

Gregory P. Lynch, OSB No. 752340
greg.lynch@millernash.com
Peter C. Richter, OSB No. 711465
peter.richter@millernash.com
Joshua M. Sasaki, P.C., OSB No. 964182
josh.sasaki@millernash.com
MILLER NASH GRAHAM & DUNN LLP
3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204
Telephone: 503.224.5858
Facsimile: 503.224.0155

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

PHILIP WALLACE, M.D.; KENT
YUNDT, M.D.; ANTHONY HADDEN,
M.D., and NORTHWEST MEDICAL
SPECIALISTS, LLC, dba Northwest Brain
and Spine,

Plaintiffs,

v.

AMSURG·HOLDINGS, INC., a Delaware
corporation,

Defendant.

Case No.: _____

COMPLAINT

(Declaratory Relief, Injunctive Relief, Sherman
Antitrust Act, Intentional Interference with
Business Relationship and Prospective
Economic Advantage)

(15 USC §§ 2, 15, 26)

DEMAND FOR JURY TRIAL

Plaintiffs Philip Wallace, M.D. ("Dr. Wallace"), Kent Yundt, M.D. ("Dr. Yundt"), Anthony Hadden, M.D. ("Dr. Hadden"), and Northwest Medical Specialists, LLC, doing business as Northwest Brain and Spine ("Northwest Brain and Spine") (collectively referred to as "Plaintiffs") allege as follows:

INTRODUCTION AND SUMMARY

1. This is an action for declaratory, injunctive, and other relief brought by Dr. Wallace, Dr. Yundt, Dr. Hadden, and Northwest Brain and Spine, three physicians and their medical practice that treat patients in Bend, Oregon, and the surrounding areas. Plaintiffs seek to have a one-sided noncompete provision in favor of defendant AmSurg Holdings, Inc. ("AmSurg"), declared unenforceable.¹ The noncompete provides in part that:

"No Owner or Affiliated Physician, nor any Affiliate of any Owner or Affiliated Physician shall * * * have any direct or indirect ownership interest in, or manage, lease, develop or otherwise have any financial interest in any business or entity competing or planning to compete with [Bend Surgery Center, LLC ("BSC")] * * * within a twenty-five (25) mile radius of the Center (the "Market Area"); or * * * become an employee of a hospital or an Affiliate of a hospital that is located within the Market Area * * * until the later of (i) five (5) years from the date of this Agreement, or (ii) two (2) years after such Owner (or with respect to an Affiliated Physician, the Owner with whom such Affiliated Physician is affiliated) ceases to be a Member of the [BSC]." Ex. 1, ¶ 8.2.

2. This noncompete provision not only applies to the other physician owners of BSC but also "Affiliated Physicians" and "Affiliates" of physician owners and Affiliated Physicians. The Agreement broadly defines "Affiliate" and "Affiliated Physician" as follows:

"'Affiliated Physician' means any individual physician who directly or indirectly through another entity has an ownership interest in [BSC], is an Immediate Family Member of any individual who directly or indirectly through

¹ The noncompete provision is contained in an "Operating Agreement" between AmSurg and the physician owners of BSC. A copy of the Operating Agreement is attached as Exhibit 1 and incorporated by this reference. BSC is not a party to the Operating Agreement. Neither are Dr. Wallace and Northwest Brain and Spine.

another entity has an ownership interest in [BSC], or is a grantor, trustee or beneficiary of any trust that is a Member of [BSC]." Ex. 1, ¶ 1.3.

"'Affiliate,' with respect to any individual or Entity, means any individual or other Entity directly or indirectly controlling, controlled by or under common control with such individual or Entity." Ex. 1, ¶ 1.2.

As a result of this provision and AmSurg's other unlawful acts described below, four out of the five neurosurgeons in Central Oregon are restricted from competing with AmSurg.

3. Dr. Yundt and Dr. Hadden own Northwest Brain and Spine, and Dr. Wallace is a physician employed at Northwest Brain and Spine. Plaintiffs are in the process of developing an ambulatory surgery center ("ASC"), a health care facility that offers patients an alternative to the hospital setting for outpatient surgical procedures. The planned ASC will be adjacent to their existing clinical practice, which will enable Plaintiffs to provide greater convenience, more timely treatment, and superior care for their patients.

