JAMS ARBITRATION CASE REFERENCE NO. 120050164

MED-LEGAL ASSOCIATES, INC.,
a California corporation,

Petitioner,

v.

BRUCE E. FISHMAN, M.D., F.I.C.S., INC.,
a California medical professional corporation;
and BRUCE E. FISHMAN, M.D., an individual,

Respondents.

FINAL AWARD

Counsel

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Arbitrator

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JAMS

Place of Arbitration
JAMS, Los Angeles Resolution Center, 555 W. 5th Street, Suite 3200, Los Angeles, CA 90013

Date of Final Award: February 2, 2017

THE UNDERSIGNED ARBITRATOR, having been designated in accordance with Section 14.h of the parties' Management Services Agreement ("MSA"), which states that ". . . all disputes, claims or controversies arising in connection with, relating to, or arising out of this Agreement, shall be settled by arbitration in accordance with the arbitration rules and procedures of JAMS," and by agreement of the parties, finds, concludes and issues this Final Award as follows:

I. Introduction and Procedural Statement

Petitioner in this arbitration is Med-Legal Associates, Inc., ("MLA"), a company that provides management services to orthopedic surgeons appointed as Qualified Medical Evaluators by the State of California Department of Industrial Relations, Division of Workers Compensation. MLA is owned and operated by Patrick Nazemi, who is not a party to this action. Respondents are Dr. Bruce E. Fishman and his medical corporation, Bruce E. Fishman, M.D., F.I.C.S (collectively "Dr. Fishman"). Dr. Fishman employed the services of MLA from November 1, 2012 through April 30, 2014.

The procedural history of this case is extensive. The parties were contentious, which resulted in protracted discovery disputes, countless arguments over email, multiple hearings and orders issued by the Arbitrator, all of which eventually culminated in the appointment of a Discovery Referee, Hon. Margaret A. Nagle (Ret.). Because relations between counsel often disintegrated into conflict, Judge Nagle attended and presided over the depositions of the parties. Judge Nagle also ruled on motions to compel and issued orders regarding the production of documents and other discovery matters.[1]

The evidentiary hearing for this matter was originally scheduled for nine days. On February 23, 2016, the parties mutually requested that the hearing be reduced to five days, and the Arbitrator agreed to this request. Over the ensuing four months, the parties continued to litigate their claims and prepared for arbitration. Neither side made any further requests regarding the

[1] See most recent Order Denying the Evidentiary and Monetary Sanctions Requested by Claimant Med-Legal Associates, Inc. dated September 21, 2016 for, among other things, graphic examples of the toxic and often unproductive relationship between counsel: "...in reported proceedings before the Discovery Referee, Mr. Paul unabashedly referred to: Mr. Kapp as a 'putz' and 'the biggest jerk I [i.e. Mr. Paul] ever dealt with;' the pleadings filed on behalf of Fishman as 'butt-wipe' and 'crap;' and Daniel Rubin, the lawyer working with Mr. Paul, as 'sophomoric' and 'playing junior lawyer.'"

number of days scheduled for the hearing. Just prior to the commencement of the proceedings, Petitioner proposed a witness list, which projected to consume 32.5 hours. Nevertheless, Petitioner did not seek extra hearing days.

The evidentiary hearing was therefore conducted during five days, on June 27-30 and July 5, 2016. Each side offered documentary evidence at the hearing, and such evidence was admitted (Ex. 1-6; 9-13; 15-43; 51; 53-61; 84; 90-107;109-119;121-122; 206B; 210A; 214A; 216A). Each side called witnesses and cross-examined opposing witnesses: Deborah Perez, Angela Delgado, Richard Basilio, Dennis Ainbinder, Ken Bond, Patrick Nazemi, Shakisha Turner, Pablo Guerrero, and Bruce Fishman.

The presentation of the evidence was often sluggish. The Arbitrator warned the parties on several occasions that the time allotted for the presentation of all of the evidence was five days, and that some of that time would need to be allotted to Respondents for their counterclaims. Petitioner argued that it needed more time to put on its case, and that it was being unfairly cut short. The Arbitrator was amendable to providing more hearing days, but Respondents did not agree to extend the length of the hearing, citing cost and calendaring concerns. Therefore, instead of splitting the five days 50-50 as originally planned, the Arbitrator allowed Petitioner to have extra time by giving it three and a half days of the five days to present its case. Respondents agreed to this arrangement, and were given the remaining one and a half days to present their counterclaims.

At the conclusion of the presentation of evidence, Petitioner asserted that it was denied an opportunity to present its full case, even though: 1) Petitioner agreed to reduce the number of days of the hearing from nine to five; 2) At no time in the four months leading up to the arbitration did Petitioner request additional hearing days; and 3) Petitioner was given more than half of the time allotted for the entire hearing to present its case. Accordingly, above Petitioner's objections, the Arbitrator declared that the evidentiary aspect of the hearing was closed.

The parties were directed to file closing briefs. On August 9, 2016, the parties filed simultaneous closing briefs, and on August 23, 2016, the parties filed simultaneous reply briefs. Upon receipt of these briefs, the Arbitrator indicated that he would issue an Interim Award.

On September 22, 2016, the Arbitrator issued an Interim Award, against Petitioner. Respondents were awarded $113,400.00 on their counterclaim for breach of contract. As a result, the Arbitrator found that Respondents were the prevailing party and entitled to all costs and expenses, including reasonable attorney fees pursuant to Section 14g of the parties' MSA. Accordingly, as part of the Interim Award, the Arbitrator ordered that the parties submit further briefing on issues relating to costs, expenses and fees.

The briefing cycle was not without incident. After granting a brief extension, Respondents' fee application was filed on October 21, 2016. Petitioner's opposition was filed on November 18, 2016, which contained objections to the lack of documentation supporting Respondents' application. These objections incited another two months of contentious email battles and requests for intervention by the Arbitrator.

On November 21, 2016, counsel for Respondents wrote an email to counsel for Petitioner in which he stated he was considering submitting more detailed billing to support his application. The following day, counsel for Petitioner responded that he believed it was too late to file any additional supporting documentation. On December 1, 2016, Respondents filed their Reply brief and submitted more records *in camera* to the Arbitrator, citing work product concerns. Petitioner objection to this submission, which prompted the Arbitrator to issue an Order on December 2, 2016.

In the Order, the Arbitrator requested that Respondents submit additional supporting documentation including: 1) copies of all original invoices from Respondent counsel to Respondents for both attorneys fees and costs incurred, paid and/or advanced related solely to this arbitration; 2) copies of all original bills for costs incurred, paid, and/or advanced related solely to this arbitration; and 3) copies of Respondent counsel's internal accounting system showing dates of payment of all charges by Respondents. (*See* Order No. 2 on Attorney Fees and Costs). In addition, the Arbitrator agreed that the documents could be submitted *in camera*, provided that Petitioner was given a redacted copy. The Arbitrator further granted an extension of time to Respondents to submit the materials, and set the submission date for December 16, 2016. The Order also entitled Petitioner the opportunity to file a Supplemental Opposition by December 30, 2016.

On December 7, 2016, counsel for Petitioner objected to the Arbitrator's Order. On December 16, 2016, counsel for Respondents submitted supporting documentation *in camera* to the Arbitrator, and also provided redacted copies to Petitioner. On December 20, 2016, counsel for Petitioner wrote another email objecting to the redacted records, and counsel for Respondents responded that same day.

On December 21, 2016, the Arbitrator issued Order No. 3 on Attorney Fees and Costs, which granted an extension until January 17, 2017 for Petitioner to file its Supplemental Opposition. The Order stated that the Arbitrator would accept no further briefing on the matter, and required that all written communications on the issue cease. Petitioner filed its Supplemental Opposition on January 17, 2017, and the matter was submitted for decision on that date.

II. Claims

MLA. MLA contends that Respondents breached the MSA by failing to terminate the contract pursuant to its terms, thereby preventing MLA's performance. Accordingly, MLA seeks lost revenue in the amount of $2,340,000 and unpaid invoices in the amount of $11,357. Additionally, Petitioner alleges fraud and concealment causes of action against Respondents, claiming that Dr. Fishman failed to disclose his felony conviction and lack of board certification. As a direct and proximate result of Respondents' alleged fraud, Petitioner seeks $1,955,469 in damages. Finally, Petitioner opposes Respondents' counterclaims.

