To Be Argued By:
Salvatore Puccio
Time Requested: 15 Minutes

New York Supreme Court

APPELLATE DIVISION — SECOND DEPARTMENT

Docket No.
2019-09315

In the Matter of the Application of

YC MD, P.C. d/b/a
NEW YORK UROLOGIC INSTITUTE,

Petitioner-Respondent,

against

DAVID SHUSTERMAN, M.D.,

Respondent-Appellant.

BRIEF FOR PETITIONER-RESPONDENT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the Supreme Court properly confirm the arbitration award and enter judgment in favor of Respondent where Appellant failed to establish any ground for vacatur under CPLR § 7511, failed to raise any triable issue of fact, and failed to preserve his objection to the sufficiency of the evidence.

Answer: Yes. Appellant failed to preserve his objection for appellate review. Regardless, the Supreme Court properly confirmed the arbitration award because Appellant is not entitled to vacatur under CPLR § 7511 and there are no triable issues of fact.

2. Did the Supreme Court properly confirm the Arbitrator's award of costs and attorneys' fees to Respondent where Respondent defeated all of Appellant's claims, recovered damages on a counterclaim, and was declared the "prevailing party."

Answer: Yes. The Supreme Court properly confirmed the arbitrator's award of costs and attorneys' fees.

3. Did the Supreme Court properly hold that Respondent, a party to the underlying arbitration proceeding, had standing to confirm the arbitrator's award.

Answer: Yes. The Supreme Court properly determined that Respondent had standing to confirm the award.

PRELIMINARY STATEMENT

This appeal is the culmination of Appellant's multi-year quest to avoid compliance with an arbitration award. At best, Appellant is wrong on both the facts and the law. At worst, Appellant misstates the facts to evade the law. Either way, Respondent must prevail – and this Court should affirm the judgment and order entered by the Supreme Court. As it stands, for five-plus years and through sharp practices Appellant has improperly denied a medical practice of nearly $650,000 to which it is legally entitled pursuant to a valid arbitration award and judgment.

On January 4, 2017, Respondent YC MD, P.C. d/b/a New York Urologic Institute ("YCMD" or "Respondent") commenced an Article 75 proceeding to confirm the arbitration award issued by Paul Knag, Esq, dated December 6, 2016, including an award of reasonable costs and attorneys' fees (the "Final Award"). After a two-and-a-half-year saga involving multiple rounds of fruitless motion practice initiated by Appellant, several defaults by Appellant, and a baseless motion to reargue, which Respondent swiftly defeated on the merits, the Supreme Court entered a final judgment in favor of Respondent on June 25, 2019. In early August 2019, Appellant filed and served a Notice of Appeal, and the delay tactics began anew. Now, after more than two years, multiple missed deadlines, and five enlargements of time, Appellant finally perfected this appeal on August 31, 2021 – and his quest to evade the arbitration award continues.

Putting aside the track record of delay and questionable litigation tactics, Appellant's challenge to the Final Award is meritless on its face. First, Respondent defeated *every single one* of Appellant's claims seeking millions of dollars at the arbitration hearing, *and* successfully prosecuted a counterclaim. By any measure, Respondent was the "prevailing party" and is entitled to recover reasonable costs and attorneys' fees under the parties' written agreement. Second, as a named party to the underlying arbitration commenced by Appellant, Respondent unquestionably has standing to confirm the Final Award. Last, Appellant failed to preserve his objection to the sufficiency of the evidence submitted in support of Respondent's's petition to confirm the Final Award, and failed to establish any triable issue of fact or grounds to vacate the Final Award. For these reasons, the Court should affirm the Supreme Court's order confirming the Final Award, and compel Appellant to satisfy his long-overdue obligations to Respondent.

FACTUAL & PROCEDURAL BACKGROUND

The operative facts of this case are straightforward. Unfortunately, Appellant's delay tactics have needlessly complicated the procedural history.

The Underlying Arbitration and the Final Award

Appellant, a former employee of Respondent, commenced the underlying arbitration proceeding in 2011. Appellant brought than a dozen causes of action against Respondent and sought nearly $8 million in damages. Appellant also

claimed unpaid earnings based on a purported ownership interest in Respondent. Respondent denied these allegations, which plainly contradicted the terms of Appellant's employment agreement. Respondent also counterclaimed to recover money retained by Appellant from various moonlighting activities, in violation of his employment agreement.

The parties litigated the dispute over five-plus years, culminating in eight days of testimony and two rounds of post-hearing briefs. (The litigation delays and costs were the continued byproduct of Appellant's overbroad discovery demands, including site inspections and in-person expert analysis of YCMD's operations – all of which failed.) On October 21, 2016, the assigned arbitrator from the American Health Lawyers Association issued a preliminary ruling denying *all* of Appellant's claims for relief (the "Preliminary Award"). The arbitrator also found in favor of Respondent on one of its counterclaims, and awarded Respondent $6,925.00 in damages. R. 29–36.[1] Further, the arbitrator found Respondent to be the "prevailing party" under an express fee-shifting provision in the parties' agreement, and awarded Respondent all reasonable costs and attorneys' fees incurred in defense of Appellant's claims. *Id.* Respondent subsequently submitted an Affirmation and other supporting documentation reflecting its reasonable attorneys' fees and costs.

[1] "R." refers to the Record on Appeal.

Id. at 38; 248–255. Appellant then moved to set aside the Preliminary Award. *Id.* at 38.

By Order dated December 6, 2016, the arbitrator issued the Final Award. *Id.* at 38–39. The Final Award denied Appellant's motion to reargue in its entirety – upholding the denial of *all* of Dr. Shusterman's claims – upheld the award of damages to Respondent on its counterclaim in the amount of $6,925.00, and awarded Respondent $386,265.73 in attorneys' fees and $47,915.79 in costs, for a total award of $441,106.52. *Id.* At no time did Appellant contest the reasonableness of Respondent's costs and attorneys' fees. *Id.* at 38.

