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Arbitrator

IN THE MATTER OF BINDING ARBITRATION

JAMS REF. 1220038237

MED-BILLING CORPORATION and GARRETT ERSKINE,

Claimants,

vs.

MDS BILLING, LLC aka NEWCO and MD SYNERGY,

Respondents.

FINAL AWARD

I. INTRODUCTION

The above captioned matter is before the undersigned pursuant to the provisions of that certain Asset Purchase Agreement (hereinafter also the APA), specifically section 11.6.2 of same, and that certain Stipulation and Order Submitting All Claims to JAMS Arbitration, and Staying Civil Action Pending Arbitration dated on or about January 8, 2009. The parties to this arbitration are Claimants Garrett Erskine and Med-Billing Corporation represented throughout this arbitration proceeding by Bruce D. May of Stradling Yocca Carlson

& Rauth[1] and Respondents MDS Billing LLC (aka NEWCO) and MD Synergy, LLC represented throughout this arbitration proceeding by Ronald Richards of Ronald Richards & Associates.[2]

A. Procedural Summary

This matter was commenced by way of a Demand for Arbitration filed on or about April 11, 2008. The Demand for Arbitration set forth a cause of action for Breach of the Asset Purchase Agreement. A separate action by Claimant Erskine for Breach of the Employment Agreement was filed in the Superior Court on or about May 9, 2008.

As referenced above, on or about January 8, 2009 the Court signed the Stipulation and Order Submitting All Claims to JAMS Arbitration, and Staying Civil Action Pending Arbitration (hereinafter the Stipulation). Specifically, the Stipulation reads in pertinent part as follows:

"1. All claims and defenses of Plaintiff ERSKINE and Cross-Defendant MED-BILLING CORPORATION on the one hand, and of Defendant MD SYNERGY LLC and MDS-BILLING LLC on the other, shall be submitted forthwith to arbitration and decided in the JAMS arbitration. "

As set forth in the Stipulation (and as referenced above), subsequent to the filing of the Demand, Claimant Erskine filed a complaint in Superior Court for Breach of the Employment Agreement. The Stipulation recited that as of the time of the hearing Defendant MD Synergy had lodged a proposed First Amended Cross-Complaint. That pleading dated on or about December 2, 2008 has been filed and is part of the record in this action. The Stipulation also provided that any additional amended claims arising out of the Asset Purchase Agreement or Employment Agreement were to be filed in the JAMS arbitration.

Pursuant to the Stipulation a First Amended Demand for Arbitration was filed on behalf of Claimants on or about March 6, 2009 setting forth causes of action for Breach of the Asset Purchase Agreement and Breach of Employment Agreement. A further Cross-Complaint was filed by Defendant MD Synergy against Garret Erskine and Med-Billing Corporation in the arbitration on or about May 21, 2009 when it was determined the above pleading originally filed with the Court had never been filed in the arbitration.[3] The above referenced pleadings

[1] Although the initial Demand was filed by the firm of Baer & Troff, a substitution of attorney was filed on behalf of Claimants on or about November 3, 2008. Claimants were represented by Stradling Yocca Carlson & Rauth in all subsequent and substantive proceedings after the filing of the initial Demand in this arbitration.

[2] The respective parties named Doe/Roe Defendants in their pleadings however no amendments were made to add additional parties. The respective Doe/Roe allegations are deemed dismissed.

[3] The First Amended Cross-Complaint, the pleading before the Court at the time of the Stipulation, contains alter ego allegations. Pursuant to the submission on behalf of Respondents, the Cross-Complaint filed in May 2009 was to be the re-captioned First Amended Cross-Complaint which was before the Court at the time of the Stipulation. The pleading filed in May is in all respects the same as the pleading before the Court (it alleges claims for Breach of the APA, Fraudulent Concealment and Unjust Enrichment) except it does not contain the alter ego allegations. Based upon, and consistent with, the Stipulation and Order, the arbitrator treats the pleadings together as the operative pleadings in this action. (It is further noted that the pleading could be amended or there could be an amendment after a determination on the merits to set forth alter ego allegations.)

constitute the operative pleadings in this action and set forth the causes of action and issues for determination in this arbitration between these parties as named.

An initial Preliminary Hearing Conference was conducted on February 27, 2009.[4] Pursuant to the Preliminary Hearing Conferences certain orders were made including the scheduling of the arbitration hearing. Pursuant to the Preliminary Hearing Orders an arbitration hearing was conducted on August 4, 5 and 7, 2009[5] during which evidence was introduced by way of oral testimony, deposition testimony and documentary evidence. Final argument was presented by way of oral argument at the conclusion of the presentation of evidence.

The Interim Award was rendered on or about September 1, 2009 and served on or about September 8, 2008. The undersigned reserved jurisdiction to hear and determine all post hearing issues. Specifically, the Interim Award provided that:

"Pursuant to Preliminary Hearing Order No. One the Issues were bifurcated. Preliminary Hearing Order No. One reads in pertinent part as follows:

11. Bifurcation of Issues

The arbitration hearing shall be bifurcated with the substantive issues being heard and an Interim Award issued as to the substantive issues submitted for determination. Jurisdiction shall be reserved to hear and determine all post hearing issues, including but not limited to issues related to entitlement and the amount of attorneys' fees, costs and interest as may be applicable prior to the issuance of the Final Award."

Subsequent to the issuance of the Interim Award, further orders were issued addressing post hearing matters raised on behalf of the respective parties including issues related to alter ego and punitive damages. In addition further oral argument was conducted on certain post hearing issues. The post hearing orders are summarized as set forth hereinafter. Pursuant to the Interim Award, Post Hearing Briefs were submitted on behalf of the parties. In the post hearing submissions, Claimants/Cross-Respondents requested a further evidentiary hearing on the issue of alter ego. The undersigned issued Ruling Re: Post Hearing Request to Re-Open Evidentiary Hearing on Issue of Alter Ego on or about September 30, 2009 inviting Claimants to submit a written offer of proof on the issue of alter ego.

On or about October 13, 2009 the undersigned issued Ruling Re: Claimant's Request for Further Evidentiary Hearing and Order re Further Oral Argument. The request for further evidentiary hearing was denied. The request for further oral argument was granted. Further oral argument on certain specified issues that were not fully addressed in the prior briefing was scheduled and argument heard on October 21, 2009. Specifically, argument was heard on the issue of the disposition of the 500,000 Equity Units of MDS Synergy, LLC, the issue of alter ego and the issue of punitive damages.[6] Subsequent to the oral argument, the undersigned issued Ruling Re: Post Hearing Submissions on or about October 23, 2009. As part of the ruling, the undersigned ordered that Respondent would be allowed to take post hearing written discovery on

[4] A subsequent Preliminary Hearing conference was conducted to address certain administrative matters.
[5] The arbitration hearing was scheduled for August 4, 5, 6 and 7, 2009 after having been continued from the previously scheduled dates of June 8, 9, 10 and 11.
[6] The Ruling specifically set forth certain cases to be addressed by counsel during the oral argument.

the issue of punitive damages. The Ruling provided for further post hearing submissions on the Reserved Issues specifically as to the issue of punitive damages.