4. AmSurg is engaged in anticompetitive and monopolistic practices that are harming or will harm Central Oregon residents by restricting a majority of the surgeons in Central Oregon, including Plaintiffs, from being able to provide Central Oregon residents better access, choice, and lower prices in obtaining surgery and related procedures. AmSurg is a multi-billion dollar corporation that owns and operates over 250 ASCs nationwide. AmSurg's business model is to acquire a majority ownership interest in existing ASCs, such as BSC, and enter into operating agreements with the physician owners who own a minority interest and perform surgical procedures at the ASCs. In connection with AmSurg's acquisition and ongoing operation of these ASCs, AmSurg requires that all physician owners accept highly restrictive, overbroad, and one-sided noncompete covenants ("Noncompete Covenants") that prevent physicians from competing with AmSurg, thereby harming consumers. In addition to the

Noncompete Covenants, AmSurg's operating agreements contain numerous provisions intended to help AmSurg acquire and maintain monopoly power, including unenforceable provisions for liquidated damages (§ 8.2), inconvenient choice-of-law provisions (§ 14.3 (Tennessee)), onerous arbitration provisions (§ 14.11 (Colorado)), anti-dilution provisions to protect AmSurg's controlling interest (§ 12.7), and provisions releasing AmSurg from any fiduciary duties to BSC (§ 8.13).

5. AmSurg owns a majority share of three of four ASCs in Bend, Oregon. BSC is one of the ASCs that AmSurg acquired. As part of the acquisition, all of BSC's physician owners, including Drs. Yundt and Hadden, were required to sign the Operating Agreement, which included a restrictive Noncompete Covenant. Dr. Yundt and Dr. Hadden each own approximately 1 percent of BSC. The remaining ownership interest in BSC is comprised of 43 physician owners, including Drs. Yundt and Hadden, each of whom, upon information and belief, has approximately a 1 percent ownership interest in BSC. AmSurg owns a 51 percent controlling interest of BSC.

6. AmSurg's Noncompete Covenant violates Oregon law and interferes with the interests of Central Oregon residents in having timely access to healthcare and choice in selecting where to have surgical procedures performed, and by which physicians. AmSurg is attempting to use the Noncompete Covenant to prevent Plaintiffs from owning and operating an ASC that could conceivably compete with AmSurg and threaten AmSurg's monopolistic grasp. Plaintiffs therefore seek declaratory and injunctive relief voiding AmSurg's Noncompete Covenant. AmSurg is attempting to and has monopolized the ASC market in Bend, and therefore, judgment should be entered on Plaintiffs' Sherman Antitrust Act claims, as well as

their claim for intentional interference with a business expectancy and prospective economic advantage.

PARTIES

A. Plaintiffs.

7. Dr. Wallace is an individual residing in Bend, Oregon. Dr. Wallace is a physician board-certified in physical medicine and rehabilitation.

8. Dr. Yundt is an individual residing in Bend, Oregon. Dr. Yundt is a board-certified neurosurgeon.

9. Dr. Hadden is an individual residing in Bend, Oregon. Dr. Hadden is a board-certified neurosurgeon.

10. Northwest Medical Specialists, LLC is an Oregon limited liability company, doing business as Northwest Brain and Spine. Northwest Brain and Spine is a medical practice operating in Bend, Oregon, specializing in brain and spinal services and procedures.

11. Drs. Yundt and Hadden are partners in Northwest Brain and Spine. Dr. Wallace is a physician employee of Northwest Brain and Spine, but is not a partner.²

12. Northwest Brain and Spine and Drs. Yundt and Hadden should be parties to this action. Complete relief cannot be accorded in their absence, and their interests are so situated that disposing of the action in their absence would impair and impede their ability to protect their interests and risk subjecting Plaintiffs to inconsistent obligations. Drs. Yundt and Hadden are physician owners of BSC and purportedly subject to the Operating Agreement and

² This Complaint will refer to Drs. Yundt, Hadden, and Wallace as “partners” in their medical practice as is common practice for the industry. Technically, Drs. Yundt and Hadden are members of Northwest Brain and Spine, and Dr. Wallace is an employee.

Noncompete Covenant at issue in this lawsuit. Drs. Yundt and Hadden have received, and are currently contesting, an Arbitration Demand by AmSurg and BSC based on the Noncompete Covenant, thereby subjecting the parties to the possibility of inconsistent outcomes. In addition, Dr. Wallace has a business relationship with Northwest Brain and Spine and Drs. Yundt and Hadden that is contingent on expansion of their medical practice to include an ASC, and which is impeded by AmSurg's anti-competitive and monopolistic practices, including the restrictive Noncompete Covenant and the contested arbitration. Plaintiffs assert their rights to relief jointly as arising out of the same transaction, occurrence, or series of occurrences; specifically, AmSurg's anti-competitive and monopolistic practices as set forth below. Furthermore, there are questions of law and fact common to all Plaintiffs as set forth below.³

B. Defendant.

13. AmSurg is a Delaware corporation, headquartered in Nashville, Tennessee.

JURISDICTION AND VENUE

14. Plaintiffs incorporate by reference paragraphs 1 through 13 above as if fully set forth herein.

15. This action is brought under Sections 4 and 16 of the Clayton Act, as amended (15 USC §§ 15, 26), alleging violations of Section 2 of the Sherman Act, as amended (15 USC § 2), as well as violations of Oregon State law. Additionally, this Court has jurisdiction over the action pursuant to 28 USC §§ 1331 and 1337.