Respondent Moves to Confirm the Final Award

By petition dated January 4, 2017 (the "Petition"), Respondent moved to confirm the Final Award in the Supreme Court of Kings County. *Id.* at 17–257. Both as a courtesy and to save costs, Resppondent served Dr. Shusterman's arbitration counsel, Margarita Rubin, Esq., with a copy of the motion papers. On or about March 6, 2017, Mr. Michael B. Wolk, Appellant's counsel before Mr. Marino, appeared for Appellant. *Id.* at 261. After discussion among counsel, Mr. Wolk requested an extension of time to oppose the Petition due to personal/family matters. Given the circumstances described, Respondent consented to Mr. Wolk's request for an extension. Accordingly, Appellant was granted until Friday, March 30, 2017 to submit its opposition to the Petition. *Id.* at 262.

Appellant defaulted on March 30, 2017 when he failed to serve opposition papers. Again, given the circumstances described by Appellant's then-counsel, and as a professional courtesy, Respondent's counsel contacted Mr. Wolk about the default and agreed to further extend Appellant's time to oppose the Petition. Accordingly, the parties submitted a joint stipulation making Appellant's opposition papers due April 30, 2017. *Id.* at 264.

Appellant again defaulted on the April 30 deadline. Nearly two weeks after this default, Appellant's counsel requested another extension, indicating that he was dealing with a "family medical issue" that was "far worse and [more] serious" than expected. *Id.* at 403. Appellant's counsel offered to mark this extension "final," and the parties agreed to a new briefing schedule with Appellant's opposition papers due June 9, 2017. *Id.* at 265.

Appellant then defaulted for a third time, and requested *yet another* extension nearly one week after this default. Given the pattern of defaults and mounting delays, Respondent refused to consent and requested that the Supreme Court decide the Petition without opposition. *Id.* at 266–267.

Appellant Files An Untimely Motion To Dismiss

In response, on June 15, 2017, Appellant filed a motion to dismiss for lack of personal jurisdiction, which was made returnable on July 17, 2017. *Id.* at 268. Clearly, the motion was untimely – but particularly notable was that Appellant

managed to produce the motion mere *hours* after denial of his fourth request for an extension of time to oppose the Petition (which had been pending for over five months), a fact that undermined the credibility of Appellant's claimed need for months of extensions, the purported family/personal matter.

Respondent did not submit formal opposition to the motion to dismiss. Instead, Respondent re-served Appellant on June 29, 2017 – eliminating the purported defect and rendering Appellant's motion moot. R. 545 (This despite YCMD's understanding that Appellant's counsel had acknowledged service of the Petition *and* waived any jurisdictional defenses by executing three separate stipulations. *See* R. 262; 264–265.) Regardless, Appellant later failed to appear in court on his chosen return date, and the Court struck his motion to dismiss from its calendar.

Appellant Fails to Appear on June 26, 2017

On June 26, 2017, YCMD appeared before the Court on the return date of the Petition. Dr. Shusterman failed to appear. As yet another courtesy, YCMD agreed to adjourn the Petition to July 17, 2017, to be addressed simultaneously with Dr. Shusterman's motion to dismiss – this despite Appellant's *fourth* default on the Petition.

Dr. Shusterman Fails to Appear on July 17, 2017, and Default is Entered

On July 1, 2017, Mr. Wolk sent an e-mail offering to withdraw the motion to dismiss and submit opposition to the Petition, *if* Respondent would stipulate to the same. R. 405. In response, Respondent's counsel called and e-mailed Mr. Wolk to follow up. *Id.* at 409. After no initial response or return call, Mr. Wolk indicated that he was away until July 12, 2017. *Id.* Accordingly, on July 13, 2017, Respondent prepared and sent a stipulation marking off Appellant's motion to dismiss, and granting Appellant yet another extension of time to oppose the Petition. *Id.* In response, Appellant's counsel indicated he would "confer with [his] client and revert." *Id.* at 413. Respondent's counsel contacted Mr. Wolk for an update on July 14, 2017, and received no response. *Id.* at 419. Given Appellant's track record of default and delay, Respondent took no chances and appeared in Court on July 17, 2017 – the return date of both the Petition *and* Appellant's motion to dismiss. As a courtesy, Respondent even informed Appellant's counsel of its intent to appear on July 17 if the proposed stipulation was not executed. *Id.* at 409. True to form, Appellant failed to appear, and the Court entered a default judgment against him (the "Default"). *Id.* at 279–280.

Dr. Shusterman Moves to Vacate the Default and Answers the Petition

On August 3, 2017, Appellant filed a motion to vacate the Default and to dismiss for lack of personal jurisdiction, and the parties entered a stipulation staying

enforcement of the Default. R. 282–318. On August 21, Respondent filed opposition papers and cross-moved for costs and sanctions. *Id.* at 319. On October 17, 2017, the Court issued an order rescheduling the return date and directing Respondent to re-serve the Petition. *Id. a*t 462. Respondent promptly complied. *Id.* at 464–465.

Subsequently, on December 8, 2017, Appellant filed an (untimely) answer to the Petition (the "Answer"). *Id.* at 466. Respondent moved to strike the Answer on December 27, 2017. *Id.* at 476. In response, Appellant cross-moved for default judgment on his counterclaims, and for summary judgment dismissal of the Petition on the ground that Respondent YCMD lacked standing to confirm the Final Award. *Id.* at 605. Shockingly, in support of this motion, Appellant argued that YCMD was a "nonexistent entity" which was never legally incorporated under New York law. *Id.* at 613. Respondent easily disproved this allegation in its opposition papers, filed on January 26, 2018. *Id.* at 637. Appellant then shifted the narrative. Specifically, Appellant argued that Respondent lacked standing because YCMD had been dissolved and, as part of winding up its affairs, had assigned its receivables to a new corporate entity, Accord Physicians, PLLC ("Accord"). *Id.* at 672–674. Respondent preemptively addressed this allegation in its opposition papers, and it was easily dispensed with. *Id.* at 629–636. On April 12, 2018, the Court issued a Decision and Order directing the parties to appear for oral argument on April 30, 2018. *Id.* at 677.

The Court Enters Judgment in Favor of Respondent

After the April 30, 2018 appearance, the Court issued an Order on the merits, dated May 21, 2018, granting the Petition in its entirety and confirming the Final Award. R. 687. The Court also deemed Appellant's defenses "including lack of standing and lack of capacity [to sue] … without merit," and dismissed all of Appellant's counterclaims. *Id.* The Court entered judgment on May 23, 2018, and Respondent served Appellant with a Notice of Entry the same day. *Id.* at 688–690.

