SUPREME JUDICIAL COURT
FOR THE
COMMONWEALTH OF MASSACHUSETTS

SJC NO. 13697

SUSAN MIELE,
Plaintiff-Appellee

v.
FOUNDATION MEDICINE, INC.
Defendant-Appellant

On Appeal from a Judgment of the Superior Court

BRIEF FOR AMICUS CURIAE MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION, INC. (MassDLA)

In Support of Defendant/Appellant for Reversal

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Date: February 10, 2025

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the Massachusetts Defense Lawyers Association, Inc. discloses that it is a nonprofit organization. It has no parent corporation; no publicly-held corporation holds ten (10) percent or greater ownership in the organization; and it does not issue stock.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Massachusetts Defense Lawyers Association, Inc. ("MassDLA"), *amicus curiae*, is a voluntary, non-profit, statewide professional association of lawyers who defend corporations, individuals, and insurance companies in civil lawsuits. Members of MassDLA do not include attorneys who, for the most part, represent claimants in personal injury and/or employment litigation. The purpose of the MassDLA is to improve the administration of justice, legal education, and professional standards for attorneys, and to promote collegiality and civility among members of the Bar.

To promote its objectives, MassDLA participates as *amicus curiae* in cases raising issues of important to its members, their clients, and the judicial system. After reviewing the briefings in this matter, MassDLA believes that this is such a case and that its perspective may assist the Court in resolving the important issues raised by this appeal.

RULE 17(C)(5) DECLARATION

Pursuant to Mass. R. App. P. 17(c)(5), MassDLA states that (A) no party or party's counsel authored this brief in whole or in part; (B) no party, party's counsel, or other person – other than the *amicus curiae*, its members, or its counsel – contributed money that was intended to fund the preparation or submission of this brief; and (C) neither the *amicus curiae* nor its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

ARGUMENT

The Massachusetts Noncompetition Agreement Act Does Not Apply to the Agreement at Issue in This Case.

This case involves an egregious misinterpretation of the Massachusetts Noncompetition Agreement Act ("MNAA"), G.L. c. 149, § 24L, which, if allowed to stand, would cast a much wider net over a whole host of agreements that were never intended by the Legislature to be included in the restrictions of the statute in the first place.

The issue in this case is whether the Plaintiff/Appellee Susan Miele's ("Plaintiff") severance and transition agreement (the "Transition Agreement"),[1] which contained a provision that incorporated Plaintiff's prior agreement not to solicit former employees of the Defendant/Appellant Foundation Medicine, Inc. (the "Company" or "Defendant") upon termination of employment, but added a forfeiture of compensation provision for breach of that covenant to not solicit (as well as others), is subsumed within the definition of a "forfeiture for competition agreement," as laid out in the MNAA. The amicus would argue that not only does

[1] This Court did not seek *amicus* briefing on the alternative argument raised by Defendant that the Transition Agreement would be excluded from the MNAA's requirements by virtue of being a "noncompetition agreement made in connection with the cessation of or separation from employment if the employee is expressly given seven business days to rescind acceptance." It is therefore not addressed in substance in this brief. However, it is difficult to see how the Transition Agreement on its face is not such an agreement and would therefore be excluded from the restrictions imposed by the MNAA.

the Transition Agreement not fit within the definition for "forfeiture for competition agreement," but that the Legislature took specific pains to carve out nonsolicitation agreements from the definition of "noncompetition agreement" in the MNAA. Employers and businesses in the Commonwealth have relied on the plain and explicit language of the MNAA for several years in making decisions about whether or not to incorporate not only noncompete provisions in their employment agreements, but provisions such as the ones at issue in this case, including nonsolicitation and forfeiture for breach provisions. The wide consensus has been, as evidenced by this brief and other *amicus curiae* in this case, that nonsolicitation agreements were not intended to be covered by the MNAA in any shape or form, including the one in the Transition Agreement at issue in this case.

The entire legislative history, even starting with the title of the Act itself -- the Massachusetts Noncompetition Agreement Act -- confirms that the purpose of the MNAA was to legislate noncompete agreements, and nothing else. *See* Brief of *Amicus Curiae* Russell Beck (including detailed legislative history of the MNAA from a first-person perspective). *See also* Will Brownsberger, *A Study in Persistence and Compromise* (Aug. 13, 2018), https://willbrownsberger.com/a-study-in-persistence-and-compromise-legislation-regulating-agreements-not-to-compete (detailing political involvement and motivation in drafting the MNAA over many years)

The definitions of which types of agreements are included in the Act's restrictions are similarly narrow (despite the Superior Court's attempts to broaden the language). At its core, the MNAA regulates "noncompetition agreements," defined as "an agreement between an employer and an employee…under which the employee or expected employee agrees that he or she will not engage in certain specified activities competitive with his or her employer after the employer relationship has ended." G.L. c. 149, § 24L. This definition does not include "covenants not to solicit or hire employees of the employer." *Id.*

The confusion, to the extent there exists any, lies in the fact that the definition of "noncompetition agreement" incorporates the definition of a "forfeiture for competition agreement," which is defined as "an agreement that by its terms or through its manner in which it is enforced imposes adverse financial consequences on a former employee as a result of the termination of an employment relationship if the employee engages in competitive activities." *Id.* In deciding the Motion for Judgment on the Pleadings in this case, the Superior Court read the phrase "competitive activities" as being something necessarily broader than "activities competitive with his or employer," without much, if any, justification, and determined that the Legislature must have intended to incorporate provisions such as nonsolicitation agreements within this phrase. This is simply not

the case when reviewing that language in the context of the statute as a whole and the legislative history.[2]