³ See Fed R Civ P 19, 20, 21.

16. This Court has additional jurisdiction over this action pursuant to 28 USC § 1332.

17. The pecuniary effect of a declaration adverse to AmSurg in this action will exceed \$75,000. Accordingly, Plaintiffs satisfy the jurisdiction amount in controversy requirements of this Court.

18. Venue in this District is proper under Sections 4 and 12 of the Clayton Act, as amended (15 USC §§ 15(b), 22) and 28 USC § 1391. Plaintiffs reside in, are found in, and transact, and have transacted, substantial business in the District of Oregon in this Division. AmSurg is found in, and transacts, and has transacted, substantial business in the District of Oregon in this Division.

INTERSTATE COMMERCE

19. Plaintiffs incorporate by reference paragraphs 1 through 18 above as if fully set forth herein.

20. AmSurg owns and operates ASCs nationwide, including in Oregon. These ASCs provide for or purchase goods and services in interstate commerce, including durable medical supplies and equipment, medical services, and pharmaceuticals. Plaintiffs provide medical services in the state of Oregon. These services include the provision or purchase of goods and services in interstate commerce, including durable medical supplies and equipment, medical services, and pharmaceuticals. A substantial portion of the revenues of Plaintiffs and AmSurg comes from sources outside Oregon, including the federal government (through Medicare and Medicaid).

21. The unlawful acts alleged herein involve, affect, and occur in the flow of interstate commerce. All parties to this action are engaged in an industry affecting interstate commerce; namely the financing and provision of ambulatory surgery services. The unlawful acts charged in this complaint affect interstate commerce in a substantial manner.

BACKGROUND FACTS

22. Plaintiffs incorporate by reference paragraphs 1 through 21 above as if fully set forth herein.

A. Development of Northwest Brain and Spine.

23. In or around 2004, Drs. Yundt and Hadden formed Northwest Brain and Spine to provide brain and spinal care to Central Oregon residents. In September 2013, Dr. Wallace joined Northwest Brain and Spine as a physician employee performing spine and sports medicine procedures and rehabilitation.

24. Dr. Wallace provides preliminary treatment, chronic pain management, and diagnostic services for patients who do not present with an immediate need for surgery. For example, Dr. Wallace provides physical therapy, acupuncture, massage, and injections to patients to provide pain relief and acts as an integral first and final step in the patient's conservative care prior to a surgical decision. Dr. Wallace's support provides patients with convenient and comprehensive care for their pain and avoids drawn out and unnecessarily long recoveries.

25. A majority of Dr. Wallace's patients are referred by Drs. Yundt and Hadden. Similarly, Dr. Wallace often refers his patients to Drs. Yundt and Hadden should surgery be necessary. Plaintiffs are all integral to Northwest Brain and Spine's practice and are

able to provide Oregon patients with better care and efficiencies without delay because of the combination of complimentary specialties they offer within one practice and at one location.

B. AmSurg's Acquisition of BSC.

26. In or around 1996, BSC's predecessor, the Bend Surgery Center LLP, was formed as an ASC in Bend, Oregon. Drs. Yundt and Hadden purchased partnership interests in Bend Surgery Center LLP in or around 2011 or 2012. In 2013 or 2014, AmSurg approached the partners of Bend Surgery Center LLP about acquiring a majority ownership interest in Bend Surgery Center LLP.

27. In May 2014, the partners approved the sale to AmSurg and started the process of converting the Oregon partnership into a Tennessee limited liability company. In June 2014, AmSurg and the partners of Bend Surgery Center LLP, including Drs. Yundt and Hadden, executed the Operating Agreement of Bend Surgery Center, LLC. BSC is not a party to the Operating Agreement.

28. AmSurg obtained a 51 percent ownership in BSC. Each of BSC's physician owners has approximately a 1 percent ownership interest.