Appellant Moves to Stay Enforcement of the Judgment

On June 30, 2018, Appellant filed an Order to Show Cause and Motion to Reargue, seeking to stay enforcement of the judgment. Strangely, Appellant argued that the Court's May 21, 2018 Order amounted to a "*sua sponte*" determination on the merits. R. 728. The Court stayed enforcement of the May 23 Order, pending Respondent's opposition and the Court's resolution of the motion. *Id.* at 808–810. Respondent timely filed opposition papers on August 10, 2018, and Appellant replied on September 24, 2018. *Id.* at 812; 904. At no time between the filing of the Petition (January 4, 2017) and September 24, 2018 did Appellant challenge the admissibility of any evidence submitted by Respondent in support of the Petition.

The Court Enters Final Judgment in Favor of Respondent

By Decision and Order dated January 30, 2019, the Court denied Appellant's motion in its entirety. R. 913–915. The Court found "no merit" in Appellant's

"baseless" argument that the Court's determination was made *sua sponte*. *Id.* Moreover, the Court found that Appellant's motion to reargue was untimely and, once again, meritless in any event. *Id.* In particular, the Court found (1) no grounds to vacate the Final Award under CPLR § 7511; (2) no grounds to modify the Final Award under CPLR §§ 7510–7511; (3) no basis to disturb the arbitrator's finding that YCMD was the "prevailing party" entitled to costs and attorneys' fees; and (4) no merit to Appellant's contention that YCMD's dissolution affected its standing to confirm the Final Award. *Id.* The Court entered judgment on February 7, 2019, and Respondent served Appellant with a Notice of Entry on February 12, 2019. *Id.* at 916.

On June 25, 2019, the Clerk of Court signed and entered a judgment in the amount of $648, 245.57, inclusive of statutory interest, in favor of Respondent (the "Final Judgment"). *Id.* at 925–927. Respondent served Appellant with a Notice of Entry on July 17, 2019. *Id.* at 928. With respect to execution, the Final Judgment clearly delineated the respective roles of both YCMD and Accord. *Id.* at 925–927.

Appellant Fails to Perfect the Appeal Despite Four Enlargements[2]

Appellant filed a Notice of Appeal on August 6, 2019, and was unable to meet his original February 2020 deadline to perfect the appeal. R. 2. Appellant moved

[2] The remainder of the "Factual and Procedural Background" section references multiple filings related to Appellant's requests for enlargements of time to perfect the appeal. All such filings were duly submitted via the Court's digital portal, pursuant to 22 NYCRR § 670.4, and Respondent respectfully requests that the Court take judicial notice of same.

for and received a sixty-day enlargement – up to and including April 6, 2020. Respondent did not object to Appellant's request. Unfortunately, in mid-March 2020, the COVID-19 pandemic struck, and this Court was forced to suspend all filing deadlines effective March 17, 2020. Approximately four months passed before this Court established new deadlines for unperfected appeals.[3]

Not surprisingly, Appellant was unable to meet his new deadline of September 9, 2020. Instead, one day before the deadline, Appellant's former counsel, Mr. Wolk, moved for another extension, citing his own illness with COVID-19 along with other family health concerns. In his September 8 submission, Mr. Wolk failed to notify this Court of his earlier request for an extension. Still, in light of the pandemic, this Court understandably granted Appellant another sixty days to perfect the appeal – up to and including November 9, 2020.

Notably, Mr. Wolk's September 8 submission foreshadowed his own inability to proceed with the appeal. Specifically, Mr. Wolk indicated that he would withdraw as counsel within thirty days if he suffered a setback in his recovery from illness. Respondent objected to Appellant's request for an extension of time, and requested either an outright denial or a shorter, thirty-day extension. Based on its experience with Appellant's delay tactics, Respondent stressed the likelihood that Appellant's

[3] Respondent respectfully requests that the Court take judicial notice of Second Department Administrative Orders ADM 2020-0317.2 (issued March 17, 2020) and ADM 2020-0707 (issued July 7, 2020).

counsel would ultimately move to withdraw and would request yet another extension for Appellant to retain new counsel. The Court noted Respondent's objection, but granted Appellant an extension through November 9, 2020.

Despite telling this Court that he would act within 30 days of the September 8 submission, Appellant's then-counsel once again waited until one day before the deadline to seek relief. Thus, on November 8, 2020, Mr. Wolk requested a third extension, up to December 9, 2020, and indicated that he would be submitting a motion for leave to withdraw. The next day, Mr. Wolk filed a motion seeking leave to withdraw, *and* seeking a ninety-day stay of the proceedings for Appellant to retain new counsel and perfect the appeal. Respondent opposed this request by Affirmation dated November 20, 2020.

While Mr. Wolk's motion to withdraw and request for a stay were pending, Appellant's current counsel, Mr. Marino, filed a January 2021 motion seeking yet another extension of time to perfect the appeal. Remarkably, Mr. Marino represented that no prior application had been made for the relief sought therein (except, of course, for the three extensions and ninety-day stay previously requested by Mr. Wolk). Respondent once again opposed this request by Affirmation dated February 10, 2021.

On March 17, 2021 – with Mr. Wolk's motion to withdraw and request for a stay still pending, and with Mr. Marino's request for an extension also pending –

Appellant inexplicably filed and served a brief and Record on Appeal. The Court rejected Appellant's filings, pending determination of the outstanding motions.

On April 7, 2021, this Court issued a decision on the pending motions. In its Order, the Court (1) denied Mr. Wolk's motion to withdraw as unnecessary, given Appellant's retention of new counsel; (2) dismissed Mr. Wolk's request for a ninety-day stay, and (3) granted Appellant a final extension of time to perfect the appeal, up to and including June 7, 2021. The Court noted that no further extensions would be granted.