Pursuant to the terms of the Interim Award, and the further Rulings as set forth above, the parties submitted post hearing submissions on the issues of punitive damages, attorneys' fees and costs. Respondent submitted a Post Hearing Brief on the specific issue of Punitive Damages on or about November 23, 2009 pursuant to the Ruling of October 23, 2009. Claimants submitted a Final Reply on or about November 30, 2009. On or about November 30, 2009, Respondent submitted an Objection to the Reply filed on behalf of Claimants on the grounds that the Reply addressed issues beyond the issues of punitive damages covered in the ruling of October 23, 2009.[7]

The matter was submitted for determination of the Final Award as of December 1, 2009.

B. Summary of Factual and Evidentiary Considerations

The operative facts are well known to the parties and will not be restated herein in their entirety. Those specific facts as may be necessary to any particular finding or ultimate determination are specifically summarized and referenced in the Findings and Determinations, infra. Although all facts may not be summarized, all facts and evidence submitted during the arbitration proceeding have been considered in making the ultimate determinations and the Final Award as set forth hereinafter. Specifically, the undersigned has reviewed the notes of the testimony received during the hearing and has reviewed all of the exhibits introduced into evidence during the arbitration.

No attempt has been made to reference all of the evidence that has been introduced as referred to above and no attempt has been made to refer to all evidence in support of any specific finding or ultimate determination in this Final Award. The failure to refer to any specific testimony and/or item of evidence does not mean that it was not considered. Specifically, no attempt has been made to reference all of the exhibits although all have been reviewed as set forth herein. The arbitrator has reviewed all of the testimony and evidence and given it such weight as warranted based upon the totality of the evidence in the record in rendering the determinations as set forth hereinafter.

The undersigned has considered all of the legal arguments and all authorities as applicable to the various theories in support of Claimants' claims and in support of Respondents' claims. The failure to refer to all of the theories or authorities does not mean that they were not reviewed or considered. All authorities in support of any specific finding or determination are presumed and the findings and determinations are based upon the applicable law as cited. To the

[7] Although Respondent is correct that Claimants' Reply Brief only briefly touches on the issue of punitive damages (which was the remaining Reserved Issue to be briefed for determination) and addresses issues beyond the scope of the post hearing ruling, the undersigned has considered all arguments as submitted. However, to the extent that Claimants reargue the specific issues determined in the Interim Award, specifically issues which resulted in the determinations as to compensatory damages that are set forth herein, they are given no weight as those matters have already been considered and determined.

extent that the findings and determinations of the arbitrator render moot the consideration of any specific argument or legal theory they are not necessarily set forth but have been considered in reaching the ultimate determinations.

The arbitrator has found certain operative facts to be true and necessary to the determination of the issues in this action and for the Final Award. To the extent that any such finding or determination of the arbitrator differs from the position of any party, that is the result of determinations as to credibility, relevance, burden of proof considerations and the weighing of the evidence, both oral and written, as set forth above.

II. SUMMARY OF CLAIMS AND DEFENSES

The claims at issue and subject to determination in this arbitration are as set forth in the pleadings as referenced above.

A. Claimants' Claims

Claimants' First Amended Demand sets forth claims for Breach of the Asset Purchase Agreement and Breach of the Employment Agreement. As to the Breach of the Asset Purchase Agreement, Claimants assert several breaches including failure to pay pursuant to Section 1.2 (including the failure to pay the full down payment of $250,000) and breach based on understating the value of Med-Billing in order to avoid payments due under the APA. It is further alleged that Claimants breached other provisions of the APA including the failure to assign certain contracts out of Claimant Erskine's name, the failure to assume the SBA loans of Med-Billing and the failure to release Claimant Erskine from all personal guarantees.[8]

Claimants also allege breaches of the Employment Agreement. Specifically, it is alleged that Respondents failed to pay Claimant Erskine the agreed car allowance; the $6000 which was promised as compensation for disposing of Claimant Erskine's interest in PerformaX LLC and the failure to pay the severance which was due in the sum of $70,000 because the employment was terminated without cause.

In addition to the monetary sums claimed to be due and owing, Claimants are seeking prejudgment interest, waiting time penalties with reference to the unpaid severance amount, attorneys' fees and costs.

B. Respondent's Claims

Respondent's claims are for Breach of the APA, Fraud by Concealment

[8] There was no claim in the Demand or the First Amended Demand for breach based upon failure to issue the 500,000 Equity Units of MD Synergy. The one and only reference to the 500,000 units, until issues raised in the post hearing briefs, was in the initial Arbitration Brief filed on behalf of Claimant. In the initial Arbitration Brief Claimants stated in one line that Respondents "failed to issue a certificate to Erskine for the 500,000 units in MD Synergy as required by Section 1.2."

and Unjust Enrichment. Specifically, Respondents assert that Claimants breached the APA by concealing the true accounts receivable and that Claimants committed fraud by suppressing and concealing material facts concerning the accounts receivable. Respondent specifically alleges that had it known of the true facts it would not have purchased the assets on the terms as stated.

Respondent further asserts that Claimants were unjustly enriched by their actions for which Respondent seeks restitution of "valuable consideration" which was "unjustly obtained", for funds expended in pursuit of the return of its property as measured by the costs of suit, and attorneys' fees and prejudgment interest.

III. DISCUSSION OF CLAIMS/FINDINGS AND DETERMINATIONS

A. General Factual Summary

On or about September 8, 2006 Claimant Med-Billing Corporation and Respondents entered into that certain Asset Purchase Agreement [Exhibit 1] which is central to this dispute. Specifically, Claimant Med-Billing Corporation agreed to sell its assets to MDS Billing, LLC (aka NEWCO) and the parent, MD Synergy, LLC. Med-Billing Corporation was solely owned by Garrett Erskine who was the President, sole Director and shareholder.[9]

The negotiations between the parties and specifically Randhir Tuli, the principal of Respondents, and Claimant Garrett Erskine commenced in May of 2006; Mr. Tuli submitted an offer letter (which is part of Exhibit 1) on or about May 23, 2006. The negotiations culminated in the APA as set forth above.