C. The Operating Agreement's Restrictive Noncompete Covenant.

29. The Operating Agreement includes a Noncompete Covenant, which provides that:

"No Owner or Affiliated Physician, nor any Affiliate of any Owner or Affiliated Physician shall * * * have any direct or indirect ownership interest in, or manage, lease, develop or otherwise have any financial interest in any business or entity competing or planning to compete with the LLC * * * within a twenty-five (25) mile radius of the Center (the "Market Area"); or * * * become an employee of a hospital or an Affiliate of a hospital that is located within the Market Area * * * until the later of (i) five (5) years from the date of this Agreement, or (ii) two (2) years after such Owner (or with respect to an Affiliated

Physician, the Owner with whom such Affiliated Physician is affiliated) ceases to be a Member of the LLC." Ex. 1, ¶ 8.2.

30. The Noncompete Covenant operates entirely in the interest of AmSurg as the majority shareholder of BSC. For example, the Noncompete Covenant provides that:

"AmSurg, in addition to all other remedies it may have, shall have the right to injunctive relief if there is such a breach [of the Noncompete Covenant]." Ex. 1, ¶ 8.2.

This clause purports to give AmSurg, but not BSC itself, the right to injunctive relief against other physician owners of BSC (and Affiliated Physicians and Affiliates of physician owners and Affiliated Physicians). The Agreement defines Affiliate and Affiliated Physician as follows:

"'Affiliate,' with respect to any individual or Entity, means any individual or other Entity directly or indirectly controlling, controlled by or under common control with such individual or Entity." Ex. 1, ¶ 1.2.

"'Affiliated Physician' means any individual physician who directly or indirectly through another entity has an ownership interest in the LLC, is an Immediate Family Member of any individual who directly or indirectly through another entity has an ownership interest in the LLC, or is a grantor, trustee or beneficiary of any trust that is a Member." Ex. 1, ¶ 1.3.

31. Under the Noncompete Covenant, AmSurg is permitted to compete against BSC by owning and operating competing ASCs, and is currently doing so as described below. Moreover, the Operating Agreement relieves AmSurg of any fiduciary duties to BSC:

"8.13. Fiduciary Duty. Notwithstanding the foregoing or any other provision of this Agreement or applicable law, each Owner and Affiliated Physician acknowledges and agrees that AmSurg and its Affiliates may own and operate, and may continue to own and operate, facilities and businesses located within the Market Area that compete with the business of the LLC. The Owners and the Affiliated Physicians acknowledge and agree that AmSurg and its Affiliates shall not be restricted in the ownership or operation of any such competing facilities and businesses, shall have no obligation to give priority to the ownership and operation of the business of the LLC, and shall have no obligation or liability to the LLC or the Owners as a result of actions taken in furtherance of the ownership or operation of such competing facilities and businesses."

32. The Operating Agreement further provides for a penalty for breach of the Noncompete through a liquidated damages clause:

"[I]n the event a physician Owner or Affiliated Physician, or any Affiliate of a physician Owner or Affiliated Physician violates the provisions of Section 8.2.2, such physician Owner or Affiliated Physician shall pay to the LLC, as liquidated damages, an amount equal to (a) five (5) times the LLC Profit plus the LLC's interest expense for the preceding twelve (12) calendar months, minus (b) the LLC's Principal Indebtedness outstanding as of the date of such breach, with this amount multiplied by such Owner's ownership interest in the LLC (or such Owner's ownership interest in the LLC immediately prior to the termination of his or her membership in the LLC), it being acknowledged by the parties that the damages to the LLC in such event would be difficult to ascertain." Ex. 1, ¶ 8.2.

33. The Operating Agreement specifically states that a court or an arbitrator can determine the enforceability of the Noncompete Covenant:

"Without limiting the foregoing, the Members agree that in the event a court or arbitrator with appropriate jurisdiction determine [sic] that the geographic area and/or the time restrictions set forth in Section 8.2 hereof are unenforceable as a matter of law, then the court or arbitrator may modify the unenforceable provision in order to make it enforceable and such modification will be deemed to be valid amendment to this Agreement to which each Owner and his or her Affiliates or AmSurg and its Affiliates will be bound." Ex. 1, ¶ 14.4.

34. Noncompete covenants are particularly discouraged in the medical community because of the public's interest in obtaining access to affordable health care. The American Medical Association Code of Ethics 9.02 states:

"Covenants-not-to-compete restrict competition, disrupt continuity of care, and potentially deprive the public of medical services. The Council on Ethical and Judicial Affairs discourages any agreement which restricts the right of a physician to practice medicine for a specified period of time or in a specified area upon termination of an employment partnership, or corporate agreement. Restrictive covenants are unethical if they are excessive in geographic scope or duration in the circumstances presented, or if they fail to make reasonable accommodation of patients' choice of physician."