Appellant Perfects the Appeal After a Fifth Enlargement Of Time

Appellant missed the June 7, 2021 deadline. Thus, in mid-July, Respondent's counsel contacted Appellant's counsel regarding execution of the judgment. Realizing the error, Appellant filed an Order to Show Cause and accompanying Affirmation on or about July 14, 2021. Once again, Appellant sought a stay of enforcement of the judgment and a *fifth* enlargement of time to perfect the appeal. Respondent opposed this request by Affirmation dated July 21, 2021.

On August 25, 2021, the Court issued a decision granting a final extension through September 15, 2021. After five enlargements, and more than two years since filing the notice of appeal, Appellant perfected the appeal on August 31, 2021.

STANDARD OF REVIEW

The party seeking to overturn an arbitration award "bears a heavy burden and must establish a ground for vacatur by clear and convincing evidence." *Kotlyar v. Khlebopros*, 176 A.D.3d 793, 795 (2d Dep't 2019). Because judicial review of arbitration awards is strictly limited, "[c]ourts are bound by an arbitrator's factual findings, interpretation of the [parties'] contract, and judgment concerning remedies." *Miro Leisure Corp. v. Prudence Orla, Inc.*, 83 A.D.3d 945, 945 (2d Dep't 2011). Thus, an arbitration award "can be vacated by a court pursuant to CPLR 7511 … only on three narrow grounds: if it is clearly violative of a strong public policy, if it is totally or completely irrational, or if it manifestly exceeds a specific, enumerated limitation on the arbitrator's power." *Id.* at 946 (quoting *Matter of Erin Constr. & Dev. Co., Inc. v. Meltzer*, 58 A.D.3d 729, 729 (2d Dep't 2009)). Where none of these grounds for vacatur exist, the award must be confirmed. *Id.; see also* CPLR § 7510 ("The court *shall confirm* an arbitration 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[.]") (emphasis added).

Reinforcing the sanctity of arbitration awards is the principle that a court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better

one. "Indeed, even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice." *Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York*, 94 N.Y.2d 321, 326 (1999); *Kotlyar v. Khlebopros, supra*. The same result holds true where the "arbitrator offers even a barely colorable justification for the outcome reached." *Barone v. Haskins*, 193 A.D.3d 1388, 1391 (4th Dep't 2021); *Matter of Arbitration between Civil Serv. Employees Ass'n, Inc., Local 1000, AFSCME, AFL-CIO & New York State Dep't of Corr. & Cmty. Supervision*, 188 A.D.3d 1534, 1536 (3d Dep't 2020).

ARGUMENT

POINT I

AS THE PREVAILING PARTY, RESPONDENT WAS ENTITLED TO COSTS AND ATTORNEYS' FEES

By any measure, Respondent was the "prevailing party" in the underlying arbitration. Appellant's suggestion that "both [Respondent] and Dr. Shusterman were denied the overwhelming majority of the relief demanded at arbitration" is fiction. Br. 3–4.[4] To be clear, Appellant was the *claimant* in the arbitration. Appellant commenced the proceeding, pled fourteen separate causes of action, and

[4] "Br." refers to Appellant's Brief.

claimed nearly $8 million in damages *plus* an ownership stake in YCMD. But Appellant recovered nothing. By contrast, Respondent defeated every single one of Appellant's claims – thereby prevailing on the central relief sought as the *respondent* in the arbitration – and successfully recovered on one of its counterclaims. For these reasons, Respondent was the prevailing party, and the Supreme Court properly found no basis to disturb the Final Award.

A. Respondent Successfully Defeated All Of Appellant's Claims

A party is considered the "prevailing party" not only by successfully litigating its own claims, but also by defeating claims brought against it. This rule has particular application where the prevailing party is a defendant (or respondent). *See 25 East 83 Corp. v. 83rd Street Assocs.*, 213 A.D.2d 269 (1st Dep't 1995). Even Appellant acknowledges that "a party can prevail in an action by defeating a claim against it." Br. 4; *see 25 East 83 Corp.*, 213 A.D.2d at 269 ("[B]y successfully defending against plaintiff's lawsuit, defendant *must be* regarded as the prevailing party," and is entitled to recover attorneys' fees) (emphasis added). When identifying the prevailing party, the central question is whether the parties "succeeded on any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit." *New York State Clinical Laboratory Ass'n, Inc. v. Kaladjian*, 85 N.Y.2d 346 (1995). Put another way, the prevailing party must be successful with respect to the "central relief sought." *See Nestor v.*

McDowell, 81 N.Y.2d 346 (1993); *Fatsis v. 360 Clinton Ave. Tenants Corp.*, 272 A.D.2d 571 (2d Dep't 2000).

It is disingenuous to suggest that the arbitrator's award of costs and attorneys' fees was based on Respondent's recovery of "a small fraction of the amount demanded." Br. 5. Appellant ignores Respondent's successful defense against all fourteen causes of action asserted by Appellant. Likewise, Appellant ignores his own role in running up Respondent's's attorneys' fees, including his assertion of multiple baseless fraud claims that were dismissed at the pleading stage, his dilatory discovery tactics, his repeated requests for unnecessary party and non-party depositions, and his request for several days of supplemental testimony after completion of the arbitration hearing. R. 29–30. Moreover, Appellant's brief does not contain a single citation to the arbitrator's preliminary and/or final rulings, which detailed the clear "absence of proof" on each of Appellant's causes of action, and concluded that "Claimant should recover nothing in respect of his claims." R. 33–34.