Dr. Fishman. Respondents contend that MLA failed to prove any of its affirmative causes of action. Further, Respondents assert counterclaims against Petitioner, including an

allegation that MLA breached the MSA by failing to provide adequate staffing and public relations services to Dr. Fishman, resulting in damages of $113,400. Additionally, Dr. Fishman alleges a claim for intentional infliction of emotional distress ("IIED"), arguing that Mr. Nazemi attempted to extort him. Due to an ongoing fear that Dr. Nazemi will expose his felony conviction, Dr. Fishman seeks damages in the amount of $100,000-$200,000 for his IIED claim.

III. Facts

The following is a statement of those facts found by the Arbitrator to be true and necessary to the determination of all issues presented. To the extent that this recitation differs from any party's position, that is the result of determinations as to credibility, determinations of relevance, burden of proof considerations, and the weighing of the evidence, both oral and written.

Dr. Fishman is a trained orthopedic surgeon and industrial medicine physician who, as part of his medical practice, provides what is known as "med-legal" services, or Qualified Medical Examinations (QMEs) and Agreed Medical Evaluations (AMEs) involving the evaluation of workers' compensation claimants. Dr. Fishman also owns urgent medical care facilities, where he provides medical care to patients, including treatment of workers' compensation claimants. Finally, he provides surgical services at his own facilities and at surgical centers. He no longer provides services as a primary surgeon at acute care hospitals, due to the demand on his time.

In 2008, Dr. Fishman entered into a relationship with Green Lien Collections, Inc. ("GLC"), a company owned by Patrick Nazemi, which provided billing, collection and enforcement services to medical providers in the workers' compensation field. Over the course of their contractual relationship, Dr. Fishman and Mr. Nazemi worked closely together and became friends. Mr. Nazemi advised Dr. Fishman about the med-legal aspect of his business and Dr. Fishman supported Mr. Nazemi's business interests by co-signing a mortgage on one of Mr. Nazemi's properties.

After working with Mr. Nazemi for several years, Dr. Fishman became interested in generating new business with applicants' attorneys, with whom Nazemi was associated through his business contacts. Over time, Mr. Nazemi provided free business advice to Dr. Fishman and explained the benefits of expanding his med-legal practice. In 2011, Mr. Nazemi formed MLA with the intent to provide management services to med-legal providers. Ultimately, Mr. Nazemi convinced Dr. Fishman to contract with MLA.

Effective November 1, 2012, Dr. Fishman and MLA entered into an extensive management arrangement, or the MSA. (Ex. 6) Pursuant to the MSA, which replaced the parties' prior relationship with GLC, MLA took fees of 40% off the top of Dr. Fishman's gross revenue in exchange for covered services. The salient provisions of the MSA are as follows:

> "2b. Personnel. Company shall employ and provide to Client the administrative personnel and services described in Exhibit A in such manner, and through such persons, as Company determines to be necessary or appropriate, after consultation

with Client, for the efficient and proper business operations of the Practice (collectively, the 'Support Personnel'). Company shall be responsible for their compensation. Company shall periodically review and evaluate the performance of the Support Personnel and shall use reasonable efforts, after considering Client's comments and suggestions, to reassign, terminate, or make scheduling changes of any Support Personnel who are incompatible with Client.

Exhibit A: Client shall schedule all claimant examinations and supporting personnel, such as an historian, medical assistant, x-ray technician, and transcriber, through Company and shall give immediate notice Company of any anticipated changes in the regular or normal schedule. The initial Practice Locations are Client's offices in Encino and Lancaster. . . . The expenses which are included in the Management Fees are the following (the 'Included Expenses') . . . Expenses for the medical assistants/historians who accompany Practice physicians at the Practice Locations. Expenses for transcribers.

2d. Advertising and Marketing. Upon request by Client, Company shall assist Client in arranging for advertising and marketing services (collectively, 'Advertising Services') in connection with the Practice conducted by Client at the Practice Site. Such Advertising Services may include the hiring of public relations firms . . .

6a. Term. The initial term of this Agreement shall be for one (1) year commencing as of the date first written above; thereafter, this Agreement shall renew automatically for successive terms of one (1) year each, unless it is terminated in accordance with this Section 6.

6b. Termination without Cause. Either party may terminate this Agreement with or without cause at any time during any renewal term of this Agreement, on sixty (60) days written notice.

6d. Effect of Termination. Upon termination or expiration of this Agreement, for any reason, by either party or by operation of law, each party's respective obligations hereunder shall terminate in full . . .

During the negotiation of the MSA, Mr. Nazemi sought a five-year term, but Dr. Fishman, wary of making a commitment to MLA for that long, negotiated a one-year contractual term. At first, the relationship between Dr. Fishman and MLA proceeded as anticipated. MLA provided Dr. Fishman with business contacts, and Dr. Fishman's med-legal practice became busier. To help streamline the management of Dr. Fishman's business, Dr. Fishman directed Pablo Guerrero, his medical transcriptionist of many years, to provide MLA with CDs full of his medical forms and research, so that MLA could convert them to self-populating computer generated reports. In addition, MLA purported to provide administrative and advertising services to Dr. Fishman.

However, as the first year of the MSA progressed, Dr. Fishman became increasingly dissatisfied with MLA's staffing services, specifically, that the medical transcribers, physician assistants and medical researchers were inadequate and underqualified. As Dr. Fishman

explained, the personnel hired by Mr. Nazemi did not have a solid command of the English language, and their editing ability was non-existent. Dr. Fishman testified that because of the poor quality of the MLA staff, he had to assume the job of both editing and researching in addition to attending to his busy evaluation schedule. As a result, Dr. Fishman alleges that he was spending additional, uncompensated time completing work that he expected MLA's personnel to complete. In addition, Dr. Fishman testified that Mr. Nazemi failed to fill the position of physician's assistant to Dr. Fishman's satisfaction, and when Dr. Fishman finally did find a suitable physician's assistant, he did so on his own without help from Mr. Nazemi.

With respect to the advertising services promised by the MSA, Dr. Fishman contends that MLA never provided a public relations firm to service his Lancaster office. Further, Dr. Fishman testified that when meetings were arranged with potential clients in the Lancaster area, the public relations professional hired to service Dr. Fishman's Encino office refused to attend those meetings.

Perhaps more toxic was the fact that the personal relationship between Dr. Fishman and Mr. Nazemi began to erode. In late 2013, Dr. Fishman underwent open-heart surgery. During his recovery, Mr. Nazemi visited him at his home, and allegedly urged him to get back to work, despite the fact that Dr. Fishman was not yet physically ready. In addition, Mr. Nazemi failed to repay Dr. Fishman for the mortgage loan he had taken to help Mr. Nazemi purchase a business property, despite Mr. Nazemi having promised to do so. These perceived trespasses, along with Dr. Fishman's general dissatisfaction with the services provided to him by MLA staff, contributed to his decision to terminate the Agreement.

In early March 2014, Dr. Fishman and Mr. Nazemi met, and Dr. Fishman disclosed his intention to terminate the MSA without cause. According to Dr. Fishman, after a heated discussion, the parties orally agreed to terminate the contract as of May 1, 2014. A text message followed the conversation between Mr. Nazemi and Dr. Fishman, in which Mr. Nazemi acknowledged in writing that MLA had been terminated as of May 1, 2014. (Ex. 210A, 07741) In addition, Deborah Perez, MLA's President, testified that pursuant to conversations between Mr. Nazemi and Dr. Fishman, MLA provided no further invoicing services for new med-legal evaluations performed by Dr. Fishman after May 1, 2014. Mr. Nazemi, having enjoyed gross monthly revenue of $90,000 from Dr. Fishman's evaluative work, contends that he never consented to the termination.

Following the termination, the parties were still working together to reconcile outstanding account receivables on evaluations that occurred during the contractual period. In early August 2014, Dr. Fishman went to a meeting at Mr. Nazemi's office, presumably to discuss collection and disbursement on those accounts. Instead, Dr. Fishman testified that Mr. Nazemi attempted to extort him by threatening to expose an old felony conviction.

In 1983, during his residency, Dr. Fishman was convicted of a drug-related felony and served a prison sentence. As a result of this felony, Dr. Fishman suffered a revocation of his medical license, which was restored in 1990, with all restrictions removed in 1994. Since that time, Dr. Fishman has practiced medicine in good standing with the Medical Board of California, and has had no subsequent criminal or administrative problems. He has chosen not to discuss this past with colleagues, patients or Mr. Nazemi, and was not required to do so by the Medical Board. For

a period of time, Dr. Fishman's felony was posted online on the Medical Board website, which is available for public consumption. Only recently has the felony been removed from the website.