D. AmSurg's Attempts to Prevent Plaintiffs from Owning and Operating a New Surgery Center.

35. Beginning in 2014, Drs. Yundt and Hadden, through Northwest Brain and Spine, and in collaboration with Dr. Wallace, developed plans to move the existing Northwest Brain and Spine medical practice to a larger office and open an ASC in the same building to provide certain surgical services to Central Oregon patients.

36. On or about August 29, 2014, Northwest Brain and Spine entered into a commercial lease for 2115 NE Wyatt Court, Bend, Oregon, which includes space for both a medical office and surgery center.

37. On or about December 1, 2014, Drs. Yundt and Hadden notified AmSurg, through Dr. Robert Quinn, the CEO of BSC, of their intent to develop and operate a surgery center in connection with their medical practice. Dr. Quinn approved the surgery center.

38. Relying on approval from BSC, on or about December 20, 2014, Plaintiffs entered into a contract with Sunwest Builders to begin construction of the ASC facility. Construction began on or about February 14, 2015.

39. Again relying on approval from BSC, on or about January 23, 2015, Northwest Brain and Spine formed NW Pain and Surgery Center, LLC, in anticipation of the completion of the surgery center. On or about April 1, 2015, Northwest Brain and Spine moved its medical practice to the new building.

40. As part of their plans, Plaintiffs intend to have Dr. Wallace buy into Northwest Brain and Spine as a 1/3 partner (LLC member) with Drs. Yundt and Hadden.

41. Despite BSC's previous statements to the contrary, on March 24, 2015, BSC, acting on behalf of AmSurg, sent Plaintiffs a letter claiming that the planned surgery center would violate the Noncompete Covenant.

42. On May 27, 2015, BSC and AmSurg sent Plaintiffs an Arbitration Demand for Interim and Permanent Injunctive Relief and Request for Expedited Proceedings.

43. As a direct result of AmSurg and BSC filing an arbitration demand, Drs. Yundt and Hadden have not brought Dr. Wallace on as an owner and have not started operating the planned surgery center.

44. Therefore, the overly broad nature of the Noncompete Covenant, as sought to be enforced, interpreted, and applied by AmSurg, restricts Dr. Wallace's ability to practice and to become a partner of Northwest Brain and Spine, resulting in reduced choice, delay in receiving timely care, and likely higher prices for Central Oregon patients, regardless of whether the planned surgery center is actually competing with BSC.

E. AmSurg's Monopoly Power in Bend, Oregon, and the Greater Central Oregon Markets.

45. There are four ASCs in Bend, Oregon: BSC, ASC GI Diagnostic Center dba Insight GI Diagnostic ("Insight"), Cascade Surgicenter, LLC ("The Center"), and Doctors Park Surgery Center ("Doctors Park").

46. On information and belief, AmSurg is a majority owner of BSC, Doctors Park, and The Center.

47. On information and belief, AmSurg imposed the same or substantially similar Noncompete Covenants described in the Operating Agreement for BSC, for the members of Doctors Park, and for The Center.

48. On information and belief, outpatient neurosurgery procedures in Bend are only provided at BSC and The Center. On information and belief, Insight does not perform neurosurgery procedures and Doctor's Park only provides urology services.

49. The only other ASCs within approximately 150 miles of Bend, Oregon, are Eye Surgery Institute and Redmond Surgery Center, LLC, both in Redmond, Oregon, approximately twenty-five miles from Bend. Only the Redmond Surgery Center, LLC provides neurosurgery services. The Eye Surgery Institute only provides surgical services related to eye care.

50. Upon information and belief, there are five neurosurgeons in Central Oregon: Dr. Yundt, Dr. Hadden, Dr. Brad Ward, Dr. Raymond Tien, and Dr. Mark Belza. Of those five neurosurgeons, all but Dr. Belza have signed and are restricted by AmSurg's Noncompete Covenant or a substantially similar noncompete covenant. Drs. Ward and Tien are partners in The Center, which is majority-owned by AmSurg as described above.

51. AmSurg unlawfully maintains its monopoly power through its restrictive and one-sided operating agreements, including the noncompete covenants, and by its arbitration demand to enforce the same with the threat of liquidated damages as described above. AmSurg is utilizing barriers to entry to further its monopoly power. AmSurg has acquired ASCs serving almost exclusively Oregon residents but BSC is incorporated under Tennessee law and the Operating Agreement adopts Tennessee law in its choice-of-law provision.

