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OPINIONS AND ORDERS

REHEARING ORDER

ARBITRATOR DECISION

OPINION, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (MAY 24, 2023)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AFFORDABLE CARE, L.L.C.,

Plaintiff-Appellant,

v.

RAELINE K. MCINTYRE, DMD;
RAELINE K. MCINTYRE, DMD, P.C.,

Defendants-Appellees.

No. 22-60245

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 1:21-CV-85

Before: ELROD and HAYNES, *Circuit Judges*.†

PER CURIAM:*

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† Judge Willett was a member of the panel that heard oral argument. He has since recused and has not participated in this decision. This case is being decided by a quorum. 28 U.S.C. § 46(d).

* This opinion is not designated for publication. *See* 5th Cir. R. 47.5.

Affordable Care lost at arbitration. It now seeks vacatur of the resulting arbitration award because the arbitrator and an attorney for the other side both have connections to Duke University School of Law.

The district court correctly determined that these connections do not create a conflict. We therefore AFFIRM the district court's denial of relief.

I

Charles Holton was assigned to arbitrate a contract dispute between Affordable Care L.L.C., which provides nonclinical business services to affiliated dentists, and Dr. Raeline McIntyre and her dental practice. After Holton completed the ordinary conflict disclosure form, Dr. McIntyre added Paul Sun to her legal team. Holton made the following supplemental disclosure the day after Sun entered his appearance:

> I would disclose that I know Mr. Sun and probably have had one or more cases with him or against him during my career, but nothing in the last 10 years. I do not believe that I have seen or communicated with him in over 10 years. His involvement would not affect my judgment in the case.[1]

The American Arbitration Association requested objections to the disclosure, but none were made. The arbitration process then proceeded to its conclusion with Holton ultimately rejecting each of Affordable's claims and awarding attorney fees to Dr. McIntyre.

Affordable subsequently moved to vacate the award in the United States District Court for the Southern

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[1] Thus, this is not a case involving a complete lack of disclosure.

District of Mississippi, citing the Federal Arbitration Act's four statutory grounds for relief. It also sought discovery related to Holton's alleged bias and partiality.

In support of its requests, Affordable submitted screenshots taken from the webpages of Duke's law school and Sun's firm, as well as a local news article. With this publicly available information, Affordable was able to ascertain that both Holton and Sun worked at Duke University School of Law: Holton as a full-time faculty member and Sun as a "2021 Winter-session" adjunct. Affordable also determined that Holton served as the director of Duke's Civil Justice Clinic, which partners with a local legal aid service that Sun's firm also partners with, and that Sun has provided legal representation to Duke University.[2]

The district court reviewed this evidence and concluded that Affordable failed to establish grounds for vacatur under the FAA and that discovery was not warranted. It therefore denied Affordable's motions and confirmed the award. Affordable now appeals.

II

Affordable maintains that Holton's arbitration award must be vacated under the FAA due to "evident

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[2] Affordable also asserted that "Holton represented Duke University in many lawsuits from 1983 through 2005" and that "Sun and [his firm] took over representation of Duke University following Holton's long representation." But, as the district court noted, Affordable has not produced any evidence of Holton's "long representation" of Duke. Nor did it provide any evidence to substantiate its assertion that Holton had handed litigation over to Sun or his firm.

partiality or corruption in the arbitrator[]." 9 U.S.C. § 10(a)(2). We disagree.

The standard for establishing evident partiality is "stern." *OOGC America, L.L.C. v. Chesapeake Expl., L.L.C.*, 975 F.3d 449, 453 (5th Cir. 2020) (quoting *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 281 (5th Cir. 2007) (*en banc*)). The challenger must show "a concrete, not speculative impression of bias" that "stem[s] from a significant," not trivial, "compromising connection." *Id.* (citation and quotation marks omitted). "[T]he party challenging the award 'must produce specific facts from which a reasonable person would *have* to conclude that the arbitrator was partial to' its opponent." *Id.* (quoting *Cooper v. WestEnd Cap. Mgmt., L.L.C.*, 832 F.3d 534, 545 (5th Cir. 2016)).

The connections derived from Affordable's internet research do not establish a conflict of the sort contemplated by the FAA. To the contrary, they are quintessential examples of the kind of "trivial past association" our precedents have deemed insufficient to warrant "the extreme remedy of vacatur." *Positive Software*, 476 F.3d at 279. Indeed, once separated from Affordable's inflammatory characterizations, the evidence in the record reflects the kind of professional intersections that one might expect to find between any two attorneys working in the same geographical location.

Affordable has shown that both Holton and Sun served on the faculty of Duke's law school—one as an adjunct for the winter term and one as a fulltime faculty member—and that Holton and Sun were both part of organizations that served the same legal aid nonprofit. This cannot, standing alone, cast Holton's

impartiality into doubt. It does not follow that Sun and Holton had any kind of personal, professional, or financial relationship. We also agree with the district court that Affordable's bald assertion that Sun and Holton shared an attorneyc lient relationship through Holton's employment with Duke University is unsupported by the facts and the law.

This would be a different case if Affordable had offered evidence that Holton and Sun worked closely together. But we cannot, on this record, conclude that Holton and Sun were even aware of their shared Duke connection.

We have upheld arbitration awards in the face of much stronger indicia of a potential conflict. *See e.g.*, *Positive Software*, 476 F.3d at 28384 (declining to vacate award where prevailing party's attorney had previously litigated with the arbitrator); *Cooper*, 832 F.3d at 540 (declining to vacate award based on an undisclosed relationship between the opposing party and another arbitrator who worked for the same arbitral organization that the presiding arbitrator belonged to); *OOGC*, 975 F.3d at 451 (declining to vacate award despite allegations that the arbitrator had a financial incentive to rule a certain way).

In each of these cases, the unsuccessful party to an arbitration identified an unremarkable professional intersection between a party or attorney and an arbitrator, then used speculation and conjecture in an attempt to parlay that innocuous connection into a conflict of interest. Affordable's challenge is no different. Affordable has not offered specific, concrete facts that would cause a reasonable person to speculate—much

less require a reasonable person to conclude—that Holton was biased.[3]

III

In the event that we deem vacatur of the arbitration award unwarranted, as we now do, Affordable asks that it be permitted to conduct limited discovery to further probe the relationship between Holton and Sun.

We review a district court's order denying post-arbitration discovery for abuse of discretion. *Vantage Deepwater Co. v. Petrobras Am., Inc.*, 966 F.3d 361, 373 (5th Cir. 2020). "District courts occasionally allow discovery in vacatur and confirmation proceedings," and the Fifth Circuit has "endorsed a flexible inquiry for district courts to use." *Id.* at 372. Namely, "the court must weigh the asserted need for hitherto undisclosed information and assess the impact of granting such discovery on the arbitral process." *Id.* at 373 (citation omitted). In doing so, the district court "should focus on 'specific issues raised by the party challenging the award and the degree to which those issues implicated factual questions that cannot be reliably resolved without some further disclosure.'" *Id.* (citation omitted). "The party seeking discovery bears the burden of showing its necessity." *Id.* (citation omitted).

The district court's analysis is entirely consistent with this court's flexible standard. Affordable has not pointed to any compelling evidence of impropriety that

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[3] Even combining the Duke connections with the perceived procedural and substantive advantages that Affordable believes Holton extended to Sun and his client, we cannot conclude that Affordable has established evident partiality.

might demonstrate the need for further discovery. Permitting discovery in this situation would therefore needlessly undermine the efficacy of the arbitral process. *See id.* (observing that "the loser in arbitration cannot freeze the confirmation proceedings in their tracks and indefinitely postpone judgment by merely requesting discovery" (citation omitted)).

* * *

Affordable has failed to satisfy the strict requirements for vacatur of an arbitration award set out by the FAA.[4] It has likewise failed to demonstrate that

[4] Affordable's challenges based on sections 10(a)(1), 10(a)(3), and 10(a)(4) of the FAA also fail. Affordable cannot satisfy the due diligence prong of the section 10(a)(1) analysis because it was on notice of a possible connection between Holton and Sun as soon as Sun entered his appearance, yet it did not follow up on that information until it had already lost at arbitration. *See Morgan Keegan & Co., Inc. v. Garrett*, 495 F. App'x 443, 447 (5th Cir. 2017) (quoting *Barahona v. Dillard's, Inc.*, 376 F. App'x 395, 397 (5th Cir. 2010)). Affordable's argument under section 10(a)(3), that Holton engaged in misconduct by disregarding the ruling of a federal district court in concurrent federal litigation also involving Affordable and Dr. McIntyre, is contrary to the record. Holton heard evidence on this ruling, received the ruling into the record, and allowed oral argument on the issue after closing arguments had been completed. Nor does Affordable provide any argument to support its contention that Holton was bound by the ruling, which involved a different contract from the one at issue in the arbitration, different facts, and a different state's law. Affordable's argument under section 10(a)(4), that Holton exceeded his powers by granting unsolicited attorney fees to Dr. McIntyre, is also contrary to the record. The services contract between Affordable and Dr. McIntyre expressly incorporated American Arbitration Association rules, which permit an award of attorney fees "if all parties have requested such an award." American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures R47(d)ii (2013). Both Affordable and Dr. McIntyre requested an award of attorney fees in their arbitration pleadings

the district court abused its discretion in denying post-arbitration discovery. We therefore AFFIRM.

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and reiterated that request in their proposed findings and conclusions.

JUDGMENT, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (MAY 24, 2023)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AFFORDABLE CARE, L.L.C.,

Plaintiff-Appellant,

v.

RAELINE K. MCINTYRE, DMD;
RAELINE K. MCINTYRE, DMD, P.C.,

Defendants-Appellees.

No. 22-60245

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 1:21-CV-85

Before: ELROD and HAYNES, *Circuit Judges*.†

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

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† Judge Willett was a member of the panel that heard oral argument. He has since recused and has not participated in this decision. This case is being decided by a quorum. 28 U.S.C. § 46(d).

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

MEMORANDUM OPINION AND ORDER, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI (MARCH 31, 2022)

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI SOUTHERN DIVISION

AFFORDABLE CARE, LLC,

Plaintiff,

v.

RAELINE K. MCINTYRE, DMD and RAELINE K. MCINTYRE, DMD, P.C.,

Defendants.

Civil Action No. 21-cv-85-TBM-RPM

Before: Taylor B. MCNEEL, United States District Judge.

MEMORANDUM OPINION AND ORDER

Affordable Care, LLC lost in arbitration. Affordable Care now seeks to set aside the arbitration award because it believes the arbitrator was partial to Defendants. Affordable Care has not put forward evidence to demonstrate that the draconian remedy of vacatur is appropriate.

Affordable Care is a North Carolina company that prepared the governing contract with the Defendants. That contract required any disputes to be resolved in arbitration in Raleigh, North Carolina. Also, North Carolina law governed the interpretation and performance of the contract. Affordable Care demanded arbitration. An arbitrator from North Carolina was chosen. Unsurprisingly, the Defendants—who are from Mississippi—associated a Raleigh attorney as local counsel. Upon the local counsel's entry of appearance, the arbitrator disclosed that he "probably" has "had one or more cases [either] with [Defendants' local counsel] or against him during my career, but nothing in the last 10 years." He further clarified "I do not believe I have seen or communicated with [Defendants' local counsel] in over 10 years." Affordable Care does not dispute the truthfulness of these statements. Instead, Affordable Care complains that the arbitrator and Defendants' local counsel had other mutual connections within the North Carolina legal community and at Duke University, and these mutual connections are sufficient to set aside the award. The law does not support Affordable Care's position.

The Court denies Affordable Care's Motion to Vacate and Motion for Discovery. The Court grants the Defendants' Motion to Confirm. The Court finds there is no evidence of fraud or evident partiality by the arbitrator. Nor did the arbitrator engage in misconduct or exceed his powers. Finally, Defendants' Motion for Sanctions is denied. While Affordable Care's claims are weak, Defendants have not demonstrated Affordable Care's Motion was frivolous or filed for the purpose of delay.

I. BACKGROUND

Affordable Care, LLC, a dental practice management company, entered into a twentyyear management services contract with Raeline K. McIntyre, DMD, P.C., on November 1, 2002.[1] On July 24, 2013, JNM Office Property—a company owned by Dr. Raeline McIntyre and her husband, Dr. Neil McIntyre—entered into a lease agreement with Affordable Care to lease property JNM had recently purchased in Gulfport, Mississippi.

In September, 2019, the Defendants notified Affordable Care of their desire to terminate the management services contract. On November 1, 2019, Affordable Care filed its initial demand for arbitration against the Defendants, in accordance with the mandatory arbitration provision in the management services agreement. On that same date, Affordable Care filed a federal civil suit (1:19cv827HSO-RPM) against JNM Office Property, LLC, seeking a declaratory judgment that Affordable Care was not in default on the lease of the Gulfport property.

On June 3, 2020, Affordable Care filed an Amended Demand for Arbitration, bringing seventeen grounds for relief, including declaratory relief under the management services contract, attorneys' fees and indemnification, and multiple breach of contract claims. Later that month, the arbitrator who was originally selected by the parties withdrew from the matter due to Covid-

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[1] Defendant Raeline K. McIntyre, DMD, is the sole owner of Raeline K. McIntyre, DMD, P.C. Raeline K. McIntyre, DMD and Raeline K. McIntyre, DMD, P.C. will collectively be referred to as the "Defendants."

19 concerns. The parties selected Charles Holton, using the AAA process, as the new arbitrator.

The Arbitration merits hearing was held over the course of five days in December, 2020. Closing arguments were made by the parties on February 11, 2021. On March 4, 2021, Affordable Care was granted leave by Arbitrator Holton to present additional arguments on the summary judgment decision entered in the lawsuit pending between Affordable Care and JNM Office Property. Finally, on March 22, 2021, the parties were notified that Arbitrator Holton had rendered his decision on March 19, 2021.

In his 115 page decision, Arbitrator Holton found in favor of the Defendants on all seventeen counts, and then awarded attorneys' fees in the amount of $379,168 and expenses in the amount of $14,430.75 to the Defendants. [1638] at 115.

On March 24, 2021, Affordable Care filed a Complaint with this Court, seeking vacatur of the arbitration award and requesting remand of the matter to the AAA for a hearing on damages. Defendants moved [13] to dismiss the Complaint, asserting that the proper way to argue vacatur is by filing a motion to vacate as opposed to a complaint. [14] at 7. Affordable Care filed a Motion [16] to Vacate on June 17, 2021, arguing that vacatur is proper on all four grounds under 9 U.S.C. § 10. Additionally, Affordable Care filed a Motion [17] for Discovery, seeking discovery on Arbitrator

Holton and his relationship with Defendants' local North Carolina attorney, Paul Sun. On June 18, 2021, the Defendants filed a Motion [20] to Confirm

the Arbitration Award. Finally, on August 2, 2021, Defendants filed a Motion [33] for Sanctions.