A consequence of the felony conviction was that Dr. Fishman did not complete his residency in orthopedic surgery and did not obtain board certification in the field of orthopedic surgery. Instead, Dr. Fishman is board-certified by the American Board of Preventive Medicine (Occupational Medicine) and carries the initials "F.I.C.S," which stand for Fellow of the International College of Surgeons.

At some point prior to the August 2014 meeting, Mr. Nazemi came into possession of the information regarding Dr. Fishman's felony. Pursuant to Dr. Fishman's testimony, Mr. Nazemi entered the room and handed Dr. Fishman a stack of papers relating to the conviction. He then presented Dr. Fishman with an "Addendum" to the already terminated MSA which required Dr. Fishman to pay MLA $500,000. Mr. Nazemi reportedly told Dr. Fishman that if he did not sign the Addendum, he would tell everyone about Dr. Fishman's felony.

The Addendum states, in part:

"1. The Agreement is terminated pursuant to paragraph 6 as of May 1, 2014. . .

4b. Fishman and MED-LEGAL agree that MED-LEGAL shall be entitled to additional compensation equal to 20% of Fishman's anticipated Billings and MLA Collections for the time periods May 1, 2014 to April 31, 2015. The additional compensation shall be paid in one lump sum payment in the amount of $500,000.00 by September 1, 2014.

4c. The parties agree that this compensation is fair and reasonable given the substantial work performed by MED-LEGAL and the growth in market share and gross revenue increase that Fishman has experienced based on MED-LEGAL's work over the course of the contractual relationship."

(Ex. 50)

Dr. Fishman refused to sign the Addendum, and testified that this meeting was the first time that Mr. Nazemi claimed Dr. Fishman owed Mr. Nazemi money. As a result of this meeting, Dr. Fishman has suffered a lack of sleep and constant worry that his felony would be exposed. He has not sought professional help for these conditions.

For its part, Petitioner has argued that Dr. Fishman's failure to disclose the felony conviction prior to entering into the MSA was fraud. Mr. Nazemi testified that if he had known of the conviction – and the fact that Dr. Fishman was not a Board Certified Orthopedic Surgeon – he would never have entered into the MSA or introduced Dr. Fishman to his business contacts.

In terms of damages, Petitioner contends that Dr. Fishman's failure to properly terminate the MSA and the concealment of his background resulted in millions of dollars in damages in lost revenue, unpaid invoices, misappropriation of confidential information and promotional expenses.

There is a scarcity of specific evidence regarding damages, and Petitioner's request for relief is mostly based upon approximate calculations.

IV. Analysis

As a preliminary matter, the Arbitrator notes that Petitioner argued extensively in its closing briefs that it was not permitted to present its full case or defend against the counterclaims, that the arbitration was not concluded, and that the Discovery Referee failed to issue and enforce necessary discovery orders.

The procedural history and facts of this case speak for itself:

- Several months prior to the arbitration hearing, Petitioner stipulated to shorten the number of hearing days scheduled for this matter from nine to five;

- Petitioner spent the following four months litigating the claim and developing its case, yet counsel did not request additional hearing days prior to the commencement of the arbitration;

- Petitioner submitted a long witness list estimating 32.5 hours of total testimony prior to the hearing but knowing that only five days were scheduled, still did not request more hearing days until after the proceedings were already underway;

- When Petitioner first expressed a concern about time during the hearing, the Arbitrator requested, and Respondents agreed, that Petitioner could use 3.5 days (more than half) of the five days allotted for the hearing to present its case despite the fact that Respondents had counterclaims to establish;

- Respondents did not consent to extending the hearing by additional days, citing cost and calendaring concerns;

- The presentation of evidence was often interrupted by time consuming and argumentative attorney colloquy on both sides, even though both sides were aware of the time necessary to present their respective cases;

- The Arbitrator listened to all of the evidence presented during the five full days of testimony, reviewed and admitted exhibits, and provided the parties with an opportunity to file two lengthy closing briefs each;

- The parties each filed such briefs, totaling over 500 pages of argument and exhibits, some of which was new;

- The Discovery Referee issued an order which denied Petitioner's requests for issue sanctions.

In light of the above, which is supported by the transcribed record of the proceedings and other documentary evidence, the Arbitrator finds that the evidentiary aspect of the hearing was properly closed, and that Petitioner had a full and fair opportunity to present its case.

A. Petitioner's Affirmative Claims

1. Breach of Contract

Petitioner contends that Respondents breached the MSA by: 1) unilaterally terminating the contract without MLA's consent; and 2) failing to provide written notice of the termination.

a. Dr. Fishman was entitled to unilaterally terminate the MSA

"Under California law, a contract must be interpreted so as 'to give effect to the mutual intention of the parties as it existed at the time of contracting.' In so doing, '[a] court must first look to the plain meaning of the agreement's language.'" (*Orozco v. Clark* (2010) 705 F.Supp.2d 1158, 1168) (internal citations omitted) "'The 'clear and explicit' meaning of [a contract's words construed] in their 'ordinary and popular sense' ... [generally] controls 'judicial interpretation' unless the parties used the words in a technical sense or special meaning was given to the words by usage." (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Company* (2004) 116 Cal.App.4th 1253, 1263) (internal citations omitted). ". . . [I]f the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608)

The termination provision in the MSA expressly states that: "[e]ither party may terminate this Agreement with or without cause at any time during any renewal term of this Agreement, on sixty (60) days written notice." (Ex. 6) This language unambiguously permits Dr. Fishman to terminate the MSA, with or without cause, at any time and without MLA's consent. Therefore, even though Mr. Nazemi did not agree with the termination or appreciate the fact that Dr. Fishman unilaterally invoked the termination provision, that does not change the fact that Dr. Fishman was entitled to do so pursuant to the plain meaning of the MSA.

b. With or without written notice, the parties' course of performance indicated that the termination was effective as of May 1, 2014

The MSA required that notification of the termination be effected in writing. No evidence of such a writing was produced in arbitration, which, according to the express terms of Section 6b of the MSA, would be a technical breach of the agreement. However, whether a breach is material "depends on the importance or seriousness thereof and the probability of the injured party getting substantial performance." (1 Witkin, Summary 10th Contracts § 852 (2005))

Here, despite the fact that there is no evidence that Dr. Fishman formally notified MLA of his intent to terminate in writing, text messages between the parties indicated that as of May 1, 2014, MLA would no longer be working on any of Dr. Fishman's new cases. (Ex 210A) Further, Ms. Perez testified that in practice, MLA provided no further invoicing services for med-legal evaluations performed by Dr. Fishman as of May 1, 2014. (RT 291:23-292:2) Therefore, the fact that there was no written notification did not seem to affect the parties' understanding that the agreement was to be terminated. In other words, both parties were on notice that the contract was over as of May 1, 2014 and acted in accordance with that understanding without the need for a formal writing.

Moreover, MLA is not entitled to substantial performance of the contract simply because Dr. Fishman did not comply with the written notice requirement. The parties' course of conduct and performance demonstrates that Respondents and Petitioner acted and accounted in a manner consistent with a contract end date of May 1, 2014. The text messages between the parties indicate that Mr. Nazemi knew that Dr. Fishman intended to end the contract as of May 1, 2014. Further, MLA expended no fresh resources on Respondents' behalf after May 1, 2014, and could not have expected consideration from Respondents in return. By all accounts, both parties knew the business relationship had ended as of May 1, 2014.

Accordingly, the Arbitrator finds that Respondents' failure to notify MLA of the termination in writing was not a material breach.

c. MLA has not proven damages for breach of contract

Even if Petitioner could somehow show that Respondents improperly prevented MLA from performing the contract, which it cannot, MLA has not provided adequate evidence of damages.

