid family health insurance  
                                    C.   Auto allowance - \$500 per month  
                                    D.   Professional dues & education - up to \$3,000 per year  
    with valid receipts or invoices  
                                    E. Cellular telephone - up to \$150 per month with valid  
    receipts or invoices  
                                    F.   Contribution to corporate retirement plan in 2nd year

**Relocation Benefits:**    Up to \$1,500 with valid receipts or invoices

## STOCK PURCHASE AGREEMENT

THIS STOCK PURCHASE AGREEMENT is effective as of the 1st day of January, 1997 by and between Randall S. Peyton, M.D. ("Buyer"), and Raymond F. Lower, D.O., F.A.A.O.S. ("Seller").

### RECITALS:

A. The Seller owns One Hundred (100) shares (no par value) of the common stock of Countryside Orthopaedics, P.C., a Virginia professional corporation (the "Corporation"), being all of the issued and outstanding shares of capital stock of the Corporation (the "Shares").

B. The Seller desires to sell Fifty (50) of the Shares to the Buyer, and the Buyer desires to purchase Fifty (50) of the Shares from the Seller, subject to the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the promises contained herein and for other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Purchase and Sale; Closing.

1.1 Purchase and Sale.

(a) At the closing of the transaction provided for herein (the "Closing") and subject to the terms and conditions hereinafter set forth, the Seller will sell to the Buyer, and the Buyer will purchase from the Seller Fifty (50) of the Shares. At the Closing, the Seller shall surrender to the Corporation his certificate representing ownership of the Shares in transferable form, duly endorsed in blank or accompanied by

a duly executed stock power.

(b) In full consideration of the purchase and sale of Fifty (50) of the Shares, the Buyer shall pay to the Seller Ninety-Four Thousand Two Hundred Fifty-Eight Dollars (\$94,258) (the "Purchase Price").

1.2 Payment of the Purchase Price. The Purchase Price shall be paid unconditionally, with Buyer having no right of set-off against the Seller, in forty-eight (48) equal monthly payments beginning January 1, 1997. The Buyer hereby irrevocably authorizes the Corporation to have the required monthly payment of the Purchase Price withheld from his salary and paid directly to the Seller. The Buyer hereby grants the Seller a security interest in the Fifty (50) Shares sold by the Seller hereunder as security for payment of the Purchase Price and further agrees that the Seller can retain possession of the Fifty (50) Shares until the Purchase Price is paid in full.

1.3 Closing.

The Closing shall take place upon the execution of this Agreement ("the Closing Date") at the Seller's office, or at such other place as shall be mutually agreed to by the parties. To the extent that the Closing Date is after January 1, 1997, the Buyer shall immediately bring the monthly payments of the Purchase Price current as of the Closing Date.

2. Representations and Warranties of Seller.

The Seller hereby represents and warrants to the Buyer as follows:

2.1 Title to the Shares.

(a) The Seller has and will transfer to the Buyer at the Closing, good,

valid and marketable title to Fifty (50) of the Shares he has sold hereunder, free and clear of all claims, liens, encumbrances, charges and options whatsoever (but subject to the terms a Stockholders' Agreement, as amended from time to time, to be executed as a condition of Closing).

(b) The execution, delivery and performance of this Agreement will not conflict with or result in a breach or violation of any of the terms, conditions or provisions of any agreement, indenture, mortgage or other instrument or restriction of any kind to which the Seller is bound.

## **2.2 Brokers.**

All negotiations on behalf of the Seller relative to this Agreement and the transactions contemplated hereby have been carried on directly by him without the intervention of any broker, finder, investment banker or other third party.

## **3. Representations and Warranties of Buyer.**

### **3.1 Professional Status of Buyer.**

The Buyer represents and warrants that he is licensed to practice medicine in the Commonwealth of Virginia.

### **3.2 Brokers.**

All negotiations on behalf of the Buyer relative to this Agreement and the transactions contemplated hereby have been carried on directly by him without the intervention of any broker, finder, investment banker or other third party.

## **4. Obligations of Seller at Closing.**

At the Closing, the Seller shall surrender his stock certificate to the Corporation

duly endorsed or with a duly executed stock power and the Corporation shall issue to the Buyer a stock certificate representing Fifty (50) of the Shares of the Corporation stock.

5. Obligations of Buyer at Closing.

At the Closing, the Buyer shall pay to the Seller such portion of the Purchase Price as is required to bring his monthly payments current as of the Closing Date as provided in Section 1.3 hereof.

6. Amendments and Waivers.

6.1 Amendments, Modifications. This Agreement may be amended, modified, superseded or supplemented only by an instrument in writing executed and delivered on behalf of each of the parties hereto.

6.2 Waivers. The representations, warranties, covenants or conditions set forth in this Agreement may be waived only by a written instrument executed by the party so waiving.

7. Survival of Representations and Warranties.

All representations, warranties and covenants of the parties hereto contained in this Agreement or made pursuant hereto shall survive the Closing Date and remain in full force and effect, regardless of any investigation made by or on behalf of any of the parties hereto for as long a period as is permitted.

8. Representation.

The parties hereto agree that Jackson & Campbell, P.C. represented the Seller in this transaction and in the preparation of this Agreement.



9. Notices.

All notices or other communications required or permitted under this Agreement shall be in writing and shall be deemed to have been duly given, if delivered personally, upon receipt or upon refusal of receipt or, if mailed, when mailed by registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

If to Buyer:

Randall S. Peyton, M.D.  
46464 Montgomery Place  
Sterling, VA 20165

If to Seller:

Raymond F. Lower, D.O., F.A.A.O.S.  
RR 1 P.O. Box 897  
Waterford, VA 22197

10. Entire Agreement.

This Agreement sets forth the entire agreement and understanding of the parties hereto in respect of the transaction contemplated hereby, and supersedes all prior agreements, arrangements and understandings relating to the subject matter hereof.

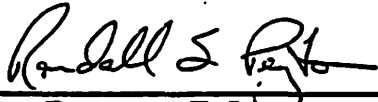
11. Applicable Law.

This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia.

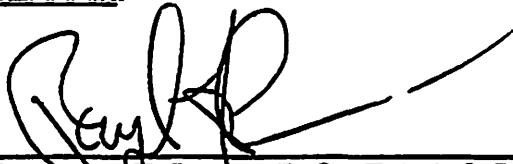
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IN WITNESS WHEREOF, each party hereto has caused this Agreement to be  
duly executed as of the day first above written.

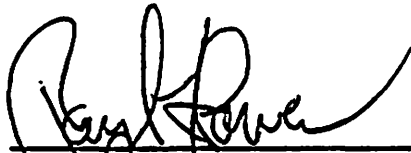
Witness:

  
As to Raymond F. Lower

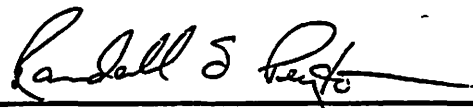
SELLER:

  
Raymond F. Lower, D.O., F.A.A.O.S.

Witness:

  
As to Randall S. Peyton

BUYER:

  
Randall S. Peyton, M.D.

6/27/97

## STOCKHOLDERS' AGREEMENT

STOCKHOLDERS' AGREEMENT made effective as of the 1st day of January, 1997, by and among (i) Raymond F. Lower, D.O., F.A.A.O.S. ("Lower"); (ii) Randall S. Peyton, M.D. ("Peyton"); and (iii) Countryside Orthopaedics, P.C., a Virginia professional corporation (the "Corporation") (the above parties collectively the "Parties").

### RECITALS:

- A. The Corporation is duly organized, validly existing, and in good standing under the laws of the Commonwealth of Virginia.
- B. The Corporation has authorized capital stock consisting of Five Thousand (5000) shares of common stock (the "Stock") of no par value, of which One Hundred (100) shares are now issued and outstanding.
- C. Lower and Peyton (collectively the "Stockholders") own all of the outstanding Stock.
- D. The Parties believe their best interests and the best interests of the Corporation are to provide for the ultimate ownership of the Stock, restrict its future transfer, and to regulate certain Corporation actions. The Parties intend that this Stockholders' Agreement govern these matters.

NOW, THEREFORE, in consideration of the mutual promises and covenants, as hereinafter set forth, and of other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

## I. CORPORATION GOVERNANCE

A. Routine Decisions. The President of the Corporation shall conduct the day-to-day operations of the Corporation without the necessity for Board of Directors or Stockholders approval of his decisions.

B. Election of Directors. Each Stockholder shall nominate one (1) member of the Board of Directors at each and every annual election of Directors. Each Stockholder hereby agrees to vote all shares of Stock owned by him for such nominees proposed by the other Stockholders at each and every election of Directors.

C. Governance Generally. The Corporation's Board of Directors shall manage the business of the Corporation in accordance with Virginia law and the By-Laws of the Corporation.

D. Stockholders. The Stockholders shall approve all actions required to be approved by the Stockholders in accordance with the Articles of Incorporation and the By-Laws of the Corporation.

E. Decisions Requiring Unanimity of Stockholders. The Stockholders must unanimously approve all of the following actions by the Corporation:

1. Incur any debt or issue any note in an aggregate principal amount exceeding FIVE THOUSAND DOLLARS (\$5,000) in a single transaction.
2. Sell, lease, exchange, mortgage, or otherwise dispose of, or contract to sell, lease, exchange, mortgage, or otherwise dispose of all, or substantially all, of the assets of the Corporation.
3. Dissolve the Corporation and liquidate the business.

4. Undertake capital expenditures in a single transaction that exceed, in the aggregate, FIVE THOUSAND DOLLARS (\$ 5,000).

5. Change the Corporation's fiscal year or method of accounting.

6. Engage in any different business or change the nature of the business that the Corporation conducts as of the date of this Stockholders' Agreement.

7. Issue, or contract to issue, unissued Stock.

8. Repurchase, redeem or acquire, or contract to repurchase, redeem, or acquire, directly or indirectly, any outstanding shares of Stock, recapitalize the Corporation, or merge the Corporation into another entity.

F. Resignation of Office or Directorship of Corporation. If a Stockholder sells or otherwise transfers all of his Stock pursuant to the provisions of this Stockholders' Agreement, such selling or transferring Stockholder must, and hereby agrees, to resign each office and directorship of the Corporation that he holds at the time of such sale or transfer, and to relinquish any other corporate appointment (e.g., trustee of the Corporation's pension or profit sharing plans).

## II. RESTRICTIONS ON TRANSFER OF STOCK

### A. Intervivos Conveyance Other Than By Sale.

1. Except as provided herein, no Stockholder may assign, transfer, or in any other manner, make any intervivos disposition of, directly or indirectly (hereafter "Convey"), any Stock now owned or hereafter acquired by him, without first obtaining the prior written consent of the other Stockholders. Except as otherwise provided herein, no Stockholder may pledge, mortgage, hypothecate, grant a security interest in or otherwise

encumber, directly or indirectly, whether voluntarily or involuntarily (hereafter "Encumber"), any Stock now owned or hereafter acquired by him, without first obtaining the prior written consent of the other Stockholders.

2. In the event that a Stockholder obtains the prior written consent required by Paragraph IIA1 above, and thereafter Encumbers any Stock now owned or hereafter acquired by him, the Stock is Encumbered subject to the following condition: If such Stockholder should default in paying or otherwise satisfying the note or other obligation secured by the aforesaid Encumbrance, then all the Stockholders in proportion to their respective ownership of the Stock, or if all Stockholders fail to act any Stockholder, shall have the right and power, but shall not be obligated, to cure such default (and to receive the Encumbered Stock as consideration therefor) in order to acquire title to such Stock and thereby prevent the so-secured creditor or creditors from taking title, either legal or equitable, to such shares of Stock.

B. Conveyance by Sale. No Stockholder may, during his lifetime, sell any or all of his Stock without first complying with the provisions of this Paragraph IIB.

1. If a Stockholder (hereafter "Recipient") receives a bona fide offer for the purchase of all (but not less than all) of the Stock then owned by him for consideration payable in cash, promissory note, or both (the "Offer"), which he intends to accept, the Recipient shall furnish written notice thereof in accordance with Paragraph VIIA (the "Notice") to each of the other Stockholders and to the Corporation of his intent to accept the Offer. The Notice shall include a true, correct, and complete copy of the Offer and the name and address of the proposed purchaser. The Recipient's

mailing of the Notice constitutes the Recipient's representation and warranty to the other Stockholders that the Offer is bona fide in all respects.

2. For a period of ten (10) days from the mailing date of the Notice, the Corporation shall decide whether to exercise the option to purchase all of the Recipient's Stock, and if such decision to exercise is made, the Corporation shall have sixty (60) days from the mailing of the Notice to purchase all (but not less than all) of the Recipient's Stock upon the same terms and conditions as those in the Offer. If the Corporation declines the option to purchase all of the Recipient's Stock or fails to decide within ten (10) days, then the other Stockholders collectively shall have the option to purchase, within sixty (60) days from the mailing of the Notice, in proportion to their respective ownership of Stock, all (but not less than all) of the Recipient's Stock upon the same terms and conditions as those in the Offer. The Corporation or the other Stockholders, as the case may be, shall exercise this option by giving written notice thereof to the Recipient.

3. If, after the sixty (60) day period, the Recipient has not received the Corporation's or the other Stockholders' written notice that the Corporation or Stockholders, as the case may be, have exercised their option to purchase all of the Recipient's Stock, then the Recipient may accept the offer and sell his Stock to the prospective purchaser upon the terms and conditions in the Offer; provided, however, (a) that the prospective purchaser signs this Stockholders' Agreement as a condition precedent to closing the sale; and (b) that the sale of the Stock to the prospective purchaser shall be closed within thirty (30) days after the last day of the other

Stockholders' time period in which to exercise their option to buy the Recipient's Stock. In the event that the sale does not close within this thirty (30) day period, the Offer shall be deemed abandoned. Every subsequent offer made by a prospective purchaser is subject to the provisions of this Paragraph IIB.

4. For the purposes of this Paragraph IIB, a "bona fide offer" means a written offer to purchase Stock which identifies the name and address of a financially responsible party or entity legally able to own Stock and which appears reasonably able to comply with the terms of the offer. The offer must be legally enforceable against the prospective purchaser. The prospective purchaser must agree in the offer to be bound by the provisions of this Stockholders' Agreement.

5. This Paragraph IIB shall not apply to the disposition of Stock upon any Stockholder's withdrawal, death, disability, or disqualification to practice.

### III. DISPOSITION OF STOCK UPON WITHDRAWAL OF STOCKHOLDER

A. Required Sale. In the event that a Stockholder (the "Withdrawing Stockholder") terminates his employment with the Corporation, by retirement or otherwise (but not due to death or disability), the Withdrawing Stockholder shall sell all his Stock to the Corporation, or if the Corporation declines to purchase, then to the remaining Stockholders (as they may then agree among themselves, or if they cannot agree, in proportion to their Stock ownership). The Corporation, unless it declines, in which case the remaining Stockholders, shall purchase the Withdrawing Stockholder's Stock.



B. Price. For the purpose of this Stockholders' Agreement, "Book Value" means the cash method book value of the Corporation. Book Value does not include the Corporation's accounts receivable or accounts payable. Any life insurance or disability insurance proceeds in excess of the Life Insurance Proceeds (as defined below) or the Disability Insurance Proceeds (as defined below) will be included in Book Value. The Corporation's accountant shall calculate Book Value. In calculating Book Value, the accountant shall determine the value of equipment by recomputing depreciation on a straight line method over 10 years. The accountant's determination of Book Value shall conclusively bind all the Parties, their successors, heirs, personal representatives, and assigns; said determination shall not be questioned by any person. The price for the Withdrawing Stockholder's Stock shall equal the Book Value of the Corporation as of the immediately preceding fiscal year end, multiplied by a fraction, the numerator of which shall be the number of shares of Stock held by the Withdrawing Stockholder, and the denominator of which shall be the total number of shares of Stock then outstanding. In the case of Peyton only, until December 31, 2000, "Book Value" shall not exceed twice the amount of the Purchase Price (as defined in Section 1.1(b) of a Stock Purchase Agreement dated January 1, 1997, by and between Lower and Peyton) actually paid by Peyton to Lower.

C. Terms of Payment. The purchase price shall be paid to the Withdrawing Stockholder within ninety (90) days after the effective date of his withdrawal as follows: at the option of the Corporation or the purchasing Stockholders, as the case may be, the purchase price shall be paid in a lump sum or in an initial installment of Fifteen Percent

(15%) of the purchase price, payable at the closing, and the balance shall be paid in twenty four (24) equal monthly installments of principal together with simple interest on the unpaid balance at a rate of eight and one-half percent (8.5%) per annum. If the Corporation or the purchasing Stockholders, as the case may be, elect the deferred payment option, a promissory note made by the Corporation or the purchasing Stockholders, as the case may be, to the order of the Withdrawing Stockholder (the "Promissory Note") shall evidence the unpaid portion of the purchase price; at closing the Corporation or the purchasing Stockholders, as the case may be, shall deliver the Promissory Note together with the initial installment of Fifteen Percent (15%) of the purchase price; payments under the Promissory Note shall commence thirty (30) days after the closing; the Promissory Note shall provide for the acceleration of the due date of the entire unpaid balance at the option of the holder upon default in the payment of any installment of principal or interest; and the Promissory Note shall provide for prepayment in whole or in part without premium or penalty.

#### IV. DISPOSITION OF STOCK UPON DEATH OF STOCKHOLDER

No Stockholder by deed, will, trust or other testamentary device, or by intestacy, may convey or transfer any or all of his Stock except in accordance with the following provisions:

A. Required Sale. Upon the death of a Stockholder, the Corporation shall purchase from the estate of the deceased Stockholder, and each Stockholder agrees on behalf of his estate or his legal representative that said estate or legal representative of the deceased Stockholder shall sell to the Corporation, all of the Stock held by such

deceased Stockholder at the time of his death.

B. Price. The Price for the deceased Stockholder's Stock shall be equal to the greater of Book Value of the Corporation determined pursuant to Paragraph IIIB of this Agreement, or the amount, if any, of life insurance proceeds received by the Corporation due to the death of the deceased Stockholder (the "Life Insurance Proceeds"). The Life Insurance Proceeds shall not exceed One Hundred Fifty Thousand Dollars (\$150,000) for any one Stockholder.

C. Method of Transfer and Terms of Payment. The Stockholders shall bind their executors or legal representatives to make, execute and deliver any and all documents necessary to carry out this Agreement. The executor or legal representative of the estate of the deceased Stockholder and the Corporation shall make, execute and deliver any and all documents necessary to carry out this Agreement.

If the Price is determined by the Corporation's Book Value, then the Corporation shall pay the purchase price to the estate of the deceased Stockholder within ninety (90) days after his date of death in accordance with the terms contained in Paragraph IIIC, and if the Price is determined by the Life Insurance Proceeds, then the Corporation shall pay the purchase price to the estate of the deceased Stockholder within thirty (30) days of receipt of the Life Insurance Proceeds. If Book Value is greater than the Life Insurance Proceeds, and if the Corporation elects not to pay the Price in a lump sum, then the Life Insurance Proceeds shall be the mandatory minimum initial installment.

#### V. DISPOSITION OF STOCK UPON DISABILITY OF STOCKHOLDER

A. Required Sale. If any Stockholder shall become Totally Disabled (as

defined below), such disabled Stockholder shall sell to the Corporation and the Corporation shall buy from the disabled Stockholder, all of the Stock held by the disabled Stockholder in accordance with the terms of this Paragraph V. For the purposes of this Agreement, "Totally Disabled" means that the Stockholder is unable to fully perform his Employment Agreement with the Corporation and such disability continues for a period of twelve (12) months. In the event that the disabled Stockholder returns to the Corporation within the twelve (12) month period, but can fully perform the required services for less than ninety (90) days, and then relapses to his disability, then the twelve (12) month disability period is not tolled and it shall continue to run.

B. Price. The Price for the disabled Stockholder's Stock shall be equal to the greater of Book Value of the Corporation determined pursuant to Paragraph IIIB of this Agreement, or the amount, if any, of disability insurance proceeds received by the Corporation due to the disability of the disabled Stockholder (the "Disability Insurance Proceeds"). The Disability Insurance Proceeds shall not exceed One Hundred Fifty Thousand Dollars (\$150,000) for any one Stockholder.

C. Terms of Payment. If the Price is determined by the Corporation's Book Value, then the Corporation shall pay the purchase price to the disabled Stockholder in accordance with the terms contained in Paragraph IIIC, and if the Price is determined by the Disability Insurance Proceeds, then the Corporation shall pay the purchase price to the disabled Stockholder within thirty (30) days of receipt of the Disability Insurance Proceeds. If Book Value is greater than the Disability Insurance Proceeds, and if the Corporation elects not to pay the Price in a lump sum, then the Disability Insurance

Proceeds shall be the mandatory minimum initial installment.

D. Total Purchase Price; Assets of Corporation. The amounts paid to the disabled Stockholder pursuant to Paragraphs VB and VC shall be in lieu of all other obligations to the disabled Stockholder in his capacity as a Stockholder; the transfer of the Stock held by the disabled Stockholder to the remaining Stockholders shall represent the termination of the disabled Stockholder's interest in the Corporation and its assets.

#### VI. DISPOSITION OF STOCK UPON DISQUALIFICATION TO PRACTICE

A. Required Sale. Notwithstanding anything contained in this Agreement to the contrary, in the event that any Stockholder becomes disqualified to practice the business of the Corporation in the Commonwealth of Virginia due to suspension, revocation or cancellation by the appropriate Governmental authority of said Stockholder's license or other privilege to practice, then and in that event, such Stockholder shall sell to the Corporation, or if the Corporation declines to purchase, then to the remaining Stockholders (as they may agree among themselves, or if they cannot agree, in proportion to their stock ownership) and the Corporation, unless it declines, in which case the remaining Stockholders shall purchase, all of the Stock held by such Stockholder.

B. Price. The price for the disqualified Stockholder's Stock shall be seventy-five percent (75%) of the amount determined pursuant to Paragraph IIIB of this Agreement.

C. Terms of Payment. The Corporation or the remaining Stockholders, as the case may be, shall pay the purchase price for the disqualified Stockholder's Stock to the

disqualified Stockholder in accordance with Paragraph IIIC.

## VII. MISCELLANEOUS PROVISIONS

A. Notices. Any notice required or permitted to be given under this Stockholders' Agreement shall be in writing and shall be deemed to have been duly delivered if delivered personally or if sent by certified mail, return receipt requested, first-class postage prepaid, addressed (i) to the Corporation, c/o Raymond F. Lower, D.O., F.A.A.O.S., President at 2 Pidgeon Hill Drive, Suite 510, Sterling, VA 20165; (ii) to Lower at RR 1 P.O. Box 897, Waterford, VA 22197; (iii) to Peyton at 46464 Montgomery Place, Sterling, VA 20165; or at any other address designated by any party in a notice given to the other parties pursuant to the provisions of this Section. Any notice which is required to be delivered within a stated time period shall be deemed timely if mailed before midnight of the last day of such period.

B. Stock Transfer Record. The Corporation shall maintain a Stock transfer book which shall record the name and address of each Stockholder. No transfer of Stock shall be effective or valid unless and until recorded in the Stock transfer book. The Corporation shall not record any transfer of Stock in the Stock transfer book unless (i) the transfer strictly complies with all the provisions of this Stockholders' Agreement; and (ii) the transferee shall have agreed in writing to be bound by all of the provisions of this Stockholders' Agreement applicable to Stockholders and shall become a party hereto.

C. Issuance of Additional Stock. The Corporation shall not issue any additional Stock except (i) upon due authorization by its Board of Directors; and (ii) in strict compliance with the provisions of this Stockholders' Agreement.

D. Entry of Legend Upon Stock Certificates. The following legend shall be entered immediately on all the Stock certificates now owned by Stockholders or hereafter issued:

"The gift, sale, mortgage, pledge, hypothecation, encumbering and voting of the shares of the Stock represented by this certificate is restricted in accordance with the terms and conditions of a Stockholders' Agreement by and between the Corporation and the named Stockholder thereon, which Agreement is dated the 1st day of January, 1997, and a copy of which is on file at the principal office of the Corporation. Said Stockholders' Agreement restricts the ability of the Stockholders to sell, give, or otherwise transfer or dispose of this Stock certificate. The Stockholders' Agreement also restricts the right of the Stockholders to vote their shares. This Stockholder's Agreement is an agreement within the meaning of Section 13.1-671.1 of the Code of Virginia."

E. Specific Performance. The Parties agree that the Stock is unique, that a Stockholder's failure to perform his obligations under this Stockholders' Agreement will result in irreparable damage, and that specific performance of the Stockholder's obligations may be enforced by a suit in equity.

F. Benefit and Burden. This Agreement shall inure to the benefit of, and shall bind, the Parties and their respective heirs, personal representatives, successors and assigns.

G. After Acquired Stock - Subsequent Stockholders. The terms and conditions of this Agreement shall specifically apply not only to the Stock owned by the Stockholders when this Stockholders' Agreement is executed, but also to any Stock acquired by the Stockholders after the date of execution of this Stockholders' Agreement. The term and conditions of this Stockholders' Agreement shall also apply to whomsoever

shall receive Stock, including by way of illustrating and not limitation, bona fide purchasers for value.

H. Termination of Agreement. This Agreement shall terminate only upon the unanimous written agreement of the Stockholders and the Corporation.

I. Alteration, Amendment, or Termination. No change or modification of this Agreement shall be valid unless the same is in writing and signed by all the parties hereto. No waiver of any provision of this Agreement shall be valid unless in writing and signed by the person against whom it is sought to be enforced. The failure of any party at any time to insist upon strict performance of any condition, promise, agreement or understanding set forth herein shall not be construed as a waiver or relinquishment of right to insist upon strict performance of the same condition, promise, agreement or understanding at a future time. The invalidity or unenforceability of any particular provision of this Agreement shall not affect the other provisions hereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provisions were omitted.

J. Integration. This Agreement sets forth (and is intended to be an integration of) all of the promises, agreements, conditions, understandings, warranties and representations among the Parties hereto with respect to the Stock, and there are no promises, agreements, conditions, understandings, warranties or representations, oral or written, express or implied, among them with respect to the Stock other than as set forth herein.



K. Conflicts of Law. This Agreement shall be subject to and governed by the laws of the Commonwealth of Virginia, regardless of the fact that one or more of the parties now is or may become a resident of a different state.

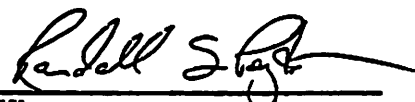
L. Right to Offset. Notwithstanding any financial entitlement a Stockholder (or estate of a Stockholder) may have hereunder, the Corporation and the other Stockholders (the "Claimants") shall have the unconditional right to make claim against such financial entitlement for any amounts owed by the Stockholder to the Claimants and the Stockholder's financial entitlement hereunder shall be reduced accordingly and the reduction shall be paid directly to the Claimants.

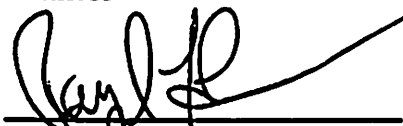
M. Retention of Corporate Name, Telephone Number and Corporate Offices. It is agreed and understood by the parties to this Agreement that Lower formed the Corporation and, therefore, no other Stockholder shall be entitled to the use of the Corporation's name, telephone number or Corporation offices should such other Stockholder terminate his relationship with the Corporation.

[REMAINDER OF THIS PAGE LEFT INTENTIONALLY BLANK]

IN WITNESS WHEREOF, the Corporation has caused this Agreement to be signed by its duly authorized officers and its corporate seal to be affixed hereto, and each Stockholder has signed this Agreement, as of the day and year first above written.

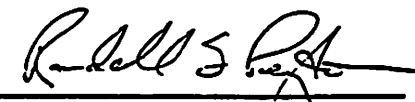
WITNESS:

  
Witness

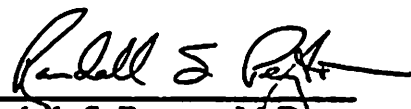
  
Witness

STOCKHOLDERS:


  
Raymond F. Lower, M.D

  
Randall S. Peyton, M.D

ATTEST:

By:   
Randall S. Peyton, M.D.  
Secretary

COUNTRYSIDE  
ORTHOPAEDICS, P.C.

By:   
Raymond F. Lower, M.D.  
President

6/27/97

CORPORATE SEAL

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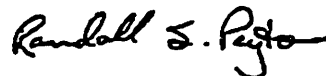
HAND DELIVERY  
October 3, 1997

Raymond F. Lower, D.O.  
Countryside Orthopaedics, P.C.  
2 Pidgeon Hill Drive  
Suite 510  
Sterling VA 20165

Dear Ray,

In accordance with paragraph 11 of the Employment Agreement (the "Agreement"), dated January<sup>11</sup>, 1997, I notify you of my intent to terminate said agreement, effective December 31, 1997.

Sincerely,

A handwritten signature in cursive script that reads "Randall S. Peyton".

Randall S. Peyton, M.D.

## Requests

- 1 - Ray pays all his/corp lawyer and accountants fees related to all discussions and any revisions to proceed.
- 2 - Pay back or credit to me Mr Lipresti's bills pertaining to the original contract.
- 3 - Payback or credit to me Mr. Zagami's bills pertaining to the original contract.
- 4 - Payback or credit to me Mr. Liprest's bills pertaining to the Purcellville Medical Building.
- 5 - Payback or credit to me Mr. Zagami's bills pertaining to the Purcellville Medical Building.
- 6 - Payback or credit to me \$1,500.00 for Ray's "Virginia Physicians Stock" as placed on the books for the buy-in.
- 7 - Payback or credit to me what was charged to my account regarding the rent payment to the Purcellville Medical Building.
- 8 - Payback or credit to me the value charged for Ray's home computer.
- 9 - Payback or credit to me the value charged for the broken fax machine.
- 10 - Payback or credit to me the value charged for the vehicles.
- 11 - Payback or credit to me the rent charged for Purcellville from Jan 1997 till now.
- 12 - Buy-in will be structured completely in pre-tax dollars without salary deferential.
- 13 - Ray will obtain a personal credit card for personal expenses.
- 14 - Ray will run his home long distance bills through his personal account or more preferably pay on his own so as not to put the corp. at increased risk for audit. If audited for these kinds of items the expense/penalty will be solely Ray Lowers.
- 15 - Ray will run his home water bills through his personal account or as stated above.
- 16 - Signature cards filled out so that Ray and I have equal rights to the bank account.
- 17 - Collection and expense reports will be done at least quarterly and a close approximation of compensation will be allocated if chosen, at least quarterly.
- 18 - An equal amount or equal percentage of collections will be left by all partners in the account when compensation is allocated.

19 - Books, CME is credited to each individual, unless previously agreed upon.

20 - Accelerate the vesting on the Pension Plan.

21 - My car lease and title will be transferred into corp. and my name not Lower.

22 - Plan devised to settle disputes on responsibilities of bills.

23 - Dismiss Mr. Zagami from all present and future corporate duties. We will obtain an accountant together for the corporation.

TWENTIETH JUDICIAL CIRCUIT  
OF VIRGINIA



WILLIAM SHORE ROBERTSON, JUDGE  
40 CULPEPER STREET  
WARRENTON, VIRGINIA 22186

THOMAS D. HORNE, JUDGE  
POST OFFICE BOX 727  
LEESBURG, VIRGINIA 20178

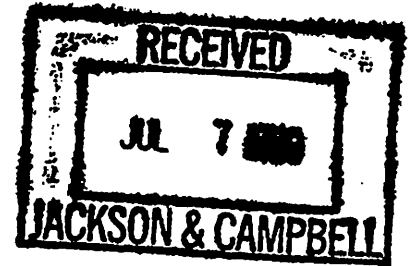
JAMES H. CHAMBLIN, JUDGE  
POST OFFICE BOX 123  
LEESBURG, VIRGINIA 20178

JEAN HARRISON CLEMENTS, JUDGE  
POST OFFICE BOX 727  
LEESBURG, VIRGINIA 20178

LOUDOUN, FAUQUIER AND  
RAPPAHANNOCK COUNTIES

RAYNER V. SNEAD, JUDGE RETIRED  
CARLETON PENN, JUDGE RETIRED

POST OFFICE BOX 550  
LEESBURG, VIRGINIA 20178



June 29, 1999

John W. Toothman, Esquire  
David H. White, Esquire  
TOOTHMAN & WHITE  
400 North Columbus Street  
Suite 250  
Alexandria, Virginia 22314

Vernon W. Johnson, III, Esquire  
JACKSON & CAMPBELL  
1120 Twentieth Street, N.W.  
South Tower  
Washington, DC 20036

Re: Randall S. Peyton  
v.  
Countryside Orthopaedics, P.C. and  
Raymond Lower, D.O.  
Chancery No. 18157  
Circuit Court of Loudoun County

Gentlemen:

In August 1995 the Complainant, Randall S. Peyton, ("Peyton") became employed by the Defendant, Countryside Orthopaedics, P.C., ("Countryside") to provide

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services as an orthopaedic surgeon. The principal of Countryside was the Defendant, Raymond Lower, D.O., ("Lower"), an osteopath, who was then Countryside's sole officer, director and shareholder. In 1996 Peyton and Lower began negotiations for Peyton becoming an officer, director and shareholder of Countryside. After nine months of negotiations where each doctor had his own counsel and accountant, agreements were signed on June 27, 1997, to be effective as of January 1, 1997, whereby Peyton became an equal shareholder with Lower in Countryside, as well as an officer and director of the corporation.

The agreements executed in June 1997 provided, among other things, that either doctor could terminate his employment and leave Countryside without reason or cause upon ninety (90) days written notice. The employment agreements contained no restrictive covenants as to competition upon either doctor upon leaving the corporation.

On October 3, 1997, Peyton gave written notice of his termination of employment effective December 31, 1997. He left Countryside as of December 31, 1997.

On January 9, 1998, Peyton brought suit against Countryside and Lower seeking the following:

1. Specific performance of his Employment Agreement as to the records and charts of patients he treated while at Countryside;
2. An accounting of the payments to which he is entitled from Countryside under his Employment Agreement;
3. Damages for breach of his Employment Agreement by Countryside for not paying Peyton what he is entitled to thereunder; and
4. Breach of Fiduciary Duty involving alleged depletion of Peyton's accounts receivable and an increase in expenses charged to him by Countryside.

Countryside and Lower filed an Amended Cross-Bill seeking the following:

1. A declaratory judgment as to the rights of Countryside and Peyton under the Stockholder Agreement;
2. Damages for breach of fiduciary duty by Peyton;
3. Rescission of the agreements signed in June 1997 because of alleged breaches of contract by Peyton; and
4. Damages for alleged fraud by Peyton in inducing Lower to enter into the agreement in 1997.

This case came on for trial without a jury on November 23, 24, 25 and 30, December 1 and 2, 1998 and January 6 and 26, March 22 and May 3 and 4, 1999.

At the conclusion of argument on May 4, 1999, I ruled that no personal liability on Lower had been shown. Therefore, judgment is awarded Lower on Peyton's claims against him individually. I also ruled that the evidence does not support an award of

punitive damages against Peyton. All other issues were taken under advisement, and they are addressed below.

Orders Submitted by Peyton Concerning Discovery and other Rulings on  
November 5, 1998 and January 6, 1999

The orders submitted by Peyton with his Praecipe filed June 21, 1999, concerning rulings which I made on various motions on November 5, 1998, and January 6, 1999, will not be entered because I feel that the objections to each order as set forth in the Defendant's Praecipe filed June 25, 1999, are well-taken. The orders need to be revised to meet the Defendant's objections.