Having overcome each of Appellant's fourteen causes of action, and having defeated every single claim for relief asserted against it, there is no legitimate dispute that Respondent successfully obtained the "central relief sought." *See Nestor*, 81 N.Y.2d at 346. *See also Nestor v. Britt*, 35 Misc.3d 5, 941 N.Y.S.2d 827, 829 (1st Dep't 2012); *338 West 46th Street Realty LLC v. Leonardi*, 2011 WL 2749612 (1st

Dep't July 15, 2011) (in both cases, by successfully defeating plaintiff's claim, defendant was found to be the "prevailing party" and awarded attorneys' fees). For that reason alone – even putting aside its meritorious counterclaim – Respondent "must be regarded as the prevailing party," and is entitled to recover reasonable costs and attorneys' fees. *25 East 83 Corp.*, 213 A.D.2d at 269. *See Graybill v. VanDyne*, 67 Misc.2d 228 (Sup. Ct. Monroe Co. 1971) (defendant was the prevailing party where plaintiff's complaint was dismissed, notwithstanding dismissal of defendant's counterclaim); *Hansen v. Levy*, 139 Misc. 693, 694, 248 N.Y.S. 200 (2d Dep't 1930) (defendant was the prevailing party, notwithstanding that his counterclaim – for a greater amount than that sought by plaintiff – was dismissed; "the words 'prevailing party' can have no other meaning except the party in whose favor judgment should be entered.").[5]

[5] While Appellant has not explicitly addressed this issue on appeal (and has never challenged the reasonableness of YCMD's costs and attorneys' fees) it is well-settled that "the amount reasonably in controversy in a litigation, not the amount actually recovered, is generally the ceiling on the fees that may be awarded pursuant to a fee-shifting clause." *Diamond D Enters. USA, Inc. v. Steinsvaag*, 979 F.2d 14, 19 (2d Cir. 1992); *see also F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250 (2d Cir. 1987). Here, the total amount placed in controversy *by Dr. Shusterman* was nearly $8 million. On that basis alone, the costs and attorneys' fees awarded by the arbitrator were reasonable.

B. Respondent Successfully Prosecuted A Counterclaim Against Appellant

In addition to defeating all of Appellant's claims, Respondent also recovered damages on a counterclaim. In fact, the arbitrator found it "uncontested" that Appellant improperly withheld from Respondent the proceeds of certain offsite services performed by Appellant, and further found that Appellant "acted inappropriately by soliciting patients, disparaging [Respondent] and potentially certain other actions." R. 35. Based on these findings, and "since no relief [was] ordered on [Appellant's] claims," the arbitrator correctly ruled that Respondent was entitled to costs and attorneys' fees. *Id.* The fact that Respondent did not recover on *all* of its counterclaims is meaningless. *See id.* (citing *Vertical Computer Systems, Inc. v. Ross Systems, Inc.*, 59 A.D.3d 205 (1st Dep't 2009) (defendant was the prevailing party where it obtained judgment on one of its counterclaims, even though its other counterclaims were dismissed)). *See also Zeller & Goldschmidt v. Cooper, Selvin, & Strassberg*, 167A.D.2d 548 (2d Dep't 1990) (arbitrator's determination of the "losing party" was neither irrational nor violative of public policy, even though award granted to the prevailing party was "minor" in comparison to the total amount sought).

Appellant cites no case where a party was *not* the "prevailing party" despite defeating every claim brought against it – let alone recovering on a counterclaim as well. No such case exists, and Appellant's effort to distort the applicable case law

is unavailing. *See* Br. 4–5 (citing *43 Sutton Corp. v. Broder*, 22 N.Y.3d 1161 (Ct. App. 2014) (overturning award of attorneys' fees where, unlike here, the outcome was "not substantially favorable" to either party). Appellant's position is meritless, and this Court should affirm the arbitrator's award of reasonable costs and attorneys' fees based on Respondent's indisputable status as the prevailing party. *See Madison Liquidity Investors 119, LLC. v. Griffith*, 57 A.D.3d 438 (1st Dep't 2008) (respondent was the "prevailing party" where she was awarded summary judgment on her counterclaim); *U.S. Bank N.A. v. Lightstone Holdings LLC*, 66 Misc.3d 1232(A), 125 N.Y.S.3d 841 (Sup. Ct. N.Y. Co. Mar. 10, 2020) (defendants prevailed on their counterclaims and were therefore entitled to reasonable attorneys' fees under the parties' agreement); *Bd. of Managers of Fishkill Woods Condo. v. Gottlieb*, 184 A.D.3d 792, 795 (2d Dep't 2020) (party was entitled to reasonable attorneys' fees where it prevailed on counterclaims, notwithstanding that its recovery ($200) was a "nominal amount in context of [the] entire litigation.").

POINT II

RESPONDENT WAS A PARTY TO THE UNDERLYING ARBITRATION, AND HAS STANDING TO CONFIRM THE AWARD

Appellant's description of YCMD's corporate status, and of the relationship between YCMD and Accord, is intentionally vague. To be clear, Respondent YCMD was incorporated as a New York professional corporation on or about July 26, 2001. R. 665. On or about June 23, 2015, during the pendency of the underlying arbitration, YCMD was dissolved and its members formed a new entity, Accord Physicians PLLC. R. 74; R. 665. This sole purpose of this transformation was to switch from a professional corporation to a professional limited liability corporation, and Claimant was well aware of the transition. R. 74.

In winding up its affairs, Respondent assigned its receivables to Accord. Respondent did not, however, assign its claims or "cause of action" to Accord. Br. 5. In fact, Respondent continued to participate in the underlying arbitration post-dissolution, and both the Preliminary Award and the Final Award were issued in Respondent's name. R. 337–347. Similarly, Respondent's commenced and prosecuted the instant proceeding to confirm the Final Award, and the Supreme Court entered the Final Judgment in Respondent's name. R. 9. Accord's role is strictly limited to collection of the judgment. R. 12–13. On these facts, it is disingenuous for Appellant to argue that this matter involves "an improperly identified assignee … prosecuting the action in the name of the original party." Br.

7. That is simply not the case, as Respondent was a party to the arbitration, Respondent commenced the underlying Supreme Court proceeding, and, to this day, continues to prosecute this action in its own name. The Supreme Court properly dismissed Appellant's challenge for lack of standing, and this Court should affirm.

A. Respondent Has Standing Under BCL § 1006

The Supreme Court properly held that Respondent has standing under BCL § 1006, which governs post-dissolution corporate action. R. 915. In particular, BCL § 1006(a) allows "a dissolved corporation … to function for the purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place [.]" Per BCL § 1006(a)(4), this includes the right to "sue or be sued in all courts and participate in actions or proceedings, whether judicial, administrative, arbitrative, or otherwise, in its corporate name [.]" *See also Cava Const. Co., Inc. v. Gealtec Remodeling Corp*., 58 A.D.3d 660 (2d Dep't 2009)(a corporation continues to exist after dissolution for the winding up of its affairs, and a dissolved corporation may sue or be sued on its obligations, including contractual obligations and contingent claims, until its affairs are fully adjusted). If this were not clear enough, the statute adds that "[t]he dissolution of a corporation shall not affect any remedy available to or against such corporation … for any right or claim existing or any liability incurred before such dissolution [.]" BCL § 1006(b).