Lost profits. As the first element of damages, Petitioner alleges that it is entitled to "lost revenue" of $2,340,000, which is calculated by assuming that Petitioner would earn $90,000 per month multiplied by 26 months from May 1, 2014 "through July 2016 and continuing." (Petitioner's Closing Brief at 15)

Preliminarily, the Arbitrator notes that Petitioner's claim for "lost revenue" is a misnomer. It is well-settled that in business cases, damages are based on net profits, as opposed to gross revenue. (*Meister vs. Mensinger* (2014) 230 Cal.App.4th 381, 397) Assuming that Petitioner is making a claim for lost profits, "'[T]he general principle [is] that damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent.' Such damages must 'be proven to be certain both as to their occurrence and their extent, albeit not with 'mathematical precision.' The rule that lost profits must be reasonably certain is a specific application of a more general statutory rule. 'No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.'" (*Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 773-74) (internal citations omitted)

At arbitration, Petitioner submitted a profit and loss statement for work conducted between MLA and Dr. Fishman. (Ex. 101) The profit and loss statement was created by Anne Marie

Delgado, a bookkeeper and accountant for MLA, and covered the four-month period between January through April, 2014. (Ex. 101) Ms. Delgado testified that Mr. Nazemi had told her what months to include in the statement, and although she knew that Dr. Fishman had been working with MLA since November 2012, she did not inquire as to why Mr. Nazemi only wanted to capture that four-month period in the statement. (RT 522:9-523:5) She prepared the statement by taking the four-month average of monies collected, total revenue and total expenses and concluded that the average net profit before taxes for the four-month period was $50,000. (RT 518:8-25) One item of expenses that was deducted from the gross revenue was payroll for certain hourly employees that MLA provided to Dr. Fishman's practice pursuant to the MSA. However, the payroll expense did not include deductions for Deborah Perez or Patrick Nazemi, two senior executives, who both worked on Respondents' account on a weekly basis and presumably had high salaries. Because they are senior executives, the percentage of their salaries spent would have been a significant deduction, and also may have driven the monthly average profit down. Accordingly, the statement presented by Petitioner is not a reliable indicator of MLA's profits.

The Arbitrator finds that based on this evidence, Petitioner has not provided adequate evidence of reasonably ascertainable damages. The four-month period contained in the profit and loss statement covers only a fraction of the approximately 15 months that the parties worked together, and no evidence has been presented regarding the profits made during the other months. Moreover, the four-month period covered by the profit and loss statement appears to have been arbitrarily chosen by Mr. Nazemi, with no explanation as to why. Four months of net income which itself excludes significant expenses related to executive compensation alone is hardly a reliable indicator of future profits.[2] Therefore, the Arbitrator finds that Petitioner has not established its damages with the certainty required by law.

Unpaid Invoices. Petitioner seeks $11,357 in damages for unpaid invoices. As a preliminary matter, the Arbitrator notes that there was no evidence at arbitration to support this claim. Richard Basilio, who audits billing and collections for MLA, testified about several reports and exhibits, but admitted that none of the reports demonstrated whether Dr. Fishman owed MLA any money. (RT 778:9-783:12) Further, Mr. Basilio testified that although he originally identified twenty-four cases where Respondents failed to reimburse MLA, he later determined the cases were all paid before July 2015, with the exception of one about which he was not certain, but could have been paid. (RT 800:24-801:21)

Despite this lack of evidence, Petitioner contends that Respondents failed to pay some MLA invoices that are "outside of the pleadings." Therefore, Petitioner argues that it should be allowed to amend its pleadings to conform to proof "as may be necessary." (Pet. Closing Brief at 15) The Arbitrator denies this request. Petitioner has had ample opportunity to prepare its case, and to determine within its own accounting systems, which of its invoices had not been paid by Dr. Fishman. Further, Petitioner has presented no proof that any such outstanding invoices exist.

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[2] Even if, after overlooking these uncertainties, the Arbitrator could assume that MLA earned an average monthly profit of $50,000 on Dr. Fishman's business, this assumption bears no relation to the $90,000 per month that Petitioner now seeks in damages. Again, Petitioner is not entitled to lost revenue as damages. There is no evidence in the record to suggest that MLA earned $90,000 per month in profit from its relationship with Dr. Fishman.

The Arbitrator has "discretion to deny leave to amend when the party seeking the amendment has been dilatory and the delay has prejudiced the opposing party." (*Weil and Brown, et al.* Cal. Prac. Guide Civ. Pro. Before Trial, Ch. 6-E at 6:655 (The Rutter Group 2016)) Petitioner has not presented good cause as to why it could not have ascertained what monies it was owed before the evidentiary aspect of the hearing was closed. To grant an amendment of the pleadings now would be prejudicial to Respondents and is unjustified.

2. Fraud

Petitioner has alleged that Respondents engaged in fraud by failing to disclose that Dr. Fishman was not a Board Certified orthopedic surgeon and that Dr. Fishman was convicted of a felony in 1983. In order to show that Respondents intentionally misrepresented these facts to Petitioner, MLA must prove: "(1) misrepresentation (false representation), concealment, or nondisclosure; (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage." (*Anderson v. Deloitte & Touche* (1997) 56 Cal.App.4th 1468, 1474)

False representation, concealment, or nondisclosure. Petitioner argues that Dr. Fishman misrepresented the fact that he was a Board Certified Orthopedic Surgeon. However, Ms. Perez testified that she assisted Dr. Fishman in preparing marketing materials, including his C.V. (Ex. 102, RT 374:1-6) She further testified that Dr. Fishman provided her with the information to include in the C.V. (RT 376:5-6) She explained that the C.V. listed Dr. Fishman as Board Certified in Occupational Medicine, something that she had known all along. (RT 376:12-377:3) At all times, Dr. Fishman's designation had the initials F.I.C.S., or Fellow of the International College of Surgeons. Therefore, the Arbitrator does not find that Dr. Fishman falsely represented himself to MLA as a Board Certified Orthopedic Surgeon.

Petitioner also states that Dr. Fishman misrepresented his intention to be a customer of MLA until he retired. However, even if Dr. Fishman told Mr. Nazemi as much, the fact that Dr. Fishman negotiated and signed a one-year contract with MLA belies any potential misrepresentation.

Finally, Petitioner contends that Dr. Fishman failed to disclose that he had a felony conviction prior to entering into the contract with MLA. In fact, Dr. Fishman concedes that he did not disclose to Mr. Nazemi that he had a prior felony conviction. (RT 130:2-5) This nondisclosure satisfies the first element of Petitioner's fraud cause of action.

Scienter. In addition to showing a nondisclosure, MLA must also prove that Respondents had the appropriate knowledge of the falsity. "The requisite state of mind, or scienter, for actual fraud or intentional misrepresentation is disbelief in the truth of the statement, i.e., *knowledge of falsity*." (*Anderson v. Deloitte & Touche, supra,* 56 Cal.App.4th at 1476) Dr. Fishman testified that he has "certainly done my best not to tell anybody" about his prior conviction. (RT 130:6-10) Accordingly, Petitioner has established the requisite scienter.

Justifiable Reliance. To establish this element of fraud, MLA must show: "(1) that [MLA] actually relied on [Respondents'] misrepresentations, and (2) that they were reasonable in doing so." (*OCM Principal Opportunities Fund v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 863) First, to prove actual reliance, MLA must "'establish a complete causal relationship' between the alleged misrepresentations and the harm claimed to have resulted therefrom." (*Id.* at 864) "[A]ctual reliance occurs when . . . absent such representation, the plaintiff 'would not, in all reasonable probability, have entered into the contract or other transaction.'" (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1062-63) Petitioner argues that if he had known Dr. Fishman was convicted of a felony in the past, it would not have contracted with him. This is because Mr. Nazemi's attorney contacts would be jeopardized, which could ruin the Petitioner and injure the practice of other doctors represented by Petitioner. Further, Petitioner claims it would never have expended nearly $400,000 to promote Dr. Fishman's practice if it was aware of his criminal background.

These assertions are not sufficient to show actual reliance by MLA. To begin with, MLA has not demonstrated that any of its business relationships were actually harmed or that Petitioner was threatened in anyway as a result of Dr. Fishman's felony. Additionally, as described in greater detail below, Petitioner has provided no support for its allegation that it expended $400,000 to promote Dr. Fishman. The Arbitrator also notes that the only reason that there is a concern that Dr. Fishman's felony will be exposed at all is because Mr. Nazemi himself has threatened to do so. In short, Petitioner cannot show that the misrepresentation caused harm; to the contrary, MLA has profited from Dr. Fishman's business.