Designated Portions of the Depositions of Dr. Raymond Lower  
and Pamela A. Freed

The objections of the Defendants to the designated portions of the depositions of Dr. Lower and Pamela A. Freed offered in evidence by the Complainant on May 3, 1999, are overruled. The objections of the Complainant to the counter-designations of portions of the same two depositions by the Defendants are overruled. Therefore, all the portions of each deposition designated by the Complainant and the Defendants are admitted into evidence.

Statements Concerning Damages Provided by Counsel

The opposition of the Defendants to the Complainant's Itemization of Damages and Relief Sought is considered merely as argument. The objection of the Complainant to the Statement Regarding Defendants' Damages is also considered merely as argument. Therefore, I have considered the Complainant's Itemization of Damages and Relief Sought and the Statement Regarding Defendants' Damages.

Discovery Issue

Throughout the trial Peyton raised various and strenuous objections because of the alleged failure of the Defendant to provide discovery concerning the amounts collected by Countryside on behalf of Peyton before and after he left it on December 31, 1999.

Regardless of the nature of the documents produced by Countryside during the trial, the issue is the extent of the documents provided by Countryside prior to the commencement of the trial. Peyton was represented by George W. Campbell, Jr. from the filing of his suit to shortly before trial commenced. He was represented at trial by John W. Toothman and David H. White.

Peyton's trial counsel acknowledged that documents were produced to Mr. Campbell before trial. The Defendants consistently asserted that all the documents requested by Peyton were produced to Mr. Campbell. At trial Peyton's counsel

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repeatedly asserted that they could not determine from the documents produced the entitlement of Peyton.

No evidence was offered by any party to show when documents were or were not produced. Mr. Campbell was never called as a witness to testify about the documents produced and his efforts to utilize them. While counsel for Peyton merely made conclusory allegations of a failure to produce, counsel for the Defendants merely responded in a similar conclusory fashion that the documents were produced as requested.

Counsel for Peyton did not refute the representation by counsel for the Defendants that they produced boxes of documents for inspection by Mr. Campbell and that he made copies of some, but not all of the documents. It was not the duty of counsel for the Defendants to tell Mr. Campbell or trial counsel for Peyton what documents are important or how to use them to calculate entitlements.

I am unable to determine from the evidence presented or counsel's representations that the Defendants failed to comply with the discovery requested by Peyton prior to trial. For similar reasons I am unable to make the same determination as to the discovery ordered to be produced at the commencement of and during the trial. I find that the documents provided by the Defendants during the trial as ordered by the Court are merely updated versions of the documents already produced.

For these reasons, there will be no sanction imposed on the Defendants for any alleged failure to comply with a discovery request or court order.

#### Summary of Decision on Substantive Issues of the Case

For reasons stated below, I find as follows:

- I. As to Peyton's claims:
  - A. The temporary injunction decree as to patient records and charts entered by Judge Carleton Penn on January 15, 1998, as modified by the decree I entered on August 7, 1998, will be made permanent.
  - B. No accounting will be ordered except that Countryside is ordered to comply with the Employment Agreement and to pay Peyton his severance pay every ninety (90) days as more particularly set forth below.
  - C. Peyton is granted a judgment against Countryside in the amount of \$333,282.85 for unpaid severance pay as more particularly described below. He is not entitled to any additional pay for 1997 because I find that he was paid more in 1997 than he was entitled.

- D. The claim for breach of fiduciary duty is considered only in determining the amount owed to Peyton. There is no separate damage award for breach of fiduciary duty.
- II. As to the Defendants' claims:
- A. Countryside is found to have validly and effectively exercised its right to repurchase Peyton's stock in Countryside under the Stockholder Agreement.
  - B. Peyton did not breach any fiduciary duty to Countryside or Lower.
  - C. Peyton did not materially breach the aforesaid agreements; therefore, the Defendants' claim for rescission is denied.
  - D. Peyton did not commit fraud upon the Defendants and he did not fraudulently induce Lower to enter into the agreements in June 1997.

### **PEYTON'S CLAIMS**

#### **Injunction as to Patient Records and Charts**

At the commencement of the trial the Defendants agreed that the temporary injunction decree entered by Judge Carleton Penn on January 15, 1998, could be made permanent. In August 1998 I ruled that Countryside is entitled to be paid by Peyton at the rate of 10¢ per page for copies of patient records and \$5.00 as a handling fee per chart. The decree I entered August 7, 1998, also provides that Peyton shall pay such costs at the rate of \$750.00, or the remaining balance, per month, payable on the first day of each month and starting August 1, 1998, until paid in full.

The temporary injunction per the decree entered January 15, 1998, together with the decree concerning costs entered August 7, 1998, shall be made permanent.

#### **Peyton's Entitlement Under the June 1997 Employment Agreement**

Peyton's entitlement claims involve (1) his entitlement while still with Countryside in 1997 and (2) his severance pay after he left on December 31, 1997. His entitlement is governed by paragraph 3 of the June 1997 Employment Agreement which provides:

- "3. **Compensation.** As his entire compensation for all services rendered to the Corporation during the term of this Agreement, in whatever capacity rendered, the Physician shall receive:
- (a) **Base Entitlement.** An Entitlement (salary, retirement plan contributions and Additional Benefits, as defined below) which will be the excess of his "Collections" (as defined below) over (i) his proportionate share (initially 50 percent) of the

Corporation's "Fixed Expenses", plus (ii) 100 percent of his "Individual Expenses", plus (iii) 100 percent of his "Variable Expenses". "Fixed Expenses", "Individual Expenses" and "Variable Expenses" shall be defined by mutual agreement of the Corporation and the Physician and applied consistently from year to year. The physician shall receive a draw against the salary portion of his Entitlement which shall be payable in equal payments every month; provided, however, that no such salary shall be payable in respect of any month or portion thereof subsequent to the termination of this Agreement. On an annual basis the draw will be reconciled with the Physician's actual Entitlement for the preceding twelve months. In the event that Physician receives an Entitlement in any fiscal year which is later determined by the Corporation's accountant to be more than the amount to which the Physician was actually entitled (the "Excess Amount"), the Physician's Entitlement in the first subsequent fiscal year shall be reduced by the Excess Amount.

- (b) Definitions. The term "Collections" shall be defined in the same manner as the Corporation normally defines the term, namely cash receipts, net of refunds, actually received by the Corporation for the Physician's services.
- (c) Bonus. A bonus, payable prior to the close of the Corporation's taxable year in question, which shall be determined in the sole discretion of the Board of Directors of the Corporation. The purpose of the bonus will be to make the total compensation paid annually to the Physician equal to the reasonable value of his services to the Corporation.
- (d) Annual Benefits. The right to receive or participate in any additional "fringe" benefits, including, but not limited to, insurance programs and pension or profit sharing plans, which may from time to time be made available to physicians employed by the Corporation. Any additional Benefits shall be calculated as part of Physician's Base Entitlement.
- (e) Severance Pay. In the event that the Physician dies or otherwise ceases his employment under this Agreement for any reason (including, without limitation, disability, retirement, or voluntary or involuntary termination) the Corporation shall pay

the physician (or his estate) severance pay ("Severance Pay") as follows:

- (1) Amount. Severance Pay shall be an amount equal to eighty percent (80%) of his "Collections" less the Physician's Individual Expenses remaining unpaid at the time the cessation of employment occurred reduced by any Excess Amount remaining unpaid.
- (2) Payment. The Severance Pay determined in accordance with Paragraph 3(e)(1) shall be paid no later than ninety (90) days after the cessation of employment occurred, and then every ninety (90) days thereafter.
- (3) Interest and Offset. No interest shall accrue on any amount due pursuant to this subparagraph. The Corporation may offset payments due hereunder by amounts owed by the Physician to the Corporation.
- (4) Physician's Compliance. The Physician's (or Physician's estate's) full, timely, and continuing compliance in all material respects with every material term with this Agreement and of every other written agreement between the physician and the Corporation in force after the effective date of termination is a condition precedent to the Corporation's obligation to pay Physician Severance Pay in accordance with this paragraph."

Each area of entitlement is discussed separately below.

#### Peyton's 1997 Base Entitlement

Countryside's accountant, Dan Zagami, CPA, determined that Peyton had received monies from Countryside in 1997 in excess of the amount to which he is actually entitled. He determined the Excess Amount to be \$17,137.00, as shown in Defendants' Exhibit 94. There appears to be a mathematical error in arriving at this amount, but this error favors Peyton. Despite a demand to repay the Excess Amount, Peyton has not done so.

Peyton presented a considerable amount of evidence, including expert testimony, in an effort to show that Countryside had not properly allocated income and expenses to Peyton for 1997. I find that with the exception of the charge for tail coverage Peyton has not shown that Zagami is wrong in his calculations.

Before getting into the specific areas of controversy as to income and expenses, I must address the issues raised by Peyton concerning Generally Accepted Accounting Principles (GAAP) and the Internal Revenue Code (IRC). Peyton asserts that GAAP and IRC must be read into the Employment Agreement. I disagree. The cases cited by Peyton, Virginia State AFL-CIO v. Commonwealth, 209 Va. 776 (1969), and Safeway Steel Scaffolds of Virginia v. Coulter, 198 Va. 469 (1956), do not support Peyton's contention. Peyton's entitlements are determined by the Employment Agreement. Zagami made his calculations based upon the Agreement, and based his allocations of expenses as mutually agreed upon by Lower and Peyton as required by the Agreement. It is true that Zagami changed the format of his quarterly financial reports for the Corporation from the first and second quarters (calling them statements of revenue and expenses) to the third and fourth quarters (calling them statements of revenue and operating costs), but he made the change because of the execution of the Employment Agreement on June 27, 1997. His third and fourth quarter statements follow the Employment Agreement. Countryside did not change its method of accounting after June 1997. Countryside's accounting always remained on a cash basis.

As to income collected for the benefit of Peyton in 1997, Peyton attempted to show that Countryside allocated to Lower payments received for services rendered to certain patients seen by Peyton. See Complainant's Exhibits 8a through 8l. However, Countryside offered evidence to show that these discrepancies were rectified resulting in a credit of \$62.65 to Peyton. See Defendants' Exhibit 120 (which follows the testimony of Judy Cox).

The 1997 collections for Peyton are as shown on Zagami's fourth quarter report. See Defendants' Exhibit 94. This amount totaled \$764, 261.00.

Peyton also offered evidence to show the misallocation of expenses to Peyton. See, e.g. Complainant's Exhibits 16a through 16u. The allegations of misallocation are resolved as follows.

Alleged Misallocation

Finding

Extraordinary ordering of supplies at the end of 1997.

No evidence by which to quantify the excess over the ordinary, if any.

Corporate debts paid at the end of 1997.

No evidence by which to determine whether any payments were over and above the ordinary course of business; it is a common practice for corporations to pay debts at the end of the tax year to

	reduce its income tax liability.
Payments allegedly made directly to Lower.	No evidence to show they were not proper.
Dupuy buy-back of supplies in early 1998.	Suspicious at the most; not shown to be not in ordinary course of business.
<b><u>Alleged Misallocation</u></b>	<b><u>Finding</u></b>
Prepayment of the rent for January 1998 in December 1997.	Not out of the ordinary course of business; same done in December 1996 for January 1997 rent.
Buy-out of lease at Countryside.	Peyton agreed to it; not shown to be unnecessary; Peyton did not show that Countryside premises could have been sublet.
Lansdowne leasehold "build-out" expenses.	Peyton agreed to it; practice needed the larger space available at Lansdowne.
Purcellville office lease and other expenses (only Lower used this office).	Peyton agreed to it and knew about it before he became a stockholder; Peyton saw patients Lower initially saw at Purcellville and then referred to Peyton.
Advertising Expenses paid at end of 1997.	Not shown to be beyond ordinary course of business.
Moving expenses from Countryside to Lansdowne.	Peyton agreed to them; a business necessity; no evidence of excessiveness.
Jackson & Campbell	Not shown to have been

legal bills paid by  
Countryside.

improperly allocated  
between Countryside  
and Lower.

Medical expenses;  
telephone expenses

Not shown to have been  
improperly allocated.

On December 24, 1997, Countryside purchased tail coverage for \$15,974.00 and allocated the expense completely to Peyton. At or about the same time Peyton procured prior acts coverage. His purchase of prior acts coverage was not in violation of any agreement. This coverage never took effect because of the tail coverage purchased by Countryside.

The only reference to tail coverage in the June 1997 Employment Agreement is found in paragraph 12 which states:

"It is further agreed in the event of termination of this Employment Agreement that the Physician will pay the Corporation the proportionate share of malpractice (including "tail" coverage), health, and disability insurance premiums for the part of the year not employed if the Corporation is unable to recover from the insurance carrier a pro rated refund."

This provision only covers the situation where Peyton might have left before the end of a year. But here he left at the end of the year. This provision does not give Countryside the authority to purchase tail coverage for its protection and allocate the expense to Peyton.

Therefore, the sum of \$15, 974.00 was improperly allocated to Peyton in 1997.

The Excess Amount is, therefore, adjusted as follows:

Excess Amount as Determined by Zagami.	\$17,137.00
--	-------------

Less:

Improper Allocation for tail coverage.	\$15,974.00
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Credit for discrepancy correction discussed above.	\$62.65
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Excess Amount	\$ 1,100.35
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The Excess Amount in 1997 for purposes of Peyton's entitlement calculations is \$1,100.35.

### Peyton's Severance Pay

The Defendants argue that Peyton is not entitled to Severance Pay because Peyton breached the agreements provided in paragraph 3(e)(4) of the Employment Agreement. I do not agree.

First, the compliance provision by its own terms applies only to the Employment Agreement because it is the only "agreement between the Physician (Peyton) and the Corporation (Countryside)." The Stockholders Agreement is among Lower, Peyton and Countryside, and the Stock Purchase Agreement is between Lower and Peyton. Therefore, Peyton's compliance with the Stockholders Agreement and the Stock Purchase Agreement is not a condition precedent to Countryside's obligation to pay Severance Pay to Peyton. The parties are bound by the words they used, and not by some nebulous concept of a "package" as argued by the Defendants.

Next, in order for Countryside to be obligated to pay Severance Pay to Peyton, he must be in "compliance in all material respects with every material term" of the Employment Agreement. I do not feel that the use of the word "material" twice makes compliance anything more than compliance with a material term of the Employment Agreement. I think that it's the same as the standard for a material breach under general breach of contract principles, i.e., a breach so important and central to the contract that the breach of the obligation defeats the purpose of the contract.

The purpose of the Employment Agreement is for the provision of medical services by Peyton on behalf of Countryside and how he would be paid for such services.

As to all the breaches by Peyton as alleged by Countryside, I find either a failure of proof or not a material breach, as listed below.

#### Alleged Breach

Refusal of Peyton to pay Excess Amount.

#### Finding

Not material because (1) Lower has not repaid his Excess Amount either and (2) there is a mechanism for Countryside's recovering the Excess Amount by reducing Peyton's Severance Pay by the Excess Amount under paragraph 3(e)(1) of the Employment Agreement.



### Alleged Breach

Failure of Peyton to pay his share of the 1997 Corporate Income taxes paid by Countryside.

Peyton sought employment with Commonwealth Orthopaedic & Rehabilitation, and gave it confidential Information.

Peyton violated the "joint-letter" provision of paragraph 12 of the Employment Agreement by telling patients that he was leaving, providing to his patients a not agreed upon release, and causing a delay in getting the letter out.

Failure of Peyton to return certain property to Countryside when he left.

Peyton's actions re: tail coverage.

Peyton copied charts before he left (charts are the property of Countryside).

### Finding

There is no provision in the Employment Agreement requiring Peyton to pay this; income taxes are a corporate, not a personal expense or obligation; Countryside could easily have avoided income taxes by paying out the excess taxable income to the doctor stockholders, but it decided not to do so.

See discussion below where this found not to constitute a breach of fiduciary duty by Peyton.

Peyton had an overriding ethical duty to his patients; Lower did not cooperate completely himself in getting out the letter.

Not a material term of the Employment Agreement; even if it is, Defendants did not show value of properties taken and the effect of their taking.

See discussion above re: tail coverage.

Copying not prohibited by Employment Agreement; no proof that he did copy a chart.

00110

**Alleged Breach**

**Finding**

Peyton tried to collect a Countryside account receivable after he left.

No proof of this.

Peyton refused to fill out a form so as to allow Countryside to collect from D.C. Medicaid.

Peyton may have refused because he had already filled out what he considered the necessary forms, but Countryside offered no proof that it failed to collect because of Peyton's actions.

Peyton challenged the right to stock repurchase by Countryside under Stockholders Agreement.

Not part of the Employment Agreement.

Peyton did not pay timely for the stock he acquired from Lower.

Not part of the Employment Agreement.

Hence, Peyton is entitled to Severance Pay. The Defendants have raised several issues regarding the amount of Severance Pay.

I have decided the amount of Severance Pay based upon the evidence, and not upon opening statements of counsel or Lower's guess or estimate.

I feel that paragraph 3(e)(1) is clear in that Peyton is entitled to 80% of the cash receipts, net of refunds, "actually received" by Countryside for his services, less any unpaid individual expenses remaining unpaid at the time of cessation of employment reduced by any Excess Amount.

Countryside has paid no Severance Pay to Peyton since he left on December 31, 1997.

Countryside actually received for the services of Peyton before he left it, the following:

1. \$157,979.00 collected by IMM for Countryside from January 1998 through June 1998. See the "Gross Calculation" for Peyton on the last page of Complaint's Exhibit 3I.
2. \$260,000.00 collected by Countryside (after it took over bill collections from IMM as of July 1, 1998) from July 1998 through January 4, 1999. This amount is based upon the testimony of Janice Downs that the amount collected by Countryside on

00111

Janice Downs that the amount collected by Countryside on Peyton's accounts receivable could be determined by adding the "positive numbers" on the accounts receivable printout run on January 4, 1999 (Complainant Exhibit 3g). Erik Kloster, CPA, did the addition and found the total to be \$260,000.00.

Peyton is also entitled to 80% of any amount actually received for his services by Countryside after January 4, 1999. Also, his Severance Pay needs to be reduced by the Excess Amount of \$1,100.35, as determined above. There are no individual expenses remaining unpaid.

Therefore, Peyton is entitled to Severance Pay calculated as follows:

80% of \$157, 979.00 collected by IMM, January through June 1998.	\$126, 383.20
80% of \$260,000.00 collected by Countryside, July 1998 through January 4, 1999.	\$208, 000.00
LESS	
Excess Amount.	\$ 1,100.35
	<hr/>
Severance Pay due through January 4, 1999.	\$333, 282.85

Peyton is granted a judgment against Countryside in the amount of \$333,282.85.

Peyton is also entitled to be paid 80% of all his accounts receivable collected by Countryside since January 4, 1999. Countryside is ordered to calculate this amount and pay it to Peyton forthwith. Countryside is also ordered to comply timely with paragraph 3(e)(2) of the Employment Agreement, i.e., pay Peyton the Severance Pay to which he is entitled every ninety (90) days.

Peyton is not granted any relief as to the \$30,000.00 contributed in 1997 on his behalf to the pension and profit sharing plans of Countryside. He was aware of the plans before he became a stockholder. He was aware of the contribution while he was a stockholder. Peyton, of course, has whatever interests in the plans he has by virtue of the terms of the plans based on his employment by Countryside.

## **CLAIMS OF COUNTRYSIDE AND LOWER**

### **Declaratory Judgment**

The Defendants seek a declaratory judgment that Peyton has no claim as a shareholder of Countryside because he did not pay for the stock as required by the Stock Purchase Agreement and the Stockholder Agreement. It is clear that Peyton did not make the required monthly payments for the stock purchase. He made only one payment in August 1997, and it only paid his obligation through July 1997. He made no other payments.

Lower allowed Peyton to make the payment, he did, and did not press Peyton for any further payments. It really never became an issue until Peyton gave his notice. Countryside gave Peyton cash and a note for the repurchase of the stock as required by the Stockholders Agreement because Peyton terminated his employment. Peyton accepted the cash and the note. Countryside has been paying on the note, and Peyton has accepted the payments.

I find that Countryside validly and effectively exercised its right to repurchase Peyton's stock as provided by the Stockholders Agreement.

### **Alleged Breach of Fiduciary Duty by Peyton**

The Defendants assert that Peyton breached his fiduciary duty to Countryside and Lower when he sought employment with Commonwealth Orthopaedic & Rehabilitation and shared financial information about Countryside with Commonwealth.

Lower knew that Peyton was going to talk to Commonwealth about possible merger of the two groups. In doing so Lower knew that Peyton would be sharing Countryside financial information with Commonwealth. Lower was doing the same thing with Loudoun Healthcare. There is no agreement that prohibits Peyton from talking to another potential employer. There is no evidence that the disclosure of such information caused any damage to Countryside or Lower. Lower never told Peyton not to disclose such financial information.

I find no breach of fiduciary duty by Peyton.

### **Defendants' Claim for Rescission of the June 1997 Agreements**

This claim is based on the assertion that Peyton materially breached the agreements signed June 27, 1997. For reasons stated above, Peyton did not materially breach any of the agreements. Hence, the Defendants' rescission claim is denied.

### **Alleged Fraud by Peyton**

The Defendants argue that Peyton had an 'inflated view' of his value to Countryside, and that he only wanted to become a stockholder, then leave and take his patients with him without being subject to the restrictive covenant in his 1995 Employment Agreement.

Peyton and Lower negotiated for nine months before the agreements were signed in June 1997. Lower was reluctant to sign the agreements, but he ultimately did so. Both Lower and Peyton each had the advice of an attorney and an accountant during negotiations.

During the negotiations Peyton told Lower that it would be a long term relationship, that they would look out for each others families and that they would be a good team. The existence of a restrictive covenant was a concern to Peyton. There was one in Peyton's 1995 Employment Agreement. During negotiations for the buy-in Peyton suggested that there be no restrictive covenant, and Lower agreed. No draft of the new Employment Agreement ever contained a restrictive covenant.

Under the June 1997 Employment Agreement, Peyton obtained more benefits than he had under the 1995 Employment Agreement, e.g., severance pay, and greater allowances for automobile, cellphone, vacation, insurance, continuing medical education and professional dues. After the agreements were signed Peyton became more familiar with the financial activities of Countryside as managed by Lower who has always been the president and took care of the day to day activities of the Corporation. As discussed in more detail below, Peyton began to have misgiving about the agreement as he learned more about Lower's corporate activities.

After the agreements were signed, Peyton did certain things that were inconsistent with a long term relationship. For example, Peyton did the following:

1. He made only one payment to Lower for the stock, and he never was current in his payments.
2. He never told Lower he planned to leave until he gave notice on October 3, 1997.
3. He obtained an employer identification number for his own professional corporation in September 1997.
4. He consulted counsel about leaving the practice in the fall of 1997, and he charged the counsel fees on the Countryside American Express card. The fees were ultimately taken out of Peyton's compensation by Countryside.

Despite what Peyton might have done that was inconsistent with a long term relationship, he did not slack off in his medical duties for the Corporation. He continued to provide the same level of service to the patients he saw right up to the day he left.

Fraud cannot be founded on hindsight. It is not probative of fraud just because Peyton left Countryside within six months of signing the buy-in agreements. The Defendants have the burden to show by clear and convincing evidence that Peyton had no intent to establish a long term relationship with Lower when he signed the agreements in June 1997. To put it in terms of the elements of fraud, the Defendants need to prove by clear and convincing evidence that at the time Peyton executed the agreements,

- (1) He made a false statement of
- (2) A material fact (that he was going to have a long term relationship with Lower),
- (3) Intentionally and knowingly,
- (4) With the intent to mislead Lower, and that
- (5) Lower relied on what Peyton said, and
- (6) Damage resulted.

Because of the things discovered by Peyton and the concerns he had after the agreements were signed, I do not have a firm conviction that Peyton had the intent not to have a long term relationship with Lower when he executed the agreements on June 27, 1997. I feel that it is just as likely that Peyton left Countryside because of what occurred after the agreements were signed as that he left as the result of an intent not to establish a long term relationship with Lower when he signed the agreements.

The primary thrust of the Defendants' fraud argument appears to be that Peyton defrauded Lower to eliminate the restrictive covenant and Peyton never intended to stay long term. However, the Employment Agreement signed in June 1997 contains no restrictive covenant and no length of employment provision. Lower's Employment Agreement, signed at the same time, is similar to Peyton's Employment Agreement. It is very difficult for me to find that a restrictive covenant and a length of employment provision were material to the Defendants when they were not placed in the Employment Agreement. Peyton and Lower are both intelligent professionals. Neither is a novice when it comes to the financial aspects of a medical practice. Both were represented by counsel and each had an accountant during negotiations. If Lower had a concern about the need for a restrictive covenant or a length of employment provision, then he could have insisted that they be in the Employment Agreements. He did not. He should have realized that with an at will employment agreement Peyton could leave at any time without a reason on ninety (90) days notice.

After Peyton became a stockholder, certain events occurred that caused him to question what he had done. These events included the following:

1. His concern when he learned that the stock purchase was being treated as a post-tax agreement as opposed to the pre-tax agreement which he thought it was; and Lower's telling him to sue his lawyer and accountant when Peyton brought it to Lower's attention.

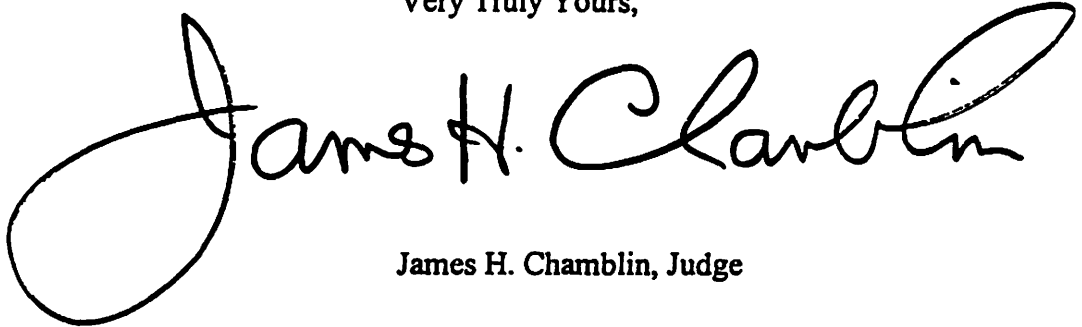
2. The failure of Zagami to explain financial matters to Peyton's satisfaction.
3. Lower's using the corporation as a means to initially pay personal expenses.
4. Peyton did not get the same agreement as Lower with respect to a potential purchase of an interest in the Purcellville office property.
5. Peyton felt Lower had total control over corporate finances.
6. Peyton's not being included with Lower in the 1997 Hospital Gala.
7. Lower's attitude about the retirement plans and employees leaving early.
8. Peyton's observation of Lower's beginning to operate on wrong bone with a medical student present.
9. Lower's handing out literature on osteopathy.
10. Peyton's migraine headache in September 1997.

I feel that things did not turn out as Peyton had expected after he became a shareholder. I cannot find he had an intent to leave early when he signed the agreement in June 1997. He did not defraud the Defendants. He did not fraudulently induce Lower to sign the agreements. He committed no fraud, either actual fraud or constructive fraud.

Final Decree

Let counsel for Peyton prepare a final decree consistent herewith to which they and Mr. Johnson may note their exceptions.

Very Truly Yours,

A large, stylized handwritten signature in black ink, reading "James H. Chamblin". The signature is written in a cursive style with a large, looping initial "J".

James H. Chamblin, Judge

00116

TWENTIETH JUDICIAL CIRCUIT  
OF VIRGINIA



WILLIAM SHORE ROBERTSON, Judge  
40 CULPEPER STREET  
WARRENTON, VIRGINIA 22186

THOMAS D. HORNE, Judge  
POST OFFICE BOX 727  
LEESBURG, VIRGINIA 20178

JAMES H. CHAMBLIN, Judge  
POST OFFICE BOX 123  
LEESBURG, VIRGINIA 20178

JEAN HARRISON CLEMENTS, Judge  
POST OFFICE BOX 727  
LEESBURG, VIRGINIA 20178

RAYNER V. SNEAD, JUDGE RETIRED  
CARLETON PENN, JUDGE RETIRED

POST OFFICE BOX 550  
LEESBURG, VIRGINIA 20178

LOUDOUN, FAUQUIER AND  
RAPPAHANNOCK COUNTIES

November 1, 1999

John W. Toothman, Esquire  
David H. White, Esquire  
TOOTHMAN & WHITE  
400 North Columbus Street, Suite 250  
Alexandria, Virginia 22314

Vernon W. Johnson, III, Esquire  
JACKSON & CAMPBELL  
1120 Twentieth Street, N.W., South Tower  
Washington, D.C. 20036

Re: Randall S. Peyton  
v.  
Countryside Orthopaedics, P.C., and Raymond Lower, D.O.  
Chancery No. 18157  
Circuit Court of Loudoun County

Gentlemen:

This case is before the Court on the Motion for Reconsideration filed by Countryside Orthopaedics, P.C. ("Countryside") seeking reconsideration of various rulings set forth in my opinion letter of June 29, 1999. I have considered the Motion as well as the Motion for Sanctions and Opposition to the Motion for Reconsideration filed by Randall S. Peyton, M.D. ("Peyton"), and Countryside's Reply and Opposition to Peyton's Motion for Sanctions.

For the reasons that follow, the Motion for Reconsideration is denied except for the issue of the amount collected by Countryside after December 31, 1997, for Peyton's services and the corresponding effect on the Severance Pay to which Peyton is entitled, and the Motion for Sanctions is denied. There is no need for any further argument or

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hearing. Also, any request by Peyton for reconsideration of the amount of severance pay is denied.

To be more specific, the only finding in my opinion letter dated June 29, 1999, which I have reconsidered is my finding that Countryside collected \$260,000.00 for Peyton's services from July 1998 through January 4, 1999. After reconsideration of the evidence, I modify my finding to find that Countryside collected \$177,168.23 for Peyton's services from July 1998 through December 1998.

It was a mistake to rely solely on the testimony of Janice Downs and Erik Kloster, CPA, in determining the amount collected by Countryside. After reviewing all the portions of their testimony cited by counsel, it is clear that a reasonable estimate of the amount collected by Countryside could not be made by merely adding up the "positive numbers" as shown on the Aged Accounts Receivable Report dated January 4, 1999 (Complainant's Exhibit 3g).

Kloster testified that he added up the "positive numbers" on the aforesaid report and got \$260,000.00. I neglected to take into consideration that he also testified that this figure represented "collections, adjustments and bad debt write-offs." Peyton's severance entitlement is based upon "collections" for his services, and "collections" is defined in the Employment Agreement as "cash receipts, net of refunds, actually received by the corporation (Countryside) for the physician's (Peyton's) services." Therefore, the sum of \$260,000.00 had to have included more than cash receipts, net of refunds, actually received by Countryside. Kloster did not provide separate figures for collections, adjustments, and write-offs.

I feel that Countryside makes a very good point, and one that I did not consider, in that if the collections are as I found them in the June 29, 1999 letter opinion, then in a year after Peyton left Countryside, it collected almost 68% of his accounts receivable (\$417,979.00 out of \$616,411.00 accounts receivable at the end of December 1997-as shown on the IMM Performance Analysis, a part of Complainant's Exhibit 3i). Such a collection rate would be unreasonable considering a lower collection rate in the past for Peyton. Even Kloster felt that such a collection rate is "unlikely."

A collection rate of a little under 29% based on collections of \$177,168.23 is more reasonable than a 68% collection rate.

I cannot explain why I overlooked, did not recall or placed no emphasis on the July through December 1998 collections set forth in Complainant's Exhibit 3i. Mr. Johnson clearly brought it to my attention during the trial. Perhaps it was because no witness for Countryside testified to the specifics of what is shown on Complainant's Exhibit 3i or because Dr. Lower testified that the amount collected was in the "neighborhood" of \$175,000.00 without an explanation of how he arrived at this figure.

Therefore, the amount of Severance Pay to which Peyton is entitled is as follows:

00118

80% of \$157,979.00  
collected by IMM,  
January through June 1998 \$126,383.20

80% of \$19,189.23  
collected by Countryside,  
July through December 1998 \$ 15,351.38

LESS

Excess Amount \$ 1,100.35

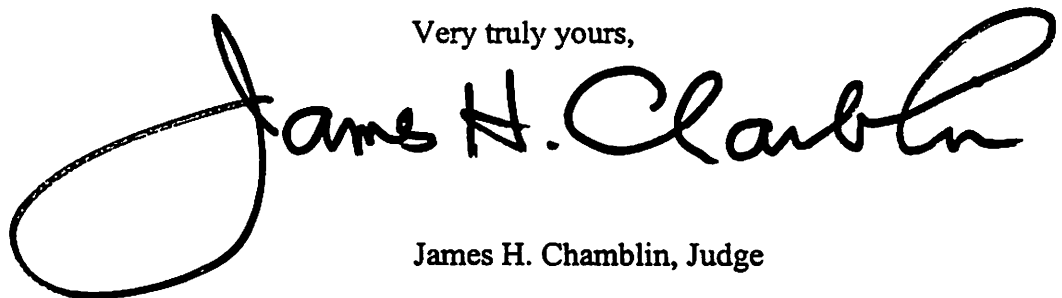
Severance Pay due through  
December 1998 \$140,634.23

Peyton is granted a judgment against Countryside in the amount of \$140,634.23. Peyton is also entitled to be paid 80% of his accounts receivable collected by Countryside since January 1, 1999. Countryside is ordered to calculate this amount and pay it to Peyton forthwith. Countryside is also ordered to comply timely with paragraph 3(e)(2) of the Employment Agreement, i.e., pay Peyton the severance pay to which he is entitled every ninety (90) days.

Peyton's Motion for Sanctions is denied because Countryside had the right to ask for reconsideration. Because Countryside attempted to offer evidence after the trial had been concluded, Exhibits F through L attached to the Motion for Reconsideration have not been considered in ruling on the Motion.

As there appears to be some disagreement among counsel about a final decree, let counsel for Peyton and counsel for Countryside and Lower submit to me within ten (10) days a proposed final decree. I will review each proposed final decree and advise counsel of the final decree I propose to enter. Thereafter, each counsel will be given ten (10) days to send their exceptions directly to me.

Very truly yours,

A large, stylized handwritten signature in black ink, reading "James H. Chamblin". The signature is written in a cursive style with a large loop at the beginning and end.

James H. Chamblin, Judge

00119

V I R G I N I A :

IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

RANDALL S. PEYTON,	)	
	)	
Complainant,	)	
	)	
v.	)	In Chancery No. 18157
	)	
COUNTRYSIDE ORTHOPAEDICS, P.C.,	)	
RAYMOND LOWER, D.O., and	)	
INTEGRATED MEDICAL MANAGEMENT, INC.,	)	
	)	
Defendants.	)	

FINAL DECREE

By Joint Stipulation filed November 19, 1998, the Complainant, Randall S. Peyton ("Peyton") agreed to dismiss this lawsuit as to Defendant Integrated Medical Management, Inc., without prejudice to any and all of his claims against that Defendant.