Here, Appellant commenced the arbitration proceeding before Respondent's dissolution, and all claims asserted in the arbitration arose before Respondent's dissolution. Thus, per BCL § 1006(b), Respondent must be permitted to enforce its rights against Appellant, including its right to confirm the Final Award. Further, Respondent had the right to sue in its own name, "in the same manner as if the dissolution had not taken place, for purposes of winding up its affairs." R. 915 (citing BCL § 1006; *Matter of Milton L. Ehrlich, Inc. (Unit Frame & Door Corp.)*, 5 N.Y.2d 275 (1959) (holding that where a corporation "could not have pleaded its voluntary dissolution as a bar to arbitration, it likewise follows that it is entitled to the benefits of the arbitration clause, and that [its opponent] may not take advantage of the dissolution to escape the contractual method agreed upon by the parties to settle their disputes." Thus, the corporation "continued to exist as a legal entity, after its dissolution, for as long as was necessary to wind up its business affairs [.]"))

B. <u>Respondent Has First-Party Standing To Confirm The Final Award</u>

It is well-settled that a party to an arbitration proceeding has standing to confirm an award issued therein. *See, e.g.*, *Escalera v. Cty. of Westchester*, 299 A.D.2d 548, 549 (2d Dep't 2002) (party "had standing to seek confirmation of the award since he commenced and participated in the arbitration, and was bound by its result"). *Cf. In re Culkin (State)*, 12 A.D.3d 794 (3d Dep't 2004) (petitioner lacked standing to confirm award because his interests were represented by another party at

the arbitration, and the party who participated "is the real party in interest"); *Capital Enters. Co. v. Dworman*, 173 A.D.3d 466, 467 (1st Dep't 2019) (party lacked standing to challenge award where it opted not to participate in the underlying arbitration); *Donas v. New York City Dep't of Envtl. Prot.*, 60 Misc.3d 1221(A), 110 N.Y.S.3d 496 (Sup. Ct. N.Y. Co. 2018) ("real parties in interest" are the participants in the arbitration). As a party to the underlying arbitration who was bound by the Final Award, Respondent has standing to confirm. [6]

The two-part test for standing is a familiar one. First, a plaintiff must demonstrate an injury in fact. That is, the plaintiff must establish that it will be harmed by the challenged action, and that the harm is more than conjectural. Second, the plaintiff's injury must arguably fall within the "zone of interests" protected by the law under which its challenge arises. *See Matter of Fritz v. Huntington Hosp.*, 39 N.Y.2d 339, 346 (1976); *Mahoney v. Pataki*, 98 N.Y.2d 45, 52 (2002); *Matter of Colella v. Bd. of Assessors of County of Nassau*, 95 N.Y.2d 401, 409–410; *Soc'y of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 773 (1991).

Without question, Respondent satisfies both prongs of this test. First, the Final Award was issued in favor of Respondent, and Respondent will suffer a direct injury if that award is not confirmed. Second, as a participant in the underlying

[6] Indeed, if the Final Award had been favorable to Appellant, Respondent could not avoid its obligations simply by dissolving the corporation.

arbitration, Respondent is certainly within the protected "zone of interests," since Respondent must confirm the Final Award to enforce it. Appellant's arguments to the contrary are baseless. The mere assignment of Respondent's receivables to Accord does not change the fact that Respondent's participated in the arbitration, was bound by the Final Award, and maintains the right to confirm that award. To that end, the Final Judgment entered by the Supreme Court clearly delineates that Respondent YCMD is the Petitioner in this proceeding, and that Respondent YCMD is the party entitled to confirmation of the Final Award. By contrast, Accord's role is limited to mere collection of the judgment on Respondent's behalf. R. 9–13. As such, Appellant's suggestion that Accord commenced this proceeding in YCMD's name is flat-out wrong. Br. 5–6. Moreover, the Final Judgment forecloses any concern that both Respondent and Accord may simultaneously attempt to collect on the Final Award. R. 9–13. Put simply, Respondent has not assigned the Final Award, nor has it assigned its underlying claim against Appellant. Instead, it has assigned, to its corporate successor, only its right of collection. Thus, as a named party to the underlying arbitration, and as the named petitioner in the underlying Supreme Court proceeding, Respondent has standing to confirm the Final Award.

Given the myriad misstatements of fact, it is no surprise that Appellant's case law is largely irrelevant. *See* Br. 5–6; *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318 (2007) (lender lacked standing to sue, absent consent of other lenders, because of

"collective action" provision in loan documents); *Wells Fargo Bank, N.A. v. Bedell*, 186 A.D.3d 1291 (2d Dep't 2020) (assignee had standing to maintain mortgage foreclosure action); *U.S. Bank N.A. v. Nelson*, 169 A.D.3d 110, 113–118 (2d Dep't 2019) (clarifying the pleading standards applicable to issues of standing, and holding that defendants waived the issue). Predictably, Appellant does not cite a single case involving confirmation of an arbitration award. Further, Appellant's cases are entirely irrelevant where, as here, the claim in question was never assigned. The Supreme Court easily recognized this, and found that "there is no merit to Shusterman's contention that YCMD lacked standing" because "the arbitrator's award was binding upon YCMD who could have sought to vacate or modify the award had it been so inclined. Under these circumstances, YCMD had sufficient standing to commence the proceeding." R. 915 (citing *Matter of Fishman*, 126 A.D.2d 546–547 (2d Dep't 1987) (despite not actively participating in the arbitration, petitioners had standing to vacate, modify, or confirm award because it was binding upon them)).