In addition to actual reliance, MLA must also show "'justifiable reliance, i.e., circumstances were such to make it *reasonable* for [MLA] to accept [Dr. Fishman's] statements without an independent inquiry or investigation." (*OCM Principal Opportunities Fund v. CIBC World Markets Corp., supra,* 157 Cal.App.4th at 864) "If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable . . . he will be denied a recovery." (*Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1194) The Arbitrator finds that MLA did not justifiably rely on Dr. Fishman's nondisclosure. If MLA and Mr. Nazemi were truly concerned about its business reputation, contacts and other customers, it could have done the minimal background search necessary to uncover Dr. Fishman's felony conviction. Dr. Fishman contends that his felony was made public on the California Medical Board website. However, even if Mr. Nazemi could not locate it on that website, he proved that he could obtain the information by other means, because he had it during the August 2014 meeting with Dr. Fishman.

Damages. Finally, "[u]nder California law, a party asserting fraud must establish that its damages are the 'proximate' or 'legal' result of the fraud." (*OCM Principal Opportunities Fund v. CIBC World Markets Corp., supra,* 157 Cal.App.4th at 869-870) Here, Petitioner alleges that it expended $395,000 in promotional expenses, as well as $1,560,000 in misappropriation of confidential information.

With respect to the promotional expenses, the MSA states that "Client . . . shall be responsible for paying the actual cost and expense of all Advertising Services performed on behalf of Client, or if mutually agreeable, to reimburse Company for such expenses." (Ex. 6) Although MLA hosted marketing events for Respondents, it does not appear as though Petitioner ever

requested reimbursement, nor did Dr. Fishman agree to pay MLA any money for these events. Ms. Perez, who was involved in marketing for Dr. Fishman, testified that she never had a conversation with Dr. Fishman about being reimbursed for marketing expenses. (RT 423:6-10) She further testified that she never told him there was a flat fee for marketing expenses. (423:11-13) Ken Bond, who did marketing and development for MLA, stated that he never told Dr. Fishman that he should be paying for his marketing services. (RT 970:17-22) However, even if there was an agreement to reimburse MLA for these expenses, or even if MLA never would have paid these expenses if Dr. Fishman had disclosed his prior felony conviction, it is of no consequence because Petitioner has laid no foundation establishing that it is owed $395,000. Simply put, no witnesses testified about this amount, and although Petitioner attempted to introduce an exhibit purporting to itemize these expenses, the exhibit was not admitted into evidence and cannot be considered here.

With respect to Petitioner's claim for $1,560,000 in misappropriation of confidential information, this claim is equally unsupportable. Petitioner calculates this amount by multiplying the amount of $150,000 per month by 40%, which equals $60,000. Then Petitioner multiplies the $60,000 by 26 months through July 2016 "and continuing." (Pet. Closing Brief at FN 14)

To begin with, it is not entirely clear from the record or Petitioner's closing briefs how Petitioner arrives at this calculation. Presumably, the calculation is somehow tied to the value of the confidential information that was allegedly misappropriated, but there is nothing more than a footnote to explain what these amounts represent, and there is no evidence in the record to support them. The record does show, however, that the materials MLA accuses Dr. Fishman of misappropriating mostly originated from Dr. Fishman himself. Mr. Guerrero testified that he delivered all of Dr. Fishman's med-legal reports to MLA. (RT 1069:11-14) He also provided Dr. Fishman's research to MLA, dating back to 2005. (RT 1070:14-17) Ms. Perez testified that MLA took this data and re-created the forms in their software. (RT 406:19-24) Mr. Guerrero further stated that the reports that Dr. Fishman uses today are the same reports he has used for years. (RT 1065:15-23) Accordingly, it does not appear as though Dr. Fishman misappropriated anything.

More importantly, Mr. Bond testified that he would use these exemplar reports as marketing materials and hand them out to people who asked. (RT 973:7-11) He stated that he never told anyone that the reports were secret or confidential, and he gave them out to as many people as possible. (RT 973:12-974:1) Therefore, regardless of whether Respondents misappropriated the forms, they were clearly not confidential materials.

For this reason, the Arbitrator finds that Petitioner has not established a foundation for the quantum of damages requested or entitlement to such damages.

3. Concealment

To prove a claim for concealment, MLA must establish "(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact

and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." (*Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 131)

Concealment of a material fact. "The word 'conceal' pertains to affirmative action likely to prevent or intended to prevent knowledge of a fact." (*Mitchell v. Locurto* (1947) 779 Cal.App.2d 507, 514) Here, Petitioner argues that Dr. Fishman concealed: 1) his felony conviction; and 2) his failure to complete his residency. For the reasons stated above, the Arbitrator finds that Dr. Fishman did conceal his felony background, but did not conceal his medical credentials.

Duty to disclose. The question of whether Dr. Fishman was under a duty to disclose his felony conviction to Petitioner is not entirely clear. On the one hand, the Medical Board did not require Dr. Fishman to disclose the felony to anyone. On the other hand, given the fact that Dr. Fishman was supposed to perform QME services under the MSA quite possibly created such a duty. As Petitioner points out, the California Department of Industrial Relations, Division of Workers Compensation had regulations regarding approval of applicants with prior felony convictions. Though the Division had already run Dr. Fishman's background and approved him in 2003, it was still possible that the Division could have denied reappointment. (*See* Ex. 105; 8 CCR § 10(c)), stating "[a]n applicant who has been convicted of any other type of felony or misdemeanor may be denied appointment or reappointment.") Accordingly, since the underlying premise of the MSA was for MLA to provide services to Dr. Fishman's med-legal practice, the Arbitrator finds that Respondents were under a duty to disclose any fact that could have threatened that practice.

Intentional Concealment with Intent to Defraud. Dr. Fishman testified that he intended to conceal his felony conviction from as many people as possible. Therefore, the question is whether he had an intent to defraud. The Arbitrator finds that he does not. The credible testimony from Dr. Fishman is that he simply wanted to put his conviction in his past, and was embarrassed to tell his colleagues. The Arbitrator does not find that he had an intent to defraud MLA, and instead, his work as a QME earned healthy profits for Petitioner.

MLA Must Have Been Unaware of the Fact. Although Mr. Nazemi was in possession of Dr. Fishman's felony conviction as of the August 2014 meeting, Petitioner argues that it did not know of the conviction at the time of contracting. Dr. Fishman testified that he did not tell Mr. Nazemi or anyone else at MLA about the conviction. Therefore, MLA was unaware that Dr. Fishman had been convicted.

Damages. For the reasons stated above, the Arbitrator finds that Petitioner cannot show that he has suffered damage as a result of the concealment of Dr. Fishman's felony conviction. By all accounts, MLA profited from Dr. Fishman's work, and there has been no testimony supporting the fact that any of MLA's business relationships have been harmed as a result of Dr. Fishman's conviction. Finally, as explained above, Petitioner has not provided any evidentiary support for the $395,000 in promotional expenses or the $1,560,000 in misappropriation of confidential information damages it seeks.

B. Respondents' Counterclaims

1. Breach of Contract

Respondents contend that Petitioner breached the MSA by failing to provide a qualified physician's assistant, editor, transcriptionist or medical researcher who could competently and timely perform impairment ratings. Respondents also allege that Petitioner failed to provide a qualified public relations firm to increase business at Dr. Fishman's Lancaster office.

The MSA requires that MLA "employ and provide to Client the administrative personnel and services described in Exhibit A in such manner, and through such persons, as Company determines to be necessary or appropriate after consultation with Client, for the efficient and proper business operations of the Practice (collectively, the 'Support Personnel')." (Ex. 6) Exhibit A to the MSA states that "Client shall schedule all claimant examinations and supporting personnel, such as an historian, medical assistant, x-ray technician, and transcriber, through Company . . ." (*Id.*) The "included expenses" on Exhibit A listed "expenses for the medical assistants/historians who accompany Practice physicians at Practice Locations" and "expenses for transcribers." (*Id.*)

Both Dr. Fishman and Mr. Nazemi testified that part of the reason Dr. Fishman entered into the contract with MLA was because he wanted additional administrative support so that he could spend more time outside the office with his family. (RT 1252:5-8; 1252:25-1253:3; 1253:6-10; RT 246:2-7) However, Dr. Fishman testified that the personnel hired by MLA pursuant to the MSA were inadequate. The first editor MLA hired, "Ozzie," had poor editing skills. (RT 1206:13-19) After relieving Ozzie of his duties, MLA hired George Manabat, who did not have a grasp of the English language. (RT 1206:20-25) As a result, Dr. Fishman testified that he began doing all of the editing himself. (RT 1207:1-2) Further, Mr. Manabat was supposed to assist Dr. Fishman with the AMA Guides ratings, but did not have a good "global understanding" of them, so Dr. Fishman stated that he took back that task as well. (RT 1208:12-19) By the time of his open heart surgery in late 2013, Dr. Fishman testified that he was completing all of the same tasks he had been doing prior to entering into the MSA. (RT 1208:20-1209:4) In his conversations with Mr. Nazemi about the staffing problems, Dr. Fishman noted that "it seemed like they had a revolving door. There would be somebody hired, and then they would be gone. Somebody else would be hired, and they would be gone." (RT 1260:16-20)