This cause came before the Court for trial without jury on November 23, 24, 25 and 30 and December 1 and 2, 1998, and January 6 and 26, March 22 and May 3 and 4, 1999, upon the following claims:

1. The claims of Peyton as set forth in his Amended Bill of Complaint as stated in:

Count II (Specific Performance)

Count III (Accounting)

Count IV (Breach of Contract)

Count VIII (Breach of Fiduciary Duty); and

2. The claims of the Defendants Countryside Orthopaedics, P.C. ("Countryside") and Raymond F. Lower, D.O. ("Lower") as set

forth in their First Amended Cross-Bill of Complaint as stated in:

Count I (Fraud)

Count II (Declaratory Judgment)

Count III (Breach of Fiduciary Duty)

Count IV (Breach of Contract).

During the trial the Court issued an opinion letter dated December 15, 1998, concerning inadmissible hearsay, and an opinion letter dated February 17, 1999, concerning the admissibility of certain exhibits.

After consideration of the evidence and the arguments of counsel at trial, on May 4, 1999, the Court ruled from the bench that there would be no punitive damage award against Peyton and that Peyton had not proven any personal liability upon Lower as to any of his claims. All other issues were taken under advisement. Countryside was granted fourteen days to counter-designate portions of depositions of two witnesses with Peyton being granted seven days to reply.

Peyton and Countryside were directed by the Court to file, and they did file, statements of their alleged damages.

By letter opinion dated June 29, 1999, the issues taken under advisement were decided.

Countryside filed a Motion for Reconsideration, Peyton filed a Motion for Sanctions and Opposition to the Motion for Reconsideration, and Countryside filed a Reply and Opposition. These Motions were decided by the opinion letter dated November 1, 1999.

At the request of the Court both parties have submitted proposed final decrees. Also, Peyton has filed a motion for costs and submitted two orders concerning proceedings herein on November 5, 1998, and on January 6 and 26, 1999. By letter to the Clerk dated November 17, 1999, Countryside objected to the entry of each order. By letter dated November 17, 1999, to the judge entering this decree, Countryside objected to the motion for costs and requested an opportunity to file an opposition to an award of costs.

The proceedings before the Court on November 5, 1999, should be the subject of an order of this Court. They are addressed below. The proposed order from January 5 and 26, 1999, is also addressed below.

Because Peyton is granted a judgment against Countryside, he is entitled as a matter of law to an award of costs under Virginia Code § 17.1-601. Countryside may note its opposition to the award of costs herein by exception to this final decree.

After consideration of all the foregoing, the Court has decided to draft and enter its own final decree after giving each party an opportunity to note exceptions.

As to the matters that came before the Court on November 5, 1998, it is ADJUDGED, ORDERED and DECREED that

1. Peyton's Motion for Partial Summary Judgment as to Count I (Fraud) of the First Amended Cross-Bill is denied;
2. The Motion to Quash Subpoena Duces Tecum filed by Loudoun Healthcare, Inc. and Loudoun Hospital Center is denied as to

category 1 of the subpoena duces tecum (the remaining issues were resolved in the order entered herein on January 4, 1999);

3. The Motion to Compel Discovery filed by Countryside and Lower is granted;

4. The Motion Regarding Discovery filed by Peyton is granted to the extent stated on the record; and

5. All discovery responses pursuant to the two discovery motions described in 3 and 4 above are due before the close of business on November 13, 1998.

The proposed order submitted by Peyton concerning the incidents of trial on January 6 and 26, 1999, is not entered because it pertains merely to incidents of the trial, and there is no need for such a court order. The transcripts of the trial on those dates will show what occurred.

Upon consideration hereof, it is

ADJUDGED, ORDERED and DECREED that Defendants' objections to the deposition designations of Peyton from the depositions of Dr. Lower and Ms. Freed be, and they hereby are, overruled; and it is further

ADJUDGED, ORDERED and DECREED that Complainant's objections to the deposition designations of the Defendants from the depositions of Dr. Lower and Ms. Freed be, and they hereby are, overruled; and it is further

ADJUDGED, ORDERED and DECREED that Peyton's objection to Defendants' Trial Exhibit No. 53 be, and it hereby is, sustained; and it is further

ADJUDGED, ORDERED and DECREED that final judgment be, and it hereby is, entered in favor of Defendant Raymond Lower, D.O., on all claims asserted against him by Complainant in this matter; and it is further

ADJUDGED, ORDERED and DECREED that the Decree entered by this Court on January 15, 1998, shall be, and hereby is, merged herein into a permanent decree as modified by this Court's Orders dated June 11, 1998, and August 7, 1998 (requiring, among other things, payment in specified amounts by Peyton to Countryside for photocopies obtained of patient charts); and it is further

ADJUDGED, ORDERED and DECREED that final judgment be, and it hereby is, entered in favor of the Defendants and against Complainant on Counts III, IV and VIII of the Amended Bill of Complaint; and it is further

ADJUDGED, ORDERED and DECREED that final judgment be, and it hereby is, entered in favor of Peyton and against Countryside on Count II of the Amended Bill of Complaint in the amount of \$140,634.23; and it is further

ADJUDGED, ORDERED and DECREED that no pre-judgment interest shall accrue on the foregoing judgment; however, interest shall accrue on the foregoing judgment at the judgment rate of interest from the date of this judgment; and it is further

ADJUDGED, ORDERED and DECREED that Countryside shall calculate 80% of the "cash receipts, net of refunds, actually received by the Corporation (Countryside) for the Physician's (Peyton's) services" pursuant to the subject Employment Agreement from January 1, 1999,

and pay it to Peyton forthwith; and it is further

ADJUDGED, ORDERED and DECREED that Countryside shall be under a continuing obligation to calculate 80% of the "cash receipts, net of refunds, actually received by the Corporation (Countryside) for the Physician's (Peyton's) services" every ninety (90) days as required by the subject Employment Agreement, and to pay such sum to him every ninety (90) days as required by the subject Employment Agreement; and it is further

ADJUDGED, ORDERED and DECREED that final judgment be, and it hereby is, entered in favor of Peyton and against Defendants on the remaining claims set forth in Counts I, III and IV of the First Amended Cross-Bill of Complaint; and it is further

ADJUDGED, ORDERED and DECREED that final judgment be, and it hereby is, entered in favor of Defendants and against Peyton on Count II of the First Amended Cross-Bill of Complaint; and it is further

ADJUDGED, ORDERED and DECREED that Defendant Countryside has validly and effectively exercised its right of repurchase of stock from Peyton on the terms provided by the Stockholders' Agreement in this matter; and it is further

ADJUDGED, ORDERED and DECREED that Complainant's Motions Concerning Discovery and Motions for Sanctions be, and they hereby are, denied in their entirety; and it is further

ADJUDGED, ORDERED and DECREED that all claims for punitive damages against Peyton are dismissed with prejudice; and it is further



ADJUDGED, ORDERED and DECREED that the Motion for Reconsideration is granted to the extent provided for herein, and that Peyton's Motion for Sanctions filed after the Motion for Reconsideration is denied; and it is further

ADJUDGED, ORDERED and DECREED that Peyton shall recover of Countryside his costs in his behalf expended in the amount of \$7,801.94 calculated as follows:

Attorney fee (Virginia Code § 17.1-624)	\$ 15.00
Filing Bill of Complaint (Virginia Code § 17.1-626)	64.00
Service Fees (3) (Virginia Code § 17.1-626)	36.00
Service of Trial Subpoenas by Private Process Server (Virginia Code § 17.1-626)	745.00
Subpoena duces tecum during trial to Ms. Downs and Ms. Cox (Virginia Code § 17.1-626)	34.00
Court Reporter fees for depositions of Lower and Ms. Freed used at trial; discovery deposition transcripts of Ms. Cox, Peyton and Ms. Pettrone; transcript of November 5, 1998, proceeding; and transcripts of other portions of trial proceedings	6,907.94

The Court determines that the court reporter fees incurred by Peyton were essential for the prosecution of this suit by him.

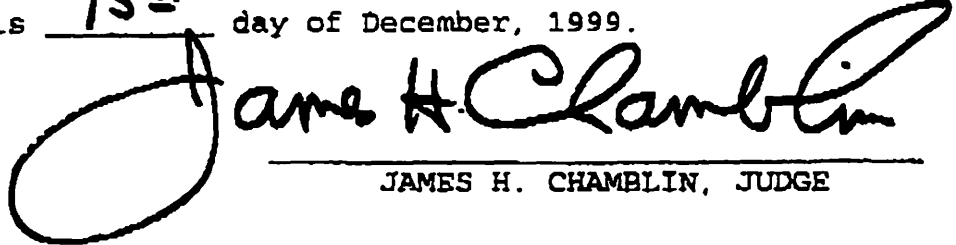
And it is further ADJUDGED, ORDERED and DECREED that Randall S. Peyton's Objection to Defendants' Untimely Objections and Exceptions to Final Decree filed herein on December 8, 1999, is overruled without the need for further argument; and it is further

ADJUDGED, ORDERED and DECREED that the Defendants' Motion for Award of Costs and/or Set-Off Against Award of Costs to Complainant filed herein on December 10, 1999, is denied without the need for further argument.

And this Decree is FINAL.

And the Clerk shall forward certified copies of this final decree to counsel of record. The Court certifies that a law clerk to the judges of this Court faxed a signed copy of the final decree to counsel of record this day.

Entered this 15<sup>th</sup> day of December, 1999.

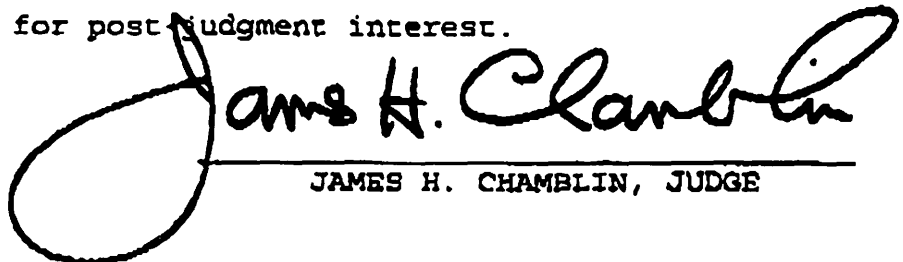
  
JAMES H. CHAMBLIN, JUDGE

With respect to this Final Decree, the Court notes and has considered the following:

1. Randall S. Peyton's Objections and Exceptions to Final Decree filed December 3, 1999.
2. Randall S. Peyton's Objection to Defendants' Untimely Objection and Exceptions to Final Decree filed December 8, 1999.
3. Defendants' Objections and Exceptions to Final Decree filed December 10, 1999.
4. Opposition to Motion for Award of Costs and Defendants' Motion for Award of Costs and/or Set-Off Against Award of Costs to Complainant filed December 10, 1999.

After consideration of the above, the proposed final decree submitted to counsel was modified to include in this Final Decree the following:

1. The overruling of the Complainant's Objection to Defendants' Untimely Objections and Exceptions to Final Decree filed December 8, 1999, without the need for further argument.
2. The denial of the Defendants' Motion for Award of Costs and/or Set-Off Against Award of Costs to Complainant filed December 10, 1999, without the need for further argument.
3. Provision for post-judgment interest.

  
JAMES H. CHAMBLIN, JUDGE

1           A       Yes, sir.

2           Q       Are you a doctor, Doctor?

3           A       Yes, sir.

4           Q       All right. What kind of doctor are you?

5           A       Orthopedic surgeon.

6           Q       When did you graduate from medical  
7 school?

8           A       Graduated from medical school in 1989.

9           Q       And then where did you go from there,  
10 briefly?

11          A       I did an internship at the Johns Hopkins  
12 Hospital and a residency in orthopedic surgery at  
13 the Johns Hopkins Hospital, finished in 1994;  
14 subsequently, a fellowship in total joint  
15 replacement at the Thomas Jefferson University in  
16 Philadelphia, Pennsylvania.

17          Q       And where did you go from there?

18          A       From there, I came to Countryside  
19 Orthopaedics in Sterling, Virginia.

20          Q       The same Countryside that's the defendant  
21 in this case?

22          A       Yes, sir.

23          Q       Who was the principal of Countryside at

1     that time?

2             A       Dr. Lower.

3             Q       And the same Dr. Lower who is a principal  
4     in this case?

5             A       Yes, sir.

6             Q       Now, are you certified in any specialties  
7     of medicine?

8             A       Yes, sir.

9             Q       What is that?

10            A       I'm board certified in orthopedic  
11     surgery.

12            Q       When you first came to Countryside, what  
13     was your position there?

14            A       I was an employee physician.

15            Q       And briefly, what was the path of your  
16     employment at Countryside? What happened to make  
17     you cease being an employee and start being a 50  
18     percent shareholder?

19            A       It was part of the contract. We  
20     discussed it previously that in a year, I would have  
21     the opportunity to buy into the corporation and  
22     become a partner.

23                    And one of the facets in the contract was

1 get the right ones marked. The ones with the yellow  
2 stickers?

3 MR. TOOTHMAN: Yes.

4 Dr. Peyton, would you hold those up?

5 THE WITNESS: Sure (complying).

6 MR. TOOTHMAN: The ones with the yellow  
7 stickers are what we're calling the originals,  
8 although they're third or fourth generation.

9 THE COURT: Just make sure you get them  
10 to me so they can be made part of the record, okay?

11 MR. TOOTHMAN: Yes, we will. Now, if you  
12 want me to reverse it and give the original --

13 THE COURT: No, no, no, that's fine. I  
14 just want to make sure I get the actual exhibits.

15 MR. TOOTHMAN: Right.

16 BY MR. TOOTHMAN:

17 Q Now, as a result of signing that  
18 agreement, what did your status become, to your  
19 knowledge, at Countryside?

20 A To my knowledge, I was supposed to be a  
21 50 percent shareholder.

22 Q Were you also an officer of the  
23 corporation?

00130

1           A       Yes, sir.

2           Q       Were you also a director of the  
3 corporation?

4           A       I believe so, yes, sir.

5           Q       What offices did you hold?

6           A       Vice president and secretary.

7           Q       Now, after you signed the agreement which  
8 is Exhibit 1-A, did you continue treating patients  
9 for Countryside?

10          A       Yes, sir.

11          Q       Was there any change in the quantity of  
12 your efforts, the percentage of your efforts,  
13 devoted to serving Countryside?

14          A       No, sir. It continued.

15          Q       So did there come a time -- well, did you  
16 fulfill your obligations under the contract which is  
17 Exhibit 1-A?

18          A       Yes, sir.

19          Q       Now, did there come a time when you  
20 decided to give notice terminating the agreement  
21 which is Exhibit 1-A?

22          A       Yes, sir.

23          Q       And when did you do that?

**00131**

1           A       It was on October 3rd.

2           Q       1997?

3           A       Yes, sir.

4                   MR. TOOTHMAN: May I approach, Your  
5 Honor, and give the witness what we have marked as  
6 Exhibit 2 (tendering document), copy for the Court  
7 (tendering document), copy for Mr. Johnson  
8 (tendering document and exiting the bench area).

9                   BY MR. TOOTHMAN:

10          Q       What is Exhibit 2, sir?

11          A       This is my letter of resignation dated  
12 October 3, '97.

13                   MR. TOOTHMAN: Your Honor, we move the  
14 admission of Exhibit 2.

15                   MR. JOHNSON: No objection.

16                   THE COURT: Admitted as Plaintiff's  
17 Exhibit Number 2.

18                   MR. TOOTHMAN: Thank you, Your Honor.

19                               (Complainant's Exhibit No. 2  
20                               received in evidence.)

21                   BY MR. TOOTHMAN:

22          Q       Dr. Peyton, after you gave notice to  
23 Countryside and Dr. Lower of termination of your

00132

1 1?

2 A I see that.

3 Q Dr. Lower is not listed as a party to  
4 that agreement, correct?

5 A Dr. Lower is the president of Countryside  
6 Orthopaedics.

7 Q Dr. Lower individually --

8 A He's on the back page.

9 Q Dr. Lower individually is not listed as a  
10 party to the agreement; is that right?

11 A I would guess that's the way the legal  
12 portion is, yes.

13 Q Now, it's your position that you've  
14 complied with all of your obligations under this  
15 employment agreement; is that true?

16 A Yes, sir.

17 Q Now, if you turn to Paragraph 3(E)(4),  
18 which is on Page 4 -- do you see that?

19 A I see that.

20 Q Would you read that provision aloud?

21 A This is the "Physician's Compliance"?

22 Q Yes.

23 A Okay. "Physician or physician's estate's



1 have it for the record that he hasn't read the whole  
2 paragraph.

3 THE COURT: If your question is whether  
4 he has complied with the paragraph, why don't you  
5 just ask it that way instead of phrasing it the way  
6 you did.

7 MR. JOHNSON: All right.

8 BY MR. JOHNSON:

9 Q Is it your position you've complied with  
10 Paragraph 3 (E) (4)?

11 A Yes.

12 Q Now, going back to the beginning of  
13 Paragraph 3, which is on Page 2 --

14 A Which one, now?

15 Q Do you see Paragraph 3, starting on Page  
16 2, "Compensation"?

17 A Yes.

18 Q Now, is it your understanding that that  
19 sets forth the formula by which compensation is to  
20 be determined under this agreement?

21 MR. TOOTHMAN: I hate to be -- this is  
22 for the 1997 component only, not the 1998 accounts  
23 receivable dealt with separately, so I therefore

1           A        I thought you'd already asked me this  
2 one.

3           Q        Is that the same as "Complex Revision  
4 Problem Shoulder"?

5           A        Yes.

6           Q        One of the agreements that you signed in  
7 June of 1997 was a stock purchase agreement; do you  
8 recall that?

9           A        Yes.

10          Q        Do you recall that under the stock  
11 purchase agreement, you were to make buy-in payments  
12 for the purchase of the stock that you were  
13 acquiring in Countryside?

14                   MR. TOOTHMAN: Beyond the scope, Your  
15 Honor.

16                   MR. JOHNSON: I don't think it is,  
17 because he asked him the question: Did you comply  
18 with all the agreements that you signed in June? He  
19 said yes. I think I'm entitled to probe that.

20                   THE COURT: Overruled. Go ahead.

21                   BY MR. JOHNSON:

22          Q        There was a stock purchase agreement, and  
23 that required you to make monthly payments for your

1 buy-in for your purchase of stock in Countryside,  
2 correct?

3 A The language on that is that the  
4 corporation would take out amounts from my  
5 compensation to cover that.

6 Q Well, the amount of the purchase price  
7 for the stock was \$94,258, correct?

8 A I don't have it in front of me, but it  
9 sounds about right.

10 Q And that was payable over a 48-month  
11 period, correct?

12 A I believe so.

13 Q In equal installments, correct?

14 A I believe so.

15 Q Without interest, correct?

16 A I believe that's the way it was supposed  
17 to be.

18 Q Now, in June of '97 when you signed the  
19 agreement, it was retroactive to January 1, 1997,  
20 correct?

21 A Correct.

22 Q So in June of 1997, did you make a  
23 payment for the first six months of buy-in payments?

1           A       At June at the exact time of the signing,  
2 no, sir.

3           Q       In fact, the only payment that you made  
4 was in August; is that right?

5           A       That is correct.

6           Q       And that covered the payments for January  
7 through July, correct?

8           A       That is correct.

9           Q       You didn't make any other payments to  
10 Countryside for the buy-in, correct?

11          A       No, I did not.

12          Q       You did not make any payments for August,  
13 September, October, November, December, correct?

14          A       I did not.

15          Q       And since you left Countryside, you were  
16 given a promissory note from Countryside for the  
17 payback of the money that you had paid in August,  
18 correct?

19               MR. TOOTHMAN: Object to the relevance,  
20 Your Honor.

21               THE COURT: Excuse me. Object to what?

22               MR. TOOTHMAN: To the relevance, Your  
23 Honor. They gave him a promissory note. It's not

1 in the contract.

2 THE COURT: How does this fit in with the  
3 compliance of the agreement? This seems like this  
4 is beyond the agreement, or else that's something  
5 that Countryside did.

6 MR. JOHNSON: The way that I think it  
7 does is if they are contesting the validity of our  
8 exercise of right of repurchase, that's a violation  
9 of the agreement. I'm not sure whether they are or  
10 they aren't, but that's what I'll find out.

11 THE COURT: Without conceding one way or  
12 the other, the objection's overruled, possibly. The  
13 objection's overruled. Go ahead. Do you remember  
14 the question? Ask it again.

15 BY MR. JOHNSON:

16 Q Countryside give you a promissory note  
17 for the payback of the money that you paid in in  
18 August, correct?

19 A Correct.

20 Q And Countryside paid 20 percent of the  
21 amount that you had paid in when it gave you that  
22 promissory note, correct?

23 A Correct.

00138

1           Q       Since then, Countryside been making  
2 monthly payments to you on that promissory note,  
3 correct?

4           A       They've been making monthly payments, not  
5 always in compliance with the promissory note.

6           Q       All the monthly payments have been made,  
7 correct?

8           A       Well --

9           Q       Up to now?

10          A       Up to now, they have, not always in a  
11 timely fashion, and we've previously pointed out  
12 that they were off by ten cents.

13          Q       Well, you've accepted those payments,  
14 correct? You've cashed the checks?

15          A       Basically, from my counsel, is that I  
16 didn't have really any other choice, even though if  
17 you read the promissory note, it gives Countryside  
18 all kinds of legal outs and gives me none. And --  
19 but counsel said that that's what it is.

20          Q       The question is, Dr. Peyton: You have  
21 accepted all of the payments that Countryside has  
22 made to you under the promissory note?

23          A       Yes.

**00139**

1           Q       There were some questions about dictation  
2 equipment. What happened to the dictation  
3 equipment?

4           A       I took that with me.

5           Q       And what happened to it after that?

6           A       The door on it was broken and I bought  
7 another one. That's basically just used as a backup  
8 in case my new one breaks.

9           Q       You had some questions about your stock  
10 buy-in.

11                   Your Honor, we've marked Exhibit 15-C.  
12 May I approach?

13                   THE COURT: Sure.

14                   (Whereupon, Mr. Toothman approached the  
15 bench area and tendered document to the Court and  
16 respondent's counsel.)

17                   BY MR. TOOTHMAN:

18           Q       Doctor, what is 15-C (tendering document  
19 and exiting the witness area)?

20           A       This is the check for buy-in that was  
21 written August 7th of '97 with a note to Dr. Lower  
22 as well as a copy of the check and a little register  
23 tape.

**00140**

1           MR. TOOTHMAN: Your Honor, we'd offer  
2 15-C at this time.

3           MR. JOHNSON: No objection.

4           THE COURT: Admitted as Plaintiff's 15-C.

5           MR. TOOTHMAN: Yes, Your Honor.

6                               (Complainant's Exhibit No.  
7 15-C received in evidence.)

8           BY MR. TOOTHMAN:

9           Q       Now, there were some questions about your  
10 not paying any contributions after that; is that  
11 correct?

12          A       That's correct.

13          Q       Why didn't you?

14          A       Well --

15               MR. JOHNSON: Objection.

16               THE COURT: Asked and answered?

17               MR. TOOTHMAN: No, I think he wants to  
18 argue it's irrelevant.

19               MR. JOHNSON: I'm not sure if it was  
20 asked and answered. It's not relevant and it's  
21 beyond the scope.

22               THE COURT: It's overruled. We're going  
23 to get to it eventually anyway, so he might as well

**00141**



1     answer it now.

2                     BY MR. TOOTHMAN:

3             Q       Explain how it worked and why you didn't  
4     pay.

5             A       I made this first payment -- this was  
6     after I had called Mr. Zagami and we had had a bonus  
7     coming to us after the first six months of the year.

8                     And Dr. Lower had said when we signed the  
9     agreements we'd wait till the bonus -- or till the  
10    first six months of the year, since we were  
11    basically at the end, until Mr. Zagami did all of  
12    the numbers up to see what the bonus was, and then  
13    the buy-in would be due at that time.

14                    And we set up -- had a meeting with  
15    Mr. Zagami where I was to get like a \$45,000 bonus  
16    and so was Dr. Lower. But during that time, I was  
17    actually leaving and an extra 25 or \$26,000 extra in  
18    the corporation.

19                    And I said that wasn't fair. It ought to  
20    be equal, you know, leave equal amounts of the  
21    money, especially since he had taken a larger salary  
22    than I had at that time.

23                    And when I called Mr. Zagami to check on

1 the bonus stuff, Mr. Zagami told me --

2 MR. JOHNSON: Objection.

3 MR. TOOTHMAN: They've identified him as  
4 the corporate accountant. It was within the scope  
5 of his responsibilities. Therefore, it is making an  
6 admission on behalf of the party.

7 THE COURT: I don't know what he said  
8 first. You can renew your objection after I hear  
9 what he said.

10 Go ahead. What did Mr. Zagami say?

11 THE WITNESS: At that point, Mr. Zagami  
12 said that the payment was to be written as a check.  
13 And I said, well, that wasn't what the agreement  
14 says, because in the agreement, it says it was to  
15 come out of my account or come out of my payment.

16 And he says, no. He says, you have to  
17 write a personal check for it. I said, well, that  
18 means that it's post-tax dollars, and we've never  
19 discussed that. He said, well, all the agreements  
20 are in post-tax dollars. So I called Dr. Lower.  
21 And he said, oh, yeah, that's in post-tax dollars.

22 So later on, I went and talked to  
23 Dr. Lower. And I said, listen, we've been talking

1 about this since Thanksgiving of 1994. It's in  
2 pre-tax dollars.

3 And he said, it's in post-tax dollars.  
4 If you have a problem with it, sue your accountant  
5 and your attorneys. It's not my problem. And at  
6 that point, I said, you know, that's certainly not  
7 what we agreed upon.

8 BY MR. TOOTHMAN:

9 Q Then what happened with respect to your  
10 additional pay-ins for purchase of the stock?

11 A So what I did is I said, well, talk to  
12 Mr. Zagami and make it pre-tax, as we had previously  
13 discussed, and Dr. Lower said he would. So I called  
14 Mr. Zagami and he said he would do some kind of a --  
15 do a schedule.

16 And so I paid this in post-tax dollars,  
17 because Dr. Lower said he was having trouble with  
18 meeting his financial concerns, because he had to  
19 take a home loan out to buy his vehicle and this was  
20 to pay that off.

21 So I wrote him this check with this note.  
22 It says, "I trust that Dan Zagami will make the  
23 pre-tax arrangements as we discussed for the

00144

1 balance."

2 Mr. Zagami and I traded telephone calls,  
3 and he wanted to set up a meeting. I told him I  
4 didn't think there was any need for a meeting. All  
5 he had to do was an amortization schedule and send  
6 it to myself and Mr. Kloster. If that was  
7 agreeable, that was fine, no big deal, but he never  
8 did that.

9 Q So why didn't you make the additional  
10 payments on the stock for August, September, and so  
11 forth?

12 A Because it was supposed to come --

13 MR. JOHNSON: Objection, asked and  
14 answered.

15 THE COURT: If that is the reason.

16 MR. TOOTHMAN: I just wanted to make sure  
17 it was. Go ahead.

18 THE COURT: The objection is overruled.  
19 Was that the reason?

20 THE WITNESS: I'm sorry. I don't  
21 understand what's going on.

22 THE COURT: The problem was pre-tax  
23 versus post-tax dollars?

00145

1           THE WITNESS: That was one of the things,  
2 but the reason why I didn't make any previous --  
3 that was the reason from August till the end,  
4 because it was supposed to be in pre-tax rather than  
5 post-tax, but the other thing was -- is it was  
6 supposed to come out of the expenses, my check, not  
7 supposed to be written as a check by me, according  
8 to the agreement. So those two things.

9           BY MR. TOOTHMAN:

10          Q       I want to show you -- there was some talk  
11 earlier -- Your Honor, approach and give him Exhibit  
12 7-A (tendering document), a copy to the Court  
13 (tendering document), and to Mr. Johnson (tendering  
14 document and exiting the bench area).

15                There was some talk earlier, sir, about a  
16 joint letter that was sent to patients. Do you see  
17 7-A?

18          A       Yes.

19          Q       Okay. What is that?

20          A       This is the letter that was sent out to  
21 patients stating my relocation.

22          Q       Is this the so-called joint letter?

23          A       Yes, sir.

00146

1           Q       And from the very start, you wanted the  
2       opportunity to buy into Countryside Orthopaedics at  
3       some point; is that right?

4           A       That's correct.

5           Q       And in part, you figured that it would be  
6       a better economic opportunity for you if you were a  
7       shareholder in the corporation at some point; is  
8       that fair to say?

9           A       That's fair.

10          Q       And your testimony is that it was your  
11       understanding that the buy-in, however it was  
12       structured, would be in pre-tax dollars. Is that  
13       right?

14          A       That's correct.

15          Q       And it was also your understanding  
16       initially that you would have a one-year contract  
17       with Countryside. Is that right?

18          A       That was what was requested.

19          Q       And you'd be an employee for one year  
20       with Countryside under the contract that you were  
21       requesting; is that right?

22          A       That is correct.

23          Q       Now, ultimately, you also wanted to have

1 a contract that didn't have a restrictive covenant  
2 in it; is that right?

3 A That is correct.

4 Q And ultimately, you received a draft of  
5 the employment agreement sometime in early 1995; is  
6 that right?

7 A Correct.

8 Q And you reviewed the draft, correct?

9 A Yes.

10 Q You looked it over carefully?

11 A Yes.

12 Q And you made comments to the draft?

13 A I'm sorry. I don't --

14 Q You made comments to Dr. Lower about the  
15 draft that you had received?

16 A Yes, I did.

17 Q If you would, I think right on the top of  
18 the notebook there is Defendants' Exhibit 8  
19 (indicating). Could you take a look --

20 A That it is.

21 Q -- at that?

22 A (Complying.)

23 Q Defendants' Exhibit 8 is the letter that

1 you wrote Dr. Lower sometime in 1995, early 1995,  
2 concerning the comments that you had to the draft  
3 agreement; is that right?

4 A That's correct.

5 Q And one of the things you wrote on the  
6 first page was with respect to the term. You asked  
7 if it should read one year, correct?

8 A Correct.

9 Q And on the second page, with respect to  
10 the restrictive covenant, you asked Dr. Lower to  
11 please omit the restrictive covenant; is that right?

12 A That is correct.

13 Q And then down below that on the paragraph  
14 that you've labeled Number 18, "Purchase Option,"  
15 you asked for other things to be added to the  
16 contract, correct?

17 A Added or changed. There are some  
18 notations here.

19 Q All right. And one of the things you  
20 asked was that the payment of the purchase amount  
21 shall be by salary differential in pre-tax dollars  
22 over a four-year period in equal installments  
23 without interest charged. Is that right?



1           A       That's what Dr. Lower and I discussed  
2 previously. That's what was agreed upon.

3           Q       And in your letter, you were asking that  
4 that be incorporated into the agreement, correct?

5           A       Yes, sir.

6           Q       Now, at the time that you were  
7 negotiating this agreement with Dr. Lower and with  
8 Countryside, you had a lawyer in Richmond review the  
9 agreement also; is that right?

10          A       Yes, I did.

11          Q       That lawyer was representing you in  
12 connection with these negotiations, correct?

13          A       He looked through the contract, yes.

14          Q       Now, ultimately, a final agreement was  
15 signed on April 24th of 1995; is that right?

16          A       Thereabouts.

17          Q       And I think that's Exhibit 9. Can you  
18 take a look at that?

19          A       Yes.

20          Q       That's the agreement that was signed,  
21 correct?

22          A       Yes, sir.

23          Q       What is the date on that?

1           A       Dr. Peyton's, April 24th.

2           Q       Now, if you would, turn to Paragraph 18,  
3       which starts on Page 8.

4           A       You said 18?

5           Q       Yes.

6           A       Okay.

7           Q       Starts on Page 8.

8           A       Got it.

9           Q       Do you see that? Paragraph 18 deals with  
10       the potential buy-in; is that right?

11          A       Yes, sir.

12          Q       And in Paragraph 18-C, which continues  
13       onto Page 9, it says that the total buy-in costs  
14       shall not exceed \$100,000. Is that right?

15          A       That's exactly right.

16          Q       Now, that agreement doesn't provide that  
17       the buy-in would be paid in pre-tax dollars, does  
18       it?

19                 MR. TOOTHMAN: Objection, calls for a  
20       legal conclusion, irrelevant, and the document  
21       speaks for itself.

22                 THE COURT: Well, it's not irrelevant,  
23       because this pre-tax seems to be a real issue with

1 Dr. Peyton. So the objection's overruled.

2 Go ahead and answer the question.

3 THE WITNESS: Okay. What's the question  
4 again, then? Sorry.

5 BY MR. JOHNSON:

6 Q The agreement does not provide that the  
7 buy-in would be paid in pre-tax dollars, does it?

8 A As I stated previously on this, this  
9 agreement does not state that, and the reason why is  
10 Dr. Lower said he took it out because his accountant  
11 told him to. And he said, just trust me; it will be  
12 in pre-tax dollars.

13 Q So at the time you signed this agreement,  
14 you knew that the agreement didn't provide for a  
15 payment in pre-tax dollars; is that right?

16 A I had agreement, verbal agreement, from  
17 Dr. Lower, quote, unquote, just trust me. I had to  
18 take this out because it doesn't look good for the  
19 accountant. And just trust me, it will be in  
20 pre-tax dollars.

21 Q So you knew that the pre-tax provision  
22 had been taken out of this agreement, correct?

23 A I knew that that term which I had

1 requested had been taken out of this agreement.

2 Q And the final agreement that you signed  
3 didn't include that term. You knew that also,  
4 didn't you?

5 A It did not include that term.

6 Q Now, later on when you were discussing  
7 the buy-in with Dr. Lower sometime later in 1996,  
8 you told Dr. Lower that if the amount of the buy-in  
9 was \$100,000, you would be leaving the area and  
10 looking for another job; is that right?

11 A No, sir, that's incorrect.

12 Q You had a discussion at some point with  
13 Dr. Lower where you told him that, did you not?

14 A I had a discussion with Dr. Lower  
15 regarding the contract and regarding the buy-in, and  
16 Dr. Lower said, I want \$100,000. And I told him  
17 that's not what the contract had stated.

18 Basically, it stated half of the negative  
19 value of the corporation plus \$100,000, not to  
20 exceed \$100,000, which is stated in the agreement  
21 right here (indicating).

22 Dr. Lower did not want to look at the  
23 agreement. He just wanted \$100,000 flat. And I

1 told him that he needs to go by the agreement; look  
2 at the agreement.

3 If he couldn't do that -- because the  
4 price of the corporation at that time was valued I  
5 think at a negative \$53,000. Take half that, add  
6 \$100,000, it comes somewhere close to \$75,000.  
7 That's not \$100,000. And so he needed to look at  
8 the agreements and abide by the agreement.

9 Q Now, you started working for Countryside  
10 as an employee in August of 1995; is that right?

11 A That is correct.

12 Q Continued working through the end of  
13 1995; is that correct?

14 A End of 1997.

15 Q At least through the end of 1995 you were  
16 still an employee, correct?

17 A Correct.

18 Q And in 1996, you were still an employee,  
19 correct?

20 A Correct.

21 Q And towards the fall of 1997, you began  
22 having discussions Dr. Lower about the buy-in,  
23 correct?

00154

1           A       Yeah, that is correct.

2           Q       And then in the context of those  
3 discussions, you had this conversation with  
4 Dr. Lower about a buy-in in the amount of \$100,000;  
5 is that right?

6           A       That was near -- near November, December  
7 of 1996.

8           Q       That's the discussion that we were  
9 talking about a few minutes ago that was in November  
10 or December of 1996; is that right?

11          A       That is correct.

12          Q       And at that time, Dr. Lower told you that  
13 the buy-in would be \$100,000; is that what you're  
14 saying?