During part of the time between the offer letter and when the APA was executed Respondents engaged in due diligence.[10] Although there was testimony that the due diligence was hurried, there is no allegation that Respondents were in any way prevented from conducting their due diligence or were denied access to any information necessary to making their decision. The failure to conduct or have adequate time to conduct due diligence is not an issue in this arbitration. It was stipulated that Respondents had no access problem. Although there was testimony that there was a "rush" to complete due diligence, it was stipulated that Respondents were not making a claim that they did not have time to complete due diligence. It is also not disputed that during the time of the negotiations and the due diligence period that both parties had the assistance of both legal counsel and accounting expertise.

The basic terms of the APA, specifically with regard to the purchase price, are set forth in section 1.2 which must be read together with the applicable Definitions as set forth in Schedule

[9] At the outset of the arbitration hearing an issue was raised as to the status of Claimant Med-Billing Corporation. Specifically, Respondents challenged that Claimant Med-Billing Corporation was suspended and thus could not appear or defend it self in the pending matter. It was conceded that Med-Billing Corporation was suspended but that as of the start of the arbitration hearing corrective action had been undertaken to bring the corporation into good standing. There was no further issue raised as to the status of Claimant Med-Billing Corporation to participate in the arbitration and the matter was deemed moot.

[10] Respondent MDS Billing, LLC did not immediately commence their due diligence as they were in the process of completing the acquisition of MD Synergy.

O. It is those provisions that Claimants urge were breached and represent the largest damages claim asserted.

At the same time that the parties entered into the APA, as part of the APA Respondents MDS Billing, LLC and MD Synergy, the parent, entered into an Employment Agreement with Claimant Erskine. Pursuant to the terms of the Employment Agreement Claimant Erskine received a Base Salary of $140,000. He was also to receive the sum of up to $6000 as compensation for disposing of his ownership interest in PerformaX, LLC plus a car allowance.

During the fall of 2007 discussions commenced between the parties regarding the calculation of the purchase price pursuant to the provisions of the APA. The parties did not reach agreement. During that time, the issues regarding the challenged accounts receivable entry of $440,000 were discussed.

Claimant Erskine's employment pursuant to the Employment Agreement was terminated without cause on or about March 18, 2008. [Exhibit 10]

B. Breach of the Asset Purchase Agreement/Calculation of the Purchase Price

1. Discussion of the Work in Progress Issue

Both Claimants and Respondents have raised claims for breaches of the APA. Although several issues are raised for determination, at the crux of the dispute with respect to the APA is the consideration and determination regarding the challenged accounts receivable entry of $440,000 otherwise characterized as the Work in Progress, or the WIP, issue. This item is at the heart of both Claimants' and Respondents' claims.[11] Not only does resolution of this issue address and aid in the resolution of certain of the other issues related to the purchase price calculation, it also bears directly upon the credibility of the principal witnesses in this matter.

The WIP issue is the first issue addressed by Claimants in their Opening Brief and is the foundation of Respondents' First Amended Cross-Complaint/Cross-Complaint. The WIP was characterized in Claimants' Brief as the "unbilled charges for medical billing services that were in the process of being invoiced and collected". [Opening Brief, page 1] This was characterized by Claimants as an asset that was being acquired by Respondents.

The Opening Brief further described the WIP as follows:

"...when a claim is in the process of being billed to the payor and no invoice has yet been issued to the provider the claim constitutes WIP, but no one can question that this is a valuable asset. It is a claim that will become an account receivable as soon as the Company completes the next step in the billing cycle, which is to issue an invoice....As services are rendered, they

[11] Claimants suggested during closing argument that the "whole issue of the WIP was a straw man", however that stated position was contrary to Claimants' stated position otherwise taken throughout the arbitration. Indeed not only was the majority of Claimant's Arbitration Brief devoted to this issue and its impact on the other issues, much of the testimony during the arbitration was taken up with this issue.

become WIP. As they are invoiced, they become accounts receivable. And as they are collected, they become revenue." [Opening Brief, page 10]

As a simple statement, there is probably no dispute with the foregoing. Indeed, by their own account, the WIP that Claimants were concerned with and as defined by Claimants was not an account receivable. The dispute presented is whether there was an agreement to treat the WIP other than as described above. Indeed, there is a dispute (as will be described with reference to the respective positions of the parties) as to whether there was any agreement at all outside the APA.

It is Claimants' position that there was an agreement, otherwise not documented as part of the APA, that the WIP would be treated as an account receivable even though it had not been invoiced and assigned a value. As will be set forth hereinafter, the testimony and other evidence are not consistent with Claimants' stated position regarding the treatment of the WIP. For the reasons as more specifically set forth below, the position of Claimants does not withstand factual or legal scrutiny based upon the entirety of the record in this action.

It is Claimants' asserted position, and as Mr. Erskine testified during the arbitration, at the time of the closing there was work in progress and he wanted to be compensated for that work as there was value to the work performed. He specifically testified that everything had been done in the billing process up to the point of invoicing the customer.[12] He testified that those invoices would end up on the books as accounts receivables.[13] Mr. Erskine also testified that he knew that accounts existed as the claims had been billed but as they had not been paid they had not been invoiced. (As discussed below, those accounts were never identified.)

Mr. Erskine testified that the negotiation of the WIP took place during the negotiation process and occurred during the months prior to the asset sale.[14] Mr. Erskine testified that the WIP had value and had to be accounted for in some way. He stated there were discussions and Mr. Tuli indicated that he, Mr. Erskine and Mr. Monty Miller were to come up with a formula or methodology to value the work that was done but not invoiced. Mr. Erskine testified as to the methodology that was agreed upon for the valuation of the WIP. The methodology utilized involved using historical numbers to come up with a conservative number. According to the testimony of Mr. Erskine, the number which was to represent the value of the work in process was ultimately determined to be $440,000. Mr. Erskine's testimony was less persuasive when considered with the totality of the evidence. If the testimony of Mr. Erskine is to be credited that he would or could have identified the invoices (as discussed below) he did not explain why it was necessary to come up with a formula to value the work in process if the actual information was available to him. Specifically, at the time these discussions were taking place, Mr. Erskine

[12] Mr. Erskine, Mr. Tuli and Ms. Lazaroff all testified as to the process of billing that was done by Med-Billing on behalf of their customers, the providers. Their description of the third party billing process was all similar. After a claim was sent to the payor and the payor paid the provider, the provider reported to Med-Billing that payment had been made and an invoice was then generated.

[13] It is not disputed, and central to this issue, that the accounts receivable that were shown on the books and records of Med-Billing Corporation were part of the assets purchased in the transaction.

