

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

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YC MD, P.C. d/b/a New York Urologic Institute, : **PETITION IN SUPPORT OF**  
 : **MOTION TO CONFIRM**  
 Petitioner, : **ARBITRATION AWARD**

-against-

: Index No. \_\_\_\_\_

DAVID SHUSTERMAN, M.D.,

Respondent.

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Petitioner YC MD, P.C. d/b/a New York Urologic Institute ("YCMD") respectfully

shows:

INTRODUCTION

1. In the underlying arbitration, Respondent David A. Shusterman, M.D. ("Respondent" or "Dr. Shusterman") commenced an arbitration proceeding, *In the Matter of the Arbitration David A. Shusterman, M.D. against YC MD, P.D, d/b/a New York Urologic Institute*, AHLA Case No. A-112210-881, against YCMD seeking over \$7,845,891, claiming that he was an owner of YCMD and entitled to unpaid earnings.

2. YCMD denied Dr. Shusterman's allegations, which contradicted the plain meaning of the parties' employment agreement, and counterclaimed against Dr. Shusterman for monies that Dr. Shusterman improperly retained from YCMD as a result of moonlighting activities Dr. Shusterman performed while working for YCMD.

3. Over five years, the parties litigated the dispute and held a hearing over the course of 8 days. Upon completion of the hearing, the Panel denied all of Dr. Shusterman's claims in

the proceeding and found in favor of YCMD on one of its counterclaims and awarded YCMD \$6,925.00 in damages. A copy of that Decision and Order is attached as Exhibit 1 and fully incorporated here. The Panel also found YCMD to be the “prevailing party” under the terms of an attorney’s fee provision in the parties’ employment agreement and awarded YCMD the costs and attorney’s fees it incurred in defense of the action and prosecution of its counterclaims.

4. By a Final Award of Paul E. Knag, Esq., of the American Health Lawyers Association, dated December 6, 2016, the Arbitrator entered an award of damages due to YCMD in the amount of \$441,106.52. *See* Exhibit 2.

~~5. YCMD now moves this Court to confirm the Final Arbitration Ruling under CPLR 7511.~~

#### PARTIES

6. Plaintiff YC MD, P.C. d/b/a New York Urologic Institute was a domestic professional corporation organized under the laws of the State of New York. YCMD is now dissolved, and all of YCMD’s receivables were assigned to Accord Physicians.

7. YCMD’s principal place of business was located at 26-32 East 14<sup>th</sup> Street, Brooklyn, New York 11235.

8. Respondent David A. Shusterman, M.D. is an individual physician licensed to practice medicine in the State of New York, specializing in urology.

9. Upon information and belief, Dr. Shusterman maintains an unrestricted license to practice medical in the State of New York.

10. Upon information and belief, Dr. Shusterman maintains a residence at 120 West 23<sup>rd</sup> Street, Apt. 3B, New York, New York 10001.

VENUE

11. Venue is proper under CPLR § 7502(a)(i), which states that “other proceedings affecting arbitration are to be brought in the county where at least one of the parties resides or is doing business or where the arbitration was held or is pending.” YCMD maintained its principle place of business in King’s County.

RELIEF REQUESTED

12. By this motion, the Plaintiff seeks an order under CPLR § 7510 confirming the December 6, 2016 Final Arbitration Ruling, entered by Paul E. Knag, Esq., in the proceeding held in accordance with the rules of the American Health Lawyers Association entitled, *In the Matter of the Arbitration David A. Shusterman, M.D. against YC MD, P.D, d/b/a New York Urologic Institute*, AHLA Case No. A-112210-881. Plaintiff seeks to confirm the Final Arbitration Ruling totaling \$441,106.52 (Four Hundred Forty-One Thousand One Hundred Six and 52/100 Dollars) to YCMD and have judgment entered thereon. The amount due is based on the following breakdown of the Final Arbitration Ruling:

- (a) The amount of \$6,925.00 (Six Thousand Nine Hundred Twenty-Five and 00/100 Dollars), plus appropriate interest thereon;
- (b) The amount of \$386,265.73 in attorney’s fees (Three Hundred Eighty-Six Thousand Two Hundred Sixty-Five and 73/100 Dollars), plus appropriate interest thereon; and
- (c) The amount of \$47,915.79 in costs (Forty-Seven Thousand Nine Hundred Fifteen and 79/100 Dollars), plus appropriate interest thereon.