15          A       He told me the buy-in would be \$100,000;  
16 take it or leave it.

17          Q       And you told him that if it's \$100,000,  
18 then I'll be leaving the area, because that's not  
19 what the agreement had stated; is that right?

20          A       That is exactly right.

21          Q       And by "leaving the area," you meant that  
22 you would be looking for another job, correct?

23          A       I can't remember if I said leaving the

1 area or if I'm going to look for another job, but I  
2 said, yes, I'll find another job if you can't abide  
3 by the agreement.

4 Q If the buy-in was \$100,000, you'd be  
5 looking for another job, basically; is that what you  
6 were saying?

7 A (Moved head up and down.)

8 Q Yes?

9 A Yes, sir.

10 Q Okay. Now, when you first joined  
11 Countryside, that was in about August of 1995; is  
12 that right?

13 A Yes, sir.

14 Q And the welcoming party that Countryside  
15 threw for you was sometime in September of 1995; is  
16 that right?

17 A Sometime. I don't remember the exact  
18 date. Sometime.

19 Q That was a nice party, wasn't it?

20 A It was a nice party.

21 MR. TOOTHMAN: Object to the relevance,  
22 Your Honor.

23 THE COURT: It's marginal, but it's

1           Q       And from time to time when you were  
2 involved in the negotiations, you had the assistance  
3 of your accountant, Mr. Kloster; is that right?

4           A       That is correct.

5           Q       When did you hire Mr. Kloster?

6           A       Sometime I think in September or October  
7 of 1996.

8           Q       Had you known Mr. Kloster previously?

9           A       No, I had not, but I did find out that we  
10 went to college together.

11          Q       Did you know him in college?

12          A       I knew just of him, but no, I didn't know  
13 him.

14          Q       Now, from time to time when you were  
15 involved in these negotiations, you also kept your  
16 own personal notes concerning certain matters with  
17 respect to the negotiations; is that right?

18          A       I'm sure I did, yes.

19          Q       Does Mr. Kloster do your personal tax  
20 returns, also?

21          A       He does.

22          Q       And has he done that since 1996?

23          A       Yes, he has.

00157



1 we be really specific so we're not confusing them?  
2 because there's other agreements floating around.

3 THE COURT: Do that, please.

4 BY MR. JOHNSON:

5 Q Dr. Peyton, there were four agreements  
6 that were signed on June 27, 1997, correct?

7 A If my recollection is correct, I think  
8 that there were only three agreements that were  
9 signed on June 27th. Then we signed another one at  
10 a later date, because it wasn't there. So we signed  
11 all the agreements.

12 And I don't remember if that was my  
13 employee contract or Dr. Lower's employee contract.  
14 One of them apparently was not there and it wasn't  
15 found out until it was sent back to the attorneys.  
16 There were three agreements that were signed and  
17 then another one signed shortly thereafter.

18 Q And the four agreements are: Your  
19 employment agreement, correct --

20 A Correct.

21 Q -- Dr. Lower's employment agreement,  
22 correct --

23 A Correct.

00158

1           Q       -- the stock purchase agreement,  
2 correct --

3           A       Correct.

4           Q       -- and the stockholder's agreement,  
5 correct?

6           A       Correct.

7           Q       Those are the only four agreements that  
8 were signed on or about June 27, 1997?

9           A       The only ones I know of.

10          Q       All right. Now, before those agreements  
11 were signed, you never told Dr. Lower that you  
12 intended to leave Countryside at some point, did  
13 you?

14          A       I never said that, never had that  
15 intention.

16          Q       Now, you never told Dr. Lower that you  
17 intended to leave Countryside and that you just  
18 wanted to get rid of the restrictive covenant in the  
19 original employment agreement, correct? You never  
20 told him that?

21          A       Never said that. Again, I never had that  
22 intention.

23          Q       Now, sometime in 1995 you became aware

1 25th, but it was signed on September 9th?

2 A No, I don't.

3 Q Do you know when this form was actually  
4 submitted to the IRS?

5 A I think it was sometime probably mid- to  
6 even late September.

7 Q Did you tell Dr. Lower that you were  
8 applying for an employer identification number?

9 A No, sir.

10 Q Did you tell Dr. Lower that you were  
11 planning to start a business called Randall S.  
12 Peyton, M.D., P.C.?

13 MR. TOOTHMAN: Object to the relevance,  
14 Your Honor. If this is relative to fraud, we're now  
15 at the wrong time period.

16 THE COURT: It's overruled. Go ahead and  
17 answer the question.

18 THE WITNESS: Repeat that again, please,  
19 sir.

20 BY MR. JOHNSON:

21 Q Did you tell Dr. Lower that you were in  
22 the process of forming, starting, or acquiring a  
23 business called Randall S. Peyton, M.D., P.C. at

1 that time?

2 A No, sir.

3 Q In fact, you didn't tell Dr. Lower that  
4 you had any plans to leave Countryside until you  
5 actually tendered your resignation on October 3,  
6 1997; is that right?

7 A That's exactly correct.

8 Q That's the Friday afternoon when you  
9 paged Dr. Lower to meet you at Tuscarora Restaurant,  
10 correct?

11 A That's correct.

12 Q You and he had a discussion and you  
13 actually handed him the resignation letter that day,  
14 correct?

15 A That is correct. We had a discussion and  
16 during that discussion, he didn't believe me. And I  
17 had the letter in my back pocket. And he said, you  
18 wouldn't leave me. You don't even have a letter of  
19 resignation.

20 I said, yes, sir, I do. And he said, I  
21 don't believe you. So I handed it to him at that  
22 point, and that was near the end of the -- end of  
23 our discussion.

159B

1 BY MR. JOHNSON:

2 Q Now, when you tendered your resignation  
3 to Dr. Lower and to Countryside, there were  
4 discussions about possibly trying to work it out so  
5 that you could stay; is that right?

6 A That is correct.

7 Q And you prepared the list that's in front  
8 of you, which was a list of what it would take to  
9 make you happy so that you would stay and not leave  
10 the corporation. Is that right?

11 A Dr. Lower asked me to fix up a list of  
12 things that I had a problem with that we needed to  
13 discuss, and these are the things -- the issues that  
14 we needed to discuss.

15 Q As far as you were concerned, these were  
16 the issues that needed to be discussed if you were  
17 to be convinced not to resign, correct?

18 A Yes. These had to be discussed.

19 Q You prepared this list yourself, correct?

20 A That I did.

21 Q And you had the input and assistance of  
22 Mr. Kloster in connection with preparing this list?

23 A No, sir, I did not.

00160

1                   THE WITNESS:   Would you repeat that,  
2   please?

3                   BY MR. JOHNSON:

4           Q       You understood that if you didn't fill  
5   out those forms, Countryside would not be able to  
6   bill for those services, correct?

7           A       No, sir, I do not understand that.   The  
8   reason why they should be able to bill for those  
9   services, because those forms were previously filled  
10   out.   Medicare had previously reimbursed Countryside  
11   for that exact patient.

12           Q       Was it Medicare or Medicaid?

13           A       And it was from something that  
14   Countryside did or something that Dr. Lower did to  
15   get me kicked off the plan.   I don't feel that I  
16   have a responsibility to do that, fill those forms  
17   back out.

18           Q       Now, when you signed your new employment  
19   agreement in June of 1997, as it relates to the old  
20   employment agreement, you were given a number of  
21   perquisites that you didn't have before; is that  
22   right?

23           A       A number of what?

**00161**

1 Q Perquisites, employment perks.

2 A I guess you can call it that, yes, sir.

3 Q Well, let's be more specific. As an  
4 employee under the 1995 agreement, you had an  
5 automobile allowance, correct?

6 A That is correct.

7 Q And that automobile allowance was \$500 a  
8 month, correct?

9 A That is correct.

10 Q And in the new employment agreement, you  
11 didn't have any limits on your auto allowance,  
12 correct?

13 A That is correct.

14 Q And in the old employment agreement, you  
15 had a cellular phone allowance, correct?

16 A I'd have to look at it, but I believe  
17 that's so.

18 Q Well, I don't want you to guess. Exhibit  
19 9 --

20 THE COURT: Is that a Plaintiff's or a  
21 Defendants' exhibit?

22 MR. JOHNSON: Defendants'. I'm sorry. I  
23 think he had it in front of him earlier. It's the

1 employment agreement.

2 THE WITNESS: Okay.

3 BY MR. JOHNSON:

4 Q On the last page, Page 11 --

5 A Uh-huh, yes, sir.

6 Q -- you had an allowance for the cellular  
7 telephone up to \$150 a month with valid receipts and  
8 invoices, correct?

9 A Yes, sir.

10 Q And in the new employment agreement,  
11 there was no limit on your cellular telephone  
12 allowance, correct?

13 A Correct.

14 Q Now, in the old employment agreement,  
15 there was no provision concerning your ability to  
16 communicate with patients concerning your departure  
17 from the practice, correct?

18 A Correct.

19 Q And in the new employment agreement,  
20 Paragraph 12 provided that you could have a joint  
21 letter notifying patients that you were departing,  
22 correct?

23 MR. TOOTHMAN: Objection. The document



1 speaks for itself, Your Honor.

2 THE COURT: It speaks for itself, but I  
3 think that's a fair statement of what it says. Go  
4 to the next question.

5 MR. JOHNSON: Okay.

6 BY MR. JOHNSON:

7 Q Now, in the old employment agreement, you  
8 had an allowance for professional dues and education  
9 of up to \$3,000 per year with valid receipts or  
10 invoices, correct?

11 A Correct.

12 Q And in the new employment agreement,  
13 there was no such limit on professional dues and  
14 education, correct?

15 A Correct.

16 Q In the old employment agreement, there  
17 was a provision entitling the prevailing party to  
18 recover attorney's fees, court costs, and other  
19 expenses incurred, correct?

20 A You'll have to point that one out to me.  
21 I don't know.

22 Q If you could turn to Page 8, Paragraph  
23 17-F --

00164

1           A       Found it.  Yes.

2           Q       -- do you see that that discusses the  
3 right of a party to recover attorney's fees, court  
4 costs, and other expenses under certain  
5 circumstances?

6           A       That's correct.

7           Q       There's no such provision in the new  
8 employment agreement, correct?

9           A       Not that I know of.

10          Q       In the old employment agreement, there  
11 was a restrictive covenant, correct?

12          A       Correct.

13          Q       Prohibiting you, as set forth in the  
14 restrictive covenant, from doing certain things for  
15 24 months following your termination, correct?

16          A       Correct.

17          Q       And there is no such provision in the --

18                 MR. TOOTHMAN:  I thought that when I  
19 tried to ask that Dr. Lower about some of these  
20 provisions, I was cut off because the document  
21 speaks for itself.

22                 Why is he having -- I object to the  
23 relevance and because the document speaks for

1           A       That was basically what we had agreed  
2 upon since 1994.

3           Q       Dr. Peyton, one of your requests in there  
4 is that the deal be structured in pre-tax dollars,  
5 correct?

6           A       It's number 12.

7           Q       That is correct?

8           A       Yes, sir.

9           Q       And as far as numbers 2 and 3, let's talk  
10 about those. Those relate to the bills of  
11 Mr. Lipresti and Mr. Zagami relating to what you  
12 call the original contract here, correct?

13          A       It's the agreement -- yeah, the four  
14 agreements that we signed.

15          Q       When you said "the original contract,"  
16 you meant the four agreements that were signed as of  
17 June 27, 1997, correct?

18          A       Correct.

19          Q       You didn't think that you should bear any  
20 of the responsibility for those bills, correct?

21          A       Again, I paid for 100 percent of my  
22 attorney and 100 percent of my accounting fees. I  
23 did not believe that I should pay for the seller's

1 100 percent or even 50 percent of the seller's fees.  
2 I don't agree with that.

3 Q Well, Mr. Lipresti was the corporate  
4 attorney, correct?

5 A That is correct.

6 Q And Mr. Zagami was the corporate  
7 accountant, correct?

8 A That is correct.

9 Q And the fees for Mr. Lipresti and  
10 Mr. Zagami's work were paid by the corporation,  
11 correct?

12 A That is correct.

13 Q Now, you also said that one of the things  
14 that you had a problem with was the July meeting  
15 that you had with Mr. Zagami. Was this a meeting  
16 towards the end of July?

17 A I don't remember the exact date, but it  
18 was somewhere in there.

19 Q And you were present at that meeting?

20 A I was present, Mr. Zagami was present,  
21 and Dr. Lower was present.

22 Q Mr. Kloster was not present, correct?

23 A Mr. Kloster was not present.

00167

1           Q       Okay. Now, at that meeting, both you and  
2 Dr. Lower agreed that you would both take bonuses  
3 out of the corporation at that time. Is that right?

4           A       That is correct.

5           Q       And at that time, both of you took a  
6 \$45,000 bonus out of the corporation, correct?

7           A       That is correct.

8           Q       And a couple of days later, you took some  
9 of that money and wrote a check, on August 7, 1997,  
10 to Dr. Lower for the first seven months of the  
11 buy-in payments, correct?

12          A       I wrote a check for them. I mean,  
13 whether it was that particular money or not, I can't  
14 tell you, but yeah, some of that went towards that.

15          Q       Well, are you saying you don't know what  
16 that check was for, Dr. Peyton?

17                   MR. TOOTHMAN: Objection.

18                   THE WITNESS: Which check are you talking  
19 about?

20                   MR. TOOTHMAN: Yeah.

21                   THE COURT: I think you're arguing with  
22 him, and I don't think he understands what you're  
23 talking about. The objection is sustained based on

1       that it's argument --

2                   MR. TOOTHMAN: Argumentative, Your Honor.

3                   THE COURT: -- argumentative. Go ahead.

4                   BY MR. JOHNSON:

5           Q       This meeting was in July, correct?

6           A       Correct.

7           Q       And sometime after that, in August, you  
8 wrote a check to Dr. Lower for the first seven  
9 months of the buy-in payments, correct?

10          A       That's correct.

11          Q       Do you recall writing him that check?

12          A       Yes, I do.

13          Q       You gave him that check?

14          A       Yes, I did.

15          Q       The money that you used to pay those  
16 first seven months of buy-in came out of the \$45,000  
17 bonus that you were paid as a result of that meeting  
18 in July, correct?

19          A       I guess you can say that. I mean,  
20 however your accounting is, yeah. I mean, whether  
21 it was money I already had in my account versus the  
22 money that came out of that bonus, yes, but -- yes,  
23 that came out of that bonus.

00169

1           A       That's correct.

2           Q       In July and August, you were both out for  
3 that time period, that three weeks total, correct?  
4 It was in July and August when you took the  
5 vacations?

6           A       End of June, July, and August, yes, sir.

7           Q       And you say you had this discussion with  
8 Dr. Lower about taking liquor from the honor bar at  
9 Disney World; is that right?

10          A       Yes, sir.

11          Q       Where is that set forth on Exhibit 55?

12          A       It's not set forth on Exhibit 55.

13          Q       You raised some issues concerning the  
14 control over the finances of the corporation; is  
15 that right?

16          A       Yes, sir.

17          Q       Now, when you signed on in June of '97,  
18 it was your understanding, was it not, that  
19 Dr. Lower was the president of Countryside, correct?

20          A       That's correct.

21          Q       And what was your position with  
22 Countryside?

23          A       Secretary and vice-president.

00170

DIRECT EXAMINATION

BY MR. JOHNSON:

Q. Would you state your full name, please.

A. Raymond Francis Lower.

Q. What is your profession, Dr. Lower?

A. I'm an orthopaedic surgeon.

Q. Where do you live?

A. Waterford, Virginia.

Q. And how long have you been an orthopaedic surgeon?

A. Since I finished my residency in 1987. So it would be 11 years.

Q. Dr. Lower, I'd like to go back through your professional background and your training a little bit, if you could. You attended college, I assume?

A. Yes.

Q. Where was that?

A. Seton Hall University in New Jersey.

Q. What degrees did you obtain?

A. A Bachelor of Science, a B.S.

Q. What year did you obtain that?

A. 1976.

00171



1 reconstruction at the University of Maryland in  
2 Baltimore. That ended in -- let me see -- '91. I  
3 got back on the staff of Walter Reed for about six  
4 weeks, and I was deployed to Saudi Arabia for seven  
5 months.

6 Q. Did you serve in the Gulf War?

7 A. Yes, I did.

8 Q. For how long?

9 A. Seven months. From August until March.

10 Q. When did you finish up there?

11 A. I came back in March of 1991 and then  
12 subsequently finished out my obligation in the  
13 military and -- and got out of Walter Reed in the  
14 summer of '91 and went in practice in Loudoun  
15 County.

16 Q. Where did you go in practice in Loudoun  
17 County?

18 A. I was initially with a Dr. Allen at  
19 Dulles Orthopaedics.

20 Q. How long did you stay with -- with  
21 Dr. Allen?

22 A. Until 1993.

23 Q. What did you do in 1993?

**00172**

1           A.       I set -- I left Dr. Allen and set up my  
2 own corporation.

3           Q.       And what was the name of that  
4 corporation?

5           A.       Countryside Orthopaedics.

6           Q.       That's the same corporation that's a  
7 defendant in this case?

8           A.       Yes, sir.

9           Q.       Did you form the corporation?

10          A.       Yes, I did.

11          Q.       Were you the incorporator?

12          A.       Yes.

13          Q.       Were you the shareholder in the  
14 corporation?

15          A.       Yes, I was.

16          Q.       Up until 1997, were there any other  
17 shareholders in Countryside Orthopaedics, other than  
18 yourself?

19          A.       No, sir.

20          Q.       And when you started Countryside in 1993,  
21 did you locate offices for the corporation?

22          A.       Yes, I did.

23          Q.       Where were those offices?

**00173**

1 MR. JOHNSON: May I approach the witness?

2 THE COURT: Yes, sir.

3 BY MR. JOHNSON:

4 Q. I'm handing you what's been marked as  
5 Defendants' Exhibit 8. Would you identify that,  
6 please?

7 A. It's a letter to me from Dr. Peyton.

8 Q. Do you recall receiving this letter?

9 A. Yes, I do.

10 Q. Does this letter reflect that Dr. Peyton  
11 had obtained the draft employment agreement?

12 A. Yes, it does.

13 Q. And what did you understand this letter  
14 to be at the time you received it?

15 A. We -- I sent Dr. Peyton the initial  
16 employment agreement, and he reviewed it. And then  
17 what he did is he went through the agreement and  
18 sent me back a letter with suggested changes or --  
19 or areas that he wanted to further discuss with me.

20 Q. On the second page of the letter, did  
21 Dr. Peyton make any comment with respect to a  
22 restrictive covenant in the draft agreement?

23 MR. TOOTHMAN: Object to the relevance,

1 those numbers put in there would be structured.

2 Q. Did you and Dr. Peyton discuss whether  
3 the buy-in would be paid in pre-tax dollars or  
4 post-tax dollars?

5 A. We did talk about pre- and post-tax  
6 dollars, and you know, we definitely talked about  
7 pre-tax. And we also did talk about post-tax, and I  
8 said we would do it -- we could structure it in  
9 pre-tax dollars.

10 However, we both had to benefit from it  
11 and -- meaning that if I ended up having -- if a --  
12 if a set dollar amount was made to the buy-in  
13 agreement and he got the advantage of being able to  
14 pay in pre-tax dollars, why should I be paid less  
15 and having to pay tax and trying -- wanted to come  
16 to the same number.

17 MR. JOHNSON: Your Honor, we offer  
18 Exhibit 8.

19 MR. TOOTHMAN: Your Honor, we object on  
20 relevance grounds. It also doesn't have any date.

21 THE COURT: It's admitted as Defendants'  
22 Exhibit No. 8.

23 . . . .

00175

1                   (Defendants' Exhibit No. 8 was admitted  
2 into evidence.)

3                   MR. JOHNSON: May I approach the witness?

4                   THE COURT: Yes, sir.

5                   BY MR. JOHNSON:

6                   Q. Dr. Lower, did there come a time when you  
7 signed an employment agreement between Countryside  
8 and Dr. Peyton?

9                   A. Yes.

10                  Q. I'm handing you what's been marked as  
11 Defendants' Exhibit 9. Can you identify that?

12                  A. Excuse me. Yes. This is the employment  
13 agreement that we signed as of the 24th of April  
14 1995.

15                  Q. Now, did Dr. Peyton come on board on  
16 April the 24th, 1995?

17                  A. No, sir.

18                  Q. When did he come on board?

19                  A. I believe we had written in August 7th,  
20 1995. So that was probably the date that he  
21 actually started.

22                  Q. Why is it that the agreement was signed  
23 in April but he started in August?

**00176**

1           A.       I guess because we both felt comfortable  
2 with it and were ready to roll and we needed to get  
3 a signed agreement to start getting Dr. Peyton on  
4 all the insurance plans and get him up and running.  
5 And that's one of the biggest things in managed care  
6 is to enter into these insurance plans and such.

7           Q.       Would you turn to Page 5 of the  
8 agreement.

9           A.       Yes.

10          Q.       What is Paragraph 13 of agreement?

11          A.       Paragraph 13 is the restrictive covenant  
12 that was in place.

13          Q.       And on Page 6, there's some handwriting  
14 at the top of the page. Do you see that?

15          A.       Yes, I do.

16          Q.       Is that in your handwriting?

17          A.       Yes, it is. That's my initials scribbled  
18 down next to the third line, and then under Section  
19 IV, Roman numeral four, I crossed out "ten" and put  
20 "five" in and actually written in.

21          Q.       Why did you do that?

22          A.       Because Dr. Peyton asked me to and I  
23 agreed to.

00177

1           A.       Well, the corporation did, but it -- the  
2       corporation actually gave him a bonus, but being  
3       that it came out of -- it came out of the  
4       compensation, I guess, that I would receive because,  
5       if I didn't give him a bonus, I guess it would have  
6       been -- it would have been paid out to me in  
7       compensation.

8           Q.       Was he entitled to any bonus under the  
9       agreement in 1995?

10          A.       No, sir, he was not.

11          Q.       In 1996, turning our attention to the  
12       discussions that you began having concerning the  
13       buy-in, did you remember when it was that you first  
14       had such a discussion?

15          A.       Regarding the buy-in?

16          Q.       Correct.

17          A.       I don't remember exactly. I mean what --  
18       what happened was August, September kind of rolled  
19       around. And Randy hadn't really been pushing me,  
20       and I hadn't been pushing him. We were waiting to  
21       see and then -- because we needed to come up with  
22       some kind of -- in order to come up with the buy-in,  
23       we needed to come in with a valuation of the

1 corporation.

2           It was at that time that I contacted  
3 Mr. Zagami to go ahead and to look at some numbers.  
4 In order to do that, of course, he needed to have  
5 numbers from IMM because not only would they give me  
6 my -- I'm sorry. It would have been by Proclaim at  
7 that time. Not only were they doing my billing, but  
8 they were always -- also doing my payables.

9           Q.     The first discussion that you had on that  
10 issue in 1996 with Dr. Peyton, was that initiated by  
11 you or by Dr. Peyton?

12           A.     I believe it was initiated by me.

13           Q.     What did you tell him when you initiated  
14 that discussion?

15           A.     I just -- I don't have an exact  
16 recollection of the conversation. I mean that --  
17 I'm sure we just said, you know, work -- we've got  
18 to get those numbers; let's go ahead and get going.  
19 But I can't -- I don't remember exactly what I said.

20           Q.     Did you request information from  
21 Mr. Zagami at that point?

22           A.     I requested it. I talked to Mr. Zagami  
23 to ask him what we needed to do, and he basically



1 knew the books. And he needed the information from  
2 IMM to see what value -- you know, to help value the  
3 corporation or ask that -- excuse me -- asset  
4 liability list and -- and such.

5 Q. Did Dr. Peyton have an accountant  
6 representing him at that time?

7 A. I -- I know -- I -- I don't know if in  
8 the August, September time frame he did or not, but  
9 I know after we subsequently gave him the -- after  
10 the corporation subsequently gave him a letter, he  
11 had -- he had a accountant helping him. And I  
12 believe it was Mr. Kloster.

13 Q. Was the letter concerning the buy-in?

14 A. Yes, it was. The letter from Dan Zagami  
15 was a way to structure the buy-in

16 Q. And was that something that was  
17 ultimately agreed upon?

18 A. No. That was just -- that letter was to  
19 try and put forth an idea of what we were going to  
20 try and structure the buy-in in and refers to this  
21 pre-, post-tax thing and -- and just idea of where  
22 to go. It wasn't anything that was hard fact --  
23 hard and fast because we had not had anyone sit down

1 and actually value the corporation at that time.

2 Q. When was that letter sent out?

3 A. I believe it was either the end of  
4 October or the beginning of November of '96.

5 Q. Did you continue to have discussions with  
6 Dr. Peyton concerning the buy-in throughout the rest  
7 of 1996?

8 A. Yes.

9 Q. How did those discussions progress?

10 A. Well, first, he was rather upset when he  
11 got the letter from Mr. Zagami. He thought he was  
12 kind of crazy. I mean, that's what he said. It  
13 wasn't exactly in that vernacular, but he did state  
14 that. And I, you know --

15 Q. Did he say why he thought Mr. Zagami  
16 was --

17 A. Well, he thought he was being overcharged  
18 for the buy-in. He said the contract says it's only  
19 \$100,000; when I look at this thing, it's -- you  
20 know, it comes out to like 140. What's going on  
21 here?

22 And my understanding is we tried. I  
23 had -- I believe Mr. Zagami ended up talking to

1 Mr. Kloster about the letter to help, and then I  
2 believe Mr. Kloster reviewed it and felt that he  
3 understood what we were putting forward in terms of  
4 a proposal to try and develop a pre- and post-tax  
5 structure to the agreement.

6 Q. And did you have further discussions in  
7 1996 with Dr. Peyton on those issues?

8 A. I mean, we talked about a number of  
9 issues. I mean, we had -- we had quite a few  
10 meetings. We talked about that and corporate  
11 matters. I mean, are you relating -- talking about  
12 specifically about the buy-in agreement? I mean,  
13 that came up some but --

14 Q. What other types of issues did you  
15 discuss at these meetings with Dr. Peyton?

16 A. Well, we talked about one of the problems  
17 both -- I mean, we had a problem with -- yeah --  
18 with Proclaim billing. And we had met with a  
19 gentleman by the name of Chuck Mann and -- and Karen  
20 Ebersole to discuss the problems with that.

21 I mean, Dr. Peyton, I allowed him to see  
22 all the financials. I never hid anything from him.  
23 He was able to get anything he wanted from IMM, and

1 Medicaid. They can be organizations and things like  
2 that.

3 Q. Now, were these all issues that were  
4 discussed in 1996 with Dr. Peyton?

5 A. Yes. He was very aware of whatever. In  
6 fact, Dr. Peyton helped me understand some of this  
7 stuff. I mean he explored some of that and found  
8 some of the -- some points.

9 Q. In 1997, in the beginning of 1997, did  
10 you have any discussions with Dr. Peyton concerning  
11 a potential buy-in?

12 A. Yeah. Yes.

13 Q. How and when did that first start?

14 A. Well, there are some letters I think that  
15 have been introduced into evidence with coming back  
16 from Mr. Kloster, I think, specifically in January  
17 where he started looking at -- documents were  
18 requested back in December regarding, as you brought  
19 up already, the leases and -- and such with the  
20 corporation. Mr. Kloster evaluates it, I think, so  
21 that he could have an independent review of what  
22 they felt the practice was valued at.

23 Then what we did is that went through the

1 January, February time frame, and I know stuff was  
2 going back and forth. And it got to the point where  
3 Randy kept calling Zan -- Dan Zagami again, and he  
4 kept calling Eric Kloster. It was like I'm getting  
5 all these different messages, and all these fingers  
6 are pointing at me every different way. And I  
7 finally said what we need to do is we need to get  
8 together, all four of us, looking everyone in the  
9 eyeball so we can work this thing out. And that's  
10 when we met on March 17th, and I'll preface that by  
11 saying that, prior to that meeting, I sent a letter  
12 to Dr. Peyton on the 14th of March.

13 Q. Let me stop you right there.

14 A. I'm sorry.

15 MR. JOHNSON: May I approach the witness?

16 THE COURT: Yes, sir.

17 BY MR. JOHNSON:

18 Q. Dr. Lower, I'm handing you what has been  
19 marked as Defendants' Exhibit 28. Would you  
20 identify that, please.

21 A. Yes. This is a handwritten letter I  
22 wrote to -- to Dr. Peyton. The date is almost cut  
23 off of the top. It's dated the 14th of March 1997.

1 Q. Did you write all that yourself?

2 A. Yes, I did.

3 Q. And is that your signature on Page 5?

4 A. Yes, it is.

5 MR. JOHNSON: We offer Defendants' 28.

6 MR. TOOTHMAN: Objection. Hearsay and  
7 relevance. Hearsay and relevance.

8 THE COURT: Is it being offered for the  
9 truth of something that's in here?

10 MR. JOHNSON: Well --

11 THE COURT: Or is it just being offered  
12 to show that this was some sort of communication?

13 MR. JOHNSON: It's being offered to show  
14 his state of mind in March of '97 which is relevant  
15 to the fraud claim.

16 MR. TOOTHMAN: I don't get that one, Your  
17 Honor. Who defrauded who? I'm sorry.

18 THE COURT: The objection is overruled.  
19 It's admitted as Defendants' No. 28.

20 (Defendants' Exhibit 28 was admitted into  
21 evidence.)

22 BY MR. JOHNSON:

23 Q. Now, was this a letter you wrote?

1           A.       Yes, it is.

2           Q.       Did you write it on or about March 14th  
3 of 1997?

4           A.       Yes, I did.

5           Q.       Did you give it to Dr. Peyton?

6           A.       I believe I actually left it on his desk  
7 that day. It was a Friday.

8           Q.       What led you to write this letter?

9           A.       During the negotiations, a number of  
10 issues started coming up with regards to the  
11 increase in his salary, some of the -- some of the  
12 ways that Dr. Peyton was interpreting things that  
13 were being said. And my concern was, at that point,  
14 before I wanted to allow somebody or give someone  
15 the option to become a partner with me and give up  
16 50 percent of what I've worked for, I wanted to make  
17 darn sure that -- that we were going to be able to  
18 work together.

19                   And so what I wanted to do is just write  
20 down -- this is just some of my feelings about some  
21 of the things that had happened with regard to some  
22 interpretations that he had and things that we were  
23 talking about, stuff, talking about, you know,

1 previous collections and -- and -- and such.

2 I mean I -- I don't think -- I don't  
3 think you need to read the whole letter right now,  
4 but that was the gist behind it because we had this  
5 meeting coming up the 17th of March. And the idea  
6 was, on the 17th of March with the four of us being  
7 there, that is Mr. Zagami, myself, and Mr. Kloster  
8 and -- and Dr. Peyton, we'd be able to sit down,  
9 probably hash through where the inconsistencies were  
10 with regards to where allocations were and things  
11 like that. And then we would find out, you know, if  
12 we were going to be able to go forward with  
13 developing a relationship and -- and going through  
14 with the contract, to develop bringing him in as a  
15 50/50 partner.

16 Q. At the time you wrote the letter, had the  
17 meeting already been scheduled for March 17th?

18 A. Yes, it had.

19 Q. If the meeting was already taking place  
20 and you knew that, why did you need to send the  
21 letter?

22 A. The reason I sent the letter was because  
23 my feeling was we had been going back and forth now



1 since the October time frame with negotiating.  
2 We're trying to figure out expenses.

3 I -- one of the things I failed to  
4 mention is, back in December, Dr. Peyton gave me a  
5 list of expenses and such that -- where he reported  
6 that I made \$188,000 off of him in 1996 and because  
7 he felt that there had not been good accounting. I  
8 was somewhat surprised when I received that because  
9 my salary from the year before had actually dropped  
10 \$20,000. So I was actually interested in trying to  
11 figure out how I made \$188,000 off of him.

12 And we went back, and we looked at all  
13 these figures to find out where did we go over, but  
14 how much did we spend, etc. Based on that, based on  
15 the conversations that transpired between that  
16 December time frame and the March time frame, my  
17 feeling was -- is that it was going to be one of  
18 those you were going to be the end all that -- and  
19 be all the end all.

20 On March 17 when we met, if we couldn't  
21 iron these things out, we probably weren't going to  
22 go forward with the partnership agreement, and  
23 that's why I wrote that letter.

00188

1           Q.       Were you surprised when he called you on  
2 Sunday?

3           A.       No. I was glad when he called me. I was  
4 hoping he would have called me a little bit earlier  
5 but --

6           Q.       What did the two of you talk about when  
7 he called?

8           A.       We talked about the substance of the  
9 letter and -- and my concerns and that I, you know,  
10 felt that this was something that was important and  
11 that we -- I kind of -- I made the analogy that it's  
12 almost like a marriage that we didn't -- we've got  
13 to trust each other. We've got to have faith in  
14 each other, and we've got to be able to work and  
15 live together. And that's what we talked about,  
16 and -- and Randy reassured me that that wasn't going  
17 to be a problem. He said we are -- we do have a  
18 good practice. We -- we can work well together. He  
19 even mentioned his accountant, Eric Kloster, had  
20 stated that we ought to try and work it because it  
21 seemed like we -- we did have a good thing going and  
22 that it appeared that we could work together from  
23 things that were said. And I was reassured that,

1 indeed, we were going to be able to make it work and  
2 we were going to be able to go forward.

3 Q. How long did the conversation last?

4 A. Well, I know I recollect probably 45  
5 minutes, an hour. I'm not sure, but I mean it  
6 wasn't like a ten-, 15-minute thing. We -- we did  
7 talk for a while and went back and forth.

8 Q. During that conversation, did you discuss  
9 the concept of being partners within the  
10 corporation?

11 A. Yes.

12 Q. Did you have any discussion at that time  
13 about how long, if at all, you were going to remain  
14 partners?

15 A. Well, I mean -- I mean I'm -- I don't  
16 know if we specifically talked about the length of  
17 time. It was just assumed -- I assumed that it  
18 would be -- I mean, my thinking -- in the  
19 deposition, Mr. Toothman asked me how long it would  
20 be. And I said I felt it was until we died -- one  
21 of us died or retired. I wasn't -- and that's  
22 specifically what I believed.

23 And we had actually talked about things

1 even with Mr. Zagami about getting life insurance to  
2 the corporation and things like that to cover one of  
3 us should that happen. Also Dr. Peyton, he said,  
4 you know, to look out for each other's families.  
5 And I mean, this is a -- this is something which  
6 we're going to make work. It's going to last  
7 longer. I had no reason to believe otherwise.

8 MR. TOOTHMAN: I object. Irrelevant.  
9 His assumptions are not relevant either. It's not  
10 material. I don't think it's probative on the  
11 fraud, and also it's -- it's unrelated to the  
12 agreement.

13 THE COURT: Overruled.  
14 Ask your next question.

15 BY MR. JOHNSON:

16 Q. During that conversation that we've been  
17 talking about or at any other time up until June  
18 27th of 1997, did you have any other discussions  
19 with Dr. Peyton about the families and taking care  
20 of each other's families?

21 A. I'm sorry?

22 MR. TOOTHMAN: Object to the relevance,  
23 your Honor.

190A

1 THE COURT: Discussion about taking care  
2 of each other's families?

3 BY MR. JOHNSON:

4 Q. To either one of you -- if something  
5 happened to either one of you?

6 A. Well, we -- we -- what was talked about  
7 was that we'd look out for each other, meaning that,  
8 if one of us checked out, if one of us died, or  
9 something like that, that we would ensure -- that  
10 the other person would ensure that that family was  
11 taken care of from the corporation with regards to  
12 the stuff that was collected, we -- just like you'd  
13 look out for a friend. That's what it -- I mean, it  
14 was in that context.