With respect to the Physician Assistant position, Dr. Fishman testified that the personnel hired by MLA either left because of a "negative interaction" with Mr. Nazemi or were underqualified and unlicensed in California. (RT 1249:9-1250:8) Accordingly, Dr. Fishman stated that because he refused to use MLA's personnel, he had to hire his own Physician's Assistant. (RT 1250:9-11)

The MSA also required MLA to, upon request of Respondents, "assist Client in arranging for advertising and marketing services . . . in connection with the Practice conducted by Client at the Practice Site. Such Advertising Services may include the hiring of public relations firms . . ." (Ex. 6) Dr. Fishman had two practice locations, one in Encino and one in Lancaster, both of which were covered by the MSA. (*Id.*) As he made clear in his testimony, the public relations firm hired

by MLA to market Dr. Fishman's practices did very little promotion of the Lancaster office. (RT 1275:2-10) In fact, Dr. Fishman stated that he had to separately hire a PR professional to attend promotional lunches in the Bakersfield area. (RT 1278:18-1280:9)

Petitioner did not offer evidence to rebut Dr. Fishman's testimony that MLA hired unqualified staff, and it was undisputed that Dr. Fishman either had to do the work himself, or hire employees and arrange promotional meetings on his own.

As a result of these failings, Respondents allege $113,400 in contractual damages. In arriving at this amount, Respondents factor in that Dr. Fishman worked an extra 8 hours per week at a rate of $250 per hour on tasks that should have been completed by MLA staff. (RT 1259:15-24; 1260:6-9)) This continued for the entire contractual period, with the exception of the six weeks Dr. Fishman was in recovery from surgery. (RT 1260:10-13)

Based upon the foregoing evidence, the Arbitrator finds that MLA breached the MSA by not providing Respondents with adequate staffing and promotional services. The Arbitrator further finds that as a result of these breaches, Respondents are entitled to damages in the amount of $113,400.

2. IIED

Respondents allege that Dr. Fishman suffered from emotional distress as a result of Mr. Nazemi's attempt to extort him with his prior felony conviction. "A cause of action for intentional infliction of emotional distress exists when there is '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.' A defendant's conduct is 'outrageous' when it is so 'extreme as to exceed all bounds of that usually tolerated in a civilized community.' And the defendant's conduct must be 'intended to inflict injury or engaged in with the realization that injury will result.'" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-51) (internal citations omitted)

The Arbitrator is persuaded that during the August 2014 meeting, Mr. Nazemi attempted to extort, or at the very least, to inflict emotional distress upon Dr. Fishman. This conclusion is based upon the fact that the Addendum for $500,000 that Nazemi sought to have Dr. Fishman sign provided no consideration to Respondents. The Addendum simply stated that "the parties agree that this compensation is fair and reasonable given the substantial work performed by MED-LEGAL and the growth in market share and gross revenue increase that Fishman has experienced based on MED-LEGAL's work over the course of the contractual relationship." (Ex 50) Petitioner could not have reasonably expected that Dr. Fishman would agree to this language or pay $500,000 that was not due to MLA, especially in light of the misgivings he had with MLA's performance under the MSA, his repeated complaints to Mr. Nazemi, and his ultimate act of terminating the contract. Petitioner must have recognized that Dr. Fishman would not sign the Addendum, otherwise there is no plausible explanation as to why Mr. Nazemi was prepared to brandish paperwork regarding Dr. Fishman's felony conviction during the meeting. In fact, the only

reason why Mr. Nazemi showed Dr. Fishman that he had evidence of the felony conviction was to force Dr. Fishman's hand. It was certainly an ambush of epic proportions; here Dr. Fishman is lured to a meeting to discuss outstanding accounting issues, only to be confronted with a baseless demand for payment and a threat of exposure.

The actions taken by Mr. Nazemi were extreme and outrageous and not only had the probability of causing emotional distress, but actually did. Dr. Fishman testified that while he chose not to seek medical help, he suffered from sleepless nights and anxiety "about the possibility of those calls being made and my practice being ruined and my ability to make a living significantly being curtailed in the last years of my practice." (RT 1287:2-1288:13)

"With respect to the requirement that the plaintiff show severe emotional distress, this court has set a high bar. 'Severe emotional distress means emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.'" (*Hughes v. Pair, supra,* 46 Cal.4th at 1051) In *Hughes,* the court found that "plaintiff's assertions that she has suffered discomfort, worry, anxiety, upset stomach, concern, and agitation as the result of defendant's comments to her . . . do not comprise 'emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.'" (*Id.*) Still other cases have found that "[h]eadaches, insomnia, anxiety, irritability [are] not 'severe' under California law." (*Paulson v. State Farm Mut. Auto. Ins. Co.* (1994) 867 F.Supp. 911, 919) (internal citations omitted) Damages were also not available to a plaintiff who suffered from "'frustration, depression, nervousness and anxiety,' and [] had not sought any medical care for the emotional distress alleged in his complaint." (*Id*)

Accordingly, while the Arbitrator has no doubt that Petitioner, through Mr. Nazemi, intended to and did inflict emotional distress upon Dr. Fishman, the severity of distress suffered by Dr. Fishman is not compensable through an IIED cause of action.

V. Attorney Fees and Costs

Respondents have moved for an award of attorney fees totaling $1,288,710.00 and costs in the amount of $128,233.18, for a total award of $1,411,943.18. The Arbitrator will consider each of these requests in turn, below.

A. Attorney Fees

Respondents seek an award of attorney fees pursuant to Section 14g of the MSA, which states: "[s]hould either party institute any action or proceeding, including without limitation arbitration, in connection with, relating to or arising out of this Agreement, the prevailing party in any such action or proceeding shall be entitled to receive from the other party all costs and expenses, including reasonable attorney's fees, incurred in connection with such action or proceeding." (Ex. 6) The Arbitrator ruled that Respondents were the prevailing party, and therefore, are entitled to an award of reasonable attorney fees and costs.

Claimant objects to Respondents' application for fees on the grounds that: 1) Respondents have failed to meet their burden of sufficient documentation; 2) the hours spent by counsel were unreasonable; 3) the hourly rate of counsel is excessive; and 4) the use of a lodestar multiplier is improper.

1. Respondents' documentation of fees is appropriate

"In California, an attorney need not submit contemporaneous time records in order to recover attorney fees . . . Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records." (*Martino v. Denevi* (1986) 182 Cal App 3d 553, 558) (internal citations omitted) "In many cases the trial court will be aware of the nature and extent of the attorney's services from its observation of the trial proceedings and the pretrial and discovery proceedings reflected in the file." (*Id.* at 557)

Here, Respondents did not submit contemporaneous billing statements in support of their fee application. Instead, counsel have submitted sworn declarations with the total number of hours spent on the matter together with a statement of their respective hourly rates. (Decl. Kapp ISO Fee Application at ¶¶ 43-44; Decl. Rubin ISO Fee Application at ¶ 16) This, combined with the Arbitrator's familiarity with the case and his observation of the attorney services provided while handling the many issues brought to his attention, is sufficient information to support Respondents' application for fees. Additionally, counsel for Respondents has submitted a spreadsheet of time records spanning from November 2014 to November 2016, which contains a breakdown of the attorney hours and a description of the services provided. (Decl. Kapp ISO Reply at Ex. B)

Petitioner objects to the spreadsheet because it was provided *in camera* and was tardily produced as part of Respondents' Reply Brief. The Arbitrator finds neither argument persuasive. First, Respondents indicated that the time records had both work product and privileged matter. (Decl. Kapp ISO Reply at Ex. C) Nevertheless, counsel offered to provide unredacted versions of the records to counsel for Petitioner, provided that he agree to an "attorney eyes only" arrangement. (*Id.*) Counsel for Petitioner not only declined to do so, but failed to propose an alternative arrangement, arguing that it was too late to submit the records and "thus [Respondents'] request for confidentiality is moot." (*Id.*) Having failed to capitalize on the opportunity to obtain the billings in an unredacted form, Petitioner cannot now claim it was denied due process. Further, at the same time as the Arbitrator ordered Respondents to produce the billings *in camera*, he also ordered Respondents to produce redacted records to Petitioner, which courts have found to be a permissible solution. (*See Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1327)

With respect to Petitioner's argument that the time records were submitted late and are therefore inadmissible, the Arbitrator notes that the spreadsheet was supplied in response to Order No. 2. It is "within the trial court's discretion to request additional information to allow it to

determine the number of hours reasonably worked for inclusion in the lodestar calculation." (*Id.* at 1325) Accordingly, the Arbitrator was entitled to request the records *sua sponte* at any time during the briefing cycle. Moreover, the Arbitrator allowed Petitioner to submit a Supplemental Opposition after receiving the time records. Therefore, Petitioner was not prejudiced by being denied an opportunity to respond.