[14] Inasmuch as Mr. Erskine testified that the discussion of these issues took place in the months prior to the sale, it was not explained why these claims as described had not then been converted to invoices like other accounts receivables within the same time frame.

had the records as this was prior to the close of the transaction, the only step remaining in the process was the invoicing and by his own testimony he could have identified the accounts. Therefore the need to use historical as opposed to actual information is not satisfactorily explained in light of the entire record. [15]

Mr. Erskine testified after coming up with a formula and an amount for the WIP there were further discussions and negotiations as to how the agreed upon WIP sum would be treated on the books and records of Med-Billing. He testified that it was determined it would be treated as accounts receivable as un-adjudicated claims. The entry for this amount was done on the books and records by Trudy Canner, his bookkeeper, at his direction. (As will be discussed hereinafter, this is inconsistent with the testimony of Mr. Tuli and Ms. Lazaroff and not supported by any other documented evidence.[16]) He further testified that Mr. Miller did not agree with this treatment.[17] Mr. Erskine testified that Mr. Tuli was involved in some of the discussions regarding the WIP and the treatment of the WIP. Mr. Tuli does not recall the specifics of any such discussions as described by Mr. Erskine. (Mr. Tuli's testimony will be summarized below.)

At one point in his testimony Mr. Erskine testified that the monies represented by the WIP were dollars that were in fact later collected but there was no evidence presented in support of this assertion. There was conflicting testimony by Mr. Erskine that he did not have access to the records after the transaction because he was not in charge of the books and records therefore he could not verify the accounts but he also testified that he knew they were billed, invoiced and paid because he could see consistent claims processing. Indeed, Mr. Erskine never offered a credible explanation as to why, if the only step in the process that was left regarding the WIP was the invoicing and this was at a time he was in control of the records, he could not provide that specific information when this was being discussed and questioned.

It is not disputed that there is no reference in the APA or other transaction documents to the WIP as testified to by Mr. Erskine. Mr. Erskine did not produce any credible documentary evidence in support of Claimants' position. The documentary evidence is, in fact, to the contrary.

The testimony of Mr. Tuli regarding the WIP issue was more persuasive and more consistent with the totality of the record. Mr. Tuli testified that he was aware of the $440,000 entry in the books and records and this entry was discussed as part of the due diligence process although he did not recall all of the discussion regarding the item. He recalled that there was a single journal entry for $440,000 but there was no support for that entry. He testified that he did not remember either Miller or Erskine telling him why the entry was entered and although he was sure there was some discussion, he did not recall what was said in the discussion.

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[15] Mr. Erskine also testified that whereas he considered the WIP an asset of the corporation which was sold along with other assets and was accounted for in the cash projections the WIP was not accounted for on the books and records of Med-Billing Corporation until the agreed treatment during the due diligence process.

[16] Claimants' Exhibit 14 for identification, except as to those undisputed pages that were the records of Claimants, simply could not meet the test of admissibility or reliability.

[17] Much importance was placed upon Mr. Miller and his role in the WIP analysis however he did not testify. Although a reason was put forth as to why he could not be present, based upon the importance of the issue to Claimants' case it raises questions. Further, even if the substance of Exhibit 14 for ID were considered it would not aid or strengthen Claimants' case on this issue.

Mr. Tuli's testimony directly contradicts Mr. Erskine about the $440,000 entry. Specifically, it was Mr. Tuli's testimony that the $440,000 entry was on the books and records prior to the sale. The documentary evidence [Exhibit A] supports this testimony. The books and records were used as to what assets were purchased. Mr. Tuli's testimony is further supported by the testimony of Ms. Lazaroff to be summarized hereinafter. Finally, the testimony of Mr. Tuli simply makes more sense based upon the totality of the evidence in the record.

Mr. Tuli testified that he was buying the accounts receivable of the company, that the sum of $440, 000 was represented as an account receivable and that is what he was buying. There was no entry for WIP on the financial statements. He discussed this with his accountant, Ms Lazaroff, after she brought to his attention there was an entry with no details. He did testify that he was not concerned, however, because he felt he was protected by the working capital provision that was placed in the APA.[18]

Finally, contrary to the testimony of Mr. Erskine, for which no evidence was introduced, Mr. Tuli testified without contradiction that the books and records of the corporation balanced after the acquisition based on the ongoing and invoiced business. He testified that they had not been able to identify any amount and/or any accounts which represented the $440,000 sum.

The testimony of Ms. Tina Lazaroff corroborated the testimony of Mr. Tuli.[19] Specifically, she testified that she was engaged by her client, Mr. Tuli, to look at the historical books and records of Med-Billing Corporation as part of the due diligence process to see if anything looked untoward or could not be substantiated. She did not audit the books.

After she reviewed the financial documents she noted one line item on the Various Open Accounts which stated it was "Various" for $440,000. [Exhibit A, page 009] She testified it looked like there was no substantiation and she asked Mr. Tuli about this entry. He told her he would talk to Erskine about this number and get proof. Ms. Lazaroff further testified that she spoke to Trudy who said that Mr. Erskine told her to book the entry of $440,000. The solution for this entry, and the failure to have the backup, was the inclusion of the Working Capital clause in the APA. In sum, the $440,000 was included in the assets but would be deducted from the minimum working capital if not substantiated.

Ms. Lazaroff was familiar with the APA. She testified, without contradiction, that the right to bill what is being worked on is something that belonged to Respondent under the Agreement.[20]

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[18] A provision for working capital was in the APA, Schedule O: "Minimum Working Capital" means $1,100,382.

[19] Ms. Lazaroff testified that she and her firm represented Mr. Tuli and Respondents in a professional and ongoing capacity. The undersigned found her to be a professional, solid and credible witness on both direct and cross-examination. Importantly, her testimony makes sense in light of the entirety of the record over all including a review of the relevant documents, specifically the APA and the various attachments to same. Her testimony is also consistent with recognized accounting practices. No attempt is made to summarize all of her testimony but the critical portions are set forth.

[20] There is no dispute that the valuation of the business was based on the revenue stream with an applied multiplier. There is no dispute that one of the assets was the accounts receivable which would have generated part of that revenue stream. Likewise, the work to be billed in the future as an account receivable would also contribute to the

In sum, based on the foregoing, the evidence supports that Respondents have shown by a preponderance of the evidence that Claimants breached the APA, and specifically sections 2.10 and 7.3 of same, with the respect to the issue of the account receivables/WIP issue as alleged in the First Cause of Action of the Cross Claim. Further, as will be more specifically discussed hereinafter, the resolution of this issue further supports Respondents' calculation of the Purchase Price pursuant to the applicable provisions of the APA.

2. Determination of Business Revenue for Purpose of Calculation of Earn Out Portion of Purchase Price

Claimants allege that Respondents breached the APA by failure to properly calculate the Business Revenue for the purpose of determining the purchase price. This alleged breach is directly related to the discussion of the WIP and certain of the claims of Claimants as related to that issue.