13. As explained below, because the Final Arbitration Ruling was made less than one year before YCMD brings this motion to confirm – and Respondent is not entitled to vacatur on any of the grounds specified in CPLR § 7511 – this application is timely and the Court should immediately confirm the Final Arbitration Ruling and enter judgment for YCMD in accordance with its provisions.

#### PROCEDURAL HISTORY

14. Dr. Shusterman completed medical school and his residency in 2007. After spending less than a year providing urology services for an entity named Columbus Medical Institute of New York (later taken over by New York University and hereinafter referred to collectively as “Columbus/NYU”), he then signed an employment agreement with YCMD, effective April 4, 2008 (the “Agreement”), in which he was to provide urology services in exchange for compensation specified in the Agreement.

15. Sometime in the Spring of 2009, YCMD discovered that, while employed by YCMD, Dr. Shusterman was providing professional services for medically-related patient care activity on behalf of Columbus/NYU and another entity named Metropolitan Lithotripter Associates P.C. (“Metropolitan”), even to YCMD patients. Dr. Shusterman was doing so in direct violation of the plain and unequivocal language of the Agreement, pocketing the monies he received from those two entities for such professional services, rather than conveying such monies to YCMD. Based upon Dr. Shusterman’s wrongful conversion of such monies, YCMD terminated Dr. Shusterman’s employment in May 2009, but, at Dr. Shusterman’s request, allowed him to work at the practice for additional time to allow him the opportunity to obtain credentialing he needed to provide medical services elsewhere. Proving that no good deed goes

unpunished, YCMD soon learned that Dr. Shusterman, among other things, was badmouthing YCMD to patients and other third parties while still working for YCMD, and it immediately terminated Dr. Shusterman's employment on June 18, 2009.

### The Arbitration Proceedings

16. In April 2011, Dr. Shusterman commenced an arbitration proceeding with the AHLA pursuant to the choice of venue provision in the Agreement. Dr. Shusterman's Specification of Claims (the "Claims") contained the following thirteen causes of action: (a) breach of contract; (b) breach of oral contract; (c) intentional misrepresentation; (d) fraud; (e) fraudulent inducement of contract; (f) unjust enrichment; (g) breach of implied covenant of good faith and fair dealing; (h) violation of general business law; (i) quantum meruit; (j) promissory and equitable estoppel; (k) breach of fiduciary duty; (l) slander; and (m) accounting. In simple terms, despite casting his claims in myriad causes of action, Dr. Shusterman asserted two claims: (1) YCMD failed to compensate Dr. Shusterman fully for the professional services he rendered while employed by YCMD (the "Compensation Claim"); and (2) Dr. Shusterman was promised to be a full "partner" of YCMD (the "Ownership Claim").

17. YCMD responded to the Claims, denied the material allegations of wrongdoing and asserted counterclaims for Dr. Shusterman's admitted failure to turn over the monies that he made while employed by YCMD by providing professional services at Columbus/NYU and Metropolitan and for employee disloyalty and the disgorgement of the salary paid to Dr. Shusterman.

18. YCMD then moved for summary judgment dismissal of several of Dr. Shusterman's Claims, including the Ownership Claim and Dr. Shusterman's breach of oral

contract claim as barred by the Agreement's merger clause. The Panel granted in part and denied in part, with right to renew after discovery, YCMD's motion. Specifically, the Panel dismissed Dr. Shusterman's breach of oral contract claim, dismissed three of Dr. Shusterman's fraud claims and granted Dr. Shusterman leave to amend his Claims to more properly specify the ownership claim.