Affordable Care argues for vacatur on the grounds that the arbitrator, Charles Holton, had an undisclosed relationship with the Defendants' counsel, Paul Sun and the Winters Law Firm. Affordable Care contends that because of that relationship, Arbitrator Holton was partial to the Defendants throughout the proceedings resulting in an "egregious award."

Based on its search of publicly available information, Affordable Care submits documents printed off of websites to show that Arbitrator Holton is a full time law professor at Duke University School of Law and serves as the Director of Duke Law School's Civil Justice Clinic, which partners with the Legal Aid of North Carolina. [1643]. Th e Winters Firm, of which Paul Sun is a founding partner, provides *pro bono* services to the Legal Aid of North Carolina. [1641] and [1642]. Before joining Duke Law, Arbitrator Holton practiced in the private sector and represented Duke University in "many lawsuits from 1983 through 2005." *Id*. The Winters Firm allegedly took over representation of Duke University, and Paul Sun has represented Duke University in several cases since then.[2] Finally, Paul Sun taught a "Wintersession

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[2] Affordable Care does not produce documents to support the statement that Arbitrator Holton Represented Duke University from 1983 through 2005 or that the Winters Law Firm took over representation of Duke University, except for a newspaper article indicating that Paul Sun represented a Duke University employee in 2018. [1645]. Affordab le Care also does not allege that the Winters Law Firm is the only firm representing Duke University, as opposed to numerous firms representing a university as large as Duke.

2021" class at Duke Law School which occurred during the arbitration proceedings. [1644].

There is no suggestion that there is a financial arrangement between Arbitrator Holton and Paul Sun. However, Affordable Care argues that because the Winters Law Firm and Paul Sun have previously represented Duke University and some faculty members in litigation, then there is an attorneyelient relationship between Arbitrator Holton and Paul Sun, since Arbitrator Holton is a faculty member at Duke Law School.

In response to Affordable Care's motion to vacate the arbitration award, the Defendants point to the following disclosure made by Arbitrator Holton:

> I would disclose that I know Mr. Sun [an attorney with Ellis & Winters] and probably have had one or more cases with him or against him during my career, but nothing in the last 10 years. I do not believe I have seen or communicated with him in over 10 years. His involvement would not affect my judgment in this case.

[284] at 1. This disclosu re was made July 23, 2020, the day after Paul Sun and his firm were retained by the Defendants, and was forwarded to all counsel of record, along with the case manager's request that any objections to this disclosure be made by July 30, 2020. *Id*. Affordable Care did not raise any objections or concerns with regard to this disclosure. [29] at 11. And Affordable Care has not alleged that Arbitrator Holton was untruthful in making this disclosure. Nor has Affordable Care offered any evidence to contradict this disclosure.

The Defendants contend that they are entitled to enforce the arbitral award and request an entry of a judgment. Defendants contend that Affordable Care's assertions are nothing more than "rank speculation, conjecture, and conclusory allegations" made in an effort to have the Court vacate the award. [29] at 8.

II. LEGAL STANDARD

Under the Federal Arbitration Act, federal courts are limited to a narrow review of arbitration awards. *See Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008) (holding that §§ 10 and 11 of the Federal Arbitration Act provide the exclusive grounds for expedited vacatur and modification); *Hamstein Cumberland Music Grp. v. Williams*, 532 F. App'x 538, 542 (5th Cir. 2013). "In light of the strong federal policy favoring arbitration, judicial review of an arbitration award is extraordinarily narrow" and "exceedingly deferential." *Cooper v. WestEnd Cap. Mgmt., L.L.C.*, 832 F.3d 534, 54344 (5th Cir. 2016) (citing *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 47172 (5th Cir. 2012)). Courts may vacate an arbitration award "only in very unusual circumstances." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (2013) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)). In accordance with the Supreme Court's decision in *Hall Street*, the four grounds listed in Section 10 of the FAA are the exclusive means by which a party can vacate an arbitration award. *Citigroup Global Mkts., Inc. v. Bacon*, 562 F. 3d 349, 352 (5th Cir. 2009).

According to Section 10 of the FAA, an award can be vacated:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy;or of any other misbehavior by which the rights of any party have been prejudice;or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id. (citing 9 U.S.C. § 10). "The Court does not 'conduct a review of an arbitrator's decision on the merits,' therefore 'arguments concerning the merits are irrelevant' to the Court's 'determination of whether there are statutory grounds within Section 10(a) under which the arbitration award should be vacated.'" *Vantage Deepwater Co. v. Petrobras Am. Inc.*, 4:18-cv-02246, 2019 WL 2161037, at *2 (S.D. Tex. May 17, 2019) (quoting *Householder Grp. v. Caughran*, 354 F. App'x 848, 851 (5th Cir. 2009)). An arbitration award "may not be set aside for a mere mistake of fact or law." *WestEnd Cap. Mgmt., L.L.C.*, 832 F.3d at 546 (quoting *Rain CII Carbon, L.L.C.*, 674 F.3d at 471-72). The party moving to vacate an arbitration award has the burden of proof, and any doubts or uncertainties must be resolved in favor of upholding the award.

WestEnd Cap. Mgmt., L.L.C., 832 F.3d at 544 (citing *Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 385 & n.9 (5th Cir. 2004)).

In seeking vacatur, Affordable Care raises all four statutory grounds available in 9 U.S.C. § 10(a). [18] at 1626. Defendants mo ve to confirm the award, disputing Affordable Care's grounds for vacatur.[3] [21] at 57;[29] at 511. Additional ly, Affordable Care requests that it be allowed to conduct limited discovery of the Arbitrator. [17]. Finally, Defendants seek sanctions in the form of attorneys' fees and costs associated with defending this action. [33]. The Court will first address each of Affordable Care's proposed grounds for vacatur and then consider the requests for discovery and sanctions.

A. Fraud

Affordable Care first contends that the arbitral award must be vacated because Arbitrator Holton had a conflict of interest arising from his past and current dealings with Defense counsel Paul Sun and his law firm, and that the failure to disclose these past dealings resulted in an award procured by fraud.

The FAA provides that a district court can refuse to enforce an arbitral award when it has been "procured by corruption, fraud, or undue means." 9 U.S.C. § 10(a)(1). Under Section 10(a)(1), "a party who alleges that an arbitration award was procured by fraud must demonstrate:(1) that the fraud occurred

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[3] Defendants also filed a Motion [13] to Dismiss Plaintiff's Complaint [1], asserting that the filing of a Complaint was procedurally improper. Given the Court's ultimate decision in this matter, the Motion to Dismiss is denied as moot.

by clear and convincing evidence; (2) that the fraud was not discoverable by due diligence before or during the arbitration hearing; and (3) the fraud materially related to an issue in the arbitration." *Morgan Keegan & Co., Inc. v. Garrett*, 495 F. App'x 443, 447 (5th Cir. 2012) (quoting *Barahona v. Dillard's, Inc.*, 376 F. App'x 395, 397 (5th Cir. 2010)); *see also Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004). With regard to the third prong, "[i]t is not necessary to establish that the result of the arbitration would have been different if the fraud had not occurred." *Karaha Bodas*, 364 F.3d at 30607. However, Section 10(a)(1) does require "a nexus between the alleged fraud and the basis for the panel's decision." *Morgan Keegan & Co.*, 495 F. App'x at 447 (quoting *Forsythe Int'l, S.A. v. Gibbs Oil Co. of Tex.*, 915 F.2d 1017, 1022 (5th Cir. 1990)).

Under the FAA, Affordable Care must meet its burden of proof on each of the three prongs. *See Barahona*, 376 F. App'x at 398, n.2 (declining to reach two of the prongs because failure to satisfy even one of them was dispositive). Affordable Care makes a blanket statement that the "undisclosed bias of an arbitrator" can meet the required showing. [18] at 16. Other than the conclusory statement that the "undisclosed bias of an arbitrator is an enumerated action that will satisfy this [fraud] requirement," Affordable Care provides no support with the facts or case law to demonstrate that any of the actions of the arbitrator rise to the level of "clear and convincing evidence" of fraud. Nor does Affordable Care even make a single argument under Section 10(a)(1) to explain how any one of the three prongs are met.

Arbitrator Holton disclosed that he "had one or more cases with [Paul Sun] or against him during [his] career, but nothing in the last 10 years." [281] at 1. He also disclosed that "I do not believe I have seen or communicated with him in over 10 years." *Id.* All that Affordable Care has demonstrated is that Paul Sun and his law firm have provided legal representation for Duke University and some of its employees in the past. And Arbitrator Holton—as a full-time professor at Duke Law School and the Director of Duke Law School's Civil Justice Clinic—does some work with Legal Aid of North Carolina. Paul Sun's firm lists the Legal Aid of North Carolina as one of the seven entities for which it provides *pro bono* services. Finally, Affordable Care demonstrated that Paul Sun was listed as a professor for a "2021 Wintersession" class at Duke Law School. Notably, Arbitrator Holton was not listed as a "2021 Wintersession" instructor.

There is no evidence, nor has there been any allegation of such by Affordable Care, that Arbitrator Holton had any kind of financial dealings or close, personal relationships with Paul Sun or the Winters Law Firm. And the relationships described—such as the fact that both the Winters Law Firm and Arbitrator Holton do work for the Legal Aid of North Carolina—are the kind of professional relationships and contacts one would expect of people working in the same locality in the legal field. *See Midwest Generation EME, LLC v. Continuum Chem. Corp.*, 768 F. Supp. 2d 939, 946-47 (N.D. Ill. 2010) (noting that interactions between the arbitrator and one party's law firm such as lecturing at seminars and serving as past-presidents of the same legal organization reveal nothing beyond the kind of professional interactions one would expect

of successful lawyers in a specialized field). And there is no evidence of any interaction between Paul Sun and Arbitrator Holton and any work with the Legal Aid of North Carolina. In fact, Arbitrator Holton disclosed that he did not think he had seen or spoken with Paul Sun in over ten years. And all of these "connections" could have been discovered through "due diligence during the arbitration hearing," after Arbitrator Holton made the disclosure describing his prior knowledge of Paul Sun. *Morgan Keegan & Co.,* 495 F. App'x at 447 (quoting *Barahona*, 376 F. App'x at 397); *see also Uhl v. Komatsu Forklift Co.*, 466 F. Supp. 2d 899, 907 (E.D. Mich. 2006) (finding no evidence of fraud where defendants knew of a relationship between the arbitrator and opposing counsel and with the exercise of due diligence could have uncovered the relationships of which they now complain). Finally, Affordable Care provides no basis, in fact or law, for its position that an attorneyelient relationship exists between Arbitrator Holton and Paul Sun.

Affordable Care has not offered any arguments as to why even the first prong required to prove fraud has been met. As to the second prong, if Affordable Care had performed its due diligence, all of these connections were discoverable in the public domain during the arbitration. *See Morgan Keegan & Co.*, 495 F. App'x at 447 (holding the plaintiff could not meet its "burden of proof" under the second prong because the grounds for fraud were discoverable by due diligence before or during the arbitration); *Matter of Arb. Between Trans Chem. Ltd. and China Nat'l Machinery Import and Export Corp.*, 978 F. Supp. 266, 30506 (S.D. Tex. 1997) ("CNMC also fails to meet . . . the threepart test for showing fraud or undue means . . . because it has not

shown that TCL's allegedly improper behavior was not discoverable by due diligence before or during the arbitration hearing."). Even if the evidence supported a finding of fraud, which it does not, this prong is unsatisfied and Affordable Care's motion to vacate on this ground is denied.

B. Evident Partiality

The Court next considers Affordable Care's contention that the award must be vacated under § 10(a)(2) based on the evident partiality of Arbitrator Holton. Under the FAA, courts may vacate an arbitration award "where there was evident partiality or corruption in the arbitrators." *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 352 (5th Cir. 2009) (quoting 9 U.S.C. § 10(a)(2)). "[A]n arbitrator's nondisclosure must involve a 'reasonable impression of bias' stemming from 'a significant compromising connection to the parties' in order for vacatur to be warranted under § 10(a)(2)." *OOGC Am., L.L.C. v. Chesapeake Expl., L.L.C.*, 975 F.3d 449, 453 (5th Cir. 2020) (quoting *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 28283 (5th Cir. 2007) (en banc)). However, the standard for assessing evident partiality is not the mere appearance of bias. *See Positive Software Sols., Inc.*, 476 F.3d at 285 ("[T]he 'mere appearance' standard would make it easier for a losing party to challenge an arbitration award for nondisclosure than for actual bias . . . " and "hold arbitrators to a higher ethical standard than federal Article III judges").

"Evident partiality is a 'stern standard.'" *WestEnd Cap. Mgmt., L.L.C.*, 832 F.3d at 545 (quoting *Positive Software Sols., Inc.*, 476 F.3d at 281). "The statutory

language . . . seems to require upholding arbitral awards unless bias was clearly evident in the decisionmakers." *Id.* Thus, for the arbitration award to be vacated, Affordable Care "must produce specific facts from which a reasonable person would have to conclude that the arbitrator was partial to" the Defendants. *See Householder Grp. v. Caughran*, 354 F. App'x 848, 852 (5th Cir. 2009) (citation and internal quotation marks omitted). This is an "onerous burden," because the urging party must demonstrate that the "alleged partiality was direct, definite, and capable of demonstration rather than remote, uncertain, or speculative." *Householder Grp.*, 354 F. App'x at 852 (quoting *Weber v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 455 F. Supp. 2d 545, 550 (N.D. Tex. 2006)) (citation and internal quotations omitted).

1. Relationship with Counsel

When challenging an arbitration award based upon nondisclosure of an arbitrator's relationship with the parties, it must be shown that the arbitrator had a "significant compromising connection to the parties." *Ameser. v. Nordstrom, Inc.,* 442 F. App'x 967, 970 (5th Cir. 2011). In nondisclosure cases, an award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding. *Positive Software Sols., Inc.*, 476 F. 3d at 283. The "reasonable impression of bias" standard is interpreted practically rather than with the utmost rigor. *Id.*

The question before the Court is whether Affordable Care has sustained its burden to establish "specific facts from which a reasonable person would *have* to conclude that the arbitrator was partial to its

opponent." *OOGC Am., L.L.C.*, 975 F.3d at 453 (citations omitted) (emphasis in original). The Court concludes that it has not.

Affordable Care's claim that there was "evident partiality" fails for two reasons. First, Affordable Care waived the objection because it waited until after the arbitration award was issued to raise its claim of evident partiality. *See Dealer Computer Servs., Inc. v. Michael Motor Co.,* 485 F. App'x 724, 727 (5th Cir. 2012) ("A party seeking to vacate an arbitration based on an arbitrator's evident partiality generally must object during the arbitration proceedings. Its failure to do so results in wavier of its right to object."). And what Affordable Care has shown are a few professional connections, the existence of which were readily discoverable to anyone who chose to look. *See Fidelity Fed. Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1313 (9th Cir. 2004) (holding that a party waives later challenges if it "either knew or should have known of the facts indicating partiality"); *Matter of Andros Compania Maritima, S.A.*, 579 F.2d 691 (2d Cir. 1978) (refusing to vacate the award where one party alleged a "close personal and professional relationship" between the arbitrator and the president of firm that owned the vessel involved in the arbitration where basis of relationship was that the arbitrator and the executive had served together on 19 arbitration panels and no other concrete support was given for the characterization that the two were "close personal friends"). All the "connections" described by Affordable Care were fairly discoverable. By waiting until the completion of the arbitration proceedings—and after it received an unfavorable ruling—Affordable Care waived its "objection" of evident partiality.