15 Q. Now, the insurance we've talked about  
16 that Mr. Zagami was looking into, can you explain a  
17 little bit on what that was for?

18 A. That was more for the -- that was for the  
19 contract for if one of us either died while we were  
20 50/50 partners or that we retired. My understanding  
21 was that part of that would be used to help defray  
22 the costs of buying out the other partner.

23 Q. After the telephone conversation with

1 ended up kind of coming to a -- a meeting of the  
2 minds and, in some areas, just said we're going to  
3 do it as 50/50. If we couldn't actually prove it  
4 with stuff, with receipts or documents, then we just  
5 said we're going to go ahead and split it 50/50, and  
6 that was usually how we -- how we -- how we settled  
7 it.

8 Q. And where did things progress from that  
9 meeting? After the meeting was over, what happened  
10 next?

11 A. Well, after that -- after that, we -- I  
12 mean, we shook hands and we knew -- you know, we  
13 just said we're going to go for it. At that time,  
14 Dan, I believe, contacted Mr. Lipresti from Jackson  
15 & Campbell to go ahead and put together the  
16 contract. Dan would work on the numbers for the  
17 buy-in and show them to Eric so that everything  
18 could be validated. And that's what we did.

19 Q. Now, was Mr. Kloster working with  
20 Dr. Peyton during this time?

21 A. Yes, he -- as far as I know, he was.

22 Q. Was he acting as Dr. Peyton's accountant?

23 A. As far as I know, he was.

00191

1 Q. Did Dr. Peyton have a lawyer representing  
2 him during this process?

3 A. As far as I know, he did.

4 Q. And did there come a time when drafts of  
5 the agreements were circulated?

6 A. Yes.

7 Q. And were comments --

8 THE COURT: Mr. Johnson, I think now is a  
9 good time. Let's take a mid-afternoon break. Let's  
10 take a ten-minute recess.

11 (Whereupon, the witness exited the  
12 witness stand.)

13 (Whereupon, a brief recess was taken.)

14 (Whereupon, the witness resumed the  
15 witness stand.)

16 THE COURT: Counsel, I've learned that a  
17 meeting I have tomorrow morning might not end by  
18 nine o'clock. It might be as late as 9:30 before I  
19 can start the case tomorrow. Could I just ask you  
20 to come at nine and just -- you might have to wait.  
21 Can I ask you to do that? I'm sorry.

22 MR. TOOTHMAN: That's okay. That's fine.

23 THE COURT: Go ahead, Mr. Johnson.

1 to that?

2 A. He said, I'm not leaving either. That's  
3 why we ought to just take it out.

4 And I said, Okay.

5 Q. In between March 17th of 1997 and the  
6 date that the agreements were signed, did you have  
7 any further discussions with Dr. Peyton concerning  
8 the length of the relationship that you were  
9 contemplating entering into?

10 A. Oh, in terms of the length of the  
11 relationship, again, I mean, my feeling was and  
12 Randy's as far as I was concerned that it was going  
13 to be, you know, forever, I mean retirement, death.  
14 I mean, we did have put in there, you know, the  
15 payments over a four-year period. We did have  
16 provisions in there for life insurance. I mean I --  
17 I had no reason at all to suspect that he would want  
18 to leave, not after what we had done to get to where  
19 we were.

20 Q. Did Dr. Peyton ever make any statements  
21 to you before the agreements were signed concerning  
22 his intentions with respect to staying with the  
23 corporation?

192A



1 THE COURT: I was going to say  
2 Mr. Toothman just hit it. Isn't this already in  
3 evidence?

4 MR. JOHNSON: Probably it is.

5 MR. TOOTHMAN: It's Plaintiff's 1-A.

6 THE COURT: I mean isn't it already in  
7 evidence as Plaintiff's Exhibit 1-A?

8 MR. JOHNSON: I think so.

9 THE COURT: Will you agree this is the  
10 same as Plaintiff's Exhibit 1-A?

11 MR. JOHNSON: Yes.

12 THE COURT: It was signed on June 27th,  
13 1997?

14 MR. JOHNSON: Yes.

15 THE COURT: Okay. So that will be a fact  
16 in this case.

17 BY MR. JOHNSON:

18 Q. Do you have Exhibit 33?

19 A. Yes, I do.

20 Q. And what is that?

21 A. A stock purchase agreement effective the  
22 1st day of January '97 between Randall S. Peyton,  
23 M.D. and Raymond F. Lower, D.O.

00193

1 Q. And when was that signed?

2 A. 6/27/97.

3 MR. JOHNSON: We offer Defendants' 33.

4 THE COURT: It's admitted as Defendants'  
5 33.

6 (Defendants' Exhibit 33 was admitted into  
7 evidence.)

8 MR. TOOTHMAN: It's admitted. I have no  
9 objection.

10 BY MR. JOHNSON:

11 Q. Do you have Defendants' Exhibit 34?

12 A. Yes, I do. That's a stockholders'  
13 agreement made effective the 1st day of January 1997  
14 by Raymond F. Lower, D.O., Randall S. Peyton, M.D.,  
15 and Countryside Orthopaedics, P.C.

16 Q. And when was that signed?

17 A. 6/27/97.

18 MR. JOHNSON: Defendants offer Exhibit  
19 34.

20 MR. TOOTHMAN: No objection, your Honor.

21 THE COURT: Admitted then as Defendants'  
22 No. 34.

23 (Defendants' Exhibit No. 34 was admitted

1 into evidence.)

2 BY MR. JOHNSON:

3 Q. Where were these agreements signed on  
4 June 27th, 1997?

5 A. At our office in Countryside.

6 Q. Were you there at the time?

7 A. Yes.

8 Q. And Dr. Peyton was there at the same  
9 time?

10 A. Yes.

11 Q. Did you both sign these agreements at the  
12 same time?

13 A. Yes, we did.

14 Q. Did you have any discussions with  
15 Dr. Peyton at the time the agreements were being  
16 signed?

17 A. We just -- you know, we were happy to get  
18 it done. So I was getting ready to go out of town  
19 that day for -- actually, leaving that afternoon  
20 with my family to -- to go to -- on vacation. So we  
21 were glad to have it consummated, and since I was  
22 rushing out, we decided when I got back we would go  
23 ahead and toast the agreement.

00195

1 Q. Now, was it your understanding that  
2 Dr. Peyton was going to be required make periodic  
3 payments for the buy-in?

4 A. Yes.

5 Q. In other words, was the amount of the  
6 buy-in going to be paid all at once or over time?

7 A. The amount of the payment was structured  
8 as per the documents, monthly payments over four  
9 years interest free.

10 Q. Was that a pre-tax or a post-tax  
11 arrangement as you understood it?

12 A. That was a pre-tax arrangement.

13 Q. And when these agreements were signed,  
14 they were retroactive to January 1, 1997?

15 A. That's correct.

16 Q. Did you have any discussion at the time  
17 with Dr. Peyton concerning buy-in payments for  
18 January through June 1997?

19 A. When we signed the agreements?

20 Q. Right.

21 A. Well, he was supposed to pay me that day  
22 when he signed it, but since I was heading out of  
23 town and he didn't have a check with him, I just,

1 you know -- I said, Well, I guess you can have it  
2 for me when I get back. I was going to be gone for  
3 two weeks, and I mean, I trusted him. So --

4 Q. And did he ultimately make that payment?

5 A. Not when I got back. Actually, when I  
6 got back, I hadn't been paid, and I, you know,  
7 waited for it. It was not paid, and I asked him a  
8 number of times for it. And in fact at one point, I  
9 even called counsel to just say what -- you know,  
10 I -- I'm surprised I haven't been paid. Do you have  
11 any suggestions because I don't -- you know, and --  
12 and at that point, Dr. Peyton finally in August gave  
13 me a payment which was -- even though he gave it to  
14 me in August and I should have the August payment,  
15 it was already a month in arrears when he gave it to  
16 me.

17 Q. What do you mean it was a month in  
18 arrears?

19 A. Well, the payments were due the 1st of  
20 the month according to the contract, and -- and the  
21 date that he gave -- the date he gave it to me was  
22 on the 7th of August. And it didn't include the  
23 August payment.

00197

1 Q. What did it include payments for?

2 A. January through July.

3 Q. At any other time other than August 7th,  
4 1997, did Dr. Peyton pay any other payments for the  
5 buy-in?

6 A. No, he did not.

7 Q. Did you ever discuss at any other time  
8 with Dr. Peyton the status of those payments?

9 A. Yeah. I asked him where the money was.

10 Q. What did he say?

11 A. He said that what he -- what he  
12 thought -- well, actually, what transpired was we  
13 had a meeting, Dr. Peyton and myself and Mr. Zagami,  
14 in the end of July. It was regarding the -- it was  
15 the middle of the year. So it was really regarding  
16 compensation, how much money there was going to be  
17 in terms of bonus and expenses and such like that.

18 After that meeting, we had decided, based  
19 on the revenue in the -- in the corporation, that we  
20 would pay each other a bonus. Nothing at that time  
21 was said.

22 I got a phone call from Mr. Zagami. I  
23 don't know exactly when it was, sometime within that

1 week, going, Dr. Peyton called me and asked why  
2 isn't this in post-tax dollars.

3 And I said, What do you mean?

4 He goes, The agreement, you know, it's in  
5 pre-tax dollars, and he's calling. He goes, Did  
6 you -- did you authorize the -- did Randy talk to  
7 you about this?

8 And I was said, No, he didn't talk to me  
9 about it. And I said, I didn't know.

10 And that's when Randy then called me and  
11 said, Hey, Ray, this thing is in pre-tax dollars. I  
12 thought you said we were going to do it in post-tax  
13 dollars.

14 And I said, We talked about pre- and  
15 post-tax, Randy, but if you remember the way it was  
16 going to be structured, if we did it in pre-tax  
17 dollars, I didn't have to want to get penalized for  
18 having to declare the -- the tax portion of it. I  
19 mean we had to pay taxes when we're -- no one was  
20 trying to abrogate their responsibility with regard  
21 to the taxes, but we were trying to make it a fair  
22 transaction. Again, I, you know, just -- well --

23 Q. Up until the agreements were signed on

1 June 27, 1997, did Dr. Peyton ever tell you that he  
2 had any plans to leave the corporation?

3 A. No.

4 Q. Did he ever tell you that, after signing  
5 the agreements, he was going to leave the  
6 corporation?

7 A. No.

8 Q. Did he ever tell you that he joined the  
9 corporation knowing that he would leave? Did he  
10 ever tell you that?

11 A. No.

12 Q. Did he ever tell you that he joined the  
13 corporation knowing he would leave and that he just  
14 wanted to get rid of the restrictive covenant in the  
15 1995 employment agreement?

16 A. No, he never told me that.

17 Q. Had he told you that, would you have  
18 entered into the agreements on June 27, 1997?

19 MR. TOOTHMAN: Objection. Calls for  
20 speculation. Irrelevant, your Honor.

21 THE COURT: Doesn't it call for  
22 speculation?

23 MR. JOHNSON: I don't think so because



1 THE COURT: That means you can answer the  
2 question.

3 THE WITNESS: Thank you. The question  
4 was, if I would have known that Dr. Peyton was going  
5 to just have me sign the -- sign the contract to get  
6 over the restrictive covenant, would I have gone  
7 through with it? Is that correct?

8 BY MR. JOHNSON:

9 Q. Correct.

10 A. No, I wouldn't have done it. I think  
11 earlier I -- I stated that why would I give up 50  
12 percent of my corporation and bring someone in as a  
13 50/50 shareholder when the guy was going to walk. I  
14 mean when the benefits -- to me, you look at the  
15 employment agreement that he had in '95, you look at  
16 what he signed in -- in 1997, what we signed  
17 together, and you look at the benefits that he  
18 derived after becoming a 50/50 partner.

19 I mean I -- I took out the restrictive  
20 covenant. That increases -- he had more, you know,  
21 corporate power. He was able to -- to -- to have  
22 more vacation. His pay increased. He got accounts  
23 receivable, and he was an employee of the

00201

1 corporation. He was an employee. I mean, if I  
2 would have had any -- if I would have had any  
3 thoughts that the guy would have walked, why  
4 wouldn't I have made the contract stricter?

5 Q. Was there a provision for severance, for  
6 payment of severance pay in the 1995 agreement?

7 A. No.

8 Q. Was there a provision for payment of  
9 severance pay under some circumstances in the 1997  
10 agreement -- employment agreement?

11 A. Yes, there was.

12 Q. Were there any other items where  
13 Dr. Peyton had a greater allowances of payments  
14 under the 1997 agreement than he did under the 1995  
15 agreement?

16 A. Sure. As a -- as a 50 percent  
17 shareholder, he didn't have -- his allowances were  
18 whatever they wanted -- whatever he wanted it to be.  
19 Because they came out of his compensation as an  
20 employee, he had certain -- certain allowances.

21 Q. Now, we're talking about allowances.  
22 What types of expenses does that include?

23 A. Well, it initially included -- for him,

1 he had CME. He had a cell -- a cell phone. He had  
2 a car allowance. He had vacation. I don't -- I'm  
3 going to refer to the exhibit, Defendants' Exhibit  
4 No. 9, your Honor -- paid family health insurance,  
5 contributions to the corporate retirement plans, and  
6 relocation benefits.

7 Q. Now, after you signed the agreements, did  
8 you go on that vacation for two weeks?

9 A. Yes, sir, I did.

10 Q. And that was from the end of June until  
11 sometime in July?

12 A. Yes.

13 Q. And then did you come back to the office  
14 after your vacation?

15 A. Yes, I did.

16 Q. Did you start working --

17 A. Yes, I --

18 Q. -- at your office?

19 A. Yes, I did.

20 Q. And you were seeing patients at that  
21 time?

22 A. Yes.

23 Q. Now, was -- was Dr. Peyton working in the

1 1997?

2 A. No, he did not.

3 Q. Did he tell you that he had contacted  
4 Commonwealth Orthopaedics and Rehabilitation in  
5 September of 1997?

6 A. No, he did not.

7 Q. Who is Commonwealth Orthopaedics and  
8 Rehabilitation?

9 A. They're a competing orthopaedic group.

10 Q. Where are they located?

11 A. They've got multiple offices. They have  
12 an office -- they are -- they're a group -- they  
13 were formed -- there was a couple of separate  
14 orthopaedic entities. One was in Reston, and one  
15 was in -- one was in Fair Oaks, and one was in  
16 Arlington. And the three practices merged and  
17 formed Commonwealth Orthopaedics for a total of  
18 about 12 or 13 orthopaedic surgeons.

19 What they also did -- where there were  
20 two other orthopaedic surgeons in Loudoun County and  
21 Dr. Sternberg and Evans, that practice dissolved  
22 with Dr. Sternberg going to Kaiser and Dr. Evans  
23 joined Commonwealth Orthopaedics.

203A

1           The importance of that, I believe, is  
2   that what happened was that Commonwealth -- Bill  
3   Hazel, who is one of the principals in that, had  
4   wanted to get their -- had wanted to get their foot  
5   in the door in Loudoun County. And he basically --  
6   they had ended up getting an office right across the  
7   hall from my office, Mark -- Mark Evans becoming  
8   part of their corporation I believe. So -- I mean,  
9   they're located in four different places, - Loudoun  
10   County and the other places I mentioned.

11           MR. TOOTHMAN: I object as testifying to,  
12   respectively, what they wanted. He can testify to  
13   the locations.

14           THE COURT: The real point of this is the  
15   competitor.

16           MR. JOHNSON: Correct.

17           THE COURT: Okay. As to motives for  
18   Commonwealth, I'll sustain the objection to that.

19           MR. JOHNSON: All right.

20           MR. TOOTHMAN: As to anything else, it's  
21   overruled.

22           BY MR. JOHNSON:

23           Q.    When you were talking about their office

1 being across the hall, across the hall where?

2 A. In my -- the new Lansdowne office that  
3 I -- where the corporation just located to.

4 Q. You moved into the Lansdowne office the  
5 beginning of November; is that right?

6 A. That's correct.

7 Q. And when did Commonwealth open its office  
8 across the hall?

9 A. It was close to the same time. I think  
10 it was maybe towards the end of December, the end of  
11 December, January time frame. I can't remember. It  
12 was fairly -- pretty close to the same time.

13 Q. Even before Commonwealth had an office  
14 across the hall from you, did you consider  
15 Commonwealth to be a competitor of Countryside  
16 Orthopaedics?

17 A. Yes.

18 Q. Did Dr. Peyton, as far you know, consider  
19 Commonwealth to be a competitor of Countryside  
20 Orthopaedics?

21 A. As far as I know, he did.

22 Q. Did the two of you ever discuss that  
23 Commonwealth was a competitor of Countryside

1 cross-examination, and if you want the Court to  
2 require him to produce what he's talking about, I'll  
3 do it. I'll require him to produce it.

4 MR. TOOTHMAN: I'd like to request that  
5 at this time, your Honor. It looks like we're going  
6 to carry over to tomorrow anyway.

7 THE COURT: We'll get to this tomorrow  
8 when you cross-examine him.

9 Go ahead, Mr. Johnson.

10 MR. JOHNSON: Thank you.

11 BY MR. JOHNSON:

12 Q. The information that you understand was  
13 given by Dr. Peyton to Commonwealth Orthopaedics and  
14 Rehabilitation, do you view that as confidential and  
15 proprietary information of Countryside Orthopaedics?

16 A. Yes.

17 Q. And did Dr. Peyton ever request  
18 permission from you to give that information to  
19 Commonwealth?

20 A. No.

21 Q. What is it about that information that  
22 you consider it to be confidential and proprietary?

23 A. Well, the information that I saw that --

1 and I actually -- I believe we obtained from  
2 Commonwealth Orthopaedics -- when we subpoenaed  
3 them, I believe they gave us the documentation that  
4 was turned over to them -- showed all the amounts of  
5 money that were -- it was the -- it was the form  
6 that IMM produces that gives you the collections,  
7 billings, and percentages outstanding ARs. That was  
8 the information.

9 MR. JOHNSON: May I approach the witness?

10 THE COURT: Yes, sir.

11 BY MR. JOHNSON:

12 Q. I'm handing you what's marked as  
13 Defendants' Exhibit 40 and ask if you can identify  
14 that.

15 A. Yes. This is the performance analysis  
16 that Proclaim/IMM would produce for us on a monthly  
17 basis.

18 Q. And the first and second pages appear to  
19 be a Proclaim form?

20 A. Yes.

21 Q. What do we see on the third page and the  
22 pages thereafter?

23 A. On that page is a doctor analysis on



1 having health problems the week preceding the --  
2 this -- this calling me to meet.

3 And I said to him -- I said, Well, Randy,  
4 is there anything, you know -- what can we do? I  
5 mean there can't be anything that insurmountable.  
6 We took -- we negotiated this thing. What all of a  
7 sudden has caused you to change? Maybe you could  
8 give me a list or something of grievances where we  
9 could see what -- if there isn't something we could  
10 work out.

11 And he said -- he goes, Okay. And he  
12 still gives me his letter of resignation. And then  
13 the next week out -- you know, part of my feeling  
14 is, if the guy really wanted to work something out,  
15 why didn't you hold on to the letter of resignation  
16 and give us a list, and -- and let's go ahead and  
17 work it out. Instead, I get the letter of  
18 resignation, and then I get a list the following  
19 Monday of -- of -- of his grievances, I guess I  
20 could say.

21 MR. JOHNSON: May I approach the witness?

22 THE COURT: Yes, sir.

23 . . . .

00204

1 BY MR. JOHNSON:

2 Q. Doctor, I'm handing you what's been  
3 marked Defendants' Exhibit 55 and ask if you can  
4 identify that.

5 A. Yes. This is the request of the areas  
6 that Dr. Peyton felt we needed to hash out prior to,  
7 I guess, continuing our relationship.

8 Q. Who prepared that list?

9 A. As far as I know, Dr. Peyton did.

10 Q. Were you given that list?

11 A. Yes, I was.

12 Q. Was that after the resignation letter had  
13 been given?

14 A. Yes, it was.

15 Q. How long after?

16 A. The following -- I believe it was Monday.

17 MR. JOHNSON: Defendants offer Exhibit  
18 55.

19 MR. TOOTHMAN: No objection.

20 THE COURT: It's admitted then as  
21 Defendants' Exhibit 55.

22 (Defendants' Exhibit 55 was admitted into  
23 evidence.)

00205

1 BY MR. JOHNSON:

2 Q. Did you review this list when it was  
3 given to you?

4 A. Yes, I did.

5 Q. Did you discuss it with Dr. Peyton?

6 A. I don't -- I don't recollect actually  
7 discussing this list per se with him. I mean --

8 Q. Okay. Did you ever refuse to discuss it  
9 with him?

10 A. No, I never refused to discuss it with  
11 him. I mean the problem -- I got this list, and  
12 I -- you look at this, and you go back to the -- you  
13 go back to our -- our meeting back in March. And  
14 80, 90 percent of this was things that I felt we had  
15 already worked out. I mean we had a meeting in  
16 September, the end of September, where I said to  
17 Randy -- I said, Are you okay? Is everything, you  
18 know -- do you have any problems with anything?

19 He said, You know, Ray, the only thing  
20 that I'm a little bit upset about is this attorney's  
21 fee that you're -- you're sticking me with half the  
22 bill for with regards to the Purcellville build-out,  
23 you know, this Purcellville building that we were

1     trying to get going. And I -- and that was the only  
2     thing I knew. When we got all this other stuff -- I  
3     mean this is stuff that we had been talking about  
4     except for there was a couple of things down here,  
5     quote, vesting schedule. He had never mentioned  
6     anything to me about that.

7             And then number 21 on the second page, he  
8     goes, My car lease and title will be transferred  
9     into the corporation in my name, not to Lower. I  
10    mean, I start looking -- you know, in retrospect now  
11    looking at this, I go what am I going to do, give --  
12    give up all this stuff and then he's still going to  
13    walk in four weeks, five weeks. I don't know.

14            Q.     In between October 3rd of 1997 and  
15    December 31 of 1997, did you ever observe Dr. Peyton  
16    photocopying any patient charts of Countryside  
17    Orthopaedics?

18            A.     Yes, I did. Yes, I did. I'm sorry.

19            Q.     On how many occasions?

20            A.     Probably at least three or four I would  
21    say. I remember specifically one morning coming in  
22    because I had an early morning surgery. And I came  
23    into the office, and the copy machine was on. And

**00207**

1 of file system we were going to get. I mean, what's  
2 happening is we were moving. He was involved in all  
3 the moves. He had knowledge, intimate, more so than  
4 me because he met and we got documentation in --  
5 in -- of meetings and such with the architects, with  
6 Bogus (phonetic) who I believe was building things  
7 out and such. So again, this was an acquisition for  
8 the office which he was well aware of and which, you  
9 know, we just -- it got taken care of. As president  
10 of the corporation, my understanding was I was able  
11 to conduct the day-to-day operations of the  
12 corporation. We had discussed it in meetings. He  
13 was aware of it, and we pursued.

14 Q. When did he approve it?

15 A. Approve what?

16 Q. That expenditure.

17 A. There was no set approval. I mean we  
18 just -- we had talked about it. We had to do it,  
19 and so we did it.

20 Q. Now, it's your testimony today that in  
21 1997 when you and Dr. Peyton discussed the subject  
22 of the restrictive covenant that you said you wanted  
23 one? You would sign one yourself?

00208

1           A.       I said why not leave one in the -- in the  
2 contract. Yeah. We talked about actually leaving  
3 the restrictive covenant in there just because we  
4 had one before. Why not keep it equitable? Let's  
5 carry it from contract to contract.

6           Q.       You had one before too?

7           A.       What? No. I mean the one that we had  
8 with the contract with Dr. Peyton.

9           Q.       Well, that's Dr. Peyton's contract. I  
10 was talking about yours. Did you have one in yours  
11 before?

12          A.       Well, he was an employee of the  
13 corporation. So of course, I didn't have a -- he  
14 didn't have a -- I didn't have a contract.

15          Q.       Well, that was the problem. When he  
16 became a shareholder, he wasn't supposed to need one  
17 just like you because you never had one either;  
18 right?

19                   MR. JOHNSON: Objection.

20                   THE COURT: The way you phrased it is  
21 argumentative, but you can ask him about whether he  
22 had an agreement himself earlier.

23                   . . . .

00209

1           A       I believe so. I'd have to look at the  
2 bills again to see. It's been a little while.

3           Q       I want to see if you can find Exhibit 1-D  
4 up there.

5                   (Whereupon, the Court conferred with  
6 counsel.)

7           MR. TOOTHMAN: Don't bother, Doctor. I  
8 think we've got it here.

9                   (Whereupon, the Court conferred with  
10 counsel.)

11           MR. TOOTHMAN: It might be a defendants'  
12 exhibit. What I'm looking for is the stock purchase  
13 agreement from June, and it might be a defendants'  
14 exhibit. It looks like this (indicating).

15           THE WITNESS: Which one?

16           MR. TOOTHMAN: 33.

17           THE WITNESS: Defendants' 33?

18                   (Whereupon, the Court conferred with  
19 counsel.)

20           BY MR. TOOTHMAN:

21           Q       Do you have that, sir?

22           A       Yes, I do.

23           Q       And is this the stock purchase agreement

1 we just referred to?

2 A I believe so, yeah.

3 Q Okay. Let's look at Page 4, Paragraph 8,  
4 "Representation." Do you see that?

5 A Yes, I do.

6 Q What does it say?

7 A It said, "The parties hereto agree that  
8 Jackson & Campbell, P.C., represented the seller in  
9 this transaction and in the preparation of this  
10 agreement."

11 Q All right. And that's consistent with  
12 your knowledge, right?

13 A That's correct. They represented  
14 Countryside Orthopaedics.

15 Q Under this agreement -- why don't you go  
16 to the first page.

17 A Okay.

18 Q Okay. Before any of the numbered  
19 paragraphs, it says, "this stock purchase agreement"  
20 in big capital letters there?

21 A Right at the top?

22 Q Yes. Do you see your name in that  
23 paragraph?



1           A       Yeah, I see my name and Dr. Peyton's  
2 name.

3           Q       After your name, it says what in  
4 quotation marks?

5           A       Seller.

6           Q       So that means under the terms of this  
7 agreement, you're the person referred to as the  
8 seller, right?

9           A       Yes.

10          Q       So Jackson & Campbell represented you.

11          A       Yes.

12          Q       All right. Now, while we're on this  
13 agreement, let's look at Paragraph 1, subparagraph  
14 1.1-A as in "apple."

15          A       Okay.

16          Q       Second sentence, see there, "At the  
17 closing" -- let me stop with that. The closing on  
18 this agreement occurred when?

19          A       The 27th of June, 1997.

20          Q       All right. It says, "At the closing, the  
21 seller shall surrender to the corporation his  
22 certificate representing ownership of the shares in  
23 transferable form, duly endorsed in black, and

1 accompanied by duly executed stock power." Did you  
2 do that on June 27, 1997 or before?

3 MR. JOHNSON: Objection. Again, I object  
4 to him trying to reopen the complainant's cases.  
5 That's the basis for my objection.

6 THE COURT: I don't think he's trying to  
7 do that. It's overruled.

8 BY MR. TOOTHMAN:

9 Q Go ahead, sir.

10 A No stock certificate was given, because  
11 no money was transferred. I wasn't paid. Why  
12 should I give a stock certificate?

13 Q Now, you were paid, however, in -- what  
14 was it, like late July or early August, right?

15 A I was paid, but it wasn't current. Even  
16 when he gave me the check in August, he was a month  
17 behind.

18 Q Now, let's look at, on the next page,  
19 Page 2, subparagraph 1.2, "Payment of the purchase  
20 price." Do you see that?

21 A I'm sorry. What was -- which one?

22 Q Subparagraph 1.2.

23 A 1.2. Okay.

1           Q       Begins with the words "Payment of the  
2 purchase price." Now, it says -- the second  
3 sentence says what?

4           A       "The buyer hereby irrevocably authorizes  
5 the corporation to have the required monthly payment  
6 of the purchase price withheld from his salary and  
7 paid directly to the seller."

8           Q       And did you -- strike that. I'm getting  
9 confused.

10                   Did Countryside cause that to happen?

11                   MR. JOHNSON: Objection to the relevance.

12                   THE COURT: Overruled. Go ahead and  
13 answer the question.

14                   THE WITNESS: No. I mean, I -- it was  
15 like it says: It was -- I was authorized to do it.  
16 I didn't have to do it. And we had elected to defer  
17 his payment until he had the financial resources to  
18 pay me. And that was decided with the check,  
19 obviously.

20                   BY MR. TOOTHMAN:

21           Q       And you said, "we elected." You meant  
22 you and Dr. Peyton and the corporation, all three of  
23 you?

1           A       Yes.

2           Q       Now, did Dr. Peyton receive one or more  
3       paychecks in every month from July 1997 through  
4       December of 1997?

5           A       You mean was he paid every month?

6           Q       Yes.

7           A       Yes.

8           Q       I want you to look at Page 5 of this  
9       agreement, Paragraph 10; first two words are "entire  
10      agreement."

11          A       You said Page 5, 10? Yes, I have it.

12          Q       All right. Now, there's a reference in  
13      there -- go ahead and read it to yourself if you  
14      would, because I want to ask you a question, but go  
15      ahead and read it first.

16          A       "This agreement sets forth the" --

17          Q       I'm sorry. Go ahead and read it to  
18      yourself. I did make you read other things out  
19      loud, but that's fine.

20          A       Okay. Yeah, I've read it.

21          Q       Okay. The transaction -- the phrase is  
22      used in the second line of this sentence -- it's all  
23      one sentence. It says, "transaction contemplated

1 hereby." Do you see that?

2 A Yes, I do.

3 Q "The transaction contemplated hereby" is  
4 the transaction that occurred on June 27, 1997 when  
5 these five agreements: The two employment  
6 agreements -- four agreements: The two employment  
7 agreements, the stock purchase agreement, and the  
8 stockholder's agreement, were signed, correct?

9 MR. JOHNSON: Objection. The agreement  
10 speaks for itself.

11 THE COURT: Isn't it clear it means the  
12 transaction pursuant to this agreement?

13 MR. TOOTHMAN: Well, I --

14 THE COURT: "Contemplated hereby."  
15 "Hereby" means by this agreement.

16 MR. TOOTHMAN: All right.

17 THE COURT: I think that's clear.

18 MR. TOOTHMAN: I was trying to get his  
19 understanding of that.

20 THE COURT: I don't think it makes any  
21 difference. You're not making any allegation it's  
22 ambiguous, are you?

23 MR. TOOTHMAN: I'm not.

1           THE COURT:  It's not a parol evidence  
2           situation, is it?  It's a crystal clear to me.  It's  
3           the transaction contemplated hereby.  It's a stock  
4           purchase.

5           MR. TOOTHMAN:  Well, could I ask him this  
6           question?

7           BY MR. TOOTHMAN:

8           Q       Dr. Lower, is it your understanding that  
9           in addition to this one document that the  
10          transaction described here is the entire transaction  
11          of the purchase of the stock and the signature on  
12          the employment agreements, because they were all  
13          tied together?

14          MR. JOHNSON:  Objection.  Same objection.

15          THE COURT:  Mr. Toothman, if you're  
16          trying to make an argument that this Paragraph 10  
17          refers to the entire agreement, which includes not  
18          only the purchase of the stock, but the employment  
19          agreement, the shareholder's agreement and  
20          everything, I do not agree with that.  That's not  
21          what this paragraph means.

22                 Besides that, it would be kind of  
23          ludicrous, wouldn't it, to say all the agreement of

1 the parties of the parties is set forth in this  
2 agreement? because that's not true.

3 MR. TOOTHMAN: No, I'm not trying to say  
4 that. I'm just trying to say that actually the --  
5 it's a package. They all come together. It's  
6 either -- it's all for one or not at all, because  
7 otherwise, you have a problem.

8 BY MR. TOOTHMAN:

9 Q Let me ask it this way: Dr. Lower --

10 MR. JOHNSON: We'll stipulate that it's a  
11 package.

12 MR. TOOTHMAN: That all four  
13 agreements -- they all had to be signed together or  
14 there wasn't going to be a deal?

15 THE COURT: Well, that's irrelevant,  
16 because they were all signed.

17 MR. TOOTHMAN: Well, I'm just trying to  
18 avoid some kind of argument that they can be severed  
19 and sort of piecemeal read separately.

20 THE COURT: Why can't they?

21 MR. TOOTHMAN: Because I don't think --

22 THE COURT: They're separate agreements,  
23 aren't they?

1                   MR. TOOTHMAN: It was the purpose the  
2 parties.

3                   THE COURT: You're trying to say that  
4 breach --

5                   MR. TOOTHMAN: He wasn't going to sell  
6 him the stock if he didn't --

7                   THE COURT: -- breach of one would  
8 justify the other side not going forward with the  
9 other agreements? Is that what you're saying? Is  
10 that the argument you're going to make?

11                   MR. TOOTHMAN: I don't know if I'm going  
12 to be the one making that argument. I'm just trying  
13 to make sure he doesn't make it, actually.

14                   THE COURT: Well, that's something the  
15 Court's going to have to decide when y'all start to  
16 argue.

17                   MR. TOOTHMAN: Right. As long as I won't  
18 suffer any prejudice from this, I'll move along.

19                   BY MR. TOOTHMAN:

20           Q       Now, I think a moment ago we were  
21 speaking about what Dr. Peyton was authorized to  
22 charge to the firm's American Express card.

23                   Was there any agreement, corporate



1 Again, with the financial stuff, a lot of that,  
2 especially when it came to the malpractice  
3 insurance, Leigh Craig wrote the -- wrote the check,  
4 I signed it, it went out.

5 And in terms of refund and things like  
6 that, the only time I might see something like that  
7 specifically is if it was brought to my attention in  
8 the ledger.

9 Q Now, you stated in your testimony  
10 yesterday that on June 27, 1997, you and Dr. Peyton  
11 signed the four agreements constituting the  
12 changeover from Dr. Peyton being an employee to  
13 being a 50/50 shareholder, correct?

14 A Yes.

15 Q Now, I believe you also embellished that  
16 by saying you were leaving on a personal vacation  
17 that day, correct?

18 MR. JOHNSON: Objection.

19 THE COURT: We've been over all this  
20 before; is that your objection?

21 MR. JOHNSON: And it's argumentative.

22 THE COURT: I mean, we've been over this.  
23 That was the day he was leaving for vacation, that

1 BY MR. TOOTHMAN:

2 Q Did you or Countryside therefore rely on  
3 Dr. Peyton doing something other than what was  
4 allowed by this agreement?

5 A You mean in terms of him giving his  
6 resignation or what?

7 Q In terms of anything. Did you rely on  
8 something else for your understanding about how long  
9 Dr. Peyton would work for the company?

10 A Yes.

11 Q And that was?

12 A I relied on basically the negotiations  
13 that took place for nine months. I relied upon his  
14 continued encouragement of me that he wanted to be a  
15 team player; that he wanted to be together; that we  
16 were going to have a long-term relationship.

17 I mean, yes, I was encouraged by what he  
18 did. He knew the position he was in; he knew what a  
19 good practice he had; and he knew that he wanted to  
20 stay in the area. I mean -- and I believed him.