C. YCMD Has Third-Party Standing To Confirm The Final Award

To be clear, this Court should find that Respondent has standing to confirm the Final Award, regardless of its corporate status and relationship to Accord. But, even if this Court finds that Accord is the real party in interest – which it should not – Respondent has third-party standing to confirm the Final Award. The doctrine of

third-party standing allows a plaintiff, in limited circumstances, to "invoke the court's jurisdiction where plaintiff's right to relief rests on the legal right of a third party." *Carlen v. Dep't of Health Servs.*, 912 F.Supp. 35 (E.D.N.Y 1996), *aff'd*, 104 F.3d 351 (2d Cir. 1996), *cert. denied*, 520 U.S. 1166 (1997). There are two central factors in determining whether third-party standing is appropriate: "the relationship of the litigant to the person whose right he seeks to assert" and "the ability of the third party to assert his own right." *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). In some cases, the Supreme Court has also considered a third factor in the analysis: whether the third-party's rights or interests "were likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have [a] confidential relation to them." *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *see also Eisenstadt v. Baird*, 405 U.S. 438, 445–446 (1972).

Although developed under federal law, New York State courts have consistently applied these same principles of third-party standing. For instance, in *New York County Lawyers Ass'n v. State*, the court held that third-party standing existed where the plaintiff suffered an injury in fact, there was a "substantial relationship" between the third-party whose rights were threatened and the nominal plaintiff, the third-party was not in a position to protect its own rights, and the third-party's rights were at risk of being diluted. 742 N.Y.S.2d 16, 20–21 (1st Dep't 2002). *See also People v. Kern*, 149 A.D.2d 187, 233 (2d Dep't 1989) (identifying three

relevant factors in determining whether third-party standing exists: "(1) the presence of some substantial relationship between the party asserting the claim and the rightholder, (2) the impossibility of the rightholder asserting his own rights, and (3) the need to avoid a dilution of the parties' [rights].").

Here, Respondent undoubtedly has third-party standing to confirm the Final Award. Respondent's dissolution and replacement by Accord, and accompanying assignment of its receivables to Accord, satisfies the threshold requirement of a "substantial relationship" between the two parties. In fact, Appellant himself has admitted that "Accord is a successor corporation to [Respondent]" and that the two entities are "virtually indistinguishable from each other." R. 611 (internal quotation marks and citations omitted). Moreover, as stated in Section II-A, *supra*, Accord is not in a position to confirm the Final Award because it was not a party to the arbitration. Thus, Accord's rights would be diluted – eviscerated, in fact – if Respondent is not permitted to proceed on its behalf. Appellant, on the other hand, would be permitted to evade the Final Award entirely. For that reason alone, Respondent must be permitted to proceed on behalf of Accord.

In sum, Respondent's mere assignment of its receivables to Accord is inconsequential with respect to standing, and the Supreme Court properly held that Respondent had the right to confirm the Final Award. In fact, Respondent's

corporate status is at issue here only because of Appellant's never-ending delay tactics.

POINT III

THE SUPREME COURT PROPERLY CONFIRMED THE ARBITRATION AWARD BECAUSE RESPONDENT SUBMITTED SUFFICIENT EVIDENCE, AND APPELLANT IS NOT ENTITLED TO VACATUR UNDER CPLR § 7511

After more than two years of motion practice before the Supreme Court, Appellant now challenges – for the first time – the sufficiency and admissibility of the evidence submitted in support of the Petition. This Court need not reach the merits of Appellant's position, because this challenge was never preserved for appellate review. Regardless, even if the Court is inclined to address the merits, the evidence submitted by Respondent was both admissible and beyond sufficient to confirm the award. Appellant cannot meet the high threshold of CPLR § 7511 – which provides the *only* permissible grounds on which to vacate an arbitration award – and this Court should affirm the Supreme Court's entry of judgment in favor of Respondent.

A. Appellant Failed To Preserve His Objection, And The Alleged Error Was Easily Correctable If Raised Before The Supreme Court

"As this Court has repeatedly stated, an issue raised for the first time on appeal is not properly before this Court." *Wells Fargo Bank. v. Islam*, 174 A.D.3d 670, 671 (2d Dep't 2019) (citing *Colonial Sur. Co. v. Advanced Conservation Sys., Inc.*, 164

A.D.3d 465, 465–466 (2d Dep't 2018); *R & B Design Concepts, Inc. v. Wenger Constr. Co., Inc.*, 153 A.D.3d 864, 864–865 (2d Dep't 2017)). Further, "[c]onsideration of such an issue is generally inappropriate as it would deprive the other party of any opportunity to develop a factual record to challenge the new assertion." *Id.* at 671–672 (quoting *Matter of Matarrese v. New York City Health & Hosps. Corp*, 247 A.D.2d 476, 476 (2d Dep't 1998)). This Court has recognized a narrow exception for "a question of law that appears on the face of the record which, had it been brought to the attention of the Supreme Court, could not have been avoided." *Id.* at 672 (quoting *200 Cent. Ave., LLC v. Bd. of Assessors*, 56 A.D.3d 679, 680 (2d Dep't 2008). Thus, an issue raised for the first time on appeal will not be entertained unless it "present[s] a pure question of law … which could not have been avoided by factual showings … if raised at the appropriate juncture." *Id.* at 672 (citing *R & B Design*, 153 A.D.3d at 864–865).

Here, the crux of Appellant's belated challenge is the (incorrect) assertion that Respondent was required to submit a client affidavit, or other "testimony from [a] party," in support of its motion to confirm the Final Award. Even assuming *arguendo* that Appellant is correct, this is clearly not a "pure question of law that appears on the face of the record." *Id.* In fact, it is precisely the type of issue that could have "been avoided by factual showings … if raised at the appropriate juncture." *Id.* That is, if Appellant had used any one of its countless opportunities

to raise this issue before the Supreme Court, Respondent could have easily submitted a client affidavit in support of the Petition. Indeed, Appellant could have raised the issue at any time between Respondent's January 2017 Petition and the entry of final judgment by the Supreme Court in June 2019. Instead, Appellant sat on his hands and, in doing so, prevented Respondent from developing a factual record in response to this unpreserved objection. Now, Appellant asks this Court to abandon precedent and consider his belated – not to mention meritless – challenge. This Court should decline.