Second, it is clear that neither the facts nor the law support a finding of evident partiality on the part of Arbitrator Holton. Significantly, Affordable Care has not cited a single case that would support the conclusions it draws from the professional connections of Arbitrator Holton, Paul Sun, and the Winters Law Firm. Nor does Affordable Care offer any specific facts to contradict Arbitrator Holton's disclosure that he has not seen or had any communications with Paul Sun in over ten years. The most Affordable Care does is put forward conclusory assertions of partiality towards the Defendants.

The cases that Affordable Care relies upon to argue vacatur under Section 10(a)(2) involve business and financial relationships between the arbitrator and one of the parties. For example, in *Thomas Kinkade Co. v. White*, 711 F.3d 719, 724 (6th Cir. 2013), the arbitration award was vacated because the neutral arbitrator's law firm had accepted a business engagement from one of the parties to the arbitration. And in *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994), the Ninth Circuit reversed the district court's judgment to vacate the award where one of the arbitrators failed to disclose that his law firm had represented the parent company of a party to the arbitration in 19 cases over 35 years.

Affordable Care is correct that "[c]ourts have found that a reasonable impression of partiality is established when the arbitrator has had a direct business or professional relationship with one of the parties to an arbitration." *Weber v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 455 F. Supp. 2d 545, 552 (N. D. Tex. 2006); *see also Thomas Kinkade Co. v. White*, 711

F.3d 719, 724 (6th Cir. 2013) ("[w]hen the neutral arbitrator engages in or attempts to engage in midarbitration business relationships with nonneutral participants, it jeopardizes what is supposed to be a party-structured dispute resolution process.").

However, there is no allegation or evidence of a financial or business relationship between Arbitrator Holton and Paul Sun or the Winters Law Firm. Also, the unsubstantiated, conclusory allegation that an attorneyelient relationship exists between Arbitrator Holton and Paul Sun is not supported by the evidence. Affordable Care does not provide any relevant law to support its conclusion that by virtue of Paul Sun and the Winter Law Firm's representation of Duke University, and on occasion some of its faculty members, an attorneyelient relationship exists between Paul Sun and Arbitrator Holton, a professor at Duke Law School.[4] While Affordable Care cites Rule 1.13 of the North Carolina Rules of Professional Conduct in support, it fails to cite the comment to that rule which states, "[t]his does not mean, . . . , that constituents of an organizational client are the clients of the lawyer." N.C. RULES OF PRO. CONDUCT R. 1.15 cmt. According to Arbitrator Holton's disclosure—which was not objected to by Affordable Care—he had not seen or communicated with Paul Sun in over ten years. And

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[4] In support of its claim that an attorneyelient relationship exists between Arbitrator Holton and Paul Sun, Affordable Care sites to Rule 1.13 of North Carolina Rules of Professional Conduct and an unpublished Connecticut district court case (*Metcalf v. Yale Univ.*, No. 15ev1696, (D. Conn. Dec. 27, 2017)—neither of which are persuasive authority for this Court as neither suggest that an attorney for an organization has an attorneyelient relationship with every employee of the organization it represents. [18] at 20.

Affordable Care does not provide any legal support for its contention that because Arbitrator Holton previously did legal work for Duke University, and Paul Sun currently does legal work for Duke University, there is a conflict of interest. *See Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 114950 (10t h Cir. 1982) (affirming denial of vacatur where the arbitrator and law firm representing a party had clients in common and finding that requiring vacatur under such facts would "request that potential neutral arbitrators sever all their ties with the business world"). Nor is there any authority to support Affordable Care's position that every attorney who has represented Duke University has an attorneyelient relationship with each of the thousands of employees at Duke—including the faculty of Duke Law School and Duke Medical School. *See Liquor Bike, LLC v. Iowa Dist. Ct. for Polk Cnty.*, 959 N.W.2d 693, 697 (Iowa 2021) ("[A] lawyer's representation of an organization does not necessarily mean the lawyer also represents the owners, employees, or other constituents of the organization.").

And Courts have refused vacatur where the undisclosed connections are much stronger.[5] For

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[5] *See ANR Coal Co, Inc. v. Cogentrix of North Carolina, Inc.*, 173 F.3d 493 (4th Cir. 1999) (finding vacatur improper where arbitrator's law firm represented company that indirectly caused the dispute in the arbitration by buying less from the defendant, who in turn sought to buy less from the plaintiff); *AlHarbi v. Citibank, N.A.*, 85 F.3d 680, 682 (D.C. Cir. 1996) (denying vacatur where arbitrator's former law firm represented party to the arbitration on unrelated matters); *Lifecare Int'l, Inc. v. CD Med. Inc.*, 68 F.3d 429, 43234 & n.3 (11th Cir. 1995) (affirming denial of vacatur where arbitrator failed to disclose that he became "of counsel" to a law firm the prevailing party had interviewed for the purpose of obtaining representation in the instant dispute and finding that this, at best, showed a remote, uncertain, and

example, in *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141 (4th Cir. 1993), the arbitrator failed to disclose his law partner's representation of one of the parties to the arbitration. *Id.* at 145. The partner had done the work while working for a different law firm and had not brought the client with him when he joined the arbitrator's firm. *Id.* The court found that the partner's prior representation of the party was not sufficient grounds for finding evident partiality by the arbitrator where the arbitrator was not involved in the litigation between the parties. *Id.* at 146. And in *Lummus Global Amazonas, S.A. v. Aguaytia Energy del Peru*, 256 F. Supp. 2d 594 (S.D. Tex. 2002), the arbitrator disclosed that his law firm and a former law partner (Carolyn Goode) had done work for a party to the arbitration and for a company (El Paso Energy) that owned a minority interest in that party. *Lummus Global*, 256 F. Supp. 2d at 620. After the arbitrator issued his ruling, Lummus discovered "new evidence" of the relationship between the arbitrator's law firm and El Paso Energy. *Id.* at 621. Another former law partner of the arbitrator (John Hushon) left the law firm to become President of El Paso Energy. *Id.* John Hushon retained his former law firm and Carolyn Goode who did substantial legal work on a financing project involving Aguaytia Energy. *Id.* The court found that the arbitrator's alleged nondisclosure did not require vacatur, noting that the disclosure put Lummus "'on notice' of the

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speculative partiality); *Health Services Mgm't Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir. 1992) (finding relationship "minimal" and insufficient to vacate where arbitrator knew one of the parties, had worked in the same office with him twenty years ago, and saw him once a year since that time).

circumstances they now allege are potentially disqualifying." *Id.* at 626.

Unlike the arbitrators in *Peoples* and *Lummus* — whose law partners actually did legal work for a party to the arbitration—there is no allegation or evidence that Arbitrator Holton or his law firm had ever done legal work for the Defendants. Arbitrator Holton and Paul Sun, as Arbitrator Holton disclosed to the parties, had cases together in the past. And while the arbitrator in *Peoples* did not make any disclosure about the work his law partner had done for a party to the arbitration, Arbitrator Holton disclosed that he knew Paul Sun from previously having cases with or against him. Affordable Care did not object to this disclosure which put it "on notice." *See Lummus Global*, 256 F. Supp. 2d at 626. And while both Arbitrator Holton and Paul Sun represented Duke University at different times, case law supports this Court's finding that denial of vacatur is appropriate because this is the kind of "trivial former business" relationship, that does not require disclosure. *See Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278 (5th Cir. 2007) (en banc) (holding that vacatur was not warranted where arbitrator and counsel for a party to the arbitration worked on the same litigation for six years but had not spoken to each other prior to the arbitration and describing this relationship as a "trivial former business relationship"); *Uhl v. Komatsu Forklift Co.*, 512 F.3d 294 (6th Cir. 2008) (affirming denial of vacatur where arbitrator did not disclose that he had served as coєounsel with counsel for one party on two occasions six years earlier); *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1360 (6th Cir. 1989) (declining to vacate where arbitrator adjudicated a

case involving former law partners—whose practice he had left two-and-a-half years earlier—since there was an absence of evidence of a personal interest in the arbitration or prior knowledge of the substance of the arbitration).

Finally, Affordable Care points to the fact that Paul Sun taught a "Wintersession 2021" class at Duke Law where Arbitrator Holton is a full-time law professor. First, the Court notes that while Paul Sun is listed as an instructor for "Wintersession 2021," Arbitrator Holton is not included in that list. As Affordable Care points out in its brief, this class was taught "during the weekends of Friday, February 19 – Sunday, February 21, and Friday, March 12 – Sunday, March 14." [39] at 7. Affordable Care offers no arguments or case law to support its conclusory claim of evident partiality based on the fact that Paul Sun taught a class as an adjunct professor at the same university that employed Arbitrator Holton. In *Midwest Generation EME, LLC v. Continuum Chemical Corp.*, 768 F. Supp. 2d 939 (N.D. Ill. 2010), Continuum's "evidence" of arbitrator bias included contacts between the arbitrator and counsel for the prevailing party. *Id.* at 949. These contacts included:(1) presenting together at seminars for the College of Commercial Arbitrators, (2) co-authoring various law journal articles, (3) serving as past-presidents (at different times) of a professional organization, (4) holding membership in the ABA Real Estate Advisory Board, and (5) developing continuing education programs. *Id.* at 949. The court noted that "these particulars reveal nothing beyond the kind of professional interactions that one would expect of successful lawyers in the area where [the arbitrator] and [plaintiff's counsel] functioned." *Id.*

> As the Sixth Circuit cautioned in *Uhl*:
>
> > We will not rush to conclude that an arbitrator is evidently partial. Arbitrators are often chosen for their expertise and community involvement, so '[t]o disqualify any arbitrator who had professional dealings with one of the parties (to say nothing of a social acquaintanceship) would make it impossible, in some circumstances, to find a qualified arbitrator at all.'

Uhl, 512 F.3d at 308 (internal citations omitted). *See also Positive Software Sols., Inc.*, 476 F.3d at 286 ("Neither the FAA nor the Supreme Court, nor predominant case law, nor sound policy countenances vacatur of FAA arbitral awards for nondisclosure by an arbitrator unless it creates a concrete, not speculative impression of bias."); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 678 (7th Cir. 1983) ("Notwithstanding the broad language of Section 18 [of the AAA's Commercial Arbitration Rules], no one supposes that either the Commercial Arbitration Rules or the Code of Ethics for Arbitrators requires disclosure of every former social or financial relationship with a party or a party's principals.").

Accordingly, Affordable Care has not met its burden of showing a significant compromising connection exists between Arbitrator Holton and Paul Sun that would merit vacatur. *Amser v. Nordstrom, Inc.*, 442 F. Appx 967, 970 (5th Cir. 2011) (an arbitrator's nondisclosure of prior service in an earlier arbitration involving one of the parties did not meet the "high threshold" necessary for vacating an award based on evident partiality). "The draconian remedy of vacatur is only warranted upon nondisclosure that involves a

significant compromising relationship." *Positive Software Sols., Inc.*, 476 F.3d at 286. This case does not come close to meeting that standard when Affordable Care has not disputed that Arbitrator Holton and Paul Sun have not seen each other or communicated in over ten years. Affordable Care's motion for vacatur on this ground is denied.

2. Arbitrator Holton's Actions During the Arbitration Proceedings

Affordable Care further seeks vacatur of the award under Section 10(a)(2) on the ground that Arbitrator Holton displayed evident partiality and bias by granting the Defendants certain procedural advantages.

First, Affordable Care asserts that the Defendants were given an advantage by Arbitrator Holton granting a continuance of the Arbitration hearing, seven weeks before the hearing was scheduled to take place. As Affordable Care points out in its brief, Paul Sun "had been in an accident on July 31, 2020 and was recovering from his injuries." [18] at 10. Affordable Care does not cite any case law to support its assertion that Arbitrator Holton's grant of a continuance to a party whose attorney was injured in an accident is evidence of a procedural advantage. Nor does Affordable Care assert or offer evidence that Paul Sun was not actually injured in an accident. There is no merit to the argument that the Arbitrator Holton was giving the Defendants an advantage when a continuance was granted because Paul Sun was recovering from physical injuries sustained in an accident. Furthermore, Arbitrator Holton allowed Affordable Care additional time to present evidence and provide arguments after the final arbitration hearing and closing arguments

had been made. [1638] at 23. Affordable Care appears to argue that Arbitrator Holton's grant of a continuance based on physical injuries sustained by the Defendants' attorney was more of "a procedural advantage" than allowing Affordable Care to make arguments and submit evidence after the final arbitration hearing. Affordable Care is wrong.

Next, Affordable Care argues that Arbitrator Holton gave the Defendants an advantage by allowing Defendants to take a different position during the arbitration than they took on a similar issue that was raised in a separate federal civil action related to a separate contract. To clarify, the Court notes that the parties to the civil action (1:19cv827HSORPM) referred to by Affordable Care are Affordable Care and JNM Office Property, LLC. JNM Office Property is owned by Raeline McIntyre and her husband, Neil McIntyre. In that action, Affordable Care sought a declaratory judgment that it was not in default of a lease agreement that the parties entered into in 2013. The parties to the instant action are Affordable Care, Raeline K. McIntyre, DMD, and Raeline K. McIntyre, DMD, P.C., and the subject of this action is the management services contract entered by the parties in 2002. Affordable Care offers no legal support for its position that Arbitrator Holton was bound by the decision of a federal district court in a different state in a different matter involving different contracts or that failure to follow that district court ruling constitutes bias or misconduct justifying vacatur of the arbitration award. Significantly, pursuant to the arbitration agreement, the interpretation and performance of the contract were governed by North Carolina law.

In *Rainier DSC 1, L.L.C. v. Rainier Cap. Mgm't, L.P.*, 828 F.3d 362 (5th Cir. 2016), the Fifth Circuit considered a claim of arbitrator bias where the arbitrator and the district court reached *the same* conclusion on cases with similar issues and the same parties. *Id.* at 36465. The court st ated that "the fact that the arbitrator and the district court reached the same result regarding the meritlessness of the Investors' claim is not itself evidence of improper bias," noting that the arbitrator's award did not reference the district court's summary judgment and nothing in the award suggested that it as not the product of an independent evaluation by the arbitrator. *Id*.

Affordable Care has not shown that Arbitrator Holton gave the Defendants such an advantage to justify vacatur when deciding what weight to give a ruling in an action in a different state that involved different contracts. Therefore, vacatur is not appropriate on this ground under Section 10(a)(2).