19. Dr. Shusterman amended the Claims, but replead the same type of allegations that undermined his Ownership claim; namely that an agreement to agree is an unenforceable promise without the necessary definite terms. Accordingly, YCMD moved for summary judgment dismissal of the replead fraud claims. The Panel denied that motion and reserved decision on the issue of an unenforceable agreement to agree for the hearing.

#### Discovery Proceedings

20. Thereafter, the parties conducted lengthy discovery proceedings over 4 years, predominately related to Dr. Shusterman's Claims and based on Dr. Shusterman's discovery requests. The parties completed, negotiated, and executed a So-Ordered Protective Order for the production of Confidential and Protected Health Information. The legal services provided during this time related to discovery included drafting discovery demands, responding and objecting to Respondents' discovery demands, and reviewing and producing YCMD's files, as well as reviewing and analyzing Respondent's document productions. This required extensive communications and correspondence with the client and his staff.

21. In total, YCMD produced thousands of pages of documents, including voluminous billing records and correspondence. Respondent likewise produced documents and the Firm spent significant time reviewing and analyzing both productions. As an example of the

type of services and analysis required relates to Respondent's unsubstantiated allegation that he brought hundreds of patients to YCMD. The only support for this supposition was a multipage list of names, which required a detailed analysis by YCMD.

22. The parties also engaged in several discovery disputes, which resulted in several orders from the Panel. As part of discovery and the disputes referenced, Respondent demanded access to YCMD's back office, including access to YCMD's billing and EMR systems for his attorney and expert to review and analyze. That required two separate trips to YCMD's facility in the presence of counsel. Ultimately, these trips and the work surrounded them were a waste of time as Respondent never even submitted an expert report related to these findings. Instead, Respondent's expert offered his general opinions as to Respondent's claims and failed to provide an actual damages analysis based on his review and analysis of the YCMD systems for which Respondent demanded access or consistent with the plain language of Respondent's employment agreement.

23. Respondent was deposed and Respondent took the depositions of the following four individuals on behalf of Respondent: Vitaly Raykhman, Yelena Raykhman, Yuli Chalik, and Svetlana Rozinski. Each deposition was a full day.

#### The Hearing And Post-Hearing Submissions

24. Upon completion of discovery, the matter proceeded to arbitration, which was concluded over the course of two years and a total of 8 days of hearings on March 18, 2014, March 19, 2014, April 30, 2014, May 1, 2014, March 3, 2015, March 4, 2015, March 6, 2015 and June 23, 2016. Several of the required hearing days were a direct result of Respondent's

insistence that additional witnesses be called in support of his claims, including Respondent's desire to call a witness from NYU Columbus.

25. The Hearing was held in Manhattan and included testimony of 6 witnesses and the introduction of 61 Hearing Exhibits.

26. After the completion of the hearing, the parties submitted lengthy post-hearing briefs. YCMD had suggested no reply briefs to limit costs and expenses, but Dr. Shusterman requested the opportunity to submit reply briefs. Accordingly, reply briefs were prepared and submitted. A copy of the main and reply briefs of YCMD are attached hereto as Exhibits 3 and 4, and fully incorporated herein.

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THE ARBITRATOR ISSUES AN AWARD IN FAVOR OF YCMD

27. By Order of the Panel dated October 21, 2016 (the "Preliminary Arbitration Ruling"), the Panel denied all of Dr. Shusterman's Claims for relief, awarded YCMD damages in the amount of \$6,925.00, and found YCMD to be the prevailing party under the terms of the parties' Agreement. *See* Exhibit 1. The Panel also requested YCMD to submit its request for attorney's fees and costs, including an Affidavit from YCMD's counsel as to fees and costs and the reasonableness thereof. *Id.*

28. On October 31, 2016, YCMD submitted the Affidavit requested and supporting documentation for its attorney's fees and costs. YCMD also moved to reargue one limited issue in the Preliminary Arbitration Ruling, which related to damages associated with Dr. Shusterman's moonlighting at NYU Columbus. Attached hereto is Exhibit 5 and fully incorporated herein is a copy of the Affidavit. In response, Dr. Shusterman cross-moved to set



aside the Preliminary Arbitration Ruling, including the finding that YCMD was the prevailing party in the arbitration. Dr. Shusterman did not argue that the attorney's fees sought were unreasonable.