21 And I believed that he wanted to remain a  
22 partner of mine. That I did rely on. I relied on  
23 his actions and what he told me, just like I

1 mentioned yesterday, in terms of this. Yeah, I knew  
2 that.

3 I mean, just like you've mentioned the  
4 agreement says, he could have signed the agreement;  
5 he could have walked in 90 days. But I never  
6 thought he would have done that. Why would I have  
7 made him a 50/50 shareholder of the corporation? I  
8 think I said that yesterday. That's ludicrous.

9 He could have given me -- under the  
10 employment agreement in 1995, he could have given me  
11 notice in 90 days. However, there would have been a  
12 restrictive covenant; he wouldn't have been entitled  
13 to his ARs; he wouldn't have had an expense  
14 allowance; everything that we've gone through,  
15 Mr. Toothman. So yes, I did rely on it.

16 Q Those aren't in this agreement, though,  
17 are they?

18 MR. JOHNSON: Objection.

19 THE COURT: Sustained. It's noon. We're  
20 going to stop. Mr. Toothman, I hope you feel  
21 better. I hope all of you have a very nice and very  
22 safe Thanksgiving.

23 MR. JOHNSON: Same for the Court.

1           A.       Dr. Peyton and Erik.

2           Q.       Erik Kloster?

3                    You have to say yes or no.

4           A.       Yes.

5           Q.       What was the information that they had  
6 and you didn't have?

7           A.       It was a -- I believe it was a list of  
8 expenditures from the date of Dr. Peyton's  
9 employment through the end of 1996 as it related to  
10 his employment agreement.

11          Q.       Now, in the course of the negotiations  
12 prior to June 27, 1997, were you privy to any  
13 discussions concerning whether the payment for the  
14 buy-in was to be in pre-tax or post-tax dollars?

15          A.       Could you repeat that again?

16          Q.       During the negotiations leading up to the  
17 agreements being signed on June 27, 1997, were you  
18 privy to any discussions concerning whether the  
19 payment for the buy-in was to be in pre-tax or  
20 post-tax dollars?

21          A.       Yes.

22          Q.       Did you observe an agreement being  
23 reached as to whether it would be pre-tax or

**00221**

1 post-tax dollars?

2 A. Yes.

3 Q. Did Dr. Peyton make that agreement?

4 A. Yes.

5 Q. What was that agreement?

6 A. Post-tax dollars.

7 Q. At the time of signing the agreements in  
8 June 1997, did Dr. Peyton protest that it was in  
9 post-tax dollars?

10 A. Other than the initial discussion from  
11 the fall of '96?

12 Q. Correct.

13 A. No, he did not protest it.

14 Q. After signing the agreements on June 27,  
15 1998, did Dr. Peyton protest to you that it was  
16 post-tax not in pre-tax dollars?

17 A. Yes.

18 Q. When did that happen?

19 A. It happened after the July conference at  
20 Lansdowne.

21 Q. And how did you happen to speak with  
22 Dr. Peyton at that point?

23 A. He -- he called me on the phone the

00222

1 following morning and asked me how I was going to  
2 instruct Paychex to reduce his gross pay for his  
3 buy-in.

4 Q. Now, going back to the meeting at  
5 Lansdowne, the meeting, was that the day before?

6 A. One or two days before that. Yes.

7 Q. Who was in attendance at that meeting?

8 A. Dr. Peyton, Dr. Lower, and myself.

9 Q. Was the pre-tax/post-tax issue discussed  
10 at all at that meeting?

11 A. No.

12 Q. When Dr. Peyton called you and asked you  
13 what arrangements would be made concerning his  
14 paycheck, tell us what else was discussed in that  
15 conversation.

16 A. I informed him that gross pay would not  
17 be reduced because it was a post-tax payment. He  
18 disagreed with me and stated that it was to be  
19 pre-tax and that he had spoken to Dr. Lower the  
20 night before and Dr. Lower had agreed to make it  
21 pre-tax.

22 Q. And what else, if anything, did you  
23 discuss?

00223

1           A.       I also advised Dr. Peyton to call Erik  
2 Kloster and speak to Erik about the document because  
3 it was to be post-tax dollars and Erik was aware of  
4 that.

5           MR. TOOTHMAN:   Objection to the  
6 speculation of Mr. Kloster's knowledge.

7           THE COURT:   I'll accept it only as  
8 that's -- that's what he told Dr. Peyton, not for  
9 the truth of it.   That's a statement he made to  
10 Dr. Peyton.

11           BY MR. JOHNSON:

12           Q.       Did Dr. Peyton respond to that?

13           A.       He became quite angry and shouted into  
14 the phone some vulgarity in reference to Erik  
15 Kloster.

16           Q.       And did the two of you discuss anything  
17 else at that time?

18           A.       No.

19           Q.       Now, during the negotiations for the  
20 buy-in, did you discuss with Erik Kloster the issue  
21 of whether it would be in post-tax or pre-tax  
22 dollars?

23           A.       Yes.

00224

1 Q. And did Erik Kloster acknowledge that it  
2 was post-tax or pre-tax?

3 MR. TOOTHMAN: Objection. Hearsay,  
4 relevance.

5 THE COURT: It sounds like that would  
6 have to be hearsay.

7 MR. JOHNSON: Erik Kloster is  
8 Dr. Peyton's accountant. He's Dr. Peyton's agent.

9 MR. TOOTHMAN: Not in all things, your  
10 Honor. And this thing is quite clear that they  
11 disagree.

12 THE COURT: The objection is sustained.

13 MR. JOHNSON: All right.

14 BY MR. JOHNSON:

15 Q. After the discussion with Dr. Peyton that  
16 you've just told us about, did you have any further  
17 discussions with Dr. Peyton on the pre-tax/post-tax  
18 issue?

19 A. We -- we had another conversation, and  
20 he -- he indicated to me that Dr. Lower had stated  
21 that, if it could be worked out between pre- and  
22 post-tax dollars to where Dr. Lower would receive  
23 the same benefit, the same dollars, then Dr. Lower



1 would be agreeable to that.

2 Q. Was that ever done?

3 A. No.

4 Q. Why not?

5 A. I had -- again, in those conferences that  
6 were -- were cancelled, I was prepared to meet with  
7 Dr. Peyton and attempt to work up for the second  
8 time a formula to convert from post-tax to pre-tax.

9 Q. And did you have a meeting with  
10 Dr. Peyton about that?

11 A. No.

12 Q. Why not?

13 A. Dr. Peyton at one point said to me on the  
14 phone, work up the formula and send it me.

15 Q. And did you do that?

16 A. No.

17 Q. Why not?

18 A. Because the last time I had worked up a  
19 formula in the fall of 1996 in an attempt to adjust  
20 post- versus pre-tax dollars, Dr. Peyton became  
21 quite upset about it.

22 Q. And did you ever have any further  
23 discussion with Dr. Peyton on that issue?

00226

1 you that it was a post-tax stock buy-in?

2 A. I do not believe this is the document.

3 Q. All right. We'll try one more.

4 MR. TOOTHMAN: Exhibit 1-D as in dog will  
5 be the stock purchase agreement. A copy for the  
6 Court, and a copy for Mr. Johnson.

7 (Whereupon, Plaintiff's Exhibit 1-D was  
8 marked for identification.)

9 BY MR. TOOTHMAN:

10 Q. Is that a agreement you were referring  
11 to?

12 A. Yes.

13 Q. What portion of that demonstrated to you  
14 that this was a post-tax buy-in?

15 A. The reference to 48 equal monthly  
16 payments beginning January 1, 1997, authorizes the  
17 corporation to have the required monthly payment of  
18 the purchase price withheld from his salary and paid  
19 directly to the seller.

20 Q. And that's the provision, sir?

21 A. Yes.

22 Q. And that's on Page 2, Paragraph 1.2?

23 A. Page 2, Paragraph 1.2, yes.

**00227**

1           Q.       All right. And there's no other  
2 provision in the agreements 1-A or 1-C or 1-D which  
3 refers to this or relates to it?

4           MR. JOHNSON: Objection.

5           THE WITNESS: I don't believe so.

6           THE COURT: It speaks for itself. It  
7 speaks for itself.

8           MR. TOOTHMAN: He testified that there  
9 was an agreement and then Dr. Peyton had a problem  
10 with it. I was trying to establish where he thinks  
11 he's coming from on this because I think they're  
12 trying to suggest -- for some reason, they felt it  
13 was material to their proof. I believe the whole  
14 purpose of it was so say that Dr. Peyton had said  
15 something about expletive Erik Kloster. I think  
16 that was the whole purpose of the discussion. I'm  
17 just trying to find out and confirm that Dr. Peyton  
18 had a reasonable basis for being concerned.

19                   Do you understand?

20           THE COURT: Yes, sir. I understand, but  
21 I think it's more appropriate for argument than it  
22 is for asking a question of this witness.

23           MR. TOOTHMAN: Well, okay.

**00228**

1 BY MR. TOOTHMAN:

2 Q. Doctor -- Mr. Zagami, I'm sorry to insult  
3 you, sir. Did you actually refer to this provision  
4 in talking to Dr. Peyton and explain to him why you  
5 felt it was in post-tax dollars as opposed to  
6 pre-tax dollars?

7 A. Yes, sir.

8 Q. And what would this sentence have to say  
9 if it were going to be pre-tax dollars in your  
10 experience?

11 A. It should say that he would have his  
12 gross salary reduced.

13 Q. Does it say his net salary is reduced?

14 A. It says withheld from salary.

15 Withholdings are taken from gross pay.

16 Q. Okay. Did you advise Dr. Lower to use  
17 the corporate American Express of Countryside for  
18 personal items?

19 A. No.

20 Q. Did you advise against it?

21 A. Yes.

22 Q. Did you advise Dr. Peyton at any time  
23 while he worked at Countryside that he was using the

1 I think he answered that one yesterday. He didn't  
2 find it was out of line. That was my --

3 MR. JOHNSON: I'm not sure that he did,  
4 but I think it's beyond the scope as well.

5 THE COURT: The objection is sustained  
6 one way or the other.

7 MR. TOOTHMAN: Thank you, your Honor.

8 BY MR. TOOTHMAN:

9 Q. Now, you participated in negotiations of  
10 Dr. Peyton's contract in the spring and early summer  
11 of '97?

12 A. That's correct.

13 Q. And even before that, you had  
14 participated in attempting to analyze data and so  
15 forth?

16 A. That's correct.

17 Q. Did the subject of Dr. Peyton's pre-1997  
18 accounts receivable ever come up as part of those  
19 negotiations?

20 A. The issue with accounts receivable, if  
21 Dr. Peyton became a shareholder, then he is entitled  
22 to his accounts receivable for 19 -- for prior  
23 times.

00230

1 guess.

2 Q Why didn't the corporation take  
3 advantage of Paragraph 1.2, the second sentence,  
4 regarding payment of the purchase price out of  
5 the monthly salary of the --

6 A Well, it's just like you said. I mean,  
7 I kind of agreed to wait. Dr. Peyton never  
8 stated that he wanted to have his check  
9 automatically debited. As he did, he gave me a  
10 written check, and I was under the understanding  
11 that he would continue to give me written  
12 checks, just like he did initially.

13 Q Anything else -- I'm sorry; go ahead.

14 A No; that's it.

15 Q Is there anything else in this  
16 agreement that you claim Dr. Peyton is in  
17 violation of?

18 A At this point, they're the main two.  
19 There may be other ones; I don't remember right  
20 now, but those appear to be the primary two.

21 Q Why -- If Dr. Peyton is allegedly in  
22 violation of the agreement, why are you still  
23 sending him money to purchase back his stock?

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# **Plaintiff's Trial Exhibits**

## EMPLOYMENT AGREEMENT

THIS AGREEMENT made effective as of the 1st day of January, 1997, by and between Countryside Orthopaedics, P.C., a Virginia professional corporation (the "Corporation"), and Randall S. Peyton, M.D. (the "Physician").

WHEREAS, the Corporation renders professional services through its employees who are duly licensed to practice medicine in the Commonwealth of Virginia; and

WHEREAS, the Corporation desires to employ the Physician upon the terms and conditions hereinafter set forth, and the Physician desires to accept such employment.

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

1. Employment. The Corporation employs the Physician, and the Physician accepts employment with the Corporation, to render medical, surgical and other related services for the Corporation as determined by the Board of Directors of the Corporation in the manner and to the extent permitted by the applicable Virginia Professional Corporation statute and the applicable canons of professional ethics as amended from time to time.

2. Scope of Duties. The Physician's duties shall include, but not be limited to, the following:

(a) Keeping and maintaining (or causing to be kept and maintained) appropriate records relating to all professional services rendered by him under this Agreement;

(b) Preparing and attending to, in connection with such services, all reports, claims and correspondence necessary or appropriate in the circumstances, all of which records, reports, claims, and correspondence shall belong to the Corporation;



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(c) Promotion of the practice by entertainment or otherwise, as and to the extent permitted by law and the applicable canons of professional ethics, and by the standards of conduct of the professional practice of the Corporation;

(d) Attendance at professional conventions and postgraduate seminars and participation in professional societies so far as is reasonable and practical; and

(e) Performance of all things reasonably desirable to maintain and improve his professional skills.

The Physician's other duties shall be such as the Board of Directors may from time to time reasonably direct, including (a) "on duty" and "on call" assignments at night and on weekends and holidays, and (b) normal duties as an officer of the Corporation.

3. Compensation. As his entire compensation for all services rendered to the Corporation during the term of this Agreement, in whatever capacity rendered, the Physician shall receive:

(a) Base Entitlement. An Entitlement (salary, retirement plan contributions and Additional Benefits, as defined below) which will be the excess of his "Collections" (as defined below) over (i) his proportionate share (initially 50 percent) of the Corporation's "Fixed Expenses", plus (ii) 100 percent of his "Individual Expenses", plus (iii) 100 percent of his "Variable Expenses". "Fixed Expenses", "Individual Expenses" and "Variable Expenses" shall be defined by mutual agreement of the Corporation and the Physician and applied consistently from year to year. The Physician shall receive a draw against the salary portion of his Entitlement which shall be payable in equal payments every month; provided, however, that no such salary shall be paid in respect of any month or portion thereof

subsequent to the termination of this Agreement. On an annual basis the draw will be reconciled with the Physician's actual Entitlement for the preceding twelve months. In the event that Physician receives an Entitlement in any fiscal year which is later determined by the Corporation's accountant to be more than the amount to which the Physician was actually entitled (the "Excess Amount"), the Physician's Entitlement in the first subsequent fiscal year shall be reduced by the Excess Amount.

(b) Definitions. The term "Collections" shall be defined in the same manner as the Corporation normally defines the term, namely cash receipts, net of refunds, actually received by the Corporation for the Physician's services.

(c) Bonus. A bonus, payable prior to the close of the Corporation's taxable year in question, which shall be determined in the sole discretion of the Board of Directors of the Corporation. The purpose of the bonus will be to make the total compensation paid annually to the Physician equal to the reasonable value of his services to the Corporation.

(d) Additional Benefits. The right to receive or participate in any additional "fringe" benefits, including, but not limited to, insurance programs and pension or profit sharing plans, which may from time to time be made available to physicians employed by the Corporation. Any Additional Benefits shall be calculated as part of Physician's Base Entitlement.

(e) Severance Pay. In the event that the Physician dies or otherwise ceases his employment under this Agreement for any reason (including, without limitation, disability, retirement, or voluntary or involuntary termination) the Corporation shall pay the Physician (or his estate) severance pay ("Severance Pay") as follows:

(1) Amount. Severance Pay shall be an amount equal to eighty percent (80%) of his "Collections less the Physician's Individual Expenses remaining unpaid at the time the cessation of employment occurred reduced by any Excess Amount remaining unrepaid.

(2) Payment. The Severance Pay determined in accordance with Paragraph 3(e)(1) shall be paid no later than ninety (90) days after the cessation of employment occurred, and then every ninety (90) days thereafter.

(3) Interest and Offset. No interest shall accrue on any amount due pursuant to this subparagraph. The Corporation may offset payments due hereunder by amounts owed by the Physician to the Corporation.

(4) Physician's Compliance. The Physician's (or Physician's estate's) full, timely, and continuing compliance in all material respects with every material term with this Agreement and of every other written agreement between the Physician and the Corporation in force after the effective date of termination is a condition precedent to the Corporation's obligation to pay Physician Severance Pay in accordance with this paragraph.

4. Corporate Facilities. The Corporation shall provide and maintain (or cause to be provided and maintained) if appropriate a private, professional office and such facilities, equipment, and supplies as it deems necessary for the Physician's performance of his professional duties under this Agreement. Such facilities shall also include the services of receptionists, x-ray technician, other paraprofessional help as needed, such as secretaries, bookkeepers, etc.

5. Physician's Responsibilities. The Physician shall have, maintain, and use,

where appropriate, an automobile, home telephone and other facilities and equipment (such as reference books, medical equipment and supplies, and space at home for attending to patients) reasonably needed in connection with his employment under this Agreement, all of which shall be at the Physician's expense except as he may from time to time be reimbursed by the Corporation. In the event the automobile is owned by the Physician, he shall also at his expense carry automobile public liability insurance protecting himself and the Corporation against claims arising out of the use of the automobile (or any other motor vehicle) in the course of his employment by the Corporation and he shall keep on deposit with the Secretary of the Corporation a certificate or other evidence that such insurance is in force. Such insurance shall be not less than such amounts as the Board of Directors may from time to time reasonably direct and in any event shall provide coverage of at least \$25,000.00 for property damage, \$100,000.00 for the injury or death of one person, and \$300,000.00 for injuries or deaths arising from one accident.

6. Exclusive Service. The Physician shall devote his full time and best efforts to the performance of his employment under this Agreement. During the term of this Agreement, the Physician shall not, at any time or place, either directly or indirectly, engage in the practice of medicine or surgery to any extent whatsoever, except pursuant to this Agreement. All fees or other income attributable to his professional services during the term of this Agreement shall belong to the Corporation. All volunteer and extra work outside the Physician's scope of employment during the term of this Agreement, if not expressly authorized by the Board of Directors, is hereby forbidden, but such permission shall not be unreasonably withheld.

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7. Professional Standards. The Physician shall perform his duties under the Agreement in accordance with such standards of professional ethics and practice as may from time to time be applicable during the term of his employment hereunder.

8. Vacations. At such reasonable times as the Board of Directors shall in its discretion permit, the Physician shall be entitled, without loss of pay, to absent himself voluntarily from the performance of his employment under this Agreement for thirty (30) days each year. All such voluntary absences to count as vacation time.

9. Post-Graduate Work. During periods of vacation and leaves of absence, the Physician is encouraged to participate in post-graduate work and other activities conducive to maintaining high professional standards.

10. Illness; Salary Continuation. If the Physician shall be involuntarily absent from the performance of his employment under this Agreement (or unable to perform on a full-time basis) due to illness or physical incapacity, he shall nevertheless continue to receive his compensation under Paragraph 3(a) until his employment permanently ceases.

11. Termination. This Agreement and the Physician's employment hereunder shall be effective upon full execution of this Agreement and shall continue indefinitely, but may be terminated at any time by mutual agreement in writing or by either party giving not less than 90 days' written notice to the other party specifying the date of termination. Notwithstanding the termination of this Agreement, the parties shall be required to carry out any provisions hereof which contemplate performance by them subsequent to such termination; and such termination shall not affect any liability or other obligation which shall have accrued prior to such termination, including, but not limited to, any liability or loss or

damage on account of default. This Agreement shall be deemed to be terminated and the employment relationship between the Corporation and the Physician upon the occurrence of any of the following:

- (a) Upon death during employment of the Physician.
- (b) The Physician fails or refuses to faithfully and diligently perform the usual customary duties of his employment or such as shall be approved by the Board of Directors and adhere to the provisions of this Agreement.
- (c) The Physician fails or refuses to comply with the reasonable policies, standards and regulations of the Employer which from time to time may be established.
- (d) The Physician conducts himself in an unprofessional, unethical, immoral or fraudulent manner.
- (e) The Physician is no longer qualified to practice medicine in the Commonwealth of Virginia.

12. Competition. Upon the termination of the Physician's employment hereunder for any reason whatsoever, the Physician and the Corporation shall send a joint letter to patients who have been treated by the Physician, explaining the patient's rights upon such departure and giving the Physician's new location. Other than by joint letter, the Physician shall not communicate directly with patients of the Corporation. After such termination, he may compete with the Corporation in the practice of medicine and surgery and treat any patients of the Corporation. Should this Agreement be terminated, the records of all patients seen by the Physician as well as all accounts receivable due the Corporation shall remain the property of the Corporation. Any property of the Corporation must be returned

by the Physician no later than the date of termination. It is further agreed in the event of termination of this Employment Agreement that the Physician will pay the Corporation the proportionate share of malpractice (including "tail" coverage), health, and disability insurance premiums for the part of the year not employed if the Corporation is unable to recover from the insurance carrier a pro rated refund. Upon termination, the purchase of any capital stock of the Corporation which may be owned by the Physician shall be governed by provisions with respect thereto in the Bylaws of the Corporation, any Stockholders' Agreement then in effect and by the governing statute.

13. Assignment Prohibited. This Agreement is personal to each of the parties hereto, and neither party may assign nor delegate any of its rights or obligations hereunder without first obtaining the written consent of the other party.

14. Amendments. No amendments or additions to this Agreement shall be binding unless in writing and signed by both parties, except as herein otherwise provided.

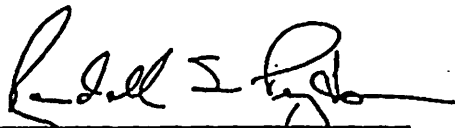
15. Governing Law. This Agreement shall be governed in all respects, whether as to validity, construction, capacity, performance or otherwise, by the laws of the Commonwealth of Virginia. The paragraph headings used in this Agreement are included solely for convenience and shall not affect, or be used in connection with, the interpretation of this Agreement.

16. Representation. The parties acknowledge and agree that the Corporation engaged the legal services of Jackson & Campbell, P.C., to render legal advice in connection with this Employment Agreement and to draft this Agreement. Physician acknowledges and agrees that he has been given the opportunity to obtain independent legal advice with

respect to this Agreement and none of the parties has been entitled to rely upon, or has in fact relied upon the legal or other advice of any other party or any other party's counsel in entering into this Agreement.

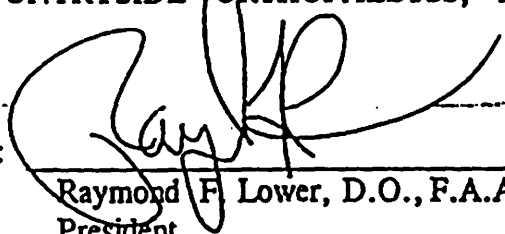
IN WITNESS WHEREOF, the parties have executed this Agreement.

ATTEST:

  
\_\_\_\_\_  
Randall S. Peyton, M.D.  
Secretary

CORPORATION:

COUNTRYSIDE ORTHOPAEDICS, P.C.

By:   
\_\_\_\_\_  
Raymond F. Lower, D.O., F.A.A.O.S.  
President

WITNESS:

\_\_\_\_\_  
As to Randall S. Pe:

PHYSICIAN:

\_\_\_\_\_  
M.D.

00241



## EMPLOYMENT AGREEMENT

THIS AGREEMENT made effective as of the 1st day of January, 1997, by and between Countryside Orthopaedics, P.C., a Virginia professional corporation (the "Corporation"), and Raymond F. Lower, D.O., F.A.A.O.S. (the "Physician").

WHEREAS, the Corporation renders professional services through its employees who are duly licensed to practice medicine in the Commonwealth of Virginia; and

WHEREAS, the Corporation desires to employ the Physician upon the terms and conditions hereinafter set forth, and the Physician desires to accept such employment.

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

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(c) Promotion of the practice by entertainment or otherwise, as and to the extent permitted by law and the applicable canons of professional ethics, and by the standards of conduct of the professional practice of the Corporation;

(d) Attendance at professional conventions and postgraduate seminars and participation in professional societies so far as is reasonable and practical; and

(e) Performance of all things reasonably desirable to maintain and improve his professional skills.

The Physician's other duties shall be such as the Board of Directors may from time to time reasonably direct, including (a) "on duty" and "on call" assignments at night and on weekends and holidays, and (b) normal duties as an officer of the Corporation.

3. Compensation. As his entire compensation for all services rendered to the Corporation during the term of this Agreement, in whatever capacity rendered, the Physician shall receive:

(a) Base Entitlement. An Entitlement (salary, retirement plan contributions and Additional Benefits, as defined below) which will be the excess of his "Collections" (as defined below) over (i) his proportionate share (initially 50 percent) of the Corporation's "Fixed Expenses", plus (ii) 100 percent of his "Individual Expenses", plus (iii) 100 percent of his "Variable Expenses". "Fixed Expenses", "Individual Expenses" and "Variable Expenses" shall be defined by mutual agreement of the Corporation and the Physician and applied consistently from year to year. The Physician shall receive a draw against the salary portion of his Entitlement which shall be payable in equal payments every month; provided, however, that no such salary shall be paid in respect of any month or portion thereof

subsequent to the termination of this Agreement. On an annual basis the draw will be reconciled with the Physician's actual Entitlement for the preceding twelve months. In the event that Physician receives an Entitlement in any fiscal year which is later determined by the Corporation's accountant to be more than the amount to which the Physician was actually entitled (the "Excess Amount"), the Physician's Entitlement in the first subsequent fiscal year shall be reduced by the Excess Amount.

(b) Definitions. The term "Collections" shall be defined in the same manner as the Corporation normally defines the term, namely cash receipts, net of refunds, actually received by the Corporation for the Physician's services.

(c) Bonus. A bonus, payable prior to the close of the Corporation's taxable year in question, which shall be determined in the sole discretion of the Board of Directors of the Corporation. The purpose of the bonus will be to make the total compensation paid annually to the Physician equal to the reasonable value of his services to the Corporation.

(d) Additional Benefits. The right to receive or participate in any additional "fringe" benefits, including, but not limited to, insurance programs and pension or profit sharing plans, which may from time to time be made available to physicians employed by the Corporation. Any Additional Benefits shall be calculated as part of Physician's Base Entitlement.

(e) Severance Pay. In the event that the Physician dies or otherwise ceases his employment under this Agreement for any reason (including, without limitation, disability, retirement, or voluntary or involuntary termination) the Corporation shall pay the Physician (or his estate) severance pay ("Severance Pay") as follows:

(1) Amount. Severance Pay shall be an amount equal to eighty percent (80%) of his "Collections" less the Physician's Individual Expenses remaining unpaid at the time the cessation of employment occurred reduced by any Excess Amount remaining unrepaid.

(2) Payment. The Severance Pay determined in accordance with Paragraph 3(e)(1) shall be paid no later than ninety (90) days after the cessation of employment occurred, and then every ninety (90) days thereafter. The Corporation's obligation to pay Severance Pay shall completely terminate on the second anniversary of the Physician's cessation of employment.

(3) Interest and Offset. No interest shall accrue on any amount due pursuant to this subparagraph. The Corporation may offset payments due hereunder by amounts owed by the Physician to the Corporation.

(4) Physician's Compliance. The Physician's (or Physician's estate's) full, timely, and continuing compliance in all material respects with every material term with this Agreement and of every other written agreement between the Physician and the Corporation in force after the effective date of termination is a condition precedent to the Corporation's obligation to pay Physician Severance Pay in accordance with this paragraph.

4. Corporate Facilities. The Corporation shall provide and maintain (or cause to be provided and maintained) if appropriate a private, professional office and such facilities, equipment, and supplies as it deems necessary for the Physician's performance of his professional duties under this Agreement. Such facilities shall also include the services of receptionists, x-ray technician, other paraprofessional help as needed, such as secretaries,

bookkeepers, etc.

5. Physician's Responsibilities. The Physician shall have, maintain, and use, where appropriate, an automobile, home telephone and other facilities and equipment (such as reference books, medical equipment and supplies, and space at home for attending to patients) reasonably needed in connection with his employment under this Agreement, all of which shall be at the Physician's expense except as he may from time to time be reimbursed by the Corporation. In the event the automobile is owned by the Physician, he shall also at his expense carry automobile public liability insurance protecting himself and the Corporation against claims arising out of the use of the automobile (or any other motor vehicle) in the course of his employment by the Corporation and he shall keep on deposit with the Secretary of the Corporation a certificate or other evidence that such insurance is in force. Such insurance shall be not less than such amounts as the Board of Directors may from time to time reasonably direct and in any event shall provide coverage of at least \$25,000.00 for property damage, \$100,000.00 for the injury or death of one person, and \$300,000.00 for injuries or deaths arising from one accident.

6. Exclusive Service. The Physician shall devote his full time and best efforts to the performance of his employment under this Agreement. During the term of this Agreement, the Physician shall not, at any time or place, either directly or indirectly, engage in the practice of medicine or surgery to any extent whatsoever, except pursuant to this Agreement. All fees or other income attributable to his professional services during the term of this Agreement shall belong to the Corporation. All volunteer and extra work outside the Physician's scope of employment during the term of this Agreement, if not

expressly authorized by the Board of Directors, is hereby forbidden, but such permission shall not be unreasonably withheld.

7. Professional Standards. The Physician shall perform his duties under the Agreement in accordance with such standards of professional ethics and practice as may from time to time be applicable during the term of his employment hereunder.

8. Vacations. At such reasonable times as the Board of Directors shall in its discretion permit, the Physician shall be entitled, without loss of pay, to absent himself voluntarily from the performance of his employment under this Agreement for thirty (30) days each year. All such voluntary absences shall count as vacation time.

9. Post-Graduate Work. During periods of vacation and leaves of absence, the Physician is encouraged to participate in post-graduate work and other activities conducive to maintaining high professional standards.

10. Illness; Salary Continuation. If the Physician shall be involuntarily absent from the performance of his employment under this Agreement (or unable to perform on a full-time basis) due to illness or physical incapacity, he shall nevertheless continue to receive his compensation under Paragraph 3(a) until his employment permanently ceases.

11. Termination. This Agreement and the Physician's employment hereunder shall be effective upon full execution of this Agreement and shall continue indefinitely, but may be terminated at any time by mutual agreement in writing or by either party giving not less than 90 days' written notice to the other party specifying the date of termination. Notwithstanding the termination of this Agreement, the parties shall be required to carry out any provisions hereof which contemplate performance by them subsequent to such

termination; and such termination shall not affect any liability or other obligation which shall have accrued prior to such termination, including, but not limited to, any liability or loss or damage on account of default. This Agreement shall be deemed to be terminated and the employment relationship between the Corporation and the Physician upon the occurrence of any of the following:

- (a) Upon death during employment of the Physician.
- (b) The Physician fails or refuses to faithfully and diligently perform the usual customary duties of his employment or such as shall be approved by the Board of Directors and adhere to the provisions of this Agreement.
- (c) The Physician fails or refuses to comply with the reasonable policies, standards and regulations of the Employer which from time to time may be established.
- (d) The Physician conducts himself in an unprofessional, unethical, immoral or fraudulent manner.
- (e) The Physician is no longer qualified to practice medicine in the Commonwealth of Virginia.

12. Competition. Upon the termination of the Physician's employment hereunder for any reason whatsoever, the Physician and the Corporation shall send a joint letter to patients who have been treated by the Physician, explaining the patient's rights upon such departure and giving the Physician's new location. Other than by joint letter, the Physician shall not communicate directly with patients of the Corporation. After such termination, he may compete with the Corporation in the practice of medicine and surgery and treat any patients of the Corporation. Should this Agreement be terminated, the records of all

patients seen by the Physician as well as all accounts receivable due the Corporation shall remain the property of the Corporation. Any property of the Corporation must be returned by the Physician no later than the date of termination. It is further agreed in the event of termination of this Employment Agreement that the Physician will pay the Corporation the proportionate share of malpractice (including "tail" coverage), health, and disability insurance premiums for the part of the year not employed if the Corporation is unable to recover from the insurance carrier a pro rated refund. Upon termination, the purchase of any capital stock of the Corporation which may be owned by the Physician shall be governed by provisions with respect thereto in the Bylaws of the Corporation, any Stockholders' Agreement then in effect and by the governing statute.

13. Assignment Prohibited. This Agreement is personal to each of the parties hereto, and neither party may assign nor delegate any of its rights or obligations hereunder without first obtaining the written consent of the other party.

14. Amendments. No amendments or additions to this Agreement shall be binding unless in writing and signed by both parties, except as herein otherwise provided.

15. Governing Law. This Agreement shall be governed in all respects, whether as to validity, construction, capacity, performance or otherwise, by the laws of the Commonwealth of Virginia. The paragraph headings used in this Agreement are included solely for convenience and shall not affect, or be used in connection with, the interpretation of this Agreement.

16. Representation. The parties acknowledge and agree that the Corporation engaged the legal services of Jackson & Campbell, P.C., to render legal advice in connection



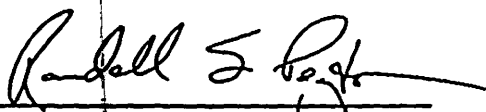
with this Employment Agreement and to draft this Agreement. Physician acknowledges and agrees that he has been given the opportunity to obtain independent legal advice with respect to this Agreement and none of the parties has been entitled to rely upon, or has in fact relied upon the legal or other advice of any other party or any other party's counsel in entering into this Agreement.

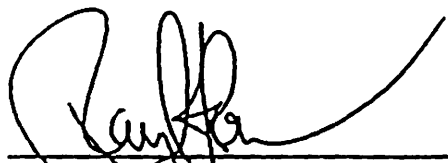
IN WITNESS WHEREOF, the parties have executed this Agreement.

CORPORATION:


ATTEST:

COUNTRYSIDE ORTHOPAEDICS, P.C.


  
Randall S. Peyton, M.D.  
Secretary

By:   
Raymond F. Lower, D.O., F.A.A.O.S.  
President

WITNESS:

  
As to Raymond F. Lower

PHYSICIAN:

  
Raymond F. Lower, D.O., F.A.A.O.S.

6/27/77

00250

## STOCKHOLDERS' AGREEMENT

STOCKHOLDERS' AGREEMENT made effective as of the 1st day of January, 1997, by and among (i) Raymond F. Lower, D.O., F.A.A.O.S. ("Lower"); (ii) Randall S. Peyton, M.D. ("Peyton"); and (iii) Countryside Orthopaedics, P.C., a Virginia professional corporation (the "Corporation") (the above parties collectively the "Parties").

### RECITALS:

A. The Corporation is duly organized, validly existing, and in good standing under the laws of the Commonwealth of Virginia.

B. The Corporation has authorized capital stock consisting of Five Thousand (5000) shares of common stock (the "Stock") of no par value, of which One Hundred (100) shares are now issued and outstanding.

C. Lower and Peyton (collectively the "Stockholders") own all of the outstanding Stock.

D. The Parties believe their best interests and the best interests of the Corporation are to provide for the ultimate ownership of the Stock, restrict its future transfer, and to regulate certain Corporation actions. The Parties intend that this Stockholders' Agreement govern these matters.

NOW, THEREFORE, in consideration of the mutual promises and covenants, as hereinafter set forth, and of other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

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## I. CORPORATION GOVERNANCE

A. Routine Decisions. The President of the Corporation shall conduct the day-to-day operations of the Corporation without the necessity for Board of Directors or Stockholders approval of his decisions.

B. Election of Directors. Each Stockholder shall nominate one (1) member of the Board of Directors at each and every annual election of Directors. Each Stockholder hereby agrees to vote all shares of Stock owned by him for such nominees proposed by the other Stockholders at each and every election of Directors.