C. Arbitrator's Misconduct

Affordable Care argues that vacatur is merited under Section 10(a)(3) because Arbitrator Holton engaged in "misconduct" when he "refused to consider evidence of the arguments and summary judgment on the issue of waiver." [18] at 22. The Defendants assert that this "summary judgment evidence" is from a separate civil action involving a lease between parties who were not subject to this arbitration. [29] at 12. The arbitrator accepted into the hearing record the summary judgment ruling from that civil lawsuit between Affordable Care and JNM Office Property, LLC, 1:19-cv-827-HSO-JCG, and allowed oral argument on the matter. [12] at 23.

Each of the parties to an arbitration must be given an "adequate opportunity to present its evidence and arguments." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 300 (5th Cir. 2004) (citations omitted). However, "an arbitrator is not bound to hear all of the evidence tendered by the parties." *Id.* "Every failure of an arbitrator to receive relevant evidence does not constitute misconduct requiring vacatur of an arbitrator's award." *Id*. at 301. "A federal court may vacate an arbitrator's award only if the arbitrator's refusal to hear pertinent and material evidence prejudices the rights of the parties to the arbitration proceedings" such that "the exclusion of relevant evidence deprives a party of a fair hearing." *Id.*

Affordable Care alleges that Arbitrator Holton did not consider the summary judgment ruling from a separate civil action involving a lease agreement between Affordable Care and JNM Property, LLC—an entity that was not a party to the instant arbitration. However, Affordable Care's statement that the arbitrator did not "consider" the summary judgment ruling from Civil Action No. 1:19-cv-827-HSO-JCG does not line up with the record. In fact, oral arguments were allowed on the matter—*after* closing arguments were made—and the summary judgment ruling was received into the record. [163-8] at 23. Clearly, Arbitrator Holton did not refuse to hear or exclude this evidence. And as the Court just stated, Affordable Care cites to no authority that suggests that the arbitrator was bound by a district court ruling in a separate action in another state, involving different contracts, or that failure to follow that ruling constitutes bias or misconduct justifying vacatur of the arbitration award.

Whether or not Arbitrator Holton decided to give weight to a particular piece of admitted evidence has no bearing on the issue of whether misconduct occurred meriting vacatur. *See Vantage Deepwater Co. v. Petrobras Am. Inc.*, 4:18CV02246, 2019 WL 2161037, at *8 (S.D. Tex. May 17, 2019).

On these facts, Affordable Care has not shown that Arbitrator Holton denied it an adequate opportunity to present its evidence and arguments. Accordingly, the Court finds that Affordable Care did not carry its burden of demonstrating that it was deprived of a fair hearing. Therefore, vacatur is not appropriate under Section 10(a)(3).

D. Arbitrator Exceeding His Powers

Finally, Affordable Care argues that the final award, which included attorney's fees and costs, requires vacatur under Section 10(a)(4). [18] at 23. The Defendants note that the arbitration hearing lasted six days, including additional time granted to Affordable Care to provide more evidence and to make additional arguments. [29] at 4. Defendants further argue that Arbitrator Holton's 115 page opinion was supported by the record and that vacatur of this matter is not warranted. *Id.* at 5-6.

Section 10(a)(4) authorizes a federal court to set aside an arbitration award "where the arbitrators exceeded their powers." *BNSF R. Co. v. Alstom Transp. Inc.*, 777 F.3d 785, 788 (5th Cir. 2015). "An argument for vacatur under Section 10(a)(4) must be balanced against the parties' agreement to have the arbitrators interpret their agreement, which means that 'an arbitral decision even arguably construing or applying the contract must stand, regardless of a

court's views of its (de)merits.'" *Vantage Deepwater Co. v. Petrobras Am., Inc.*, 966 F.3d 361, 375 (5th Cir. 2020) (quoting *Oxford Health Plans, LLC v. Sutter*, 569 U.S. 564, 569, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (2013)). "A party seeking relief under that provision bears a heavy burden." *Oxford Health Plans, LLC,* 569 U.S. at 569. "It is not enough . . . to show that the [arbitrator] committed an error – or even a serious error." *Id.* (quoting *StoltNielson S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010)). Under Section 10(a)(4), the Court looks at "whether the arbitrator's award was so unfounded in reason and fact, so unconnected with the wording and purpose of the [contract] as to manifest an infidelity to the obligation of an arbitrator." *Timegate Studios, Inc. v. Southpeak Interactive, L.L.C.*, 713 F.3d 797, 80203 (5th Cir. 2013). "The substantive question of whether an arbitrator has exceeded its powers is a function of [a] highly deferential standard of review in such cases:an arbitrator has not exceeded his powers unless he has utterly contorted . . . the essence of the contract." *Vantage Deepwater Co.*, 966 F.3d at 375 (quoting *Timegate Studios, Inc.*, 713 F.3d at 80203). "In other words, the arbitrator exceeds his authority where he acts 'contrary to an express contractual provision.'" *Id.* (quoting *PoolRe Ins. Corp. v. Org. Strategies, Inc.*, 783 F.3d 256, 265 (5th Cir. 2015)). The Court "resolve[s] any doubts in favor of arbitration." *Id.* (citing *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 472 (5th Cir. 2012)).

Affordable Care argues that Arbitrator Holton exceeded his powers by granting an award of attorneys' fees and costs, "which were never claimed by Defendants." [18] at 23. Contrary to Affordable Care's

assertion that Defendants did not request costs and attorneys' fees, Defendants clearly sought such an award in their Answer to Affordable Care's Amended Demand for Arbitration. *See* [1629] at 34 (Respondents "pray that the Amended Demand for Arbitration be dismissed with prejudice, taxing all costs of this action to Claimant and awarding Respondents reasonable attorneys' fees against Affordable, and that a judgment be entered in the Respondents' favor, together with costs incurred herein").

Further, the Final Award set forth the basis for award, and that is all that is necessary. *See Leeward Constr. Co. v. Am. Univ. of Antigua Coll. of Med.* , 826 F.3d 634, 640 (2d Cir. 2016) ("A reasoned award sets forth the basic reasoning of the arbitral panel on the central issue or issues raised before it. It need not delve into every argument made by the parties."). After analyzing each of Affordable Care's seventeen causes of action, Arbitrator Holton addressed "attorneys' fees and expenses." [1638] at 110114. At the outset, the Final Award states:

> AAA Commercial Rule 47(d)ii authorizes an award of attorneys' fees 'if all parties have requested such an award or it is authorized by law or in their arbitration agreement.' Both parties seek attorneys' fees in this matter. Rule 47 also provides that the arbitrator 'shall assess' fees and expenses.

Id. at 110.[6] Arbitrator Holton outlined the factors considered in determining what attorneys' fees and

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[6] The Service Contract at issue expressly incorporates the rules of the AAA. *See* [211] at 9 ("Any controversy or dispute . . . will be settled by arbitration in Raleigh, North Carolina in accordance

expenses to assess and the basis for the ultimate award. *Id.* at 110115. It is clear that Arbitrator Holton concluded that the parties both requested attorneys' fees and expenses, and that he was required by Rule 47 to award them.

Affordable Care has not met its burden to show that "the arbitrator's award was so unfounded in reason and fact, so unconnected with the wording and purpose of the [contract] as to manifest an infidelity to the obligation of an arbitrator." *See Timegate Studios*, 713 F.3d at 802; *Forsythe Int'l, S.A. v. Gibbs Oil Co. of Tex.*, 915 F.2d 1017, 1022 (5th Cir. 1990) ("Parties to voluntary arbitration may not superimpose rigorous procedural limitations on the very process designed to avoid such limitations . . . Submission of disputes to arbitration always risks an accumulation of procedural and evidentiary shortcuts that would properly frustrate counsel in a formal trial"). Arbitrator Holton did not exceed his powers by issuing an award of attorneys' fees and costs to the Defendants.

Accordingly, the Court finds that vacatur under Section 10(a)(4) is not appropriate.

III. MOTION FOR DISCOVERY

Affordable Care additionally requests a period of "limited discovery related to the Arbitrators' bias, partiality, and conflicts of interest, specifically related to Arbitrator Holton's relationship with Paul Sun and the Winters Firm." [172] at 8. The Defendants contend that postarbitration discovery, including deposing Arbitrator Holton is improper. The Defendants

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with the then existing rules of the American Arbitration Association applicable to commercial arbitration.").

also argue that Arbitrator Holton's disclosure with regard to his connection to Paul Sun was not objected to by the Plaintiffs, and Affordable Care's late request for discovery on the arbitrator is an attempt to "freeze the confirmation proceedings." [25] at 3.

"District courts occasionally allow discovery in vacatur and confirmation proceedings." *Vantage Deepwater Co. v. Petrobras Am., Inc.*, 966 F.3d 361, 372 (5th Cir. 2020) (citing Fed. R. Civ. P. 81(a)(6)(B)). The Fifth Circuit has endorsed "a flexible inquiry for district courts to use when assessing discovery requests in the context of such proceedings:'the court must weigh the asserted need for hitherto undisclosed information and assess the impact of granting such discovery on the arbitral process.'" *Id.* (quoting *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bimi Negara*, 364 F.3d 274, 305 (5th Cir. 2004) (internal citations omitted)). The Court should focus on "specific issues raised by the party challenging the award and the degree to which those issues implicated factual questions that cannot be reliably resolved without some further disclosure." *Id.* "The party seeking discovery bears the burden of showing its necessity." *Id.* (quoting *Freeman v. United States*, 556 F.3d 326, 341 (5th Cir. 2009)). "Moreover, '[t]he loser in arbitration cannot freeze the confirmation proceedings in their tracks and indefinitely postpone judgment by merely requesting discovery.'" *Id.* (quoting *Imperial Ethiopian Gov't v. BaruchFoster Corp.* , 535 F.2d 334, 337 (5th Cir. 1976)).

It has been observed that the deposition of arbitrators has been "repeatedly condemned" by courts. *Legion Ins. Co. v. Ins. General Agency, Inc.*, 822 F.2d 541, 543 (5th Cir. 1987). *See Hoeft v. MVL Group, Inc.*,

343 F.3d 57, 68 (2nd Cir. 2003), *abrogated on other grounds by Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008); *Woods v. Saturn Dist. Corp.*, 78 F.3d 424, 430 (9th Cir. 1996); *O.R. Securities, Inc. v. Pro. Plan. Assocs., Inc.* 857 F.2d 742, 748 (11th Cir. 1988). *See also Lyeth v. Chrysler Corp.*, 929 F.2d 891, 899 (2nd Cir. 1991) (affirming district court's denial of Chrysler's request to depose the individual arbitrator where Chrysler did not present any clear evidence of impropriety and finding district court did not err in its finding that Chrysler was simply "engaging in a fishing expedition in an attempt to determine if there is some basis, however farfetched, to prosecute a claim of bias.").

In support of its request to conduct discovery, Affordable Care cites district court cases out of New Jersey and New York where courts held that discovery requests may be granted where the "discovery is plainly relevant to colorable claims of arbitral bias." *See Nat'l Hockey League Players' Ass'n v. Bettman*, No. 93CIV5769, 1994 WL 38130, at *2 (S.D. N.Y. Feb. 4, 1994); *Hamilton Park Health Care Ctr., LTD, v. 1199 SEIU United Healthcare Workers East*, Civ. Act. No. 13-0621 (DMC), 2013 WL 6050138, at *5 (D. N.J. Nov. 13, 2013); *Cable Sys. Installations Corp. v. Int'l Brotherhood of Electrical Workers, Local Union No. 35* , Civ. No. 127407JHRKMW, 2014 WL 1291926 6, at *3 (D. NJ. Jun. 6, 2014). As stated above, the standard in the Fifth Circuit for assessing "evident partiality" is not the "mere appearance of bias." *Positive Software Sols., Inc.*, 476 F.3d at 285. Rather, Affordable Care must establish that "a reasonable person would have to conclude that the arbitrator was partial" to the

Defendants. *Householder Grp.*, 354 F. App'x at 852 (quoting *Weber*, 455 F. Supp. 2d at 550).

Not only do the cases cited by Affordable Care apply a different standard than that of the Fifth Circuit, but they are further distinguishable by their facts and holdings. For example, in both *Cable Sys. Installations* and *Nat'l Hockey League Players' Ass'n*, the courts found that the plaintiffs had set forth some basis for supporting the requests for discovery where there was evidence that the arbitrator had decided the outcome of the case prior to the hearing. *See Cable Sys. Installations*, 2014 WL 12919266, at *4; *Nat'l Hockey League Players' Ass'n*, 1994 WL 38130, at *4. Affordable Care has only presented mutual connections in the legal community between Arbitrator Holton and Paul Sun that were discoverable during the arbitration. And Affordable Care has offered no evidence to refute Arbitrator Holton's disclosure that he has not seen or communicated with Paul Sun in at least ten years. Nor has Affordable Care even suggested that Arbitrator Holton was being dishonest in his disclosure. Certainly, no evidence has been offered to suggest that the matter was determined prior to the arbitration hearings. Finally, in *Hamilton Park Health Care Center, LTD.*, the court found that the plaintiff "failed to make a showing sufficient to justify an order compelling discovery." *Hamilton Park Health Care Ctr., LTD.*, 2013 WL 6050138, at *6.

Affordable Care has provided no evidence that a reasonable person would have to conclude that Arbitrator Holton was partial to the Defendants. *See Uhl v. Komatsu Forklift Co.,* 512 F.3d 294 (6th Cir. 2008) (denying discovery on arbitrator after denying vacatur on the basis of evident partiality where plaintiff

failed to provide evidence that a reasonable person would have to conclude that the arbitrator was partial based on the fact that the arbitrator's former law partner was counsel in the arbitration). Both Arbitrator Holton's timely disclosure as well as the evidence provided by Affordable Care suggest that the relationship between Arbitrator Holton and Paul Sun was purely professional and more than ten years ago. *See Matter of Andros Compania Maritima, S.A.*, 579 F.2d 691, 70102 (2nd Cir. 1978) (affirming denial of discovery into relationship between arbitrator and principal where record showed extent of relationship was purely professional); *Lyeth v. Chrysler Corp.*, 929 F.2d 891, 899 (2nd Cir. 1991) (affirming denial of discovery where party had failed to show that arbitrator had any financial or personal stake in the outcome); *Lummus Global Amazonas, S.A. v. Aguaytia Energy del Peru*, 256 F. Supp. 2d 594, 62627 (S.D. Tex. 2002) (denying discovery for alleged bias of arbitrator based on arbitrator's former law partners' representation of owner and investor in owner where record was adequate to permit court to determine the issue); *Midwest Generation EME, LLC v. Continuum Chem. Corp.*, 768 F. Supp. 2d 939, 94647 (N.D. Ill. 2010) (holding that sufficient evidence that would justify subjecting the arbitrator to discovery was not presented where all that was shown was "a series of public, almost exclusively parallel contacts involving lecturing and writing on construction related matters" and "these endeavors were 'no secret,'" and their existence . . . was readily available to anyone who chose to look").

Accordingly, Affordable Care's motion for discovery is denied.