The Superior Court's reasoning rested on the fact that the Legislature, for public policy reasons, must have intended to restrict these types of forfeiture provisions – ones in which employees lose money or are required to return consideration if a provision is breached. However, even this reasoning is belied by the fact that the MNAA also excludes "forfeiture agreements" from its reach. A "forfeiture agreement" is defined by the MNAA as "an agreement that imposes adverse financial consequences on a former employee as a result of the termination of an employment relationship, regardless of whether the employee engages in competitive activities following cessation of the employment relationship," and explicitly does not include a "forfeiture for competition agreement." The Legislature therefore did not intend to generally regulate or restrict these types of forfeiture provisions in agreements, only to the extent there was a provision requiring forfeiture and being enforced in such a way as to render it similar to a noncompetition agreement.[3]

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[2] There is very little legislative history on the genesis of the definition of "forfeiture for competition agreement," indicating that it was not a primary focus of the Legislature's negotiations over the MNAA. What little exists is detailed in the *amicus* brief submitted by Attorney Beck.

[3] The *amicus* brief submitted by Russell Beck provides a detailed history of the intent of including the phrase "forfeiture for competition agreement," which appears largely to focus on the forfeiture of deferred compensation, and the

The opposite is in fact indicated by both the plain language of the text and the legislative history, where all roads point to the fact that nonsolicitation agreements were intended to be excluded entirely from the reach of the MNAA. Such finding is consistent with the weight of Massachusetts law distinguishing agreements not to compete from nonsolicitation agreements. *See Automile Holdings, LLC v. McGovern*, 483 Mass. 797, 812-813 (2020) (nonsolicitation or "anti-raiding" provision not the same as a "traditional" noncompetition agreement where it only "indirectly prohibited employment with a single competitor," involved individuals not party to the agreement, and did not "stifl[e] ordinary competition"); Brief of Defendant/Appellant Foundation Medicine, Inc., collecting and citing other Massachusetts cases, at 28-29.

The impact of allowing the Superior Court's decision to stand is immense. Employers and businesses have relied on the plain language of the statute as allowing for nonsolicitation provisions to stand, and as a proper, appropriate, and measured way in which an employer can guard against post-employment malfeasance by former employees. *See* Jerry Cohen, Karen Breda, & Thomas J. Carey, Jr., *Employee Noncompetition Laws and Practices: A Massachusetts Paradigm Shift Goes National*, 103 Mass. L. Rev. 31 (2022) ("Without denigrating

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concerns laid out by this Court in *Cheney v. Automatic Sprinkler Corp. of Am.*, 377 Mass. 141, 147 fn. 7 (1979).

or diminishing the significant of the MNAA's reforms, we would be remiss if we failed to point out that many other employers' options remain after MNAA… The MNAA [] permits covenants not to solicit the employer's other employees…. *"). See also Brownsberger, supra* (discussing need for small businesses to have access to contractual provisions that protect their businesses). The amicus notes that a forfeiture or "clawback" provision with respect to a nonsolicitation agreement is oftentimes one of the only ways to confirm that the former employee will comply with the agreement – a "stick," so to speak, to ensure compliance with the nonsolicitation provision. Without these provisions, former employees would be incentivized to breach the agreement and wait to see if the former employer sues. Meanwhile, the employer has paid out benefits to the breaching former employee; lost key talent after the former employee solicited its employees; and would be forced to expend time, energy, and money on the legal process in order to recover damages, some of which are difficult to quantify in a court of law.

Had the Legislature intended to regulate such provisions in the context of any activity <u>other</u> than a noncompetition agreement, it could have explicitly said so. Instead the <u>only</u> reference to nonsolicitation comes within the definitions of what is excluded from the reach of the MNAA, and nowhere else. Such is consistent with the narrow compromise struck by the Legislature in avoiding an outright ban on noncompete agreements, but placing restrictions on the large

majority of noncompetes in the Commonwealth. *See Brownsberger*, *supra*. If this Superior Court decision were to stand, it would not only negatively impact countless agreements currently in place in the Commonwealth, but remove a significant and meaningful option that employers have to ensure compliance with post-employment restrictions.

CONCLUSION

For the foregoing reasons, the Massachusetts Defense Lawyers Association, Inc. requests this Court reverse the Superior Court's ruling in favor of the Plaintiff-Appellee and issue judgment in favor of Defendant-Appellant Foundation Medicine, Inc.

MASSACHUSETTS DEFENSE
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CERTIFICATE OF COMPLIANCE

I, Catherine M. Scott, counsel for *amicus curiae* Massachusetts Defense Lawyers Association, Inc., certify that this brief complies with the requirements of Mass. R.A.P. 17, 19, and 20. This brief complies with the length and typeface limitations in Rule 20(a)(3)(E) because it is in proportionally spaced font: Times New Roman, size 14, and contains 1,746 non-excluded words, as counted by using the Word Count feature in Microsoft Word.

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CERTIFICATE OF SERVICE

I, Catherine M. Scott, Esq., counsel for *amicus curiae* Massachusetts Defense Lawyers Association, Inc., certify that I served this brief via EFileMa and electronic mail on all counsel of record:

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