52. Further, under the terms of the Operating Agreement, AmSurg unlawfully maintains its 51 percent majority ownership in BSC through an anti-dilution provision in the event of admission of new members which provides:

"12.7.1. If AmSurg's Membership Percentage at the time any New Member is to be admitted is greater than 51%, then AmSurg and each Owner shall transfer to such New Member its or his pro rata share, on the basis of its or his *then*-current Membership Percentage, of the New Member Interest; provided, however, that in no event will AmSurg be required to transfer any portion of its Membership Interest to the New Member that would result in AmSurg's membership Percentage following any such transfer falling below 51.0%; and provided, further, that the Owners may elect to transfer their Membership Interests in such other proportions as they may mutually agree. In the event that the Membership Interest to be transferred by AmSurg is so limited to prevent AmSurg's Membership Percentage from falling below 51.0%, each Owner shall transfer to the New Member his pro rata share, on the basis of such Owner's then-current Membership Interest as a percentage of the Membership Interests held by all Owners, of the Membership Interest that would have otherwise been transferred to the New Member by AmSurg; provided, that the Owners may elect to transfer their Membership Interests in such other proportions as they may mutually agree.

12.7.2. If AmSurg's Membership Percentage at the time any New Member is to be admitted is equal to or less than 51%, then each Owner shall transfer to the New Member his or her pro rata share, on the basis of such Owner's then-current Membership Interest as a percentage of the Membership Interests held by all Owners, of the New Member Interest; provided, that the Owners may elect to transfer their Membership Interests in such other proportions as they may mutually agree." (Emphasis added.)

FIRST CLAIM
(Declaratory Relief Voiding the Noncompete)

53. Plaintiffs incorporate by reference paragraphs 1 through 52 above as if fully set forth herein.

54. An actual and justiciable controversy exists between Plaintiffs and AmSurg as to whether the Operating Agreement's Noncompete Covenant is invalid, in whole or in part. The Court should declare the respective rights and legal relations of the parties as requested herein.

55. 28 USC § 2201 et seq. and ORS 28.020 entitle this Court to determine rights under a written contract and declare the rights, status, and other legal relations under a

contract. 28 USC § 2201 et seq. and ORS 28.030 entitle this Court to issue a declaratory judgment construing a contract before or after there has been a breach. ORS 28.050 states that the enumeration of disputes subject to declaratory relief does not limit or restrict the Court from exercising its general powers to issue a declaratory judgment to terminate a controversy or eliminate uncertainty. The Oregon Declaratory Judgment Act is to be liberally construed and administered. ORS 28.120.

56. The Noncompete Covenant is a covenant in restraint of trade. To be valid, the Noncompete Covenant must meet each of the following requirements: "(1) it must be partial or restricted in its operation in respect either to time or place; (2) it must come on good consideration; and (3) it must be reasonable, that is, it should afford only a fair protection to the interests of the party in whose favor it is made, and must not be so large in its operation as to interfere with the interests of the public." *Konecranes, Inc. v. Scott Sinclair*, 340 F Supp 2d 1126, 1130 (D Or 2004) (quoting *North Pacific Lbr. Co. v. Moore*, 275 Or 359, 364, 551 P 2d 431 (1976)).

57. The Noncompete Covenant is overly broad and unreasonable as described above and specifically in that it applies to physicians and owners, affiliated physicians and owners, and affiliates of affiliated physicians, and prohibits them from having "any direct or indirect ownership interest in, or manage, lease, develop, or otherwise have any financial interest in any business or entity competing or planning to compete with the LLC [BSC] * * *." Ex. 1, ¶ 8.2. As a result, four out of the five neurosurgeons in Central Oregon are restricted by AmSurg's Noncompete Covenants, and three out of the four ASCs in Bend are restricted by AmSurg. The Noncompete Covenant therefore makes it practically impossible for any new

ASCs to open and operate in Bend by constraining the limited number of neurosurgeons in the area from becoming members or having an interest in any other ASC. The neurosurgeons are therefore tied to AmSurg and prevented from serving the interests of the public by offering Oregon residents better access, choice, and lower prices in medical services.

58. The Noncompete Covenant is one-sided and does not apply to or prevent AmSurg from competing against BSC. Instead, the Noncompete Covenant allows AmSurg, one owner of BSC, to prevent competition from all of the other 43 owners of BSC and their affiliates. These restrictions serve no legitimate business or other purpose, other than to permit AmSurg to achieve and maintain monopoly power in the ASC market in Bend and greater Central Oregon.

59. Furthermore, the Noncompete Covenant is overly broad with respect to time. The Noncompete Covenant is in effect for the later of five years from the date of the Operating Agreement or two years after the physician ceases to be a member of BSC. Ex. 1, ¶ 8.2. In the employment context, Oregon law forbids noncompetition agreements that exceed a two-year term, and any agreement in excess of two years is voidable and unenforceable. ORS 653.295(2). Thus, the Noncompete Covenant is not partial or restricted in its operation with respect to time.