IV. MOTION FOR SANCTIONS

Defendants have also asked the Court to sanction [33] Affordable Care for filing a motion to vacate "for the purpose of delay." [34] at 2. Affordable Care's Response includes emails between counsel and a seventeen page brief. Affordable Care requests reasonable expenses, including attorneys' fees, associated with responding to the motion, in accordance with Rule 11(c)(2) of the Federal Rules of Civil Procedure. [38] at 1.

Rule 11 authorizes a court to impose sanctions on a party who files a pleading if the claims or defenses of the signer are not supported by existing law or by a good faith argument for an extension or change in existing law, Fed. R. Civ. P. 11 (b)(2);or the allegations and other factual statements lack evidentiary support or are unlikely to do so after a reasonable opportunity for investigation. Fed. R. Civ. P. 11 (b)(3). The purpose of the rule is to "deter baseless filings in district court," *Cooter & Gell v. Hartmarx Corp*, 496 U.S. 384, 404, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990), and to ensure that "victims of frivolous lawsuits do not pay expensive legal fees associated with defending such lawsuits." *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 879 (5th Cir. 1988). After notice and opportunity to respond, courts finding a Rule 11(b) violation may impose appropriate sanctions. Fed. R. Civ. P. 11 (c)(1). These may include monetary and injunctive sanctions, *Farguson v. MBank Houston, N.A.*, 808 F.2d 358, 35960 (5th Cir. 1986), and even dismissal, *see Jimenez v. Madison Area Technical Coll.*, 321 F.3d 652, 657 (7th Cir. 2003). Courts have a duty to impose the least severe sanction that is sufficient to deter future conduct. *Mendoza v. Lynaugh*,

989 F.2d 191, 196 (5th Cir. 1993); Fed. R. Civ. P. 11 (c)(4).

The Fifth Circuit has noted that "[a]n attorney may escape sanctions under [R]ule 11 if he had to rely on a client for information about the facts underlying the pleadings." *St. Amant v. Bernard*, 859 F.2d 379, 383, n.15 (5th Cir. 1988). In *St. Amant*, the court summarized the three duties that Rule 11 places on attorneys:

> (1) counsel must make reasonable inquiry into the factual basis of any pleading, motion, or other paper; (2) counsel must make a reasonable inquiry into the law; and (3) counsel must not file a pleading, motion, or other paper intended to delay proceedings, harass another party, or increase the cost of litigation.

Id. at 382 (citing *Thomas*, 836 F.2d at 874).

The Court is within its discretion to deny the Defendants' request for sanctions. *See Cooter & Gell v. Hartmarx Corp*, 496 U.S. 384, 404, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990) (stating that a district court has broad discretion in determining whether any sanction is warranted and, if so, what it should be); *Lulirama, Ltd. v. Axcess Broadcast Servs., Inc.*, 128 F.3d 872, 884 (5th Cir. 1997) (affirming district court's refusal to impose sanctions); *Matta v. May*, 118 F.3d 410, 416 (5th Cir. 1997) (reversing district court's order imposing sanctions because plaintiff's libel claims were well grounded in fact and law).

Rule 11 requires the movant to "describe the specific conduct that allegedly violates Rule 11(b)." Fed. R. Civ. P. 11 (c)(2). "Under Rule 11(b)(2), [s]anctions

are appropriate if counsel submits a legally indefensible filing, and [a] filing is legally indefensible if it is not warranted by existing law or by a nonfrivolous argument." *M2 Techn., Inc. v. M2 Software, Inc.*, 748 F. App'x 588, 589 (5th Cir. 2018) (citing *Snow Ingredients, Inc. v. SnoWizard, Inc.*, 833 F.3d 512, 528 (5th Cir. 2016)) (internal quotations omitted). Defendants assert that Affordable Care's motion to vacate is frivolous and that it should be sanctioned for its bad conduct. [34] at 3, 7.

However, Defendants have failed to meet their burden under Rule 11 of showing that these claims were frivolous. While Affordable Care's case is weak and the Court ultimately denied the motion to vacate, Defendants have not shown that the filings were "legally indefensible." *M2 Techn.*, 748 F. App'x at 589 (citing *Snow Ingredients, Inc.*, 833 F.3d at 528) (internal quotations omitted). *See Greenblatt v. Richard Potasky Jeweler, Inc.*, 19 F. App'x 307, 310 (6th Cir. 2001) (denying costs where the plaintiff's appeal "though weak, is not frivolous"); *Brandt v. Magnificent Quality Florals Corp.*, 371 F. App'x 994, 995 (11th Cir. 2010) (affirming denial of sanctions where "Plaintiffs' case [was] weak at best"); *We Shall Overcome Fdn. v. Richmond Org., Inc.*, 330 F. Supp. 3d 960, 968 (S.D. N.Y. 2018) (holding that while defense proffered was weak, it was not frivolous).

In support of its Motion to Vacate, Affordable Care filed a twentyseven page brief citing cases in an effort to support its arguments. *See Auto Mech. Local 701 v. Joe Mitchell Buick, Inc.* , 930 F.2d 576, 579 (7th Cir. 1991) (cross motions for sanctions denied because arguments made were not "devoid of arguable merit"). While the Court finds that all of Affordable Care's

bases for vacatur are unavailing, the Court cannot say that bringing forward these grounds was frivolous or done in bad faith. *See Teamsters Local Union No. 430 v. Cement Express, Inc.*, 841 F.2d 66, 68 (3rd Cir. 1988) (reversing monetary sanctions because while legal theory espoused was novel, it was not plainly unreasonable); *Allied Indus. Workers of Am. Local 232 v. Briggs & Stratton Corp.*, 837 F.2d 782, 78889 (7th Cir. 1988) (affirming district court's denial of sanctions because Briggs & Stratton had not resisted arbitration in bad faith).

In its seventeen page memorandum in Response to Defendants' motion for sanctions, Affordable Care describes its efforts to comply with Rule 11's requirement to make reasonable inquiry into the facts supporting its claims. [39] at 1014. Affordable Care outlines its discovery of connections of which it claimed showed "evident partiality" as well as its efforts to ascertain more about the contacts between Arbitrator Holton and Paul Sun. Affordable Care researched the issues and attempted to find some case law to support its position. And while this Court finds those cases distinguishable from this case and Affordable Care's position in moving to vacate is unpersuasive and quite weak, the Court does not find their arguments were so frivolous as to warrant Rule 11 sanctions. Similarly, there is a lack of evidence of "improper purpose, such as harassment or delay." *Uhl v. Komatsu Forklift Co.,* 512 F.3d 294, 308 (6th Cir. 2008) (denying sanctions where, although Komatsu's case was weak, there was no evidence of improper purpose or delay behind the appeal).

Accordingly, the Defendants' motion for sanctions is denied. The Court further denies Affordable Care's

request for attorney's fees associated with the motion. *See* Fed. R. Civ. P. 11(c)(2) ("If warranted, the court *may* award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion). Affordable Care's case is flimsy, and the Court declines to award sanctions to either side. *See Walker v. City of Bogalusa*, 168 F.3d 237, 241 (5th Cir. 1999) (motions for sanctions by both parties denied because both parties contributed to "disharmony in the proceedings" and filed briefs that "were long on hyperbole and personal attacks").

V. CONCLUSION

IT IS, THEREFORE, ORDERED AND ADJUDGED that Plaintiff's [16] Motion to Vacate Arbitration Award is DENIED and Defendants' [20] Motion to Confirm Arbitration Award is GRANTED. The Defendants are entitled to recover attorneys' fees in the amount of $379,168 plus costs in the amount of $14,430.75 from the Plaintiff as provided in the Arbitration Award entered on March 19, 2021. The Court rules as follows with respect to the remaining motions:

1. Plaintiff's [17] Motion for Discovery is DENIED;

2. Defendants' [33] Motion for Sanctions is DENIED;

3. Plaintiff's [12] Ex Parte Motion for Case Management Conference is DENIED AS MOOT;

4. Defendants' [13] Motion to Dismiss is DENIED AS MOOT;

5. Plaintiff's [26] Motion for Leave to File Substitute Exhibit 28 is GRANTED;and

6. Plaintiff's [35] Motion for Leave to File Supplemental Memorandum and Motion to Conduct Limited Discovery is GRANTED in part and DENIED in part. The motion is GRANTED to the extent the Court allows the filing of the Motion and considered it in its rulings but DENIES the motion as to the relief requested.

SO ORDERED AND ADJUDGED this the 31st day of March, 2022.

/s/ Taylor B. McNeel
United States District Judge

DENIAL OF PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (JUNE 22, 2023)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AFFORDABLE CARE, L.L.C.,

Plaintiff-Appellant,

v.

RAELINE K. MCINTYRE, DMD;
RAELINE K. MCINTYRE, DMD, P.C.,

Defendants-Appellees.

No. 22-60245

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 1:21-CV-85

ON PETITION FOR REHEARING EN BANC

Before: ELROD and HAYNES, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service

requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

ARBITRATOR FINAL DECISION AND AWARD (MARCH 19, 2021)

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL
RALEIGH, NORTH CAROLINA

AFFORDABLE CARE, LLC,

Claimant,

v.

RAELINE K. MCINTYRE, DMD AND RAELINE K. MCINTYRE, DMD, P.C.,

Respondents.

AAA NO. 01-19-0003-4957

Arbitrator: Charles R. Holton

FINAL DECISION AND AWARD

1. This matter comes before the undersigned Arbitrator after a final hearing in the aboveeaptioned matter.

2. Claimant Affordable Care, LLC ("Affordable") filed its initial Demand for Arbitration on November 1, 2019, against Respondents Raeline K. McIntyre, DMD, and Raeline K. McIntyre, DMD, PC (the "PC"). Affordable later filed an Amended Demand for Arbitration (the "Demand"), asserting seventeen claims for relief against Respondents, and seeking damages and attorneys' fees. Respondents denied that Affordable

is entitled to any relief. Respondents also contend that they are entitled to set off sums due to the PC against any award to Affordable, and that they are entitled to recover attorneys' fees and costs.

3. A final arbitration hearing was held by videoconference from December 1, 2020, to December 4, 2020, and on December 14 and 15, 2020. Affordable and Respondents were each represented by counsel.

4. Affordable and Respondents each presented an opening statement. In its case, Affordable called as witnesses Karol Twilla, Affordable's senior vice president for field operations, 12/1/2020 Tr. 75:10-13, Respondent Dr. Raeline McIntyre, her husband Dr. Neil McIntyre, 12/14/2020 Tr. 51:11-13, and Kevin Hudi, vice president of Affordable Dentures Dental Laboratories, Inc. ("ADDL"), 12/4/2020 Tr. 39:24-25. Respondents called Dr. Raeline McIntyre and Dr. Neil McIntyre to testify in their case. Affordable called Ms. Twilla and Mr. Hudi as rebuttal witnesses. Both sides offered documentary exhibits.[1] Following the hearing, Affordable and Respondents each submitted a post-hearing brief, as well as proposed findings of fact and conclusions of law.[2] After receiving the post-hearing submissions of the parties, the Arbitrator heard closing arguments.

5. On March 4, 2021, Affordable filed a Request for Judicial Notice of the Summary Judgment Decision

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[1] Joint Exhibits are referred to as "Joint. Ex." and the exhibit number;Affordable's exhibits are re ferred to as "Cl. Ex." and the exhibit number; and Respondents' exhibits are referred to as "Resp. Ex." and the exhibit number.

[2] Affordable's post-hearing brief is referred to as "Cl. Br."; Respondents' post-heari ng brief is referred to as "Resp. Br."

and Transcript of a lawsuit pending in the Southern District of Mississippi between Affordable Care and JNM Office Property LLC, 1:19cv827HSOJCG and, thereafter, requested further oral argument regarding the significance of that decision to this arbitration. Additional oral argument was held on March 11, 2021. At that time the undersigned Arbitrator accepted into the arbitration hearing record said Summary Judgment Decision and Hearing Transcript, along with Affordable Care's Second Motion for Partial Summary Judgment and JNM's Second Amended and Supplemental Complaint, all filed in that case.

The Arbitrator, having been designated in accordance with the arbitration agreement of the parties and having been duly sworn makes the following Findings of Fact and Conclusions of law based on the evidence and authorities presented at the final hearings along with the legal briefs and arguments of counsel.

FINDINGS OF FACT:

The Parties:

6. Affordable is a dental practice management company, also known as a dental support organization. 12/1/2020 Tr. 76:8-14. Affordable enters into contractual affiliations to manage dental practices across the country, and has affiliated practices in forty different states. *Id.* 82:12-17. Affordable owns Affordable Dentures Dental Laboratories, Inc. ("ADDL"). *Id.* 76:15-19. Through ADDL, Affordable provides in-house dental laboratory services to each affiliated practice. *Id.* 76:4-22; 12/4/2020 Tr. 390 1:23-391:19. Affordable and ADDL provide what Affordable calls "economy

denture" services. 12/1/2020 Tr. 76237713. Affordable-affiliated dental practices provide extractions, dentures, and implants. 12/3/2020 Tr. 43912. Affordable advertises that its affiliated practices provide sameday service, meaning that a patient can have teeth extracted and receive a denture on the same day. 12/4/2020 Tr. 3232021; *id.* 397223982.

7. Respondent Raeline K. McIntyre, DMD, is a dentist licensed to practice in Mississippi. 12/14/2020 Tr. 42123.

8. Dr. Raeline McIntyre is the sole shareholder and president of Raeline K. McIntyre, DMD, PC. 12/2/2020 Tr. 210710.

Affiliation Between the PC and Affordable:

9. In 2001, as she was finishing dental school at the University of Mississippi Medical Center Dental School in Jackson, Mississippi, Dr. Raeline McIntyre received several calls from a recruiter associated with Affordable.[3] 12/14/2020 Tr. 41520; *id.* 517612. Although Affordable managed dental practices, Affordable did not own practices—only a licensed dentist could own a practice. *See* 12/2/2020 Tr.1272-12. The recruiter encouraged Dr. McIntyre to consider owning an Affordableaffiliated dental practice. 12/14/2020 Tr. 6512.

10. While she was not initially interested in Affordable's offer, eventually Dr. Raeline McIntyre

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[3] On October 22, 2015, Affordable Care, Inc., converted to a limited liability company and became Affordable Care, LLC. *See* Cl. Ex. 40. References to "Affordable" in these findings and conclusions mean Affordable Care, Inc., prior to its conversion, and Affordable Care, LLC, after the conversion.

agreed to travel to North Carolina to meet with representatives of Affordable. 12/14/2020 Tr. 61375. Affordable explained that it could handle the management of the dental practice, such as human resources, taxes, payroll, marketing, and advertising, while she could focus on practicing dentistry. *Id.* 91121. Dr. Raeline McIntyre would be a general dentist, but her practice would be limited to extractions, dentures, and implants. *Id.* 11714.

11. During the recruiting process, Affordable asked Dr. Raeline McIntyre if she could "fill in" at an Affordableaffiliated dental practice in Gulfport, Mississippi, while Affordable was working to get a licensed dentist to purchase the practice. 12/14/2020 Tr. 13616. She agreed, and began working at the practice in Gulfport in or around February 2002. *Id.* 131723.