In short, Respondents have submitted sufficient and timely documentation to allow the Arbitrator to determine a reasonable award of attorney fees.

2. Calculation of Lodestar

"The most widely accepted approach for determining a 'reasonable' fee award is the 'lodestar' method—i.e., multiplying the *number of hours reasonably expended* on the litigation by a *reasonable hourly rate*." (*Chin, Wiseman, et al.,* Cal. Prac. Guide Employment Litigation Ch. 17-H at 17:685 (The Rutter Group 2015), *citing Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* (1986) 478 US 546, 564) (emphasis in original) "The lodestar figure is calculated using the *reasonable rate* for comparable legal services in the local community for noncontingent litigation of the same type, multiplied by the *reasonable number of hours spent* on the case. (*Id.* at 17:686, *citing Ketchum v. Moses* (2001) 24 C4th 1122, 1131-1132) (emphasis in original)

Respondents are seeking a base fee award of $626,595.00 for work incurred by Howard Kapp, the Senior Partner; Daniel Rubin, an associate attorney; and a legal assistant.[3] [4] The total amount sought by Respondents is broken down as follows: 1) Mr. Kapp worked 585.20 hours at a rate of $550 per hour for the sum of $321,860.00; 2) Mr. Rubin worked 869.50 hours at a rate of $350 per hour for the sum of $304,325.00; and 3) the legal assistant worked 10.25 hours at a rate of $40 per hour for the sum of $410.00.

Petitioner objects to the claimed amount, arguing that both the rate and the hours worked are excessive.

a. Reasonable Rate

With respect to the reasonable rate, services compensable are "computed from their reasonable market value. The trial court [is] entitled to use the prevailing billing rates of comparable private attorneys as the 'touchstone' for determination of that value." (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 643) "The determination of the applicable, reasonable hourly rate 'is not made by reference to rates actually charged the prevailing party.' Rather, '[t]he burden is on the plaintiff to produce evidence that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.' 'Affidavits of the [attorney seeking fees] and other attorneys regarding prevailing fees

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[3] The base amount does not include the lodestar multiplier, addressed elsewhere in this Award.

[4] The base amount also does not include "extra rent and office totaling $17,760," which Mr. Kapp has included in the calculation of his fees. The Arbitrator addresses this amount as a cost in *Section V.B*, rather than as an item of fees. (*See* Decl. Kapp ISO Fee Application at ¶ 43)

in the community, and rate determinations in other cases, particularly those setting a rate for the [attorney seeking fees], are satisfactory evidence of the prevailing market rate.'" (*Fitzgerald v. Law Office of Curtis O. Barnes* 2013 WL 1627740 at *2 (E.D. Cal. April 15, 2013)) (internal citations omitted) "In addition, the Court may rely on its own familiarity with the local legal market and knowledge of customary local rates in setting an appropriate hourly rate." (*Id.*)

Here, Mr. Kapp and Mr. Rubin submitted declarations supporting their respective hourly rates. With respect to Mr. Kapp, he appears to have a discrepancy in his hourly rate. He testified that the hourly rate charged to Respondents was $550 per hour, however, Mr. Kapp's retainer agreement with Respondents, which was provided to the Arbitrator *in camera,* provides for a lower hourly rate. There is no indication of when Mr. Kapp raised his rate to $550 per hour, no contemporaneous billing statements submitted to the Arbitrator which reflect his increased rate and no fee schedule attached to the application for fees. The Retainer Agreement specifically states that any rate increases would take place upon 60 days' notice effective the following January 1. The only evidence provided of Mr. Kapp's rate increase was a March 11, 2016 email from Mr. Kapp to Referee Nagle indicating that he charged $550 per hour. (Decl. Kapp ISO Reply at Ex. D) This does not constitute "notice" as contemplated by the retainer, and it does not assist the Arbitrator in determining when the rate increase occurred, and how many of Mr. Kapp's hours should be apportioned to the retainer rate versus the increased rate. In short, there is a failure of proof regarding the $550 per hour rate.

Counsel for Respondents argue that the rate increased due to the "complexity, multitude of distracting and ultimately . . . no productive discover battles, abuse and overall contentiousness that persisted throughout the course of this matter." (Reply at 4) However, as Mr. Kapp readily admits, the contentiousness was not one-sided. (*See, e.g.,* Decl. Kapp ISO Fee Application at ¶ 26) As a result, it is not reasonable to attribute the rate increase entirely to Petitioner's actions.

Because there is no basis to apply the $550 per hour rate, the Arbitrator finds that $500 per hour is a reasonable fee for Mr. Kapp's services in this matter. This was the original rate quoted by counsel to Respondents, and the Arbitrator has determined it appropriate based upon his own familiarity with the local legal market, knowledge of customary local rates and Mr. Kapp's background and experience in the field.

With respect to Mr. Rubin, his reported rate was $350 per hour. Petitioner argues that this rate is unreasonable based upon secondary sources such as the Real Rate Report and the Laffey Matrix. Mr. Rubin began his engagement on the case in December 2015 and worked on the matter through the end in 2016. According to the 2015-2016 Laffey Matrix, which calculates rates for the Washington DC area, an attorney of Mr. Rubin's experience should be earning approximately $331-$343 per hour. (*See* http://www.laffeymatrix.com/see.html; *see also Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, discussing the propriety of relying on the Laffey Matrix as a source for determining reasonable rates) The Arbitrator finds that Los Angeles rates would be commensurate if not higher than Washington DC rates, and therefore, Mr. Rubin's hourly rate of $350 per hour is reasonable.

Finally, Respondents seek an award of fees for the legal assistant engaged in this case. Awards of attorney fees for paralegal time are commonplace and appropriate in California where

the fees are related to the case. (*See Guinn v. Dotson* (1994) 23 Cal.App.4th 262, 268-69) The Arbitrator finds that the fees were related to the case based on the time records submitted, and therefore, Respondents are entitled to seek an award for the legal assistant. Further, the Arbitrator finds that her rate of $40 per hour is reasonable.

b. Reasonable Hours

"The number of hours reasonably worked is determined by looking at the time reasonably spent on a matter, including time spent drafting and revising pleadings, meeting with clients, preparing the case for trial, and handling an appeal." (*Ibid.* at 17:687, *citing Hensley v. Eckerhart* (1983) 461 US 424, 430) "Reasonable hours may include time spent by *more than one attorney* on a particular issue or task, provided there is no duplication of effort." (*Chin, Wiseman, et al.,* Cal. Prac. Guide Employment Litigation Ch. 17-H at 17:685 (The Rutter Group 2015), *citing Davis. V. City & County of San Francisco* (9th Cir. 1992) 976 F.2d 1536, 1544) (emphasis in original)

The Arbitrator has reviewed the time records which were submitted to him *in camera* by Respondents, and has determined that for the most part, counsel has spent a reasonable number of hours engaging in legitimate activities such as drafting pleadings, meeting with the client and preparing for depositions and arbitration. Nevertheless, and without revealing any work product contained within Respondents' records, the Arbitrator finds that there are certain tasks for which an unreasonable amount of time was spent, mostly related to drafting briefs. For example, some of the briefing was billed at between 50 and 100 hours, and more. The Arbitrator is mindful that there are claims of contentiousness and frivolous pleading in this case, however, these claims do not justify the extraordinary number of hours expended in drafting these briefs.