C. Governance Generally. The Corporation's Board of Directors shall manage the business of the Corporation in accordance with Virginia law and the By-Laws of the Corporation.

D. Stockholders. The Stockholders shall approve all actions required to be approved by the Stockholders in accordance with the Articles of Incorporation and the By-Laws of the Corporation.

E. Decisions Requiring Unanimity of Stockholders. The Stockholders must unanimously approve all of the following actions by the Corporation:

1. Incur any debt or issue any note in an aggregate principal amount exceeding FIVE THOUSAND DOLLARS (\$5,000) in a single transaction.

2. Sell, lease, exchange, mortgage, or otherwise dispose of, or contract to sell, lease, exchange, mortgage, or otherwise dispose of all, or substantially all, of the assets of the Corporation.

3. Dissolve the Corporation and liquidate the business.

4. Undertake capital expenditures in a single transaction that exceed, in the aggregate, FIVE THOUSAND DOLLARS (\$ 5,000).

5. Change the Corporation's fiscal year or method of accounting.

6. Engage in any different business or change the nature of the business that the Corporation conducts as of the date of this Stockholders' Agreement.

7. Issue, or contract to issue, unissued Stock.

8. Repurchase, redeem or acquire, or contract to repurchase, redeem, or acquire, directly or indirectly, any outstanding shares of Stock, recapitalize the Corporation, or merge the Corporation into another entity.

F. Resignation of Office or Directorship of Corporation. If a Stockholder sells or otherwise transfers all of his Stock pursuant to the provisions of this Stockholders' Agreement, such selling or transferring Stockholder must, and hereby agrees, to resign each office and directorship of the Corporation that he holds at the time of such sale or transfer, and to relinquish any other corporate appointment (e.g., trustee of the Corporation's pension or profit sharing plans).

## II. RESTRICTIONS ON TRANSFER OF STOCK

### A. Intervivos Conveyance Other Than By Sale.

1. Except as provided herein, no Stockholder may assign, transfer, or in any other manner, make any intervivos disposition of, directly or indirectly (hereafter "Convey"), any Stock now owned or hereafter acquired by him, without first obtaining the prior written consent of the other Stockholders. Except as otherwise provided herein, no Stockholder may pledge, mortgage, hypothecate, grant a security interest in or otherwise

encumber, directly or indirectly, whether voluntarily or involuntarily (hereafter "Encumber"), any Stock now owned or hereafter acquired by him, without first obtaining the prior written consent of the other Stockholders.

2. In the event that a Stockholder obtains the prior written consent required by Paragraph IIA1 above, and thereafter Encumbers any Stock now owned or hereafter acquired by him, the Stock is Encumbered subject to the following condition: If such Stockholder should default in paying or otherwise satisfying the note or other obligation secured by the aforesaid Encumbrance, then all the Stockholders in proportion to their respective ownership of the Stock, or if all Stockholders fail to act any Stockholder, shall have the right and power, but shall not be obligated, to cure such default (and to receive the Encumbered Stock as consideration therefor) in order to acquire title to such Stock and thereby prevent the so-secured creditor or creditors from taking title, either legal or equitable, to such shares of Stock.

B. Conveyance by Sale. No Stockholder may, during his lifetime, sell any or all of his Stock without first complying with the provisions of this Paragraph IIB.

1. If a Stockholder (hereafter "Recipient") receives a bona fide offer for the purchase of all (but not less than all) of the Stock then owned by him for consideration payable in cash, promissory note, or both (the "Offer"), which he intends to accept, the Recipient shall furnish written notice thereof in accordance with Paragraph VIIA (the "Notice") to each of the other Stockholders and to the Corporation of his intent to accept the Offer. The Notice shall include a true, correct, and complete copy of the Offer and the name and address of the proposed purchaser. The Recipient's

mailing of the Notice constitutes the Recipient's representation and warranty to the other Stockholders that the Offer is bona fide in all respects.

2. For a period of ten (10) days from the mailing date of the Notice, the Corporation shall decide whether to exercise the option to purchase all of the Recipient's Stock, and if such decision to exercise is made, the Corporation shall have sixty (60) days from the mailing of the Notice to purchase all (but not less than all) of the Recipient's Stock upon the same terms and conditions as those in the Offer. If the Corporation declines the option to purchase all of the Recipient's Stock or fails to decide within ten (10) days, then the other Stockholders collectively shall have the option to purchase, within sixty (60) days from the mailing of the Notice, in proportion to their respective ownership of Stock, all (but not less than all) of the Recipient's Stock upon the same terms and conditions as those in the Offer. The Corporation or the other Stockholders, as the case may be, shall exercise this option by giving written notice thereof to the Recipient.

3. If, after the sixty (60) day period, the Recipient has not received the Corporation's or the other Stockholders' written notice that the Corporation or Stockholders, as the case may be, have exercised their option to purchase all of the Recipient's Stock, then the Recipient may accept the offer and sell his Stock to the prospective purchaser upon the terms and conditions in the Offer; provided, however, (a) that the prospective purchaser signs this Stockholders' Agreement as a condition precedent to closing the sale; and (b) that the sale of the Stock to the prospective purchaser shall be closed within thirty (30) days after the last day of the other

Stockholders' time period in which to exercise their option to buy the Recipient's Stock. In the event that the sale does not close within this thirty (30) day period, the Offer shall be deemed abandoned. Every subsequent offer made by a prospective purchaser is subject to the provisions of this Paragraph IIB.

4. For the purposes of this Paragraph IIB, a "bona fide offer" means a written offer to purchase Stock which identifies the name and address of a financially responsible party or entity legally able to own Stock and which appears reasonably able to comply with the terms of the offer. The offer must be legally enforceable ~~against the~~ prospective purchaser. The prospective purchaser must agree in the offer to be bound by the provisions of this Stockholders' Agreement.

5. This Paragraph IIB shall not apply to the disposition of Stock upon any Stockholder's withdrawal, death, disability, or disqualification to practice.

### III. DISPOSITION OF STOCK UPON WITHDRAWAL OF STOCKHOLDER

A. Required Sale. In the event that a Stockholder (the "Withdrawing Stockholder") terminates his employment with the Corporation, by retirement or otherwise (but not due to death or disability), the Withdrawing Stockholder shall sell all his Stock to the Corporation, or if the Corporation declines to purchase, then to the remaining Stockholders (as they may then agree among themselves, or if they cannot agree, in proportion to their Stock ownership). The Corporation, unless it declines, in which case the remaining Stockholders, shall purchase the Withdrawing Stockholder's Stock.

B. Price. For the purpose of this Stockholders' Agreement, "Book Value" means the cash method book value of the Corporation. Book Value does not include the Corporation's accounts receivable or accounts payable. Any life insurance or disability insurance proceeds in excess of the Life Insurance Proceeds (as defined below) or the Disability Insurance Proceeds (as defined below) will be included in Book Value. The Corporation's accountant shall calculate Book Value. In calculating Book Value, the accountant shall determine the value of equipment by recomputing depreciation on a straight line method over 10 years. The accountant's determination of Book Value shall conclusively bind all the Parties, their successors, heirs, personal representatives, and assigns; said determination shall not be questioned by any person. The price for the Withdrawing Stockholder's Stock shall equal the Book Value of the Corporation as of the immediately preceding fiscal year end, multiplied by a fraction, the numerator of which shall be the number of shares of Stock held by the Withdrawing Stockholder, and the denominator of which shall be the total number of shares of Stock then outstanding. In the case of Peyton only, until December 31, 2000, "Book Value" shall not exceed twice the amount of the Purchase Price (as defined in Section 1.1(b) of a Stock Purchase Agreement dated January 1, 1997, by and between Lower and Peyton) actually paid by Peyton to Lower.

C. Terms of Payment. The purchase price shall be paid to the Withdrawing Stockholder within ninety (90) days after the effective date of his withdrawal as follows: at the option of the Corporation or the purchasing Stockholders, as the case may be, the purchase price shall be paid in a lump sum or in an initial installment of Fifteen Percent



(15%) of the purchase price, payable at the closing, and the balance shall be paid in twenty four (24) equal monthly installments of principal together with simple interest on the unpaid balance at a rate of eight and one-half percent (8.5%) per annum. If the Corporation or the purchasing Stockholders, as the case may be, elect the deferred payment option, a promissory note made by the Corporation or the purchasing Stockholders, as the case may be, to the order of the Withdrawing Stockholder (the "Promissory Note") shall evidence the unpaid portion of the purchase price; at closing the Corporation or the purchasing Stockholders, as the case may be, shall deliver the Promissory Note together with the initial installment of Fifteen Percent (15%) of the purchase price; payments under the Promissory Note shall commence thirty (30) days after the closing; the Promissory Note shall provide for the acceleration of the due date of the entire unpaid balance at the option of the holder upon default in the payment of any installment of principal or interest; and the Promissory Note shall provide for prepayment in whole or in part without premium or penalty.

#### IV. DISPOSITION OF STOCK UPON DEATH OF STOCKHOLDER

No Stockholder by deed, will, trust or other testamentary device, or by intestacy, may convey or transfer any or all of his Stock except in accordance with the following provisions:

A. Required Sale. Upon the death of a Stockholder, the Corporation shall purchase from the estate of the deceased Stockholder, and each Stockholder agrees on behalf of his estate or his legal representative that said estate or legal representative of the deceased Stockholder shall sell to the Corporation, all of the Stock held by such

deceased Stockholder at the time of his death.

B. Price. The Price for the deceased Stockholder's Stock shall be equal to the greater of Book Value of the Corporation determined pursuant to Paragraph IIIB of this Agreement, or the amount, if any, of life insurance proceeds received by the Corporation due to the death of the deceased Stockholder (the "Life Insurance Proceeds"). The Life Insurance Proceeds shall not exceed One Hundred Fifty Thousand Dollars (\$150,000) for any one Stockholder.

C. Method of Transfer and Terms of Payment. The Stockholders shall bind their executors or legal representatives to make, execute and deliver any and all documents necessary to carry out this Agreement. The executor or legal representative of the estate of the deceased Stockholder and the Corporation shall make, execute and deliver any and all documents necessary to carry out this Agreement.

If the Price is determined by the Corporation's Book Value, then the Corporation shall pay the purchase price to the estate of the deceased Stockholder within ninety (90) days after his date of death in accordance with the terms contained in Paragraph IIIC, and if the Price is determined by the Life Insurance Proceeds, then the Corporation shall pay the purchase price to the estate of the deceased Stockholder within thirty (30) days of receipt of the Life Insurance Proceeds. If Book Value is greater than the Life Insurance Proceeds, and if the Corporation elects not to pay the Price in a lump sum, then the Life Insurance Proceeds shall be the mandatory minimum initial installment.

#### V. DISPOSITION OF STOCK UPON DISABILITY OF STOCKHOLDER

A. Required Sale. If any Stockholder shall become Totally Disabled (as

defined below), such disabled Stockholder shall sell to the Corporation and the Corporation shall buy from the disabled Stockholder, all of the Stock held by the disabled Stockholder in accordance with the terms of this Paragraph V. For the purposes of this Agreement, "Totally Disabled" means that the Stockholder is unable to fully perform his Employment Agreement with the Corporation and such disability continues for a period of twelve (12) months. In the event that the disabled Stockholder returns to the Corporation within the twelve (12) month period, but can fully perform the required services for less than ninety (90) days, and then relapses to his disability, then the twelve (12) month disability period is not tolled and it shall continue to run.

B. Price. The Price for the disabled Stockholder's Stock shall be equal to the greater of Book Value of the Corporation determined pursuant to Paragraph IIIB of this Agreement, or the amount, if any, of disability insurance proceeds received by the Corporation due to the disability of the disabled Stockholder (the "Disability Insurance Proceeds"). The Disability Insurance Proceeds shall not exceed One Hundred Fifty Thousand Dollars (\$150,000) for any one Stockholder.

C. Terms of Payment. If the Price is determined by the Corporation's Book Value, then the Corporation shall pay the purchase price to the disabled Stockholder in accordance with the terms contained in Paragraph IIIC, and if the Price is determined by the Disability Insurance Proceeds, then the Corporation shall pay the purchase price to the disabled Stockholder within thirty (30) days of receipt of the Disability Insurance Proceeds. If Book Value is greater than the Disability Insurance Proceeds, and if the Corporation elects not to pay the Price in a lump sum, then the Disability Insurance

Proceeds shall be the mandatory minimum initial installment.

D. Total Purchase Price; Assets of Corporation. The amounts paid to the disabled Stockholder pursuant to Paragraphs VB and VC shall be in lieu of all other obligations to the disabled Stockholder in his capacity as a Stockholder; the transfer of the Stock held by the disabled Stockholder to the remaining Stockholders shall represent the termination of the disabled Stockholder's interest in the Corporation and its assets.

#### VI. DISPOSITION OF STOCK UPON DISQUALIFICATION TO PRACTICE

A. Required Sale. Notwithstanding anything contained in this Agreement ~~to the contrary~~, in the event that any Stockholder becomes disqualified to practice the business of the Corporation in the Commonwealth of Virginia due to suspension, revocation or cancellation by the appropriate Governmental authority of said Stockholder's license or other privilege to practice, then and in that event, such Stockholder shall sell to the Corporation, or if the Corporation declines to purchase, then to the remaining Stockholders (as they may agree among themselves, or if they cannot agree, in proportion to their stock ownership) and the Corporation, unless it declines, in which case the remaining Stockholders shall purchase, all of the Stock held by such Stockholder.

B. Price. The price for the disqualified Stockholder's Stock shall be seventy-five percent (75%) of the amount determined pursuant to Paragraph IIIB of this Agreement.

C. Terms of Payment. The Corporation or the remaining Stockholders, as the case may be, shall pay the purchase price for the disqualified Stockholder's Stock to the

disqualified Stockholder in accordance with Paragraph IIIC.

## VII. MISCELLANEOUS PROVISIONS

A. Notices. Any notice required or permitted to be given under this Stockholders' Agreement shall be in writing and shall be deemed to have been duly delivered if delivered personally or if sent by certified mail, return receipt requested, first-class postage prepaid, addressed (i) to the Corporation, c/o Raymond F. Lower, D.O., F.A.A.O.S., President at 2 Pidgeon Hill Drive, Suite 510, Sterling, VA 20165; (ii) to Lower at RR 1 P.O. Box 897, Waterford, VA 22197; (iii) to Peyton at 46464 \_\_\_\_\_ Montgomery Place, Sterling, VA 20165; or at any other address designated by any party in a notice given to the other parties pursuant to the provisions of this Section. Any notice which is required to be delivered within a stated time period shall be deemed timely if mailed before midnight of the last day of such period.

B. Stock Transfer Record. The Corporation shall maintain a Stock transfer book which shall record the name and address of each Stockholder. No transfer of Stock shall be effective or valid unless and until recorded in the Stock transfer book. The Corporation shall not record any transfer of Stock in the Stock transfer book unless (i) the transfer strictly complies with all the provisions of this Stockholders' Agreement; and (ii) the transferee shall have agreed in writing to be bound by all of the provisions of this Stockholders' Agreement applicable to Stockholders and shall become a party hereto.

C. Issuance of Additional Stock. The Corporation shall not issue any additional Stock except (i) upon due authorization by its Board of Directors; and (ii) in strict compliance with the provisions of this Stockholders' Agreement.

D. Entry of Legend Upon Stock Certificates. The following legend shall be entered immediately on all the Stock certificates now owned by Stockholders or hereafter issued:

"The gift, sale, mortgage, pledge, hypothecation, encumbering and voting of the shares of the Stock represented by this certificate is restricted in accordance with the terms and conditions of a Stockholders' Agreement by and between the Corporation and the named Stockholder thereon, which Agreement is dated the 1st day of January, 1997, and a copy of which is on file at the principal office of the Corporation. Said Stockholders' Agreement restricts the ability of the Stockholders to sell, give, or otherwise transfer or dispose of this Stock certificate. The Stockholders' Agreement also restricts the right of the Stockholders to vote their shares. This Stockholder's Agreement is an agreement within the meaning of Section 13.1-671.1 of the Code of Virginia."

E. Specific Performance. The Parties agree that the Stock is unique, that a Stockholder's failure to perform his obligations under this Stockholders' Agreement will result in irreparable damage, and that specific performance of the Stockholder's obligations may be enforced by a suit in equity.

F. Benefit and Burden. This Agreement shall inure to the benefit of, and shall bind, the Parties and their respective heirs, personal representatives, successors and assigns.

G. After Acquired Stock - Subsequent Stockholders. The terms and conditions of this Agreement shall specifically apply not only to the Stock owned by the Stockholders when this Stockholders' Agreement is executed, but also to any Stock acquired by the Stockholders after the date of execution of this Stockholders' Agreement. The term and conditions of this Stockholders' Agreement shall also apply to whomsoever

shall receive Stock, including by way of illustrating and not limitation, bona fide purchasers for value.

H. Termination of Agreement. This Agreement shall terminate only upon the unanimous written agreement of the Stockholders and the Corporation.

I. Alteration, Amendment, or Termination. No change or modification of this Agreement shall be valid unless the same is in writing and signed by all the parties hereto. No waiver of any provision of this Agreement shall be valid unless in writing and signed by the person against whom it is sought to be enforced. The failure of any party at any time to insist upon strict performance of any condition, promise, agreement or understanding set forth herein shall not be construed as a waiver or relinquishment of right to insist upon strict performance of the same condition, promise, agreement or understanding at a future time. The invalidity or unenforceability of any particular provision of this Agreement shall not affect the other provisions hereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provisions were omitted.

J. Integration. This Agreement sets forth (and is intended to be an integration of) all of the promises, agreements, conditions, understandings, warranties and representations among the Parties hereto with respect to the Stock, and there are no promises, agreements, conditions, understandings, warranties or representations, oral or written, express or implied, among them with respect to the Stock other than as set forth herein.

K. Conflicts of Law. This Agreement shall be subject to and governed by the laws of the Commonwealth of Virginia, regardless of the fact that one or more of the parties now is or may become a resident of a different state.

L. Right to Offset. Notwithstanding any financial entitlement a Stockholder (or estate of a Stockholder) may have hereunder, the Corporation and the other Stockholders (the "Claimants") shall have the unconditional right to make claim against such financial entitlement for any amounts owed by the Stockholder to the Claimants and the Stockholder's financial entitlement hereunder shall be reduced accordingly and the reduction shall be paid directly to the Claimants.

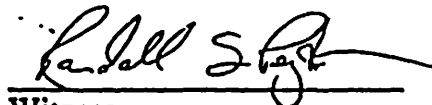
M. Retention of Corporate Name, Telephone Number and Corporate Offices. It is agreed and understood by the parties to this Agreement that Lower formed the Corporation and, therefore, no other Stockholder shall be entitled to the use of the Corporation's name, telephone number or Corporation offices should such other Stockholder terminate his relationship with the Corporation.

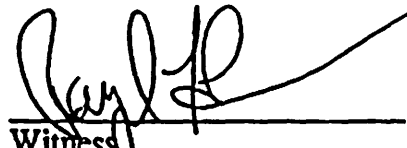
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IN WITNESS WHEREOF, the Corporation has caused this Agreement to be signed by its duly authorized officers and its corporate seal to be affixed hereto, and each Stockholder has signed this Agreement, as of the day and year first above written.

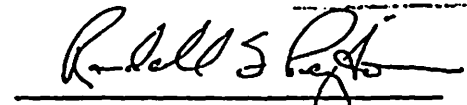
WITNESS:

  
Witness

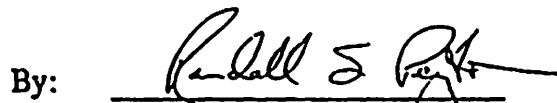
  
Witness

STOCKHOLDERS:

  
Raymond F. Lower, M.D


  
Randall S. Peyton, M.D

ATTEST:

By:   
Randall S. Peyton, M.D.  
Secretary

6/27/97

COUNTRYSIDE  
ORTHOPAEDICS, P.C.

By:   
Raymond F. Lower, M.D.  
President

CORPORATE SEAL

k:\031803.1\Stock.agt

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## STOCK PURCHASE AGREEMENT

THIS STOCK PURCHASE AGREEMENT is effective as of the 1st day of January, 1997 by and between Randall S. Peyton, M.D. ("Buyer"), and Raymond F. Lower, D.O., F.A.A.O.S. ("Seller").

### RECITALS:

A. The Seller owns One Hundred (100) shares (no par value) of the common stock of Countryside Orthopaedics, P.C., a Virginia professional corporation (the "Corporation"), being all of the issued and outstanding shares of capital stock of the Corporation (the "Shares").

B. The Seller desires to sell Fifty (50) of the Shares to the Buyer, and the Buyer desires to purchase Fifty (50) of the Shares from the Seller, subject to the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the promises contained herein and for other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Purchase and Sale; Closing.

1.1 Purchase and Sale.

(a) At the closing of the transaction provided for herein (the "Closing") and subject to the terms and conditions hereinafter set forth, the Seller will sell to the Buyer, and the Buyer will purchase from the Seller Fifty (50) of the Shares. At the Closing, the Seller shall surrender to the Corporation his certificate representing ownership of the Shares in transferable form, duly endorsed in blank or accompanied by

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a duly executed stock power.

(b) In full consideration of the purchase and sale of Fifty (50) of the Shares, the Buyer shall pay to the Seller Ninety-Four Thousand Two Hundred Fifty-Eight Dollars (\$94,258) (the "Purchase Price").

1.2 Payment of the Purchase Price. The Purchase Price shall be paid unconditionally, with Buyer having no right of set-off against the Seller, in forty-eight (48) equal monthly payments beginning January 1, 1997. The Buyer hereby irrevocably authorizes the Corporation to have the required monthly payment of the Purchase Price withheld from his salary and paid directly to the Seller. The Buyer hereby grants the Seller a security interest in the Fifty (50) Shares sold by the Seller hereunder as security for payment of the Purchase Price and further agrees that the Seller can retain possession of the Fifty (50) Shares until the Purchase Price is paid in full.

1.3 Closing.

The Closing shall take place upon the execution of this Agreement ("the Closing Date") at the Seller's office, or at such other place as shall be mutually agreed to by the parties. To the extent that the Closing Date is after January 1, 1997, the Buyer shall immediately bring the monthly payments of the Purchase Price current as of the Closing Date.

2. Representations and Warranties of Seller.

The Seller hereby represents and warrants to the Buyer as follows:

2.1 Title to the Shares.

(a) The Seller has and will transfer to the Buyer at the Closing, good,

valid and marketable title to Fifty (50) of the Shares he has sold hereunder, free and clear of all claims, liens, encumbrances, charges and options whatsoever (but subject to the terms a Stockholders' Agreement, as amended from time to time, to be executed as a condition of Closing).

(b) The execution, delivery and performance of this Agreement will not conflict with or result in a breach or violation of any of the terms, conditions or provisions of any agreement, indenture, mortgage or other instrument or restriction of any kind to which the Seller is bound.

## **2.2 Brokers.**

All negotiations on behalf of the Seller relative to this Agreement and the transactions contemplated hereby have been carried on directly by him without the intervention of any broker, finder, investment banker or other third party.

## **3. Representations and Warranties of Buyer.**

### **3.1 Professional Status of Buyer.**

The Buyer represents and warrants that he is licensed to practice medicine in the Commonwealth of Virginia.

### **3.2 Brokers.**

All negotiations on behalf of the Buyer relative to this Agreement and the transactions contemplated hereby have been carried on directly by him without the intervention of any broker, finder, investment banker or other third party.

## **4. Obligations of Seller at Closing.**

At the Closing, the Seller shall surrender his stock certificate to the Corporation

duly endorsed or with a duly executed stock power and the Corporation shall issue to the Buyer a stock certificate representing Fifty (50) of the Shares of the Corporation stock.

5. Obligations of Buyer at Closing.

At the Closing, the Buyer shall pay to the Seller such portion of the Purchase Price as is required to bring his monthly payments current as of the Closing Date as provided in Section 1.3 hereof.

6. Amendments and Waivers.

6.1 Amendments, Modifications. This Agreement may be amended, modified, superseded or supplemented only by an instrument in writing executed and delivered on behalf of each of the parties hereto.

6.2 Waivers. The representations, warranties, covenants or conditions set forth in this Agreement may be waived only by a written instrument executed by the party so waiving.

7. Survival of Representations and Warranties.

All representations, warranties and covenants of the parties hereto contained in this Agreement or made pursuant hereto shall survive the Closing Date and remain in full force and effect, regardless of any investigation made by or on behalf of any of the parties hereto for as long a period as is permitted.

8. Representation.

The parties hereto agree that Jackson & Campbell, P.C. represented the Seller in this transaction and in the preparation of this Agreement.

9. Notices.

All notices or other communications required or permitted under this Agreement shall be in writing and shall be deemed to have been duly given, if delivered personally, upon receipt or upon refusal of receipt or, if mailed, when mailed by registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

If to Buyer:

Randall S. Peyton, M.D.  
46464 Montgomery Place  
Sterling, VA 20165

If to Seller:

Raymond F. Lower, D.O., F.A.A.O.S.  
RR 1 P.O. Box 897  
Waterford, VA 22197

10. Entire Agreement.

This Agreement sets forth the entire agreement and understanding of the parties hereto in respect of the transaction contemplated hereby, and supersedes all prior agreements, arrangements and understandings relating to the subject matter hereof.

11. Applicable Law.

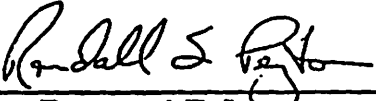
This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia.

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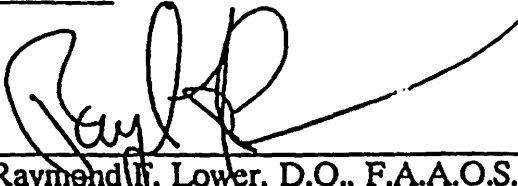
00271

IN WITNESS WHEREOF, each party hereto has caused this Agreement to be  
duly executed as of the day first above written.

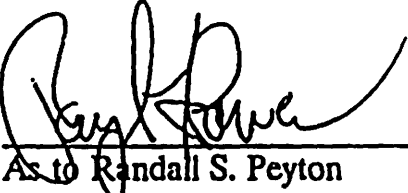
Witness:

  
As to Raymond F. Lower

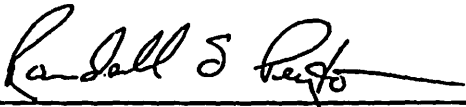
SELLER:

  
Raymond F. Lower, D.O., F.A.A.O.S.

Witness:

  
As to Randall S. Peyton

BUYER:

  
Randall S. Peyton, M.D.

6/27/17

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8/7/97

Dear Ray,

Enclosed is the check for 7 months of buy-in.  
I trust that Dan Zagari will make the pre-tax  
arrangements, as we discussed for the balance.

Ray

<b>PAMELA A. PEYTON RANDALL S. PEYTON MD. 46464 MONTGOMERY PL. STERLING, VA 20165</b>		<b>1445</b> 85-7188/2550 115
<b>Pay to the Order of</b> <u>Ray Lower</u>		<b>8-7-1997</b>
<u>Thirteen Thousand Seven Hundred Forty-five and 97/100</u> Dollars		<b>\$ 13,745.97</b>
<b>CHEVY CHASE BANK</b> CHEVY CHASE, MARYLAND 20815		
<b>For</b> <u>Practice buy-in</u>		<u>Randall S. Peyton</u>
<b>⑆25507198⑆ ⑆15400⑆156⑆ 1445</b>		

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94,258. ÷  
48. =  
1,963.71  
1,963.71 \*  
7. =  
13,745.97  
..0..



00273



# **Defendant's Trial Exhibits**

Randall S. Peyton, M.D.  
1011 Clinton Street  
Apt. 2F  
Philadelphia, PA 19107

Ray Lower, D.O.  
Suite 510  
2 Pidgeon Hill Drive  
Sterling, VA 20165

Dear Ray:

Again, it was good to see you and Patty. Thanks for the hotel room and the wonderful dinner. Pam and I are getting excited as we near our return to Virginia.

Regarding the contract, I have several questions and requests before we have an attorney overlook it. I will list these in outline form for ease of identification.

2. Term: Should this read one year?

6. Duties: Please omit the second sentence.

Please add "in a fair and equitable manner" after "...assignment of patients..." in the third sentence.

Please change the last sentence in the third paragraph to "Employer may advise the employee of duties to be performed ..." or omit the sentence.

7. Exclusive Service: Please delete "... will not require any services.", or add "Exclusive of stocks, bonds, real estate, commodities or other terms of investment."

Please add "If other Professional money is earned and turned over to the Employer, this money is added to the Employee's accounts collected."

8. Please add "... equipment, "hospital fees and staff dues" and such...

11. Professional Liability Insurance: Please add "If the employer and employee mutually agree to a departure then the employee's tail will be divided equally among the parties."

12. Involuntary Termination: (c) Please add "...other than serving one's country."

(e) This is very arbitrary, please define or omit,

(g) Please define or omit.

~~(j) Please define chronic.~~

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Please add "If employee is terminated for the convenience of the employer, then the employer will pay employee three months severance pay as calculated from the previous earnings of the employee."

13. Restrictive Covenant: Please omit.

14. Covenant Not to Disclose Confidential Information: Please add "If this agreement is terminated, the employee is entitled to a copy of the records and x-rays of any patient that requests the employee to have such records."

15. Remedies: Please explain.

17. Additional Understandings: (b) Please add to last sentence ...any such medical institutions "after joining staff", ....

18. Purchase Option: Please add "... if option has not been acted upon by the end of the second year the minimum billed charges will be waived as a criteria to exercise this option."

(c) ii. The total amount of i + ii shall not exceed \$100,000.00, and should the corporation be valued negatively, 50% of the negative value will be deducted from the purchase amount. The payment of purchase amount shall be by salary differential ~~in pretax dollars~~ over a four year period ~~(in equal installments without interest charged)~~.

(c) iii.

(c) iv. This shall entitle the employee to equal voting rights in the corporation at the time of the decision to exercise the purchase option.

(c) v. If a merger ensues, employee will be taken on as an equal partner immediately and held equal in all business decisions.

(d) Should we make a preliminary partnership agreement?

Appendix A: ? life insurance  
? disability insurance  
? relocation expenses  
? what kind of health insurance

I hope this is clear, but as you can see there are several things that I do not understand and would like clarification on. If you have any questions about my questions please do not hesitate to call me.

Very Truly Yours,



Randall S. Peyton, M.D.

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## EMPLOYMENT AGREEMENT

THIS EMPLOYMENT AGREEMENT, made and entered into this 24 day of April, 1995, by and between CountrySide Orthopaedic Associates, P.C., a Virginia Corporation ("EMPLOYER") and Randall Peyton, M.D. ("EMPLOYEE"):

### WITNESSETH:

WHEREAS, the EMPLOYER is engaged in the business of rendering professional services; and

WHEREAS, the EMPLOYER'S business consists of the practice of medicine; and

WHEREAS, the EMPLOYEE is not under any contract to perform services for any other employer; and

WHEREAS, the EMPLOYEE is or will be duly licensed and qualified to practice the business of EMPLOYER in all localities served by the EMPLOYER; and

WHEREAS, EMPLOYER's Board of Directors has offered employment to the EMPLOYEE subject to certain terms and conditions hereinafter set forth and the EMPLOYEE has indicated his willingness to accept such employment;

NOW, Therefore, in consideration of the mutual promises and covenants as hereinafter set forth, the parties hereto agree as follows:

1. Employment. The EMPLOYER hereby employs the EMPLOYEE and the EMPLOYEE hereby accepts employment with the EMPLOYER upon the terms and conditions hereinafter set forth.

2. Term. Subject to the provisions for termination as hereinafter provided, the term of this Agreement shall be for the period of two (2) years commencing on August 7, 1995, and thereafter on a year-to-year basis, terminable by either party hereto, upon the giving of written notice to the other party ninety (90) days in advance of the termination date. *MS*

3. Salary. For all services rendered by the EMPLOYEE pursuant to this Agreement, the EMPLOYER shall pay the EMPLOYEE an annual salary. ("Salary"), as defined and set forth in Appendix A of this section, payable biweekly.

4. Bonus. EMPLOYEE shall be entitled to a bonus equal to fifty percent (50%) of net collections in excess of four hundred thousand dollars (\$400,000) per year. Net collections shall be determined based on services rendered by EMPLOYEE each contract

DEFENDANT'S  
EXHIBIT

9

Stimulant 7 Aug 1995

year (The contract year shall begin on the contract anniversary date and end 365 days later) and include all net collections up to ninety (90) days after the end of each contract year for services rendered during that contract year.

5. Fringe Benefits. EMPLOYER shall provide benefits as defined and set forth in Appendix A.

6. Duties. The EMPLOYEE is engaged to perform professional medical services as an orthopaedic surgeon for and on behalf of the EMPLOYER. The EMPLOYER shall determine the assignment of patients in a fair and equitable manner to the EMPLOYEE and the EMPLOYEE must perform services for patients assigned to him by the EMPLOYER. EMPLOYEE shall be assigned all patients that may need joint replacement surgery unless otherwise requested by patient.

EMPLOYEE shall adhere faithfully to all professional ethics and customs, shall avoid all acts, habits and usage which might injure in any way, directly or indirectly, the professional reputation of EMPLOYER or any other employees of EMPLOYER, and shall follow and abide by all federal, state and municipal ordinances and laws relating to or regulating the practice of medicine.

No person other than the EMPLOYER shall have the right to designate, by name or by description, the EMPLOYEE employed by the EMPLOYER who is to perform the services sought by such patient. All work performed by the EMPLOYEE shall be subject to review by the EMPLOYER.

The EMPLOYEE is engaged to perform professional medical services for and on behalf of the EMPLOYER at EMPLOYER's place of business each week, based upon the normal rotation of the EMPLOYER's professional employees.

The night and weekend call schedule of the EMPLOYEE shall be shared equally with all physician employees of EMPLOYER.

The EMPLOYEE's office and surgical schedule shall be established by the EMPLOYER in consultation with EMPLOYEE.

The EMPLOYEE shall make all reasonable efforts to become board certified in his specialty.

7. Exclusive Service. The EMPLOYEE shall devote his full, entire and undivided professional time and attention to rendering professional services on behalf of the EMPLOYER and shall not, without the prior written consent of the EMPLOYER, during the term of this Agreement, be engaged in the rendering of such services or in any other business activity, whether or not such business activity is pursued for gain, profit or other pecuniary advantage which would interfere with the satisfactory performance of his duties as an employee of the EMPLOYER, but this shall not be construed as preventing the

EMPLOYEE from expending reasonable amounts of time for charitable and professional activities or from investing his assets. The EMPLOYEE further agrees that, during the period of this Agreement, all money earned by the EMPLOYEE from the rendering of professional services (other than the salary herein contemplated) belong to the EMPLOYER as a result of its salary payments to the EMPLOYEE called for by the terms of this Agreement. Any money earned and turned over to EMPLOYER shall be included as "net collections" for purposes of Paragraph 4.

8. Working Facilities. The EMPLOYER, at its own cost, shall furnish the EMPLOYEE with an office, technical and secretarial, personnel, supplies, equipment, hospital fees, medical staff dues and such other facilities and services suitable as determined solely by the EMPLOYER to his position and adequate for the performance of his duties.