12. Dr. Raeline McIntyre continued to work at the Affordableaffiliated prac tice in Gulfport on a temporary basis until around August 2002. 12/14/2020 Tr. 1938. After working as a temporary employee, Dr. Raeline McIntyre agreed to own a dental practice managed by Affordable. *Id.* 19912.

13. Affordable sent Dr. Raeline McIntyre a packet of materials to sign to set up a professional corporation in her name. 12/14/2020 Tr. 22516. Dr. Raeline McIntyre signed the papers, and Affordable set up the PC, with Dr. Raeline McIntyre as the sole owner of the PC. *Id.* 221722.

Professional Assets Purchase Agreement:

14. On November 1, 2002, pursuant to a Professional Assets Purchase Agreement (Joint Ex. 6), the

PC purchased the assets of James A. Poe, DDS, P.C. (the "Poe PC"), a dental practice owned by Dr. James Poe and managed by Affordable. 12/1/2020 Tr. 9512-17.

15. Either Affordable or its outside legal counsel drafted the Professional Assets Purchase Agreement. 12/2/2020 Tr. 1771521.

Services Agreement:

16. Also on November 1, 2002, the PC entered into a Management Services Agreement (the "Agreement" or "MSA") (Joint Ex. 3) with Affordable. 12/14/2020 Tr. 202321.6. Affordable also drafted this Agreement. *Id.* 2178. Dr. Raeline McIntyre did not think that the standard terms of the Agreement were negotiable;however, she was able to negotiate her salary from the PC, 12/4/2020 Tr. 457920, which was reflected in the Managing Dentist Employment Agreement (Joint Ex. 5).

17. Under the MSA, Affordable agreed to act as the PC's agent to "manage the business aspects of the Practice on PC's behalf and in the PC's name." MSA § I(A); *id.* § VI(B). According to the MSA, Affordable was "granted all necessary authority and discretion to that end, understanding that at all times [Affordable] is obligated to manage the Practice with the PC's best interest in mind." *Id.* § I(A). Affordable also agreed to perform the services listed in Exhibit B to the MSA. *Id.* § I(C).

18. Under Exhibit B, Affordable agreed to lease office space and equipment to the PC under a separate lease, provide an inecenter dental laboratory through ADDL, assist the PC with recruitment, staffing, and

pay, provide a centralized purchasing system for supplies, assist the PC in obtaining legal services, develop and implement marketing plans, provide financial services, and procure certain insurance. *See id.*

19. Pursuant to the "Financial Services" section of Exhibit B, Affordable established a checking account in the PC's name, called the "[d]epository checking account." MSA at 17. The PC was required to deposit all money received from its operations into the depository checking account. *Id.* According to the Agreement, withdrawals could be made only by employees of the PC after notice to Affordable, or "by [Affordable's] transfers from this account to the operating checking account." *Id.*

20. Also under Exhibit B, Affordable established another account, called the "[o]perating checking account." MSA at 17. Affordable deposited funds from the depository checking account into the operating checking account. *Id.* Affordable agreed that "[a]ll expenses incurred in the operation of the PC and approved by the PC shall be paid by checks drawn on this account by [Affordable's] designated employees." *Id.*

21. The PC and Affordable also agreed on certain business policies and procedures, set forth in Exhibit A to the MSA. MSA § I(B) & MSA Ex. A. The PC adopted the policies outlined in Exhibit A to the MSA, and reserved the right to "delete, supplement or modify any of the business policy guidelines" with advance written notice to Affordable. MSA § I(B).

22. The parties agreed that the PC would pay Affordable the fees set forth in Exhibit C to the Agreement. MSA § III(A).

23. Exhibit C to the MSA is the "Summary of Management Fees." Exhibit C states that the PC "shall pay to [Affordable] the listed fees "[m]onthly." MSA at 19.

24. Pursuant to Exhibit C, the PC was required to pay to Affordable each month the "actual cost, including an allocation of related overhead, of Practice Expenses purchased by [Affordable] from unaffiliated vendors." MSA Ex. C ¶ 1. "Practice Expenses" are defined in Exhibit C to the Agreement. *Id.* at 2021.

25. Pursuant to Exhibit C, the PC was required to pay to Affordable each month a "Central Office Services Fee," defined to include certain "specific services." MSA Ex. C ¶ 2. The Agreement permits Affordable to modify the "Central Office Services Fee" on a prospective basis upon notice to the PC. *Id.* Ex. C ¶ 4. If the PC notifies Affordable that it objects to the modification, Affordable must reinstate the "Central Office Services Fee" previously in effect. *Id.* The evidence shows that over time, Affordable did increase the "Central Office Services Fee." *Compare id.* Ex. C ¶ 2 (monthly "Central Office Services Fee" total of $1,680) with Cl. Ex. 9 at 3[4] (reflecting "Management Service Fees" for December 2017 of $2,250).

26. Pursuant to Exhibit C, the PC was required to pay to Affordable a "Management Services Fee." MSA Ex. C ¶ 3.

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[4] Affordable offered the PC's financial statements from 2017, 2018, and 2019 into evidence as Claimant's Exhibits 9, 10, and 11. The financial statements do not have page numbers. Pinpoint citations are to the page cited counting from the first page of the exhibit.

27. The "Management Services Fee" includes a one-time payment of $100,000 by the PC upon execution of the Agreement. *Id.* ¶ 3.1. Dr. Raeline McIntyre testified that the PC paid this fee. 12/14/2020 Tr. 3922-406.

28. The "Management Services Fee" section of Exhibit C requires the PC to pay one-half of the "Net Operating Margin," "[b]eginning the first month after all accounts payable to [Affordable] from PC under Section III(C) are repaid." MSA Ex. C ¶ 3.2. "Net Operating Margin" is defined in Exhibit C as "Net Collected Patient Fees less Practice Expenses." *Id.* at 21. "Net Collected Patient Fees" is defined in Exhibit C as "the total fees charged to patients less any uncollected amounts and refunds." *Id.* at 20.

29. The "Management Services Fee" section of Exhibit C requires the PC to pay "in addition" to the other Management Services Fees listed, "$25,000 plus 50% of net operating margin annually" once, in the first calendar year after all accounts payable to Affordable from the PC under section III(C) of the Agreement have been repaid. MSA Ex. C ¶ 3.3. For each year after the year when the PC was required to pay $25,000 plus one-half of the net operating margin, the PC was required to pay "annually" "$50,000 plus 50% of net operating margin." *Id.* Affordable paid itself this "Management Services Fee" monthly, and not annually. 12/3/2020 Tr. 1041:3-1051:0;12/15/2020 Tr. 1082:2-1092:0.

30. Exhibit C to the MSA defined "Practice Expenses" as "costs, accounted for on a cash basis, directly related to the operation of the Practice." MSA at 20. These costs included "[f]acility and equipment lease expenses under the Lease Agreement and related

maintenance and repair expenses," dental laboratory expenses, marketing expenses, clinical and office supplies expenses, employee compensation, utilities, professional fees, insurance, and other expenses. *Id.* at 2021.

31. Section III(B) of the MSA is entitled "MINIMUM CASH BALANCE." This section provided:

> At all times during the term hereof, a minimum cash balance shall be maintained in the PC checking account equal to (1) sum of all current and unpaid invoices (both those received and those pending), note or installment payments, payrolls, rents, expenses, and other charges incident to the operation of the PC which are currently due or will become due over the next thirty (30) day period, plus (2) an amount deemed necessary by Manager to be adequate for contingencies. Should the cash balance fall below the minimum amount as set forth in this section at any time for any reason, Manager shall notify PC and PC shall agree to payment of Practice Expenses (defined in Exhibit C) by Manager in accordance with the terms of Section (C) following or PC's shareholder(s) shall provide a loan or a capital contribution sufficient to pay Practice Expenses and restore the minimum cash balance. If PC and Manager do not agree to one of the foregoing options, either party may terminate this Agreement immediately in which case Manager shall use all remaining funds to pay unpaid obligations.

MSA § III(B).

32. Section III(B) is silent as to which party to the MSA was responsible for maintaining the minimum cash balance. MSA § III(B). It is also unclear where that balance is to be maintained. The term "PC checking account" is not defined in section III(B) or elsewhere in the MSA.

33. Section III(C) of the MSA is entitled "DISCRETIONARY MANAGER PAYMENTS." This section provided:

> If the PC's Net Collected Patient Fees (as defined in Exhibit C) are insufficient to pay Practice Expenses and maintain the minimum cash balance referenced in (B) above, Manager may, in its discretion, with the approval of the PC, pay up to Three Hundred Thousand Dollars ($300,000.00) of Practice Expenses on behalf of the PC. PC shall record such payments by Manager as accounts payable to Manager and use all, if any, future Net Collected Patient Fees in excess of Practice Expenses to pay such accounts payable to Manager until same are paid in full.

MSA § III(C).

34. The MSA also contained an indemnification provision regarding acts or omissions occurring during the term of the MSA:

> The PC shall indemnify, hold harmless and defend Manager, its officers, directors, shareholders and employees, from and against any and all liability, loss, damage, claim, causes of action, and expenses (including reasonable attorneys' fees), whether or not covered by insurance, caused or asserted to have been

> caused (directly or indirectly) by, resulted from, or arisen out of the performance of medical or dental services or the performance of any intentional acts, negligent acts or omissions by the PC and/or its affiliates, its shareholders, agents, employees and/or subcontractors (other than Manager) during the term hereof. Manager shall indemnify, hold harmless and defend the PC, its directors, shareholders and employees, from and against any and all liability, loss, damage, claim, causes of action, and expenses (including reasonable attorneys' fees), caused or asserted to have been caused (directly or indirectly) by, resulted from, or arisen out of the performance of any intentional acts, negligent acts or omissions by Manager and/or its shareholders, agents, employees and/or subcontractors during the term of this Agreement.

MSA § IV(B).

35. The parties agreed that the term of the MSA would be twenty years from the date of execution on November 1, 2002, "unless sooner terminated pursuant to the provisions" of the MSA. MSA § V(A). Section V(B) of the MSA provided that either party could terminate the Agreement "for cause," as defined in section V(B). Cause for termination included the following occurrences:

> (2) A breach by either party of any material provision of this Agreement or any other agreement between PC and Manager or an affiliate of Manager; provided, that, if such breach is subject to cure, the breaching party shall have a reasonable period (not to exceed

> thirty (30) days) after notice of such breach from the other party to cure such breach, and if such breach is cured, then such breach shall not be grounds for termination unless repeated;
>
> * * *
>
> (9) Any termination of any lease between Manager and PC or the Agreement To Provide Dental Laboratory Services between PC and Affordable Dentures Dental Laboratories, Inc.

MSA § V(B)(2), (5), (9).

36. The parties further agreed that "[i]n the event of the termination of this Agreement for any reason," the PC would "not solicit for employment any employees of Manager or any affiliate of Manager, including employees of Affordable Dentures Dental Laboratories, Inc." MSA § V(C). There is no time limitation on the nonsolicitation covenant. Ther e is also no geographic limitation.

37. The MSA contained the following provision regarding confidential information:

> The PC and its shareholders agree not to use or disclose any confidential information or trade secrets of Manager except in connection with operating the Practice during the term of this Agreement. Such confidential information and trade secrets are agreed to include all procedures used by Manager in the operation of the business aspects of the Practice, all business and patient forms supplied by Manager and used by the Practice,

> all software supplied by the Manager and used by the Practice, and any other materials or proprietary knowledge which the Manager treats as confidential. Such confidential information shall not include any material in the public domain (whether or not listed above) or any patient records. The PC further agrees: (i) to keep stri ctly confidential and hold in trust all confidential information and not disclose confidential information to any third party, including its affiliates without the express prior written consent of Manager; and (ii) to impose this obligation of confidentiality on its affiliates, partners, shareholders, employees and independent contractors. The PC acknowledges that the disclosure of confidential information to it by Manager is done in reliance upon its representations and covenants in this Agreement. Upon expiration or termination of this Agreement by either party for any reason whatsoever, the PC shall immediately return and shall cause its affiliates, partners, shareholders, employees and independent contractors to immediately return to Manager all confidential information, and the PC will not, and will cause its affiliates, partners, shareholders, employees and independent contractors not to, thereafter use, appropriate, or reproduce such confidential information.

MSA § II(B).

38. Dr. Raeline McIntyre, as the sole shareholder of the PC, agreed to guarantee the PC's performance of its obligations in the MSA, "except for PC's financial

obligations to Manager for loans and management fees, which obligations shall be nonrecourse to shareholder(s) except to the extent of the assets and income generated by the Practice." MSA § VI(A).

39. The parties also agreed that "[t]his Agreement contains the entire agreement between the parties in regard to the subject matter hereof. This Agreement may not be modified, or any provisions hereof waived, except by a written instrument executed by the parties hereto." MSA § VI(E).

40. The parties agreed that the validity, interpretation, and performance of the MSA would be governed by North Carolina law, "except that issues concerning the practice of dentistry shall be governed by the laws of the State where the Center is located." MSA § V(G).

The 2002 Lease:

41. Also on November 2, 2002, Affordable and the PC entered into a lease agreement (the "2002 Lease") (Joint Ex. 2). The 2002 Lease stated that Affordable "owns or leases the premises located at 15441 Orange Grove Road, Highway 49 North, Gulfport, Mississippi 39502, comprised of a fully furnished and equipped Affordable Dentures Center (the 'Premises')." 2002 Lease at 1.

42. Affordable did not own the Premises. 12/1/2020 Tr. 164331651. Rath er, Affordable leased the Premises from Ship Island Properties, Inc., pursuant to a lease agreement dated October 23, 2000 (the "Ship Island Lease") (Joint Ex. 1). The Ship Island Lease had a fiveyear term, commencing on November 1, 2005, and terminating on October 31,

2005, unless terminated sooner pursuant to the lease terms. Ship Island Lease § II.

43. In the 2002 Lease, Affordable agreed to lease the Premises to the PC. Regarding the term of the lease, the 2002 Lease provided:

> The term of this Lease shall commence on November 1, 2002, and shall continue for a period of twenty (20) years unless and until earlier terminated. Absent a default hereunder, neither Landlord nor Tenant may terminate this Lease except in connection with the termination of that certain Agreement to Provide Management Services to a Dental Practice between Landlord and Tenant of even date herewith. Termination of said Agreement will result in automatic termination of this Lease. In addition, if Landlord does not own the Premises, this Lease shall terminate automatically when Landlord's lease of the Premises expires or is terminated. In the event that this Lease is terminated pursuant to the immediately preceding sentence, Landlord shall use its reasonable best efforts to obtain equivalent office space and lease such premises to Tenant under terms and conditions (including, without limitation, rental terms) substantially identical to those of this Lease.