First, the determination that Claimants did not sustain their burden to show there was an agreement that WIP would be characterized as an account receivable impacts the calculation of the purchase price. Specifically, Respondents have treated the $440,000 according to GAAP (consistent with the provisions of the APA) as bad debt.[21] When this is taken into account as to the ultimate calculation of the purchase price, whether under Exhibit 16 or Exhibit G, it is clear that Claimant has not achieved the higher multiple under the APA. Under either calculation as referenced the total bad debt, when the disputed sum is included, is $566,753.21.[22] Therefore, when this bad debt number is included in the calculation, Claimants do not meet the threshold for application of the larger multiple under the APA.

The further issue raised as to the calculation of the Purchase Price is the proper calculation of the Business Revenue for the purpose of the Purchase Price calculation. Specifically, the issue is the proper interpretation of the defined term "Business".

The Purchase Price was to be equal to the Business Revenues, a defined term, for the twelve months ending August 31, 2007 multiplied by the Multiple. The term Business Revenues refers to the revenues from the "Business" defined as: "...the billing, collection and practice management consulting business presently conducted by the Company and as conducted in the future by Newco for (a) physical therapy practices and (b) the non physical therapy practices listed on Exhibit D.

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revenue stream. Claimants' position appears to carve out a special category of assets which are not otherwise covered under the APA.

[21] Claimants argue that treating WIP as bad debt is not consistent with GAAP, however, Respondents did not treat WIP as bad debt as there was no WIP on the books and records. Rather, Respondents treated the $440,000 that was carried on the books and records as an account receivable as bad debt. [That sum was later reduced by a credited amount; see footnote 19.]

[22] There was no dispute as to the bad debt sum of $150,081. The balance of the bad debt amount is the $440,000 accounts receivable amount minus sums that were credited to Mr. Erskine making the total outstanding amount the of the challenged account receivable the sum of $416, 672. [There is no real dispute as to the credited amount. See Exhibit B, page 104]

The parties differ in their positions as to how this clause should be read. Reduced to its simplest terms the issue is whether Exhibit D defines the totality of the revenue to be considered. It is Claimants' stated position that only the non-physical therapy clients mentioned on Exhibit D to the APA are to be excluded as other business revenue[23]; Claimants would exclude only subpart (b) of the definition. When the "Business" provision is read in context of the entire agreement as to the purpose for the purchase price calculation and as a matter of construction as to how the provision is written, it is clear that the provision can only be interpreted as advanced by Respondents. For the purpose of calculating the purchase price the two clauses must be read together as defining the business presently conducted; thus Exhibit D includes both subparts for the purpose of determining the "Business Revenues" to be considered in the purchase price calculation.

The undersigned finds that the calculation as set forth in Exhibit G[24] is based upon the proper methodology as set forth in the provisions of the APA. The gross revenue calculation of Claimants as evidenced by Exhibit 16 (or Exhibit 14 @ 00218) would generate Business Revenue of $2,189,454.55. Based upon the determination of bad debts as discussed above, Claimant Med-Billing Corporation would not meet the requirements for the application of the higher multiple of 1.3 even if Claimants' interpretation of "Business" could be adopted.

Pursuant to the calculation of Business Revenue as evidence by Exhibit G, the number would be $2,072,601.35. This number is achieved by the consideration of "Business" as set forth above as the proper interpretation under the contract. Based upon that interpretation, even without consideration of the $416, 672 account receivable in the bad debt calculation, Claimants have not met the threshold requirement for the higher multiple. However, as set forth above, the treatment of the $416,672 as bad debt is proper under the facts and the provisions of the APA.

3. Summary

In sum, the undersigned finds and determines that Respondents have shown that Claimants violated the APA by including within the financial statements a line item for accounts receivable in the sum for $440,000 which was unsubstantiated. The undersigned finds and determines that Respondents have shown by a preponderance of the evidence that there were no side agreements, oral or written, to support the claim of Claimants. Further, any such agreements would be barred by the parol evidence rule, to be discussed hereinafter. [See Section IV, below.]

The undersigned further finds that the evidence supports that there was no evidence introduced in support of the sum of $440,000; there was no evidence introduced as back up documentation for that sum, there was no evidence that any accounts in that sum ever materialized and no evidence that any dollars in that amount were ever collected subsequent to the close of the transaction. Further, the preponderance of the evidence, if not the clear weight of

[23] Other Billing Revenues" (as opposed to other business revenue) is a specific defined term which is actual gross revenues for the applicable time period "received and booked by Newco for billing services, less returns and allowances for bad debts, each on a GAAP basis, *other than Business Revenues.*" [Emphasis added]

[24] The undersigned has considered the arguments regarding the preparation of Exhibit G. The undersigned finds the explanation regarding the preparation of Exhibit G to be credible and consistent with the requirement of the APA.

the evidence, supports that there was no reference in any of the financial statements or documents presented to Respondents that represented that sum as WIP as opposed to an account receivable.

Finally, Respondents have shown by a preponderance of the evidence that their interpretation of "Business" for the purpose of calculation of "Business Revenue" is factually and legally supported by the entirety of the record.

C. Discussion of Other Claims Pursuant to Asset Purchase Agreement

Based upon the determination as to the issue of the WIP which supports Respondents' Claim for Breach of the Asset Purchase Agreement, Respondents' performance pursuant to the Asset Purchase Agreement is arguably excused and any further discussion is therefore moot. However, because of the issues that were raised during the arbitration hearing the Claimants' alleged breaches of the APA that were submitted for determination are discussed hereinafter.

1. Breach of APA for Failure to Pay the Cash Down Payment of $250,000

The APA required that Respondents would pay as part of the purchase price a cash payment which included a down payment of $250,000 at Closing (a defined term). To the extent that Claimants assert that Respondents breached the APA by the failure to pay the down payment of $250,000, the record does not support this claim.[25] Specifically, in their Opening Brief and in their presentation of claims during the arbitration Claimants asserted this as a breach of section 1.2. However, introduced during the hearing (and indeed as was attached as Exhibit B to the First Amended Demand) was a letter dated October 2, 2006 which specifically set forth the further agreement of the parties regarding the down payment. By written agreement made a part of the APA the parties agreed that the sum of $199,185 would be paid to Claimant at the Closing instead of the $250,000.

Although Claimant testified regarding his understanding of the reasons for the deductions from the initial down payment amount and the reason why he felt compelled to go ahead with the agreement nonetheless, the letter of October 2, 2006 is clear on its face and made a part of the APA. There is no other documentation to support that the letter agreement was other than negotiated along with all of the other documents that make up the APA. Further, Claimant has not plead and did not show by a preponderance of the evidence that he was coerced into signing either that letter or the APA.[26]

The undersigned finds and determines that Claimants have not sustained their burden as to this claim.

[25] This was not set forth as a specific breach in the First Amended Demand.