B. Appellant Is Not Entitled To Vacatur Under CPLR § 7511

Even if the Court reaches the substance of Appellant's objection, it is meritless on its face. Not surprisingly, Appellant completely ignores the standards set by CPLR §§ 7510–7511 governing the confirmation of arbitration awards. That is, the 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 [CPLR] § 7511." CPLR § 7510 (emphasis added). In other words, so long as the motion is timely (as it was here) and so long as there are no grounds for vacatur or modification under CPLR § 7511, "confirmation should be summarily granted." Alexander, Practice Commentary, McKinneys Cons. Laws of New York Annotated, CPLR § 7510. *See also Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471 (2006) ("It is well settled that judicial review of arbitration awards is extremely

limited. An arbitration award must be upheld when the arbitrator offers even a barely colorable justification for the outcome reached.") (internal quotation marks and citations omitted); *Congregation Talmud Torah of Flatbush v. Feinstein*, 124 N.YS.2d 252, 253 (Sup. Ct. Kings Co. 1953) ("It is the policy of the courts to uphold an award and every reasonable intendment must be indulged to give effect to the work of the arbitrators.").

CPLR § 7511(b)(1) sets forth the only possible grounds for vacating an arbitration award. Thus, an award "will not be vacated unless [it] is totally irrational, exceeds specifically enumerated limitation on arbitrators' power, or is violative of strong public policy." *Neiman v. Backer*, 211 A.D.2d 721, 721 (2d Dep't 1995) (citing CPLR § 7511(b)(1)). The § 7511 basis for Appellant's challenge is not entirely clear, but Appellant suggests a violation of public policy based on the disparity between the damages award and the award of costs and attorneys' fees recovered by Respondent. Of course, for all the reasons set forth in Section I, *supra* – including Respondent's status as the prevailing party, its successful defense against all of Appellant's claims, and its successful prosecution of a counterclaim – this claim is baseless. Moreover, this alleged "disparity" is an illusion, because Respondent's reasonable costs and attorneys' fees were a mere fraction of the amount in controversy in the arbitration, which was nearly eight million dollars. *See Diamond D Enters. USA, Inc. v. Steinsvaag*, 979 F.2d 14, 19 (2d Cir. 1992); *F.H.*

Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250 (2d Cir. 1987) (both holding that the amount in controversy, not the amount recovered, is generally the "ceiling" on an award of costs and attorneys' fees). Appellant cites no other grounds for vacatur under CPLR § 7511, and none exist.

C. The Evidence Submitted By Respondent Was Admissible And Sufficient To Confirm The Award

Appellant's challenge to the sufficiency of the evidence – based solely on the absence of a party affidavit from Respondent – is misplaced. In support of his position, Appellant cherry-picks a handful of cases, but ignores the glaring factual distinctions. For example, Appellant cites *Worldwide Asset Purch., LLC v. Karafotias*, 9 Misc.3d 390 (Civ. Ct. Kings Co. 2005) for the broad proposition that a petition verified by counsel is insufficient to confirm an arbitration award. Br. 7. But Appellant fails to disclose that the petition in *Worldwide Asset Purch.* was "verified by the Petitioner's attorney *entirely on information and belief*, and [was], therefore, not evidence of any of the matters asserted." 9 Misc. 3d at 394 (emphasis added). The same is true with respect to *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980), where the court held that an attorney affirmation had no evidentiary value because the attorney "demonstrated no personal knowledge" of the material facts and "was a total stranger" to the underlying proceedings. *See* Br. 8 (citing *Zuckerman*). This logic does not apply where, as here, the Petition was verified by counsel with firsthand knowledge of the material facts, based on counsel's

participation in the underlying arbitration proceeding. For that reason alone, Appellant's challenge fails.

Making matters worse, the court in *Worldwide Asset Purch.* acknowledged that an attorney affirmation may "serve as the vehicle for the submission of acceptable attachments which do provide evidentiary proof in admissible form." 9 Misc. 3d at 394 (internal quotation marks and citation omitted). *See also* Br. 8 (citing *Zuckerman*, 49 N.Y.2d at 563 ("The affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form,' e.g. documents, transcripts. Such an affidavit or affirmation could also be accepted with respect to admissions of a party made in the attorney's presence.")).

Here, the Petition was not only verified based upon personal knowledge of the material facts, but was appropriately used as a vehicle to submit both the Preliminary and Final Award, along with other exhibits relevant to the Court's determination. *See Matter of People v. Lutheran Care Network, Inc.*, 167 A.D.3d 1281, 1283 (3d Dep't 2018) (in a special proceeding under CPLR Article 4, the Supreme Court adopted an "unduly narrow view" and "improperly disregarded the evidence contained in the numerous exhibits that were annexed to [counsel's] affirmation, which, in that regard, served as a vehicle for the submission of documentary

evidence."); *Warner v. Kain*, 162 A.D.3d 1384, 1385 n.2 (3d Dep't 2018) ("attorney affirmation effectively served as a vehicle for the submission of acceptable evidence"); *State of New York v. Grecco*, 43 A.D.3d 397, 399–400 (2d Dep't 2007) (even where attorney "did not assert any personal knowledge of the facts, his affirmation, to which were annexed at least 57 exhibits, satisfied the statutory requirements [for summary judgment] because it served as a vehicle for the submission of documentary evidence.")). Accordingly, Appellant's position – that the Supreme Court's confirmation of the Final Award lacked an "evidentiary predicate" – is fictitious. Even if Appellant timely raised this issue, and he did not, it would not have presented a triable issue of fact, because the Petition and attached exhibits more than satisfied YCMD's burden under CPLR § 7510. Thus, Respondent was entitled to "a summary determination upon the pleadings, papers and admissions" pursuant to CPLR § 409(b), and this Court should affirm.

CONCLUSION

For all of the foregoing reasons, the Supreme Court's Decision and Order confirming the Final Award, and its entry of judgment against Appellant, should be affirmed in their entirety. Further, Respondent respectfully requests that the Court affirm its status as the "prevailing party" in the underlying arbitration, and award Respondent all costs and attorneys' fees incurred on appeal.

Dated: Great Neck, New York
September 29, 2021

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Name of typeface:	Times New Roman
Point size:	14
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Line spacing:	Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, printing specifications or any authorized addendum containing statutes, rules, regulations, etc., is 8,501 words.

Dated: Great Neck, New York
September 29, 2021

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