2002 Lease § 2. Nothing in the 2002 Lease required the PC to agree to lease office space from Affordable if Affordable obtained "equivalent office space." *See id.*

Managing Dentist Employment Agreement:

44. Also on November 1, 2002, Dr. Raeline McIntyre entered into a Managing Dentist Employment Agreement ("Employment Agreement" or "MDEA") with the PC, under which she agreed to work for the PC. Joint Ex. 5. Affordable is not a party to the Employment Agreement. *See* Joint Ex. 5 at 1 (listing parties). Although the Employment Agreement was between the PC and Dr. Raeline McIntyre, Dr. Raeline McIntyre testified that she negotiated with Affordable over two provisions of the Employment Agreement: her salary and her ability to work for her husband's practice in Mendenhall, Mississippi. 12/4/2020 Tr. 45824601; *see* 12/3/2020 Tr. 180181813.

45. The Employment Agreement contained a nonsolicitation provision stating that "[i]n the event of termination of the Agreement for any reason, the Dentist agrees that he or she will not solicit for employment any employees of the [PC], Affordable Care, Inc., or its subsidiaries or affiliates." MDEA ¶ 8.

46. There is no time limitation on the nonsolicitation covenant in paragraph 8 of the Employment Agreement. *See* MDEA ¶ 8. There is also no geographic limitation on the nonsolicitation covenant in paragraph 8 of the Employment Agreement. *See id.*

47. According to paragraph 11 of the Employment Agreement, the parties acknowledged that Affordable was a thirdparty beneficiary "of certain provisions of this Agreement." MDEA ¶ 11. Nothing in the Employment Agreement specified which provisions were intended to benefit Affordable. *See id.*

48. Mississippi law applies to the Employment Agreement. MDEA ¶ 10.

The ADDL Agreement:

49. On November 1, 2002, the PC and ADDL entered into an Agreement to Provide Dental Laboratory Services (the "ADDL Agreement") (Joint Ex. 4).

50. In the ADDL Agreement, ADDL agreed to perform laboratory work for the PC at an inhouse laboratory within the PC's office. Joint Ex. 4.

Operation of the PC from 2002 to 2019:

51. Following the execution of the MSA in 2002, the PC operated an Affordableaffiliated dental practice. 12/1/2020 Tr. 7936; 12/14/202 0 Tr. 20:19216. At that time, the Affordable practice in Gulfport had a potentially wide geographic market: the closest Affordable practices were in Jackson, Mississippi, New Orleans, Louisiana, and Mobile, Alabama. 12/14/2020 Tr. 1322.

52. Dr. Raeline McIntyre and her husband Dr. Neil McIntyre, also a licensed dentist, practiced dentistry at the PC. 12/3/2020 Tr. 177:1621; *id.* 179:1318:017; 12/ 4/2020 Tr. 517:1720; 12/14/2020 Tr. 51:113. The PC also hi red an oral surgeon, Dr. Carroll Palmore, who practiced dentistry at the PC. 12/4/2020 Tr. 517:2123.

53. Dr. Raeline McIntyre was a general dentist when she was affiliated with Affordable, but her practice was limited to extractions, dentures (including partial dentures), and implants. 12/14/2020 Tr. 117-14. Affordable appeals to patients who may be reluctant to visit, or generally do not have a relationship with a dentist, but have a particular dental problem they need addressed, and getting the need addressed through

the necessary extractions and dentures in one day is important. 12/14/2020 Tr. 8:24910; 12/15/2020 Tr. 88158914. Dr. McIntyre explained how she would treat a patient that came to Affordable's Gulfport location, treating the "whole patient," determining the patient's chief complaint, presenting treatment options, and upon the patient's selection of a treatment option, beginning the work with the patient that would lead to the patient getting dentures the same day. 12/14/2020 Tr. 1517192. Dr. McIntyr e further explained how she interacted with the dental lab at the Gulfport location and why the relationship with the lab was critical to the success of the practice. 12/14/2020 Tr. 1618192; *id.* 2692722.

54. The practice grew under Dr. Raeline McIntyre's leadership, and served more than 37,000 patients. 12/14/2020 Tr. 42244311; *id.* 1091318. As the practice grew, the PC's revenues grew. *See* 12/14/2020 Tr. 65718. In 2017, the PC's revenue peaked at $3.2 million. Cl. Ex. 11A.

Affordable's Financial Control Over the PC:

55. Affordable exercised significant control and influence over the PC's business. Among other things, Affordable controlled all monies received by the PC.

56. The PC deposited all monies collected from patients into the depository checking account on a daily basis. 12/14/2020 Tr. 32213314. The PC did not withdraw money from the account. *Id.* 3315343. Affordable swept money out of the depository checking account on a daily or neardaily basis. *Id.* 34412. The bank statements for the depository checking account were addressed to Affordable. *Id.* 3413354.

57. Affordable was entrusted to pay its own management fees, to pay invoices approved by the PC, to handle the PC's payroll, to prepare budgets and financial reports, and to coordinate the preparation of tax returns. MSA Ex. B; *id.* Ex. C.

58. During the time the PC was an affiliated practice, Affordable produced monthly and yearend financial statements. *E.g.*, Cl. Exs. 9, 10, 11. The financial statements for the PC reflect the payment of Management Fees. *Id.*

59. Affordable introduced the PC's financial statements in evidence through the testimony of Karol Twilla. 12/1/2020 Tr. 131:7–139:7. Ms. Twilla testified that in her position at Affordable and in discharging her duties, she would have received the financial statements of the PC, as well as the financial statements of other affiliated practices. *Id.* 137:22–138:2.

60. Ms. Twilla testified that the PC was a "very, very successful practice." 12/1/2020 Tr. 89:22–23. Ms. Twilla identified 2017, 2018, and 2019 as the "really good years for Dr. McIntyre." *Id.* 89:23–24. According to Ms. Twilla, "[t]owards the end of about the fourth quarter of 2019 is when her practice really started to suffer from a revenue standpoint." *Id.* 89:24–90:1. She described the PC as a "growing practice." *Id.* 16:7–8. Ms. Twilla described 2019 as "a good year up until the fourth quarter, and then the fourth quarter the revenues started to really decline, which put it into a negative cash balance position." *Id.* 16:8–16. She identified the fourth quarter as October, November, and December 2019. *Id.* 168:7–10. Ms. Twilla testified that after "the initial communication from Dr. McIntyre" terminating the Agreement took place, "[t]hat's when the [PC's] revenue started to decline," and a minimum

cash balance deficiency started to grow. 12/2/2020 Tr. 99611. Ms. Twilla attributed this decline to Dr. McIntyre's attention being diverted to starting a new practice. *Id.* 991225. Ms. Twilla testified that Affordable's expectation for Dr. Raeline McIntyre's practice in 2020 was that "she could continue to grow." *Id.* 1032.

61. As described above, 2017 was the PC's best year financially, with revenue in the amount of $3.2 million, but the PC's revenue declined in 2018 to $2.9 million, Cl. Ex. 10, and further declined in 2019 to $2.2 million, Cl. Ex. 11. *See* 12/3/2020 Tr. 881923.

62. The PC's revenue in 2019 declined as compared to its 2018 revenue throughout most of the year; May 2019 was the only month in which the PC earned more revenue than it did in the corresponding month in 2018. Cl. Ex. 11 at 5.[5] By the end of the third quarter of 2019, before the time period during which Ms. Twilla said the PC's revenue started to decline, the PC's revenue was already 18.93% less than the PC's revenue for 2018 for the first three quarters of the year. *Id.*; *see* 12/3/2020 Tr. 9011118. By the end of 2019, the PC's revenue was 23.38% less than the revenue the PC earned in 2018; contrary to Ms. Twilla's testimony, most of the loss occurred in the first three quarters of the year, as opposed to the fourth quarter of the year. Cl. Ex. 11. The PC's revenue did decline significantly in the fourth quarter of 2019 as compared to the fourth quarter of 2018, but the PC's revenue was less in each quarter of 2019 than the

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[5] The financial statements that Affordable prepared are not paginated, but the information discussed is on the fifth page of Claimant's Exhibit 11.

respective quarter of 2018, and decline accelerated from the first to the second quarter, and from the second to the third quarter, which was comparatively the worst quarter of 2019 for the PC. *Id.*

63. As discussed above, pursuant to Exhibit C of the Agreement, Affordable was entitled to 50% of the PC's Net Operating Margin; Dr. Raeline McIntyre as the PC's sole shareholder, was entitled to the PC's profit that was not payable to Affordable, and thus she was entitled to the other 50% of the Net Operating Margin.

64. The financial statements reflect a figure called "Practice Owner Bonus." *See* Cl. Exs. 9, 10, 11. The "Practice Owner Bonus" reflects the payment by Affordable to Dr. Raeline McIntyre of an amount for her share of the PC's operating profit. 12/1/2020 Tr. 126181272 2;12/2/2 020 Tr. 139131401.

65. The financial statements reflect a figure called "Variable Bonus Fee." *See* Cl. Exs. 9, 10, 11. The "Variable Bonus Fee" reflects the payment to Affordable of its share of the PC's operating profit. Cl. Exs. 9, 10, 11.

66. In the financial statements 2017, 2018, and 2019 that were admitted in evidence at the final hearing, the amounts for "Practice Owner Bonus" (paid to Dr. Raeline McIntyre) and "Variable Bonus Fee" (paid to Affordable) are not equal. In each of those years, the "Variable Bonus Fee" paid to Affordable, as reflected in the financial statements, is greater than the "Practice Owner Bonus." Cl. Exs. 9, 10, 11.

67. Dr. Neil McIntyre testified that the pattern that the amount of the "Variable Bonus Fee" exceeded the amount of the "Practice Owner Bonus" was

reflected in the financial statements for the PC for years other than 2017, 2018, and 2019. 12/14/2020 Tr. 226:9–227:14. Dr. McIntyre test ified that this pattern existed in every year for which he reviewed the financial statements. *Id.* 226:17–227:14. The Arbitrator finds that Affordable failed to provide a satisfactory explanation for these discrepancies.

68. Further, as noted hereinabove, Karol Twilla testified that Affordable pays out its Variable Bonus Fee solely on a monthly basis notwithstanding that part of Exhibit C 3.3 that references payment of the Variable Bonus Fee on an annualized basis. 12/3/2020 Tr. 105:2–10; 12/15/ 2020 Tr. 108:3–109:20; *id.* 113:9-19. The predictable result of this practice is that if the PC has one or more months during a year when it is not profitable, Affordable will pay itself more than 50% of the Net Operating Margin for the year: In months when the PC is profitable, Affordable pays itself 50% of the Net Operating Margin, but in months when the PC is not profitable, there is no evidence that Affordable pays or returns any amount of money to the practice. According to Ms. Twilla, Affordable does not on an annual basis reconcile or "true up" the amount Affordable is entitled to under the terms of the Agreement. 12/3/2020 Tr. 104:13–105:10. This financial management practice of Affordable is contrary to its duty to manage the Practice with the PC's best interest in mind, as per Art. I (A) of the MSA.

69. Affordable's financial control of the PC and its cash management had an additional predictable and consequential effect. Affordable could effectively determine for itself whether the PC could pay for equipment, itself, or would have to use Affordable's cash for equipment purchases, with the result that

Affordable would own the equipment and lease it to the PC. After payment of the PC's regular monthly expenses, Affordable paid out available cash so it received on a monthly basis its Variable Bonus Fee, and Dr. Raeline McIntyre received her Practice Owner Bonus. 12/1/2020 Tr. 127714. According to Karol Twilla, Affordable's regular practice was to use its cash to pay for an affiliated practice's equipment, and then lease that equipment to the practice. 12/1/2020 Tr. 125511. Although Afford able would amortize the cost of any equipment leased to a practice over five years, the PC did not "rent to own" the equipment; rather, through the equipment's useful life, Affordable owned the equipment. 12/2/2020 Tr. 187131?; *id.* 188510. Upon questioning from the Arbitrator, Ms. Twilla agreed it might be possible for a practice like the PC to accumulate enough cash at some point during a given month to purchase costly equipment, *id.* 20322052, but that was not Affordable's regular practice. In the absence of an arrrangement like the Agreement, a business owner like Dr. Raeline McIntyre would have the choice whether to use available cash to make an equipment purchase, which would leave less cash available to be paid out to herself as the business owner, or instead lease equipment, which would mean that the PC would not own the equipment and would pay some regular amount as a lease payment, but would have more cash available to pay out to herself as the business owner. Under the Agreement, as Ms. Twilla agreed, the PC retained the right to purchase equipment if it chose to do so. 12/1/2020 Tr. 1252224; 12/2/2020 Tr. 1882125. But Affordable's financial control and cash management limited if not precluded Dr. Raeline McIntyre from making that choice.

70. Other business practices of Affordable also disadvantaged the PC. Affordable produced promotional mailers for affiliated practices that advertised services available, prices, and offered discounts available at a specific Affordable location or locations. *E.g.*, Resp. Exs. 4, 5; 12/14/2020 Tr. 5896023; *id.* 84310. The evidence at the final hearing showed that Affordable sent promotional mailers to patients of the PC that identified not the Gulfport location, but rather a different Affordable practice in Covington, Louisiana. Resp. Ex. 4; 12/14/2020 Tr. 84 324; 12/15/2020 Tr. 824-1112. Affordable explained that it sent promotional mailers for a particular practice to residents within certain identified zip codes rather than sorting the mailing list so that patients of a given Affordable practice would receive promotional mailers for that practice. 12/15/2020 Tr. 103 24. Affordable's approach would disadvantage a practice like the PC that had drawn patients from a geographic area that, based on Affordable's decision to later open another affiliated practice, would be closer to the new Affordable practice. Affordable benefitted from the profitsharing arrangement with its affiliated practices whether a former patient of the PC returned for more dental care to the PC or went to a different affiliated practice, but the PC would lose potential revenue of a former patient seeking additional dental services who was enticed to go to a different practice based on the promotions Affordable was marketing for that different practice. Affordable chose a marketing approach that did not honor the dentistpatient relationship for the PC and was contrary to the PC's financial interest, but would make it easier for Affordable to avoid sorting the mailing list and would support Affordable's financial interest.

71. Using its financial control, Affordable repeatedly attempted to interfere with Dr. Raeline McIntyre's professional decision making, by trying to discourage the PC from spending money on appropriate equipment and dentist salaries. Although Ms. Twilla admitted that the PC always had the right under the Agreement to purchase whatever equipment Dr. McIntyre requested, 12/1/2020 Tr. 1722023;12/2/2020 Tr. 13124-1331, Affordable refused to honor that right. When Dr. Raeline McIntyre requested that Affordable purchase imaging equipment necessary for patient care, Affordable refused for three years to allow the PC to make the purchase. 12/4/2020 Tr. 48618- 48720; *id.* 48725-4886. As outlined above, Affordable had a financial interest in minimizing the PC's costs, and thus maximizing Affordable's management fees based on the PC's net operating margin.