60. As a result of the Noncompete Covenant, Plaintiffs are prevented from owning and operating a licensed ASC that could conceivably compete with AmSurg or BSC.

61. As a direct result, Central Oregon residents are restricted in access and choice to medical care and likely will pay higher prices and experience delay in receiving services because of AmSurg's anticompetitive monopoly and restraint of trade.

62. The Noncompete Covenant is therefore unreasonable in that it allows and furthers AmSurg's, by and through BSC, monopoly power in the ASC market to the detriment of the interests of the Oregon public.

63. For all of the reasons stated above, the Noncompete Covenant is an unreasonable restraint on trade and is therefore invalid and unenforceable.

64. This Court should issue a declaratory judgment that this claim may properly proceed in this Court, that Oregon law governs the enforceability of the Noncompete Covenant, and that the Noncompete Covenant is invalid and unenforceable under Oregon law.

**SECOND CLAIM
(Injunctive Relief)**

65. Plaintiffs incorporate by reference paragraphs 1 through 64 above as if fully set forth herein.

66. Plaintiffs are entitled to an injunction against AmSurg, prohibiting it from enforcing the Noncompete Covenant and declaring the Noncompete Covenant invalid and unenforceable.

67. Plaintiffs are entitled to injunctive relief on the grounds set forth in this complaint, and specifically because Plaintiffs have a clear legal and/or equitable right to own and operate ASCs in order to provide medical services to Central Oregon residents free from the unreasonable and unlawful restraint of trade of the Noncompete Covenant.

68. Unless AmSurg is enjoined from the foregoing conduct, Plaintiffs will be irreparably harmed as a result of being prevented from owning and operating an ASC as part of Northwest Brain and Spine, along with general harm to the public, and Plaintiffs have no adequate remedy at law.

THIRD CLAIM
(Sherman Antitrust Act—Monopolization by AmSurg)

69. Plaintiffs incorporate by reference paragraphs 1 through 68 above as if fully set forth herein.

70. AmSurg has acquired and maintained monopoly power in the ASCs market in Bend and the greater Central Oregon markets. AmSurg owns a majority share in three out of four ASCs in Bend, Oregon, as detailed above.

71. AmSurg has also acquired and maintained monopoly power in the neurosurgery services market in Bend and the greater Central Oregon markets.

72. AmSurg has acquired and maintained market power willfully and by improper means, including use of overly broad, invalid, and unenforceable operating agreements including through its Noncompete Covenants in restraint of trade and other restrictive provisions detailed above.

73. AmSurg is able to steer patients to ASCs that are owned and operated by AmSurg and to prevent physicians from owning or operating any ASC that could compete with AmSurg.

74. AmSurg's conduct constitutes the establishment of an illegal monopoly in violation of Section 2 of the Sherman Act.

75. AmSurg's maintenance of its market power has resulted in diminished competition in the relevant market and injury to Plaintiffs. Plaintiffs are entitled to treble their damages, together with attorney fees, pursuant to Section 4 of the Clayton Act, 15 USC § 15(a).

76. Unless restrained, AmSurg's unlawful and anticompetitive conduct will continue. Because Plaintiffs have no other adequate remedy at law, they seek an injunction

restraining AmSurg from engaging in the monopolistic actions alleged above, pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26.

**FOURTH CLAIM
(Sherman Antitrust Act—Attempted Monopolization by AmSurg)**

77. Plaintiffs incorporate by reference paragraphs 1 through 76 above as if fully set forth herein.

78. AmSurg has engaged in predatory and anticompetitive conduct as outlined above, including by acquiring three out of the four ASCs in Bend and executing operating agreements in the purchase of the ASCs that contain restrictive provisions including Noncompete Covenants that prevent physicians and owners, affiliated physicians and owners, and affiliates of affiliated physicians from owning and operating ASCs that provide much needed medical and surgical services to Central Oregon residents, with the goal of steering patients exclusively to AmSurg-owned and-operated ASCs.

79. AmSurg has engaged in predatory and anticompetitive conduct with the specific intent of obtaining market power in the relevant markets and of excluding competitors therefrom, including Plaintiffs.

80. To the extent that AmSurg is deemed to not yet have a monopoly, AmSurg is dangerously close to obtaining market power in the relevant market due to its market share, its high barriers to entry, and its invalid Noncompete Covenants that restrict physicians from providing services to Oregon residents in competition with AmSurg.

81. AmSurg's anticompetitive actions are unreasonable, have no legitimate business purpose, and adversely affect the choice, quality, cost, and competition in the ASC and specifically neurosurgery markets in Bend and the greater Central Oregon markets.