In addition, some of the descriptions in the time records are vague, and do not allow the Arbitrator to assess whether the time spent was reasonable. Examples of these descriptions include: "research," "meeting re Fishman," "discussion with client," and "emails re Fishman case." The Arbitrator is also wary of Respondents' use of block billing in certain instances. "Trial courts retain discretion to penalize block billing when the practice prevents them from discerning which tasks are compensable and which are not." (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1010) The use of block billing in this case makes it difficult for the Arbitrator to determine whether counsel for Respondents spent a reasonable amount of time on the identified tasks, because the time cannot be apportioned. Additionally, it has already been noted that this was an equally contentious litigation, often devolving into conflicts that were unnecessary. This complication must be taken into account when assessing whether all of the hours spent on the case were reasonable or whether some could have been avoided.

Finally, although Respondents are the prevailing party in this action, the Arbitrator notes that Respondents did not succeed on every aspect of their counterclaims. "If ... a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate *may* be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith.... [T]he most critical factor is the degree of success obtained. To be compensable, an attorney's time must be 'reasonable in relation to the success achieved.'" (*Id.* at 1005) (internal citations omitted) Here,

Respondents were successful on the breach of contract claim, but were not awarded anything for the IIED claim. Therefore, to award Respondents *all* of their fees in light of the fact that they did not obtain total success.

As a result of the foregoing, the Arbitrator finds that Respondents' request for attorney fees should be reduced by one-third. Respondents are therefore entitled to an award of $418,257.00 in base attorney fees.[5]

3. The use of a lodestar multiplier is unreasonable

Respondents contend that the Arbitrator should award a multiplier of "2" to its fees, due to "the risk of the case, and the abnormally contentious nature of every aspect of this case . . ." (Decl. Kapp ISO Fee Application at ¶ 47)

It is well settled that "the purpose of a fee enhancement is primarily to compensate the attorney for the prevailing party at a rate reflecting the risk of nonpayment in contingency cases as a class." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138) Further, "a trial court should award a multiplier for exceptional representation only when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation. Otherwise, the fee award will result in unfair double counting and be unreasonable. Nor should a fee enhancement be imposed for the purpose of punishing the losing party." (*Id.* at 1139)

"[T]he party seeking a fee enhancement bears the burden of proof." (*Id.* at 1138) The Arbitrator finds that Respondents have not met this burden. First, this is not a contingency case. Both the retainer agreement and counsel's declarations indicate that this matter was billed by the hour. Therefore, there is no need for the Arbitrator to compensate Respondents' counsel at a rate reflecting the risk of nonpayment present in contingency cases.

Second, Respondents have not demonstrated that this matter demanded "exceptional representation" over and above what was provided by counsel and included in the base lodestar calculation. This case involved straightforward claims of breach of contract, fraud, concealment and intentional infliction of emotional distress. These claims were neither complex nor challenging in nature. The only challenging part of this litigation was the high level of discord between counsel, which was a wound inflicted equally by both sides. Contentiousness, when borne by both parties, does not form the basis for the application of a lodestar multiplier. Accordingly, the Arbitrator will not apply a multiplier to the base fee award.

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[5] Mr. Kapp: $500/hour x 585.20 hours = $292,600. $292,600 x 1/3 = $87,780. $292,600 - $87,780 = $204,820.
Mr. Rubin: $350/hour x 869.50 hours = $304,325. $304,325 x 1/3 = $91,298. $304,325 - $91,298 = $213,027.
Legal Assistant: The Arbitrator finds that the requested amount of $410 is reasonable and will not be adjusted.
Total Fee Award: $204,820 + $213,027 + $410 = $418,257.00

B. Costs

As the prevailing party, Respondents are also entitled to an award of costs pursuant to Section 14g of the MSA. (Ex. 6) In accord with this provision, Respondents have requested $128,233.18 in costs, a breakdown of which was submitted as part of the time records produced *in camera* to the Arbitrator.

A review of the time records reveals that Respondents seek a cost award for the following items: 1) extra rent and office parking for Mr. Rubin; 2) court reporter and transcript fees; 3) JAMS fees; 4) copying and phone charges; 5) parking and mileage for travel to hearings and depositions; 5) mailing fees; and 6) service of process fees.[6]

Typically, CCP section 1033.5 enumerates which costs are recoverable. Under CCP section 1033.5, some of the costs claimed by Respondents would not be permitted, such as transcripts not ordered by the court or photocopying of documents other than exhibits. (*See* CCP § 1033.5(b)(3) and (b)(5)) However, in an arbitration setting, the type of fees, costs and expenses that are recoverable are a matter of contract interpretation. Here, section 14h of the MSA, which governs disputes, states that: "all disputes, claims or controversies arising in connection with, relating to, or arising out of this Agreement, shall be settled by arbitration in accordance with the arbitration rules and procedures of JAMS . . ." Therefore, the Arbitrator is not bound by the Code of Civil Procedure, and instead must look to the express provisions of the Arbitration Agreement in order to determine the entitlement of the prevailing party. Section 14g of the MSA contains a *mandatory* fee and cost provision, stating that the prevailing party "*shall*" recover "*all* costs and expenses . . ." (Ex. 6) (emphasis added)

"Generally, when a contract provision states only that a prevailing party is entitled to 'reasonable attorney's fees and costs,' or similar nonspecific language, courts have held that such language must be interpreted in light of the limits set forth in Code of Civil Procedure section 1033.5. Nevertheless, '[w]hile it is reasonable to interpret a general contractual cost provision by reference to an established statutory definition of costs, we do not discern any legislative intent to prevent sophisticated parties from freely choosing a broader standard authorizing recovery of reasonable litigation charges and expenses.'" (*Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1065; *see also Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 492)

With respect to the MSA, the parties chose a very broad provision; there is no limitation as to what costs or expenses are recoverable, and no mention of CCP § 1033.5. On the contrary, the parties specifically stated that *all* costs and expenses were recoverable. If the parties intended to adhere to the limitations enumerated in the Code of Civil Procedure, they could have so specified. Instead, Petitioner, who drafted the MSA, made no attempt to exclude the recovery of any type of cost.

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[6] The Arbitrator finds that although Respondents submitted these costs as part of the time records *in camera,* nothing about the costs reflect information of a privileged nature. Therefore, by revealing the various categories of costs claimed, the Arbitrator is not violating any claim of privilege.

Respondents have presented documentation of costs incurred in the form of checks, credit card charges, and invoices for the following amounts:

1.	JAMS Fees	$78,917.39
2.	Copies	2,612.39
3.	Court reporter/transcript fees	11,972.63
4.	Service of Process	44.10
5.	Extra Express	303.18
6.	Sanctions	3,000.00
	Total	96,849.31

Any costs in excess of the foregoing, including extra rent, parking, mileage, and the like, will be disallowed due to the lack of documentation. Consequently, the Arbitrator finds that the foregoing documented costs requested by Respondents in the sum of $96,849.31 are reasonable in nature, incurred in connection with this litigation and are recoverable. Therefore, Respondents are entitled to a cost award in the amount of $96,849.31.

VI. Final Award

1. Petitioner MED-LEGAL ASSOCIATES, INC. shall take nothing on its claim.

2. On their counter-claim, Respondents BRUCE E. FISHMAN, M.D., F.I.C.S., INC., a California medical professional corporation and BRUCE E. FISHMAN, M.D., an individual, are hereby awarded the following sum to be paid by Petitioner MED-LEGAL ASSOCIATES, INC.: $113,400.00.

3. Respondents BRUCE E. FISHMAN, M.D., F.I.C.S., INC., a California medical professional corporation and BRUCE E. FISHMAN, M.D., an individual are the prevailing parties in this arbitration. Pursuant to Section 14.g. of the MSA cited herein Respondents BRUCE E. FISHMAN, M.D., F.I.C.S., INC., a California medical professional corporation and BRUCE E. FISHMAN, M.D., an individual, are additionally awarded $418,257.00 in attorney fees and $96,849.31 in costs and expenses to be paid by Petitioner MED-LEGAL ASSOCIATES, INC.

This Award is in full resolution of all claims and counterclaims submitted in this Arbitration. All claims not expressly granted herein are hereby denied.

DATED: February 2, 2017

Viggo Boserup
Arbitrator

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Med-Legal Associates, Inc. vs. Fishman M.D., Bruce E., et al.
Reference No. 1220050164

I, Reina Feazell, not a party to the within action, hereby declare that on February 02, 2017, I served the attached Final Award on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Orange, CALIFORNIA, addressed as follows:

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I declare under penalty of perjury the foregoing to be true and correct. Executed at Orange, CALIFORNIA on February 02, 2017.

Reina Feazell
rfeazell@jamsadr.com