[26] Not only are Claimants' claims as to this issue not supported by the evidence and contrary to the APA Mr. Erskine's credibility is called into question based on his testimony on this issue. The Letter Agreement was not even mentioned during his direct examination.

2. Breach of APA for Failure to Issue the 500 Units in MD Synergy

This was not alleged as a specific breach of the APA or stated as a claim within the First Amended Demand.[27] However Claimants' Opening Brief states in one sentence that Respondents "failed to issue a certificate to Erskine for the 500,000 units in MD Synergy as required by Section 1.2." During the arbitration Mr. Erskine testified that the units were issued to Med-Billing; that the APA called for them to be issued to Med-Billing but the Operating Agreement[28] referred to him as owner.

Based upon the post hearing submissions and argument, it appears clear that the certificates for 500,000 units of MD Synergy were not, in fact, issued. In summary, it is the apparent position of the Claimants that despite the breach of the APA and the fraudulent conduct, as specifically found and determined as set forth above, that Claimant Erskine is entitled to enforce that provision of the APA. It is Respondent's position that based upon the breaches and fraudulent conduct that Claimant Erskine would be unjustly enriched if he were to receive the units at issue.

As discussed and determined hereinabove, the undersigned has found and determined that Claimants, and each of them, breached the terms of the APA with reference to the representation as to the accounts receivable which specifically breached sections 2.10 and 7.3 . (Section III. B, supra) The undersigned has further determined that Claimants fraudulently concealed the true nature of the accounts receivable as more specifically set forth in Section III, E, infra.

The undersigned finds and determines that based upon the entirety of the record and the findings and determinations as set forth herein that Claimants have not shown entitlement to the 500,000 units. Claimants breached the APA and have not shown that they otherwise performed pursuant to the terms of the APA.

3. Breach of the APA for Failure to Reassign the SBA Loans to NEWCO, Release Erskine from personal guarantees or make necessary payments.

Claimants specifically alleged violation of Sections 2.13, 6.3 and 6.4 of the APA. As to each of the foregoing alleged breaches, the evidence supported that as of the time of the arbitration hearing, these matters had either been resolved consistent with the requirements of the APA and/or were in the process of being resolved consistent with the requirements of the APA. More importantly, Claimant Erskine testified that no damages had been suffered as a result of the failure to have these matters transferred immediately and/or to have him removed from the personal guarantees. He further testified that he did not believe his credit had been affected.

The undersigned finds and determines that Claimants have not sustained their burden as to these alleged breaches. The undersigned specifically finds and determines that Claimants

[27] Not only was this not an asserted claim or breach, there was never a claim or a request to value these units until the post hearing briefing and after a determination had been made as to the disposition of the units.
[28] The Operating Agreement was an attachment to and part of the APA. Exhibit 1 @ 00075

have not shown by a preponderance of the evidence that they have sustained any damage as a result of these alleged breaches.

D. Discussion of Claims Pursuant to the Employment Agreement

Claimants allege breach of the Employment Agreement, specifically the failure to pay the severance sum pursuant to section 5.2.2, the $6000 for disposing of his interest in PerformaX pursuant to section 6.1 and the car allowance pursuant to section 4.4. It is not disputed that Claimant Erskine was terminated with out cause pursuant to the terms of the Employment Agreement. Mr. Tuli specifically testified that Mr. Erskine was not terminated for any fraud in connection with his employment; the fraudulent conduct was the personal conduct of Mr. Erskine in connection with the APA.

Except as to the car allowance, for which Respondents argued there had been a waiver, Respondents offered no other evidence to contradict the claims of Respondents as to the breaches of the Employment Agreement.

As to the claims pursuant to the Employment Agreement, the undersigned finds and determines that Claimant Erskine has shown by a preponderance of the evidence that Respondents breached the provisions of the Employment Agreement by failure to pay the $6000 for Mr. Erskine's disposal of his interest in PerformaX and the failure to pay the severance of $70,000 as of the time of his termination. The under signed further finds and determines that Claimant Erskine has shown by a preponderance of the evidence that Respondents breached the provisions of the Employment Agreement by failure to pay the alleged car allowance in the sum of $14, 163.64 pursuant to the testimony of Mr. Erskine. (There was no contrary evidence presented as to the amount of the car allowance.)

E. Discussion of Remaining Cross-Claims

In addition to the claims for Breach of the APA, Respondents have brought claims for Fraudulent Concealment and Unjust Enrichment.

1. Fraudulent Concealment

The actions which constitute this claim are the same which constitute the claims for Breach of the APA. The undersigned incorporates the discussion, findings and determinations as set forth regarding the Breach of the Asset Purchase Agreement. The undersigned finds Respondents, and each of them, have shown by the clear weight of the evidence, by clear and convincing evidence, that Claimants, and each of them, fraudulently concealed the true nature of the accounts receivable.

The undersigned finds and determines that the Respondent was damaged in the amount that the accounts receivables were overstated. Specifically, the undersigned finds and determines that based upon the clear weight of the evidence that Respondent was damaged in the sum of $416, 672.00.

2. Unjust Enrichment

The actions which constitute this claim are the same which constitute the Claims for Breach of the APA and Fraudulent Concealment. The undersigned incorporates the discussion, findings and determinations as set forth regarding the Breach of the Asset Purchase Agreement and specifically the discussion as set forth under Section C, 2, supra.

IV.DISCUSSION OF LEGAL ISSUES

A. Introduction of Parol Evidence

As set forth above regarding Claimants' claims as to the Breach of the APA agreement and specifically as related to the to the WIP issue, in addition to Claimants' failure of proof as more specifically set forth above, Claimants' attempt to introduce the alleged oral agreement is legally barred.

First, it is not disputed that the APA was an integrated agreement as specifically set forth in section 11.2. It is also not disputed that there are not any provisions in the APA that in any way address or refer to WIP in either the body of the agreement or any of the many attachments to the APA which together form the entire agreement. There is no question that Claimants seek to introduce the terms of an oral agreement[29] that would vary the terms of the APA. It is clear that Claimants attempt to introduce the evidence not to explain any of the terms of the APA but to add terms to the agreement that are simply not there even if the testimony and evidence of Claimants on this issue were credited.

To the extent that Claimants seek to have the evidence considered to vary the terms of the written agreement and/or as evidence of a contemporaneous oral agreement it is barred by application of the Parol Evidence Rule, a rule of substantive law. *Banco Do Brasil, S.A. v. Latian, Inc.*,(1991) 234 Cal. App. 3d 973,1000. As the Court stated in *Alling v. Universal Manufacturing Corp.*((1992) 5 Cal. App; 4th 1412, 1433:

"The parol evidence rule generally prohibits the introduction of any extrinsic evidence, whether oral or written to vary, alter or add to the terms of an integrated written instrument. [Citations omitted] 'An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.'(Rest. 2d Contracts, section 209, subd. (1).) In California, the rule is embodied in Code of Civil Procedure section 1856..."