82. AmSurg's attempt to obtain market power has resulted in diminished competition in the relevant market and injury to Plaintiffs. Plaintiffs are entitled to treble their damages, together with attorney fees, pursuant to Section 4 of the Clayton Act, 15 USC § 15(a).

83. Unless restrained, AmSurg's unlawful and anticompetitive conduct will continue. Because Plaintiffs have no other adequate remedy at law, they seek an injunction restraining AmSurg from engaging in the monopolistic actions alleged above, pursuant to Section 16 of the Clayton Act, 15 USC § 26.

FIFTH CLAIM

(Intentional Interference with Business Relationship and Prospective Economic Advantage)

84. Plaintiffs incorporate by reference paragraphs 1 through 83 above as if fully set forth herein.

85. Beginning in 2014, Drs. Yundt and Hadden, through Northwest Brain and Spine, and in collaboration with Dr. Wallace, developed plans to move the existing Northwest Brain and Spine medical practice to a larger office and open an ASC in the same building to provide certain surgical services to Central Oregon patients. The Plaintiffs intended that Dr. Wallace would become a partner and owner of the practice once the ASC was completed.

86. As part of this plan, and in reliance on BSC's statements, Plaintiffs entered into a commercial lease that includes space for both a medical office and an ASC facility. On December 20, 2014, Plaintiffs entered into a contract with Sunwest Builders to begin construction of the ASC facility.

87. On March 24, 2015, BSC, acting on behalf of AmSurg, sent Plaintiffs a letter claiming that the planned ASC would violate the Noncompete Covenant. On May 27,

2015, BSC and AmSurg sent Plaintiffs an arbitration demand seeking injunctive relief to enforce the Noncompete Covenant.

88. As a direct result of AmSurg and BSC's letter and arbitration demand, Drs. Yundt and Hadden have not yet brought Dr. Wallace on as an owner and have not yet been able to start operating the planned ASC.

89. AmSurg is a third party and is not a member of Northwest Brain and Spine or Northwest Pain and Surgery Center, LLC, and is not party to any agreement, nor a participant in any plans related to Plaintiffs' medical office or prospective ASC.

90. AmSurg intentionally interfered with Plaintiffs' business relationships and prospective ASC by engaging in anticompetitive and monopolistic practices, including the use of the invalid Noncompete Covenants, including the one at issue here, and filing the arbitration demand seeking to enforce the same.

91. AmSurg's interference was accomplished through improper means, by, for example, violating the antitrust laws through its monopoly and/or attempted monopolization and by utilizing an unreasonable and therefore invalid Noncompete Covenant that is an unenforceable covenant in restraint of trade in violation of Oregon law, as described above.

92. AmSurg's actions, by and through BSC, are driven by its improper motive to monopolize the ASC market in Central Oregon.

93. Because of AmSurg's conduct, Plaintiffs' business relationship has been disrupted because construction of the ASC has been significantly delayed and remains incomplete and because Dr. Wallace has not been able to join Drs. Yundt and Hadden as a partner in the practice and remains an employee.

94. AmSurg's interference has resulted in substantial harm to Plaintiffs by creating costly and extensive delays and impairing expected economic benefits, in amounts to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request trial by jury and pray for relief as follows:

1. For a declaratory judgment that this claim may properly proceed in this Court, that Oregon law governs the enforceability of the Noncompete Covenant, and that the Noncompete Covenant is invalid and unenforceable under Oregon law;
 2. For a preliminary and permanent injunction enjoining AmSurg from enforcing the Noncompete Covenant against Drs. Yundt and Hadden;
 3. For an order staying arbitration proceedings brought by BSC and AmSurg until such time as this Court deems proper;
 4. For a monetary judgment against AmSurg in an amount to be alleged in an amended complaint, and to be trebled under the provisions of Section 4 of the Clayton Act, 15 USC § 15, for reasonable attorney fees, costs and disbursements;
 5. For punitive damages as permitted by law;
 6. For an injunction against AmSurg in such form as this Court may deem just and proper, restraining violations by AmSurg of the antitrust laws of the United States as described in the foregoing complaint;
 7. For attorney fees and costs to the extent permitted by contract and/or law;
- and

8. Such other and further relief as the Court deems just and proper.

DATED this 14th day of August, 2015.

MILLER NASH GRAHAM & DUNN LLP

s/ Gregory P. Lynch

Gregory P. Lynch, OSB No. 752340

greg.lynch@millernash.com

Peter C. Richter, OSB No. 711465

peter.richter@millernash.com

Joshua M. Sasaki, P.C., OSB No. 964182

josh.sasaki@millernash.com

Telephone: (503) 224-5858

Facsimile: (503) 224-0155

Attorneys for Plaintiffs