29. By Order dated December 6, 2016, the Panel issued its Final Arbitration Ruling. *See* Exhibit 1. In the Final Arbitration Ruling, the Panel denied Dr. Shusterman's motion to reargue in its entirety, including the denial of Dr. Shusterman's claims, denied YCMD's motion to reargue, upheld its prior award of damages to YCMD on its counterclaim in the amount of \$6,925.00, and based on the submissions of YCMD, awarded YCMD \$386,265.73 in attorney's fees and \$47,915.79 in costs, for a total of \$441,106.52. *See* Exhibit 1.

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THIS COURT SHOULD CONFIRM THE AWARD, AS AFFIRMED,  
AND ENTER JUDGMENT IN ACCORDANCE WITH ITS PROVISIONS

30. CPLR § 7510 provides that “[t]he court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511.”

31. There is no question here that YCMD has brought this motion to confirm the Award within one year after its delivery to YCMD. As referenced above, the Final Arbitration Ruling, the American Health Lawyers Association delivered the Arbitration Award to the parties on December 6, 2016.

32. Respondent is not entitled to vacatur on any of the grounds specified in CPLR § 7511, which only gives the Court the authority to vacate a final arbitration award if an arbitrator “exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made...” CPLR § 7511(b)(1)(iii).

33. Accordingly, this Court should enter judgment on the Award under CPLR § 7514(a) in the principal amount of \$441,106.52, apportioned as described herein, plus appropriate interest thereon, together with the costs, disbursements and attorneys' fees for this proceeding.

CONCLUSION

34. For all the reasons set forth above, this Court should grant YCMD's motion in its entirety.

WHEREFORE, Petitioner respectfully prays that an order be made herein confirming the Final Arbitration Ruling and directing that judgment be entered thereon in this Court, together with interest from the 6<sup>th</sup> day of December, 2016, and costs and disbursements as taxed, and attorneys' fees, and that Plaintiff have such other and further relief as the Court deems just and appropriate.

Dated: Great Neck, New York  
January 4, 2017

GARFUNKEL WILD, P.C.  
*Attorneys for Petitioner*

By: 

Andrew L. Zwerling  
Salvatore Puccio

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(516) 393-2200

To: Margarita Rubin, Esq.  
*Attorney for Respondent*  
8802 136th St.  
Richmond Hill, NY 11418

**VERIFICATION**

I, Salvatore Puccio, an attorney duly authorized to practice law before the Courts of the State of New York and a partner of the law firm of Garfunkel Wild, P.C., attorneys for the petitioner, affirm under the penalties of perjury that I have read the foregoing petition and know the contents thereof. The same is true to my own knowledge except as to those matters stated to be alleged on information and belief, and as to those matters, I believe them to be true. The source of my knowledge, information and belief are derived from conversations with employees of the petitioner, examination of books, records and papers furnished to me by the petitioner and the Firm's own independent investigation, and involvement in the aforementioned arbitration proceedings. The reason why this verification is made by me and not by the petitioner is because the petitioner is not within Nassau County, where Garfunkel Wild, P.C. maintains its office.



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Salvatore Puccio, Esq.

Sworn to before me this  
4<sup>th</sup> day of January, 2017

  
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NOTARY PUBLIC

**BARBARA R. BALESTRIERI**  
Notary Public, State of New York  
No. 01BA5057826  
Qualified in Nassau County  
Commission Expires 3/25/2018