9. Expenses. The EMPLOYEE is required as a condition of his employment to provide and/or maintain an automobile for use by EMPLOYEE in connection with any necessary travel in the practice of medicine. EMPLOYEE shall carry automobile liability insurance protecting himself and the EMPLOYER against claims arising out of the use of an automobile in the course of his employment with the EMPLOYER, and he shall keep on deposit with the EMPLOYER a certificate or other evidence that said insurance is in force. Said insurance shall be not less than such amounts as the EMPLOYER may from time to time reasonably direct and in any event, the said insurance shall not be less than \$50,000.00 for property damage, \$500,000.00 for the injury of death of one person, and 1,000,000.00 for injury and death arising from one accident. EMPLOYEE shall be reimbursed in accordance with Appendix A. ~~It said about amounts that employer carries.~~ *QJ*

10. Reimbursement for Disallowed Compensation and Expenses. In the event that any salary payment, medical reimbursement, employee fringe benefit, expense allowance payment or the expense incurred by the EMPLOYER for the benefit of the EMPLOYEE shall in whole or in part, upon audit or other examination of the income tax returns of the EMPLOYER, be determined not to be allowable deductions from the gross income of the EMPLOYER and such determination shall be made final by the appropriate state or federal taxing authority or a final judgment of a court of competent jurisdiction, and no appeal shall be taken therefrom, or the applicable period for filing notice of appeal shall have expired, then in such event the EMPLOYEE will repay the EMPLOYER the amount of such disallowed compensations or expenses, or both. This legally enforceable obligation is in accordance with the provisions of Revenue Ruling 69-115 and is for the purpose of entitling such EMPLOYEE to a business expense deduction for the taxable year in which the repayment is made to the EMPLOYER. In this manner, the EMPLOYER shall be protected from having to bear the entire burden of a disallowed expense item.

11. Professional Liability Insurance. The EMPLOYEE shall hold harmless and indemnify the EMPLOYER, its successors and assigns, from and against any and all liabilities, costs, damages, expenses and attorney fees resulting from or attributable to any and all negligent acts and omissions of the EMPLOYEE. At the EMPLOYER's expense, the EMPLOYEE shall obtain and maintain in full force and effect during his employment

under this Employment Agreement, a policy or policies of professional malpractice insurance having an aggregate face amount of not less than \$1,000,000.00/\$3,000,000.00, if such dollar amounts are commercially available and are economically feasible, issued by one or more insurers approved by the EMPLOYER and insuring the EMPLOYER against any and all liabilities, costs, damages, expenses, attorney fees resulting from or attributable to any and all professional error, omissions, negligence and malfeasance of the EMPLOYEE. In the event that EMPLOYEE's employment is terminated for any such reason enunciated in Paragraph 12, or if EMPLOYEE leaves for whatever reason on his own volition, then his malpractice tail is his sole responsibility. If EMPLOYER terminates EMPLOYEE solely for its convenience, then EMPLOYER shall pay for EMPLOYEE's malpractice tail, however, EMPLOYEE shall be responsible for the payment of his malpractice tail for all other terminations.

**12. Involuntary Termination.** This Agreement shall be deemed to be terminated and the employment relationship between the EMPLOYEE and the EMPLOYER shall be deemed to be severed upon the occurrence of any of the following:

- (a) Upon the death of the EMPLOYEE during employment.
- (b) The suspension, revocation, or cancellation of the EMPLOYEE's right to practice his profession in the areas served by the EMPLOYER or his loss of his license for whatever reason.
- (c) The imposition of any restrictions or limitations by any governmental authority having jurisdiction over the EMPLOYEE to such an extent that he cannot engage in the professional practice for which he was employed other than required military service.
- (d) The EMPLOYEE fails or refused to faithfully and diligently perform the usual, customary duties of his employment and adhere to the provisions of this Agreement.
- (e) The EMPLOYEE conducts himself in an unprofessional, unethical, immoral, or fraudulent manner, or is found guilty of unprofessional or unethical conduct by any board, institution, organization, or professional society having any privilege or right to pass upon the conduct of the EMPLOYEE or the EMPLOYEE's conduct discredits the EMPLOYER or is detrimental to the reputation, character and standing of the EMPLOYER.
- (f) The EMPLOYEE does not maintain during the course of employment, the necessary staff privileges, permits and credentials to practice medicine in such ambulatory and acute care settings where EMPLOYER has privileges.
- (g) Alcoholism or other substance abuse by EMPLOYEE.
- (h) Chronic illness disability or failing health of EMPLOYEE which affects his ability to practice medicine.

If EMPLOYEE is terminated for the convenience of EMPLOYER, EMPLOYER shall pay EMPLOYEE three months of salary defined in Paragraph 3 as severance.

Upon actual termination of employment in accordance with any of the provisions of this Paragraph 12, the EMPLOYEE shall be entitled to receive such compensation, if any, accrued under the terms of this Agreement, but unpaid as of the date of the actual termination of employment.

**13. Restrictive Covenant.**

(a) The parties stipulate the EMPLOYER is engaged in the practice of Orthopaedic Surgery (the "Business") in the "Territory" (as defined below).

(b) EMPLOYEE, in the event of termination of employment for any reason whatsoever including but not limited to expiration of the term of employment, except exercising the purchase option in paragraph 18, agrees that, during the twenty-four (24) month period immediately following the termination of employment ("Restricted Period"), EMPLOYEE shall not Compete (defined below) or employ or solicit the employment of any Restricted Employee (defined below).

(c) For all purposes of this Agreement, the terms defined below shall have the respective meaning specified, and the following definitions shall be equally applicable to the singular and plural forms of the terms defined:

i. "Compete" means, directly or indirectly, on EMPLOYEE's own behalf or on behalf of any other Person, other than at the direction of EMPLOYER and on behalf of the EMPLOYER: (A) organizing or owning any interest in a business which engages in the Business in the Territory; (B) engaging in the Business in the Territory; (C) assisting any Person (as a director, officer, employee, agent, consultant, lender, lessor or otherwise) to engage in the Business in the Territory; (D) engaging in the Business (whether as an employee, partner or in any other affiliation including, but not limited to, being employed by a common employer, or being affiliated through a common management arrangement with a Management Services Organization) in the Territory with any EMPLOYEE previously employed by EMPLOYER; or (E) engaging in the Business in the Territory with any EMPLOYER that employs or is otherwise affiliated (including, but not limited to, and affiliation through a common management arrangement with a MSO) with any EMPLOYEE previously employed by EMPLOYER. Notwithstanding the above, EMPLOYEE shall be allowed to continue using all surgical hospitals in the Territory.

ii. "Person" means any entity, including, without limitation, any natural person, company, partnership, corporation, trust, association, organization or governmental unit.



iii. "Restricted Employee" means any person that was an employee or regularly associated with the EMPLOYER at any time during the twelve (12) months immediately preceding the termination of this Agreement.

iv. "Territory" means the ~~five~~ <sup>one</sup> mile radius from any practice location(s) of the EMPLOYER where the EMPLOYEE treated patients in the twelve-month period immediately preceding commencement of the "Restricted Period".

(d) The provisions of this Paragraph 13 shall survive the expiration or termination of this Agreement for any reason.

14. Covenant Not to Disclose Confidential Information. Physician acknowledges and stipulates that: (A) during the term of this Agreement, EMPLOYEE will be placed in a position by the EMPLOYER to become acquainted with various aspects of the Confidential Information (defined below); (B) the use or disclosure of the Confidential Information by EMPLOYEE except as expressly authorized by the EMPLOYER is prohibited and would seriously damage the EMPLOYER; (C) in addition to being given access to the Confidential Information, EMPLOYEE will receive material benefits as a result of the Agreement, including compensation and experience. Therefore, EMPLOYEE agrees as follows:

(a) During the term of this Agreement and thereafter, EMPLOYEE shall not, without the prior written consent of EMPLOYER, directly or indirectly:

i. divulge, furnish or make accessible to any Person or copy, take or use in any manner any of the Confidential Information;

ii. take any action which might reasonably or foreseeable be expected to compromise the confidentiality or proprietary nature of any of the Confidential Information; or

iii. fail to follow the reasonable suggestions made by EMPLOYER from time to time regarding the confidential and proprietary nature of the Confidential Information.

(b) "Confidential Information" means all of the materials, information and ideas of EMPLOYER, including, without limitation: patient names, patient lists, patient records, patient information, operation methods and information, accounting and financial information, marketing and pricing information and materials, internal publications and memoranda, and other matters considered confidential by the EMPLOYER.

(c) In the event this Agreement is terminated, EMPLOYEE shall be entitled at his own expense, to copies of patient records and x-rays for which the patient has made written request for such copies to be given to EMPLOYEE.

(d) The provisions of this Paragraph shall survive the expiration or termination of this Agreement for any reason.

15. Remedies. Remedies shall be available to EMPLOYER in the event of a breach of the provisions of Paragraphs 13 or 14 according to the following provisions:

(a) The parties agree that a breach by EMPLOYEE of any of the provisions of Paragraphs 13 or 14 of this Agreement would cause irreparable damage to the EMPLOYER. Therefore, EMPLOYER shall be entitled to preliminary and permanent injunctions restraining EMPLOYEE from breaching or continuing any breach of any of the provisions of Paragraphs 13 and 14 of this Agreement. The existence of any claim or cause of action on the part of EMPLOYEE against EMPLOYER, whether arising from this Agreement or otherwise, shall not constitute a defense to granting or enforcement of this injunctive relief.

(b) The Restricted Period shall be extended by a period equal to the time period during which EMPLOYEE is in breach of any of the provisions of Paragraph 13.

(c) The remedies available to EMPLOYEE under this Agreement are cumulative. EMPLOYER may, in its sole discretion, elect to pursue all or any of such remedies. Such remedies are in addition to any given by law or equity and may be enforced successively or concurrently.

(d) The provisions of this Paragraph shall survive the expiration or termination of this Agreement for any reason.

16. Acknowledgment of Reasonableness. Physician has carefully read and considered the provisions of this Agreement and agrees that the restrictions set forth herein, particularly those in Paragraphs 13 and 14, are fair and reasonably required for the protection of the EMPLOYER. If any provision of Paragraph 13 relating to the restrictive period, scope of activity restricted and/or the territory described therein shall be declared by a court of competent jurisdiction to exceed the maximum time period, scope of activity restricted or geographical area such court deems reasonable and enforceable under applicable law, the time period, scope of activity restricted and/or area of restriction held reasonable and enforceable by the court shall thereafter be the restrictive period, scope of activity restricted and/or the territory applicable to the restrictive covenant provisions in this Agreement.

17. Additional Understandings. Notwithstanding, any other provisions of the Agreement, EMPLOYER and EMPLOYEE agree that:

(a) Nothing in this Agreement shall contravene professional ethics or the medical judgment of the EMPLOYEE.

(b) This contract is contingent upon EMPLOYEE obtaining, in an expendi-

tious manner either before or after becoming an EMPLOYEE, and continuing his Virginia medical license and hospital privileges to professionally practice medicine at any hospital where the EMPLOYER has privileges. If EMPLOYEE is denied hospital privileges at any such medical institution after becoming an employee, EMPLOYER shall have the option to terminate this Agreement. *Already having the privileges etc.*

(c) EMPLOYER shall establish, and modify from time to time, all professional fees for services rendered by Physician. EMPLOYER shall own and control all collections and billings arising pursuant to the rendering of medical services by EMPLOYEE. All fees and compensation received or realized by EMPLOYER as a result of the rendering of services by EMPLOYEE shall belong, be paid and be delivered to EMPLOYER.

(d) EMPLOYEE shall keep full and accurate accounts and records of all professional work done by EMPLOYEE or under Physician's supervision in a timely fashion in accordance with guidelines established by the EMPLOYER. All such accounts and related medical records and patient histories are the exclusive property of EMPLOYER. EMPLOYEE holds such records in trust for EMPLOYER and shall promptly relinquish such records to the EMPLOYER upon demand.

(e) EMPLOYER shall have full and complete authority and responsibility with respect to the administration of the business, the hiring of, or contracting with, physicians and all other personnel for the operations of the EMPLOYER.

(f) If either party is required to enforce any of its rights under this Agreement, the prevailing party shall be entitled to recover from the other party all attorneys' fees, court costs and other expenses incurred by the prevailing party in connection with the enforcement of those rights.

*parties* (g) Both parties acknowledge that the services to be rendered by EMPLOYEE are unique and personal. Accordingly, EMPLOYEE may not assign any of EMPLOYEE's rights or delegate any of EMPLOYEE's duties or obligations under this Agreement. *either party*

#### 18. Purchase Option.

(a) In the event EMPLOYEE has not been terminated under Article 12, and EMPLOYEE has billed charges in excess of \$500,000 during the preceding contract year, EMPLOYER shall then have the option to purchase fifty percent (50%) of EMPLOYER's stock upon completion of either year one or year two of this employment agreement. EMPLOYEE and EMPLOYER agree in good faith to negotiate and execute a stock purchase agreement acceptable to both parties. EMPLOYEE and EMPLOYER shall also negotiate and execute a Stockholder's Agreement and Employment Agreement, dealing with issues including but not limited to compensation, employee termination, buyout upon death, restrictions on transfer of stock etc.

(b) Upon purchase of said stock EMPLOYEE shall execute all documents making EMPLOYEE a co-guarantor of all the corporation's reasonable loans, leases or other liabilities which EMPLOYER has personally guaranteed.

(c) The purchase price for the stock shall be determined as follows:

i. One-half of the "Book Value" of the EMPLOYER ("Book Value" shall be determined based on the EMPLOYER's most recent month end financial statements determined on tax basis applied consistently with prior periods.) plus:

ii. One hundred thousand dollars (\$100,000) for the intangible value of the EMPLOYER. Goodwill includes medical records, physician network, office systems, trained personnel, etc. that are necessary for a successful practice.

iii. The total of Paragraphs 18 (c) i and 18(c) ii shall not exceed one hundred thousand dollars (\$100,000). Payment shall be made through equal payroll deductions over a four year period.

19. Notices. Any notice required or permitted to be given under this Agreement shall be sufficient if in writing and if sent by registered or certified mail, in the case of the EMPLOYEE to his residence, and in the case of the EMPLOYER, to its principal office.

20. Construction.

(a) This Agreement shall be governed by the laws of the state of Virginia. This waiver by any party hereto of a breach of any provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach by any party. This instrument contains the entire agreement of the parties concerning employment and may not be changed except by written agreement duly executed by the parties hereto. This Agreement shall inure to the benefit of and be binding upon the parties, their successors, heirs and personal representatives. This Agreement shall not be assignable.

(b) Where so applicable words in the masculine shall include the feminine, words in the neuter shall include the masculine and the feminine, and words in the singular shall include the plural.

(c) If any one or more of the provisions of this Agreement is declared void by an authority having legal jurisdiction or is determined to be inconsistent with the primary purpose of this Agreement, such declaration or determination shall not be construed so as to impair the validity of the remaining provisions, it being the intent of the parties that this Agreement is to be executed and is to remain effective as if the void or inconsistent provisions had not been included herein.

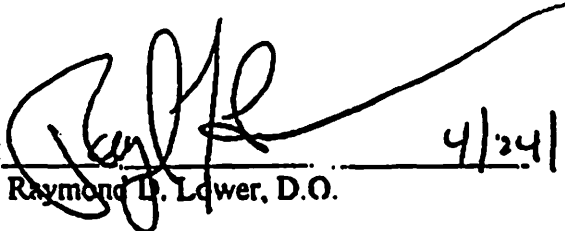
(d) In the event any state or federal laws or regulations, now existing or enacted or promulgated after effective date of this Agreement, are interpreted by judicial

decision, a regulatory agency or legal counsel to a party hereto in such a manner as to indicate that the structure of this Agreement may be in violation of such laws or regulations, EMPLOYER and EMPLOYEE shall amend this Agreement as necessary. To the maximum extent possible, any such amendment shall preserve the underlying economic and financial arrangements between EMPLOYER and EMPLOYEE.

(e) This Agreement sets forth the entire understanding between the parties with respect to subject matter hereof and cannot be amended except by a writing signed by both by both parties. No waiver of any subsequent breach of such term or this Agreement shall be deemed to be a waiver of any subsequent breach of such term or provision of this Agreement. This Agreement supersedes and replaces in their entirety any and all other employment agreements, oral or written, if any, between the parties hereto.

WITNESS THE FOLLOWING SIGNATURES AND SEALS

EMPLOYER: COUNTRYSIDE ORTHOPAEDICS, P.C.  
a Virginia Corporation

By:  4/24/95  
Raymond D. Lower, D.O.

EMPLOYEE: By:  4/25/95  
Randall Peyton, M.D.

## APPENDIX A

### **SALARIES AND BENEFITS**

**Salary:**                      Year 1 - \$140,000  
                                    Year 2 - \$160,000

**Fringe Benefits:**        A.   Paid Leave  
                                    (i) Two weeks vacation  
                                    (ii) One week continuing education  
                                    (iii) All holidays observed by the corporation  
                                    B.   Paid family health insurance  
                                    C.   Auto allowance - \$500 per month  
                                    D.   Professional dues & education - up to \$3,000 per year  
    with valid receipts or invoices  
                                    E. Cellular telephone - up to \$150 per month with valid  
    receipts or invoices  
                                    F.   Contribution to corporate retirement plan in 2nd year

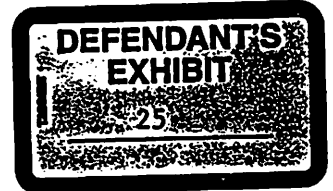
**Relocation Benefits:**    Up to \$1,500 with valid receipts or invoices

HOMES  
LOWRY  
HORN &  
JOHNSON  
L T D

*A professional corporation • Certified Public Accountants*

**M E M O R A N D U M**

TO: Dr. Randy Peyton  
FROM: Erik K. Kloster  
DATE: January 20, 1997  
SUBJECT: Purchase of Stock



- The buy-in date should be based on the financial statements dated December 31, 1996. The buy-in value is based upon tax basis, financial statements or the corporate tax return. At the end of the calendar year, Dr. Lower will reduce the cash and take out as bonus most of the income for the year. Therefore, the book value of the practice should be a negative at December 31st.
- The employment contract calls for you to guarantee the notes payable to the extent that they are reasonable. This is in Clause 18b of the employment agreement. Notes payable would probably be deemed to be reasonable to the extent that there are assets that are owned by the practice that exceed the notes payable balance. If the notes payable balance is larger than the assets, then a reasonable guarantee would be just total assets or fixed assets plus cash.
- We need to make sure that acquiring half of the stock of the practice will include half of the accounts receivable of the corporation or at least the amount of receivables generated by Dr. Peyton.
- The accounting needs to be more detailed. We need to define which expenses are to be allocated to each doctor. According to the general ledger, certain expenses started to be allocated during August 1996. I am unable to tell how the allocation is made. Many of the office expenses should be split evenly, such as rent, staff salaries, payroll taxes, utilities, medical supplies—things along those lines. Other things need to be allocated on an individual basis, such as travel, automobile and related expenses, seminars, cellular phones, meals and entertainment, promotions, and subscriptions. If there is an allocation of the notes payable, then the interest should also be allocated accordingly.
- We need to get the detail of the large note payable and the automobile loans that are currently in the corporation.
- Is the advertising listed in the general ledger of a corporate nature, or is it really related to just one doctor. Most of this promotion looks like it is for golf or tennis tournaments.

309 Maple Avenue West • Vienna, Virginia 22180-4363 • Phone (703) 281-4880 • FAX (703) 281-4322

Charles E. Lowry • Norman P. Horn • Robert J. Neuhard • Lourell John Johnson, Jr. • Richard J. Leonard  
Walter C. Burger • Rebecca S. Tibbitt • Martin H. Bergh • Erik K. Kloster • Eugene C. Thomas (retired)

**Confidential**  
PD010768

00288

HOMES  
LOWRY  
HORN &  
JOHNSON  
L T D

Dr. Randy Peyton

-2-

January 20, 1997

- Are sales tax returns being filed.
- All taxes from 1996 and prior need to be the responsibility of Dr. Lower unless expenses are specifically attributable to Dr. Peyton.
- Salaries for 1996 through October 31 on an annualized basis would be Dr. Lower - \$436,000 and Dr. Peyton - \$175,000.
- Based upon the October 1996, numbers, total receivables for the practice - \$1,194,003. Dr. Peyton's portion - \$557,925 or 46.7 percent. Collections for the first year of Dr. Peyton's contract were \$295,080, this is really for eight months with the collections. The second year of the contract which begins April 25, 1996, collections were \$300,308 for six months. Annualized that would be \$600,616 which based on the contract would show a bonus of approximately \$100,000. The contract calls for a salary of \$160,000 in the second year of the contract and for April 25 through October 31, Dr. Peyton's salary was only \$91,535. Based on the collection percentage over 1996, Dr. Peyton's collection ratio is 33.5 percent. This is based on charges of \$1,472,637 and collections - \$494,363. The accounts receivable balance of \$557,925 for Dr. Peyton equates to estimated collections of \$187,295. Based on the same types of formulas, Dr. Lower's collection percentage is 42.3 percent. His accounts receivable balance of October 31, is \$593,440. His estimated collections would be \$251,171. If we could have the shareholders agreement to allocate 1996 and prior collections based upon this ratio, Dr. Peyton would receive 42.7 percent of the collections during 1997, plus his percentage of collections for revenue, and new charges in 1997.

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Confidential  
PD010769



Dear Roway,

There are several issues which need to be addressed before we can proceed with becoming partners. Over the past 1 1/2 yrs. I have honored the contract and then some. I have not attempted to read anything into this document, however, I feel you have been liberal in your interpretation of the contract and other documents not related to it. (ie the information sheet from proclain stating tax information regarding your pay as of Aug '96.) It should be stated now, that there are + have never been any addendums or amendments to the contract. Your way of thinking + your suggestion of the above disturbs me. If there ever was an addendum you know, as well as I, that we both would have signed + notarized it + had it included in the appendix. The truth of the matter is in Aug of '96 we were in the process of putting the partnership together, + based on your previous years collections, and expected future earnings, you asked + I agreed to increase your monthly compensation based on the premise that we would be partners by year end. However, this did not transpire + the contract was extended to 31 Dec 96 per you + Eric's letter dated 25 Jan 1997.

This is a make point since the contract specifically states the term of the Agreement shall be for a period of 2 yrs (section 2) + that you shall have the option at year one or two to purchase 50% of the stock (section 18). With this in mind it is obvious, based on appendix A that your salary is \$160,000 for the second year. Since we have not arrived at or executed a partnership Agreement to date the excess amount of your compensation during 1996 needs to be deducted from your bonus.

This is not a money issue, but rather one of you selectively interpreting and creating events for your benefit. The problem therefore, as I see it is philosophical and rooted in principle. My perception is that when things do not fit what you feel is appropriate you interpret them "your way", the above example being the most glaring.

This causes me concern because I feel that this will continue to be a problem after we are partners. I feel that if it is not your way you will never compromise + will hear + see things the way that benefits you the most.

These last 5 months have given me pause to reassess our relationship on several

levels. First as a physician and doctor I have no problems with your abilities or skills, however as a business associate I do. I am concerned, because, I do not think you have the trust & faith in me as a peer. In addition, because of your interpretation & recollection of events, I have lost faith & trust in you.

Another concern I have is you pitting David & Eric against each other. Some of your comments about David are unfounded, especially since you have never taken the time to call him & ask him to explain things to you. You hold in your heart that he is only looking out for my interests; this is not true. It is the corporate accountants & has has the interests of the corporate interest in his thoughts.

Your ~~set~~ motivation for sharing with me statements that Eric has said regarding tax preparation, chart of accounts, and David's performance as the corporate accountant puzzle me. It concerns me because I feel as if we will have to "clean house" and change everything when "you come on board." It has to be myself if you are interpreting things the way you are now, how will you interpret them when you own 50% of the corporation?

If we can't resolve issues now what will we do then? The last week has really brought all this to bear causing my trust in you to be eroded to the point where I am concerned about the selling 50% of the corporation to you. I don't want, so I'm sure you don't, to get into a relationship where trust and faith at the inception are tenuous. I want to be as certain as possible that we will listen & when appropriate, compromise for the benefit of the practice / corporation; which will benefit us. Benefit is not only financially, but with regard to our reputation in the community.

This letter is not about dollars. It is about our ability to trust each other and run a business together. Yes, we can practice medicine together & yes we both follow the same medical ethical code; but can we be business partners together where we can trust that we are both looking out for each others interests just so we look out for the interests of our mutual patients? It is a "marriage" and every successful marriage is based on faith, commitment, trust, mutual respect and compromise. Being able

to give in + sacrifice for the good of the whole.

I want you to consider the above paragraphs as an opportunity for us to see if we can work together as business associates as well as orthopaedic surgeons. To see if we can reestablish that trust that is so vitally important for the survival + success of a relationship. It is better to know now, than in a few years. If you want to meet prior to our Monday meeting to go over any of this please call.

Sincerely,

Ray

called over weekend.

net 2 Raym 17 march -

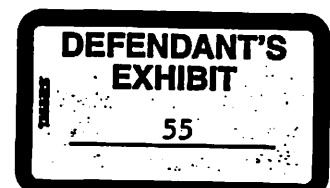
cc: Dan Zay -  
Peter Lipinski

## **Requests**

- 1 - Ray pays all his/corp lawyer and accountants fees related to all discussions and any revisions to proceed.**
- 2 - Pay back or credit to me Mr Lipresti's bills pertaining to the original contract.**
- 3 - Payback or credit to me Mr. Zagami's bills pertaining to the original contract.**
- 4 - Payback or credit to me Mr. Liprest's bills pertaining to the Purcellville Medical Building.**
- 5 - Payback or credit to me Mr. Zagami's bills pertaining to the Purcellville Medical Building.**
- 6 - Payback or credit to me \$1,500.00 for Ray's "Virginia Physicians Stock" as placed on the books for the buy-in.**
- 7 - Payback or credit to me what was charged to my account regarding the rent payment to the Purcellville Medical Building.**
- 8 - Payback or credit to me the value charged for Ray's home computer.**
- 9 - Payback or credit to me the value charged for the broken fax machine.**
- 10 - Payback or credit to me the value charged for the vehicles.**
- 11 - Payback or credit to me the rent charged for Purcellville from Jan 1997 till now.**
- 12 - Buy-in will be structured completely in pre-tax dollars without salary deferential.**
- 13 - Ray will obtain a personal credit card for personal expenses.**
- 14 - Ray will run his home long distance bills through his personal account or more preferably pay on his own so as not to put the corp. at increased risk for audit. If audited for these kinds of items the expense/penalty will be solely Ray Lowers.**
- 15 - Ray will run his home water bills through his personal account or as stated above.**
- 16 - Signature cards filled out so that Ray and I have equal rights to the bank account.**
- 17 - Collection and expense reports will be done at least quarterly and a close approximation of compensation will be allocated if chosen, at least quarterly.**
- 18 - An equal amount or equal percentage of collections will be left by all partners in the account when compensation is allocated.**

**00295**

**Exhibit "F"**



**19 - Books, CME is credited to each individual, unless previously agreed upon.**

**20 - Accelerate the vesting on the Pension Plan.**

**21 - My car lease and title will be transferred into corp. and my name not Lower.**

**22 - Plan devised to settle disputes on responsibilities of bills.**

**23 - Dismiss Mr. Zagami from all present and future corporate duties. We will obtain an accountant together for the corporation.**

### **ASSIGNMENT OF ERROR**

The circuit court erred by ruling that Dr. Peyton was entitled to recover severance pay when Dr. Peyton failed to make the buy-in payments required as a material term of his agreements with Countryside and Dr. Lower.



VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA AT RICHMOND

COUNTRYSIDE ORTHOPAEDICS, P.C. )

and )

RAYMOND LOWER, D.O., )

Appellants, )

v. )

RANDALL S. PEYTON, )

Appellee. )

RECORD NO. 00058

CIRCUIT COURT NO. 18157

DESIGNATION OF APPENDIX

Appellants Countryside Orthopaedics, P.C. and Raymond Lower, D.O., designate, pursuant to Rule 5:32(d) of the Rules of this Court, the following to be included in the Appendix it will file with its Brief in this appeal.

1. Bill of Complaint as finally amended.
2. Amended Answer and Grounds of Defense of defendants Countryside Orthopaedics, P.C. and Raymond Lower, D.O.
3. First Amended Cross Bill of Complaint.
4. Letter Ruling, June 29, 1999.
5. Letter Ruling, November 1, 1999.
6. Order Entering Judgment dated December 15, 1999.
7. Excerpt from the Trial Transcript as follows:

WitnessInclusive Pages

Randall S. Peyton

82-83  
93-95  
157-159  
191-197  
599-600  
875-884  
887  
905-906  
925  
935-939  
989  
993-994  
1013

Raymond F. Lower

493  
498-499  
512-513  
526-530  
534-539  
548-549  
554-555  
563-570  
572-574  
601-602  
649-650  
707-715  
734

Dante A. Zagami, Jr.

990  
1275-1278  
1430-1432

Erik K. Kloster

398

## 8. Exhibits:

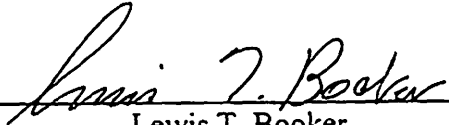
<u>Trial Number</u>	<u>Description</u>	<u>Date</u>
PX-1(a)	Countryside-Dr. Peyton Employment Agreement	As of January 1, 1997

	<u>Trial Number</u>	<u>Description</u>	<u>Date</u>
	PX-1(b)	Countryside-Dr. Lower Employment Agreement	As of January 1, 1997
	PX-1(c)	Stockholders' Agreement-Dr. Lower, Dr. Peyton and Countryside	As of January 1, 1997
	PX-1(d)	Stock Purchase Agreement between Drs. Peyton and Lower	As of January 1, 1997
	PX-15(c)	Check for Buy-In Payment and Accompanying Letter	August 7, 1997
	DX-8	Letter, Dr. Peyton to Dr. Lower about employment	Undated
	DX-9	Countryside-Dr. Peyton Employment Agreement	April 24, 1995
	DX-25	Memorandum from Mr. Kloster to Dr. Peyton	January 20, 1997
	DX-28	Letter from Dr. Lower to Dr. Peyton concerning negotiations	March 17, 1997
	DX-55	List of Demands from Dr. Peyton	October 6, 1997

9. Assignments of Error, March 15, 2000.
10. Award of Appeal, June 8, 2000.
11. Designation of Appendix, June 23, 2000.

Respectfully submitted,

**COUNTRYSIDE ORTHOPAEDICS, P.C.  
RAYMOND LOWER D. O.**

By   
Lewis T. Booker

Lewis T. Booker (VSB No. 05261)  
**HUNTON & WILLIAMS**  
Riverfront Plaza, East Tower  
951 East Byrd Street  
Richmond, VA 23219-4074  
Telephone: (804) 788-8200  
Facsimile: (804) 788-8218

Vernon W. Johnson, III, Esq.  
**JACKSON & CAMPBELL, P.C.**  
One Lafayette Centre  
1120 Twentieth Street, N.W.  
South Tower, Suite 300  
Washington, DC 20036-3437  
Telephone: (202) 457-1600  
Facsimile: (202) 457-1678

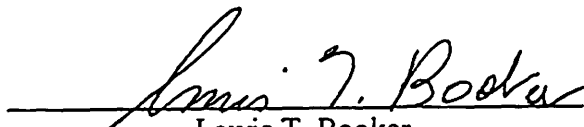
*Counsel for Appellants  
Countryside Orthopaedics, P.C. and  
Raymond Lower, D.O.*

**00301**

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing DESIGNATION OF APPENDIX was mailed, via first-class mail, postage prepaid to the following on this the 23<sup>rd</sup> day of June, 2000.

John W. Toothman, Esq.  
David H. White, Esq.  
Toothman & White, P.C.  
300 North Lee Street, Suite 450  
Alexandria, VA 22314

  
Lewis T. Booker

00302

IN THE  
SUPREME COURT OF VIRGINIA

COUNTRYSIDE ORTHOPAEDICS, P.C., )

and )

RAYMOND LOWER, D.O., )

Appellants, )

v. )

Record No. 000558

RANDALL S. PEYTON, M.D. )

Appellee. )

APPELLEE'S ADDITIONAL DESIGNATION OF CONTENTS OF APPENDIX

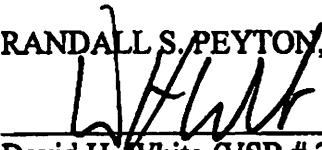
Appellee Randall S. Peyton, M.D., by his undersigned counsel and pursuant to Rule 5:32(d), Rules of the Virginia Supreme Court, hereby designates the following additional materials to be included within the Appendix in this appeal:

1. Trial Testimony:
  - a. Randall Peyton: pp. 102, 104, 160-61
  - b. Raymond Lower: pp. 507, 511, 706
  - c. Dante Zagami, pp. 1279-1280
2. Deposition of Raymond Lower, 11/4/98, p. 164

Respectfully submitted,

RANDALL S. PEYTON, M.D., Appellee

By:

  
David H. White (VSB # 27357)  
TOOTHMAN & WHITE, P.C.  
300 N. Lee Street, Suite 450  
Alexandria, Virginia 22314  
(703) 739-2660

**CERTIFICATE OF SERVICE**

I certify that this 29<sup>th</sup> day of June 2000, I have served the foregoing Designation by mailing one copy to counsel for appellees:

Vernon W. Johnson III  
Jackson & Campbell, P.C.  
1120 20<sup>th</sup> Street, N.W., South Tower  
Washington, D.C. 20036-3437  
Fax: (202) 457-1678

Lewis T. Booker  
Hunton & Williams  
Riverfront Plaza, East Tower  
951 East Byrd Street  
Richmond, Virginia 23219-4074  
Fax: (804) 788-8218

  
\_\_\_\_\_  
David H. White

00304

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the  
City of Richmond on Thursday the 8th day of June, 2000.*

Countryside Orthopaedics, P.C., et al.,	Appellants,
against	Record No. 000558
	Circuit Court No. 18157
Randall S. Peyton,	Appellee.

From the Circuit Court of Loudoun County

Upon the petition of Countryside Orthopaedics, P.C. and another an appeal is awarded them from a judgment rendered by the Circuit Court of Loudoun County on the 15th day of December, 1999; upon the appellants, or some one for them, filing an appeal bond with sufficient security or an irrevocable letter of credit in the clerk's office of the trial court in the penalty of \$500, within 15 days from the date of the Certificate of Appeal, with condition as the law directs.

This appeal, however, is limited to the consideration of assignment of error No. 1 which reads as follows:

1. The circuit court erred by ruling that Dr. Peyton was entitled to recover severance pay when Dr. Peyton failed to make the buy-in payments required as a material term of his agreements with defendants.

On further consideration whereof, it is ordered that the parts of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germane to assignment of



error No. 1, and the briefs to be filed shall be limited to such discussion as is relevant to that assignment of error.

The petition for appeal is refused as to assignment of error No. 2.

Reference is made to the said petition for the names of all the appellants involved in this appeal.

A Copy,

Teste:

  
Clerk

CERTIFICATE OF APPEAL

Pursuant to Rule 5:23, I, David B. Beach, Clerk of the Supreme Court of Virginia, do hereby certify that on June 8, 2000 an appeal was awarded as described in the order to which this certificate is appended. A copy of this certificate and a copy of the order to which it is appended were this day mailed to the lower court indicated in the order and to all counsel of record.

Given under my hand this 8th day of June, 2000.

  
Clerk

00307