The Court went on to discuss various considerations regarding the application of the parol evidence agreement. The Court specifically held that "a prior or contemporaneous collateral oral agreement relating to the same subject matter may sometimes be admitted in evidence. However, this is true only where it is not inconsistent with the terms of the integration.

[29] There was no assertion that the agreement regarding the WIP and the treatment of same was never reduced to writing.

(Masterson v. Sine (1968) 68 Cal.2d. 222." [See also: *Gerdlund v. Electronic Dispensers Internat.* (1987) 190 Cal. App. 3d 263]

In sum Claimants seek to present an entirely new agreement that is inconsistent with the integrated APA, even assuming the evidence in support of the agreement was credible.

B. Alter Ego Theory

Respondents raised and argued that Claimant Erskine is the alter ego of Med-Billing Corporation. It was virtually undisputed that subsequent to the subject transaction that Med-Billing, having sold all of its assets, was a mere shell. There was no contrary evidence. As the Court stated in *Rowe v. Exline*, 153 Cal. App. 4th 1276 (2007):

"Alter ego theory posits that the individual defendants are inseparable from the corporation and in legal effect are the corporation. ([Citation omitted] [Alter ego theory requires that the corporation and individual should be considered as one]). The corporate form is disregarded and the entity is considered an association of individuals."

At the commencement of the arbitration Med-Billing was suspended. The current status of the corporation as of the arbitration was not in dispute. Indeed, the entire facts and circumstances make application of the alter ego doctrine applicable to the current factual situation. Claimant Erskine was and is the sole principal, director and shareholder of Claimant and Cross-Defendant Med-Billing Corporation. Claimant Erskine dominated and controlled Med-Billing Corporation in all matters during the negotiation of the APA, as evidenced by the testimony and provisions of the APA. Further, Claimant Erskine controlled the instant arbitration and is responsible for the legal fees, which is not disputed.

Claimant was given the opportunity to submit an offer of proof on the issue of alter ego. There was nothing in the offer of proof if presented by way of testimony that would have overcome the evidence in support of the finding as set forth.

It is further noted that pursuant to the terms of the APA that as to certain matters it was contemplated that Claimant Erskine would remain personally responsible. Although Claimant argued that certain of the provisions were inconsistent, specifically sections 1.6 and 4.5, when considered in light of the entire transaction Claimant has not shown any legal basis that the provisions should not be read and interpreted as they clearly read on their face.

In sum, it is not fairly disputed that there was no separateness as between the entity Med-Billing and the individual. There was, in fact, such an unity of interest as between Claimant Erskine and the corporation that the separate existence ceased to exist. See: *Alexander v. Abbey of the Chimes* (1980) 104 Cal. App. 3d 39 and *Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal. App. 2d 825. Further, there would be an inequitable result based upon the record to treat the acts as that of the corporation alone. Based upon the evidence in the record and the applicable case law, the undersigned finds and determines that Claimant Garrett Erskine is the alter ego of Claimant Med-Billing Corporation.

Finally, the clear weight of the evidence supports that Claimant Garrett Erskine was personally responsible for the tortious conduct of fraudulent concealment. Thus, alternatively, liability is not dependent on application of alter ego but is based upon his personal misconduct. See: *Filet Menu, Inc. v. C.C.L. & G., Inc.* (2000) 79 Cal. App. 4th 852; *Wyatt v. Union Mortgage Co.* (1979) 24 Cal. 3d 773.

IV. DETERMINATION OF RESERVED ISSUES

The undersigned reserved jurisdiction, as more specifically set forth above, to determine certain reserved issues. The undersigned finds and determines as to the Reserved Issues as set forth hereinafter.

A. Punitive Damages

The clear weight of the evidence in the record supported the fraudulent conduct of Claimant Erskine.[30] Respondent has shown the right to punitive damages based upon the conduct of Claimant Erskine. The issue is the amount of punitive damages. Respondent is seeking a multiplier of four times the compensatory damages which is the damages plus the interest.

The undersigned has read and considered the case law cited on behalf of Respondent.[31] The undersigned has further read and considered the facts adduced during discovery and evidence regarding the financial ability of Claimant Erskine. The undersigned finds that although the conduct of Claimant justifies consideration of an award of punitive damages, the record does not support an award of punitive damages based on the multiplier as requested by Respondents nor do the facts of Claimant's financial condition justify a multiplier in this sum.

Based upon consideration of the entire record and the purpose for which punitive damages are awarded the undersigned finds punitive damages in the sum of $ 100,000.00.

B. Attorneys' Fees, Costs and Interest

Respondents MDS Billing LLC (aka NEWCO) and MD Synergy, LLC were determined to be the prevailing parties in this arbitration pursuant to the provisions of the Asset Purchase Agreement, section 11.6.2.[32] Respondents are entitled to an award of reasonable attorneys' fees and costs.

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[30] Not only did Claimant not present stronger evidence during the hearing, both Claimant and counsel on behalf of Claimant in post hearing submissions continue to deny and/or fail to recognize the failure to present evidence in support of their position and the consequence of the fraudulent conduct with respect to the enforcement of the APA.

[31] Claimants have cited no contrary authority on the substantive law regarding the considerations for the imposition of punitive damages; Claimants have cited no case authority.

[32] To the extent that Claimants made a claim, and specifically Claimant Erskine made a claim, for attorneys' fees pursuant to the Employment Agreement, the undersigned has determined that Respondents are the net prevailing parties in this consolidated action. Further, Claimants have not shown any basis for apportionment of attorneys' fees based upon the facts of this case.

Respondents seek a total of $93,518.00 in attorneys' fees as of October 21, 2009.[33] In addition to attorneys' fees, Respondents seek costs in the total sum of $30,268.83 which represents Expert Witness fees in the sum of $4200 and arbitration fees in the total sum of $26,068.83.[34]

As to the request for attorneys' fees, the undersigned finds that the hour rate of $600 although high is within the range of fees within the legal community of Respondents' counsel based upon counsels background and experience.[35] The undersigned further finds that the total of the fees requested based upon the tasks performed, the issues involved and the results obtained are reasonable.

V. FINAL AWARD

The undersigned incorporates the Discussion and Findings and Determinations as set forth above in Section III, supra, as the Findings and Determinations as to the issues submitted for determination. Based on the foregoing, the undersigned specifically Finds and Determines as set forth hereinafter as to the Claims and Cross-Claims and makes this Final Award as to the matters submitted for determination.

A. Claimants' Claims

1. As to Claimants' Claims for Breach of the Asset Purchase Agreement, the undersigned finds that Claimants have not sustained their burden by a preponderance of the evidence that Respondents breached the provisions of the Asset Purchase Agreement as specifically set forth. The undersigned finds in favor of Respondents MDS Billing, LLC (aka NEWCO) and MD Synergy, LLC, and each of them, and against Claimants Med-Billing Corporation and Garrett Erskine, and each of them; Claimants to take nothing by way of award as against Respondents MDS Billing, LLC (aka NEWCO) and MD Synergy, LLC as to the Claims for Breach of the Asset Purchase Agreement. [As set forth below, the undersigned finds and determines that Respondents have shown that Claimants have breached the terms of the Asset Purchase Agreement which defeats their claims under the Asset Purchase Agreement.]

2. As to Claimants' Claims for Breach of the Employment Agreement, the undersigned finds that Claimants have shown by a preponderance of the evidence that Respondents MDS Billing, LLC (aka NEWCO) and MD Synergy, LLC, and each of them, breached the Employment Agreement by failure to pay the $6000 pursuant to section 6.1, failure to pay severance in the sum of $70,000 pursuant to section 5.2.2 and failure to pay the car allowance pursuant to section 4.4 in the total sum of $14,163.64.

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[33] Respondent made no further request for attorneys' fees in any subsequent submissions after October 21, 2009.
[34] These sums represent the total sums billed to Respondents as of the date of the Final Award.
[35] There was no specific opposition to either the hourly rate or overall total of the sum of the attorneys' fees as requested on behalf of Respondents. The total of the attorneys' fees requested on behalf of Respondents are less than the sum of the attorneys' fees incurred by Claimant based upon the evidence in the record.

In addition to the foregoing, Claimant Erskine is awarded as Waiting Time Penalties as to the sum of $70,000 for the severance awarded, the total sum of $16,153.85.

The undersigned finds in favor of Claimant Garret Erskine and against Respondents, MDS Billing, LLC (aka NEWCO) and MD Synergy, LLC, and each of them. Claimant Garrett Erskine is awarded the total sum of $106, 317.49 as against Respondents MDS Billing, LLC (aka NEWCO) and MD Synergy, LLC said sum to be an offset against the award against Claimants on the Cross-Claim of Respondents as set forth in 2 (A) below.

B. Respondents' Claims

1. As to Respondents' Claim for Breach of the APA, the undersigned finds that Respondents have shown by a preponderance of the evidence that Claimant Med-Billing Corporation breached the terms of the APA. The undersigned finds in favor of Respondents MDS Billing, LLC (aka NEWCO) and MD Synergy, LLC, and each of them, and against Claimant Med-Billing Corporation.

The undersigned finds that Respondents have shown that Claimant Garrett Erskine is the alter ego of Med-Billing Corporation.

Respondents MDS Billing, LLC (aka NEWCO) and MD Synergy, LLC are awarded as against Claimants Med-Billing Corporation and Garrett Erskine, and each of them, as and for damages for Breach of the Asset Purchase Agreement the sum of $416, 672.00 plus interest at the legal rate of 10% from October 1, 2006. (As of September 18, 2009 interest had accrued in the sum of $134,741.45 and accrues at the rate of $151.08 per day to the date of the rendering of the Final Award.

2. As to Respondents' Claim for Fraud by Concealment, the undersigned finds that Respondents MDS Billing, LLC (aka NEWCO) and MD Synergy, LLC, and each of them, have shown by clear and convincing evidence that Claimants Med-Billing Corporation and Garrett Erskine fraudulently concealed the true nature of the accounts receivables on the books and records of the corporation. The undersigned finds in favor of Respondents MDS Billing, LLC (aka NEWCO) and MD Synergy, LLC, and each of them, and against Claimants Med-Billing and Garrett Erskine, and each of them.

The undersigned finds that Respondents have shown that Claimant Garrett Erskine is the alter ego of Med-Billing Corporation. The undersigned further finds that Claimant Garrett Erskine is personally liable for the fraudulent concealment as more specifically set forth above.

Respondents MDS Billing, LLC (aka NEWCO) and MD Synergy, LLC are awarded as against Claimants Med-Billing Corporation and Garrett Erskine, and each of them, as and for damages for Fraudulent Concealment the sum of $416, 672.00 plus interest thereon as set forth in Section 2 (A), above.

The undersigned finds that the conduct of Claimant Garrett Erskine was fraudulent and willful and entitles Respondent to an award of punitive damages. The undersigned finds punitive damages in the total sum of $100,000.00.

3. As to Respondents' Claim for Unjust Enrichment, the undersigned finds in favor of Respondents, and each of them, and against Claimants, and each of them. The undersigned specifically finds that Claimants would be unjustly enriched by the retention of any further consideration (specifically entitlement to or retention of the 500,000 Equity Units of MD Synergy LLC and any further earn out payments under the APA) and that based upon the breaches as set forth above and fraudulent conduct that Claimants, and each of them, are not entitled to enforce the terms of the APA as against Respondents MDS Billing, LLC (aka NEWCO) and MD Synergy, LLC, and each of them.

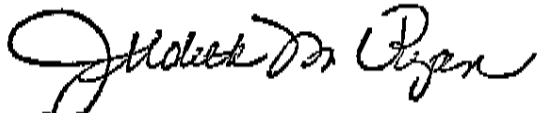
C. Attorneys' Fees, Costs and Interest

The undersigned finds and determines that Respondents MDS Billing, LLC (aka NEWCO) and MD Synergy, LLC are the prevailing parties in this arbitration as to the Asset Purchase Agreement. Respondents are awarded as and for reasonable attorneys' fees the sum of $93,518.00 and costs in the total sum of $30,268.83 pursuant to the provisions of the APA, section 11.6.2 plus interest at the legal rate from October 1, 2006 until the date of this Final Award and post judgment interest at the legal rate.

This Final Award resolves all issues submitted for determination in this arbitration as between these parties as named herein.

DATED: December 28, 2009

It is So Ordered:



Judge Judith M. Ryan (Ret.)
Sitting as Arbitrator

PROOF OF SERVICE BY FACSIMILE & U.S. MAIL

Re: Med-Billing Corporation, et al. vs. MDS Billing, LLC, et al.
Reference No. 1220038237

I, Michael A. Deshong, not a party to the within action, hereby declare that on December 30, 2009 I served the attached FINAL AWARD on the parties in the within action by facsimile and depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Orange, CALIFORNIA, addressed as follows:

Ronald Richards
Ronald Richards & Associates
P.O. Box 11480
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Fax: 310-277-3325

Bruce May
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Donald Hamman
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I declare under penalty of perjury the foregoing to be true and correct. Executed at Orange, CALIFORNIA on December 30, 2009.

Michael A. Deshong