72. The Agreement gave the PC the sole authority to set salaries for associate dentists. MSA at 15 (Staffing). Ms. Twilla admitted that the PC could pay associate dentists "anything that they want." 12/1/2020 Tr. 1742122. However, when Dr. Raeline McIntyre informed Affordable of desired salary increases, Affordable refused and/or delayed putting increases into effect. 12/4/2020 Tr. 488913. Dr. Raeline McIntyre testified that this occurred multiple times throughout the PC's affiliation with Affordable. *Id.* Dr. Raeline McIntyre also testified that she did not remember a time that she requested an increase when it was granted in the amount and within the time that she requested. *Id.* 4881821. Again, Affordable had a financial incentive to suppress associate dentist salaries, because those salaries were practice expenses

that would reduce the net operating margin, and in turn reduce Affordable's management fees.

73. The MSA required Affordable to provide a centralized purchasing system for the PC to purchase supplies. MSA at 15 (Inventory and Supplies). However, Affordable failed to maintain current paidup accounts with suppliers necessary to allow the PC to purchase supplies. 12/4/2020 Tr. 489310. In the late summer or early fall of 2019, Dr. Raeline McIntyre attempted on several occasions to purchase dental implants;she was told that Affordable had not paid its account, and that she could not purchase the implants on her own credit card. *Id.* 489317. Affordable's failure to promptly pay bills interfered with Dr. Raeline McIntyre's efforts to obtain implants necessary to care for a patient. *See id.*

Termination of 2002 Lease and the PC's move to 505 Cowan Road:

74. As required under the Agreement and the 2002 Lease, Affordable also leased office space to the PC. *See* MSA at 15. The PC operated at the Premises beginning in 2002. 12/1/2020 Tr. 164810. There is no evidence that, after October 31, 2005, Affordable extended its lease of the Premises. *See* 12/2/2020 Tr. 163114;12/3/2020 Tr. 13115- 17. However, the PC continued to operate at the Premises, and pay rent to Affordable until 2013 or 2014. *Id.* 253212545.

75. In 2013, JNM Office Property, LLC ("JNM"), a company ultimately owned by Dr. Raeline McIntyre and Dr. Neil McIntyre, purchased property at 505 Cowan Road. 12/3/2020 Tr. 28713.

76. On July 24, 2013, JNM entered into a lease agreement with Affordable to lease 505 Cowan Road to Affordable (the "JNM Lease") (Joint Ex. 7). *See* 12/3/2020 Tr. 255:7-16.

77. JNM constructed an office building at 505 Cowan Road. 12/14/2020 Tr. 68:8-13.

78. Meanwhile, the owner of the Premises sold the property, and in 2014, the Premises were destroyed. 12/3/2020 Tr. 254:19-255:1. Th e Ship Island Lease terminated. *See* 12/2/2020 Tr. 165:9-23. According to its terms, the 2002 Lease terminated automatically when Affordable's lease of the Premises terminated, and no later than 2014. *See* 2002 Lease § 2.

79. In August 2014, the PC moved its operations to 505 Cowan Road. 12/3/2020 Tr. 255:2-6. Affordable entered into a written lease with JNM for the Cowan Road property. Affordable then subleased the Cowan Road property to the PC, but there was no written sublease and no identifiable terms and conditions for the sublease other than the payment of agreed-upon rent. The PC began paying monthly rent to Affordable for office space at 505 Cowan Road. 12/1/2020 Tr. 162:14-18.

Maintenance and Upkeep of 505 Cowan Road:

80. According to the JNM Lease, Affordable was responsible for maintaining the building and the grounds at 505 Cowan Road. *See* JNM Lease ¶ 6(B)(1); 12/4/2020 Tr. 361:16. However, Affordable did not properly maintain grounds to the satisfaction of the PC. 12/4/2020 Tr. 362:9. The PC took on the work of landscaping and maintaining the grounds at the 505

Cowan Road office without any objection from Affordable. *Id.* 3618:3624; *id.* 3631:216.

81. The PC engaged Bravo Lawn and Design LLC ("Bravo Lawn") to manage and perform landscaping and related services at 505 Cowan Road. *See* 12/2/2020 Tr. 45:310; 12/4/2020 Tr. 361: 8:12. Bravo Lawn is ultimately owned by the McIntyres. 12/3/2020 Tr. 286:192873. Dr. Raeline McIntyre approved invoices from Bravo Lawn and forwarded them for Affordable to cause the invoices to be paid as practice expenses. 12/2/2020 Tr. 35:18362. Dr. Neil McIntyre testified that Affordable operations consultants who visited 505 Cowan Road would have seen that outside maintenance work was being performed. 12/4/2020 Tr. 386:1338720. Although Affordable influenced and often resisted decisions by the PC to incur expenses, Affordable never raised a question about the invoices for Bravo Lawn, 12/4/2020 Tr. 388:210. Affordable never asked Dr. Raeline McIntyre concerning the ownership of Bravo Lawn, and never suggested that the invoices were too high for the services provided. *See id.* 386:1318; *id.* 388:210. Nothing in the Agreement prevented the PC from retaining a landscaping service and paying for the service as a practice expense. Nothing in the Agreement prevented the PC from selecting a landscaping service ultimately owned by the McIntyres.

82. The PC engaged SparklePro LLC ("SparklePro") to manage and provide cleaning services at 505 Cowan Road. *See* 12/2/2020 Tr. 45:310. SparklePro is ultimately owned by the McIntyres. 12/3/2020 Tr. 286:192873. Dr. Raeline McIntyre approved invoices from SparklePro and forwarded them for Affordable to cause the invoices to be paid as practice expenses.

12/2/2020 Tr. 262:2–27:1; *see* 12/1/2020 Tr. 118:1–119. Jan Boatright, an operations consultant for Affordable, knew that the PC had hired an outside cleaning service. 12/4/2020 Tr. 387:18- 388:1. Although Affordable influenced and often resisted decisions by the PC to incur expenses, Affordable never raised a question about the invoices from SparklePro. 12/3/2020 Tr. 145:13–18. Affordable never asked Dr. Raeline McIntyre concerning the ownership of SparklePro, and never suggested that the invoices were too high for the services provided. 12/4/2020 Tr. 388:2–10. Nothing in the Agreement prevented the PC from retaining a cleaning service and paying for the service as a practice expense. While the Business Policy Guidelines Exhibit A to the Agreement stated that the practice facility would be cleaned by the PC's employees each day, and that "[o]utside cleaning services should be utilized only for periodic carpet shampoos, waxing, etc.," MSA at 13, the PC had the unilateral right to modify the Business Policy Guidelines, *id.* § I(B). Further, Affordable offered no credible evidence that SparklePro provided more than "periodic" services. *See id.* When directed to the provision in the Business Policy Guidelines specifically referring to outside cleaning services, Ms. Twilla testified that she thought periodic meant on a quarterly basis, "or at least every other month." 12/3/2020 Tr. 144:25–12. However, she admitted that until she learned of the ownership of SparklePro, Affordable never raised any concern about the frequency of billings for cleaning services. *See id.* 145:13–18. Finally, the PC agreed to give notice to Affordable of any changes to the Business Policy Guidelines. MSA § I(B). To the extent that retaining SparklePro represents a change to the Guidelines, Affordable received written notice every time it received

and caused to be paid an invoice for cleaning services. *See* 12/2/2020 Tr. 31:3–14; *id.* 33:19–34:22.

83. Karol Twilla testified that she first learned that SparklePro and Bravo Lawn were owned by the McIntyres in late February or early March of 2020. 12/2/2020 Tr. 55:8–17. Affordable offered no evidence that it had any concerns about the PC making payments for cleaning and landscaping services, or the amounts of those payments, before Affordable learned of the ownership of SparklePro and Bravo Lawn. *E.g.*, 12/3/2020 Tr. 145:13–18.

Property and equipment at 505 Cowan Road:

84. At the hearing, Karol Twilla testified that when Affordable affiliates with a dental practice, "Affordable Care would own the property, would own the equipment, the furnishings, and the dental space." 12/1/2020 Tr. 86:19–21. She also testified that Affordable's practice was to lease the equipment to the practice. *Id.* 86:12–87:11. Affordable introduced no documentation of any lease of any equipment.

85. Ms. Twilla first testified that "[t]here is a sublease" between Affordable and the PC regarding the alleged lease of furnishings and equipment. 12/1/2020 Tr. 129:25–130:7. However, Affordable's counsel later acknowledged that "[t]here was no written sublease." *Id.* 159:17. Ms. Twilla then testified that Affordable's position was that when the PC moved to 505 Cowan Road, "[t]hat the lease continue[d] as it's written in" the 2002 Lease. 12/2/2020 Tr. 101:01–15. Although the 2002 Lease terminated automatically when Affordable's lease of the Premises ended, Ms. Twilla

testified that the 2002 Lease was the controlling sublease for the 505 Cowan Road property. 12/2/2020 Tr. 157815.

86. Through Ms. Twilla's testimony, Affordable introduced a list of equipment that Ms. Twilla said represented items at 505 Cowan Road that Affordable owned. *See* 12/3/2020 Tr. 1232312414; Cl. Ex. 36. Ms. Twilla later admitted that she did not prepare the list and had no other knowledge of its specific contents. 12/3/2020 Tr. 15617- 1578. Affordable offered no documentation to support the list, such as invoices or receipts to show that it purchased the listed property with its funds.

87. Dr. Neil McIntyre testified that he and Dr. Raeline McIntyre purchased furnishings and equipment for the 505 Cowan Road office with the McIntyres' personal funds. 12/14/2020 Tr. 213102l4: 18. Evidence produced in discovery and introduced at the hearing showed that the McIntyres purchased at least $124,853 in property for the 505 Cowan Road office with personal funds. 12/14/2020 Tr. 2151722;Resp. Ex. 8. [6]

88. Although Ms. Twilla testified in response to Affordable's counsel's questions that Affordable owns all the property and equipment at affiliated practices, 12/1/2020 Tr. 861921, Ms. Tw illa admitted on cross-examination that she had no personal knowledge of what equipment Affordable owned at 505 Cowan Road. 12/3/2020 Tr. 101210. Ms. Twilla also testified that she did not know whether any of the equipment set up

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[6] Respondents' Exhibit 8 is misidentified in some parts of the hearing transcript as Exhibit A. *See* 12/14/2020 Tr. 21510; *id.* 21615.

at the Premises was moved to 505 Cowan Road. *Id.* 132231335.

89. Ms. Twilla's testimony that Affordable owns all the property and equipment at 505 Cowan Road was not credible and does not support a finding that Affordable owned the property and equipment.

90. Other than Ms. Twilla's testimony, which the Arbitrator does not credit, Affordable offered no evidence that it purchased the property and equipment located at 505 Cowan Road. Instead, the credible evidence showed that the McIntyres and the PC purchased and owned the property and equipment. Affordable failed to show that it owned any particular piece of property or equipment located at 505 Cowan Road. Further, by failing to ever provide a lease or leases regarding the furnishings and equipment at the Cowan Road property, Affordable violated its contract duties under Exbibit B 1 of the MSA.

ADDL laboratory staffing issues:

91. Under the Agreement, Affordable agreed to provide an inhouse dental laboratory to serve the needs of the PC's patients. MSA at 15.

92. An adequately staffed laboratory was critical to the PC's ability to provide timely patient care, and essential to the financial success of the PC. *See* 12/14/2020 Tr. 93:14-94:4; *see also* 12/15/2020 Tr. 97:20-98:3 (Mr. Hudi's testimony th at number of lab employees varies in relation to practice's revenue). Affordable advertised both to the managing dentists who owned practices managed by Affordable, and to patients, that it provided sameday dent ure service. 12/14/2020 Tr.

81259212. The inhouse ADDL laboratory was essen - tial to providing sameday service. 12/3/2020 Tr. 11816-24.

93. Affordable and ADDL mismanaged the Gulfport laboratory. ADDL Gulfport laboratory employees were overworked and underpaid, resulting in significant staff attrition. 12/4/2020 Tr. 38338425; 12/14/2020 Tr. 85713. When the PC had its most profitable years, the laboratory was staffed with four full technicians to timely meet patient needs. 12/14/2020 Tr. 9424951. However, by 2019, only one full technician remained in the laboratory. *Id.* 9421953; Resp. Ex. 7. In many cases, the PC could no longer offer sameday denture servic e due to the deficiencies in laboratory staffing. 12/14/2020 Tr. 811924; *id.* 86916; *id.* 1091922; *id.* 208221010.

94. When problems in dental laboratory staffing negatively impacted the PC's patient service and productivity, Affordable failed to adequately address the problems. Dr. Raeline McIntyre raised the laboratory staffing issues with Affordable and ADDL, making clear that the practice was in dire need of a fully staffed laboratory. 12/14/2020 Tr. 9011953; Resp. Ex. 7. Rather than listen to Dr. Raeline McIntyre's concerns about the laboratory, Affordable tried to force the PC to make do with the laboratory staffing it had, refused to increase pay for overworked laboratory staff, and failed to recruit and hire adequate staff. 12/14/2020 Tr. 8827; *id.* 9716982. Ms. Twilla admitted that Dr. Raeline McIntyre raised concerns about the staffing of the ADDL laboratory prior to the termination letter in September 2019. *Id.* 181422.

95. Kevin Hudi testified that in February 2019, Dr. Raeline McIntyre declined to allow ADDL to

require Gulfport laboratory staff to participate in a productivity data collection program that ADDL implemented, known as "Smart sheet." 12/4/2020 Tr. 414134155;12/15/2020 Tr. 53 9553. Dr. McIntyre told Mr. Hudi that her laboratory manager, Russell Dukes, was already too busy, and the laboratory was understaffed. 12/4/2020 Tr. 415:6415. She also told Mr. Hudi that she did not think the data collection effort would be useful. *Id.* 4151215. Mr. Hudi admitted that ADDL discontinued the "Smart sheet" program after realizing that "[i]t turned out to be more work, on our side, capturing data and running reports." 12/15/2020 Tr. 7639. Mr. Hudi testified that "the labor was more than the data was providing." *Id.* 761013.

96. Consistent with Mr. Hudi's testimony, Dr. Raeline McIntyre testified that she called Mr. Hudi and said that the laboratory employees were overwhelmed, and adding another requirement would be more than they could handle. 12/4/2020 Tr. 50215-5033. Dr. Raeline McIntyre testified that the ADDL employees were already submitting the same data ADDL was requesting, but in a different format. *Id.* 50349.

Termination of the Services Agreement:

97. After repeatedly complaining to Affordable about its mismanagement of the PC, and particularly the problems caused by the inadequate laboratory staffing, Dr. Raeline McIntyre decided to terminate the Agreement between Affordable and the PC. *See* 12/14/2020 Tr. 1011910410.

98. On September 18, 2019, Dr. Raeline McIntyre, on behalf of the PC, sent a letter to Affordable terminating the Agreement for cause. Joint Ex. 8 at 1-

2. Dr. McIntyre explained in the letter that there were at least two grounds to terminate for cause:(1) Affordable's breach of its promise to manage in the best interests of the PC was a breach of a material term, giving rise to cause for termination under section V(B)(2) of the Agreement; and (2) the termination of the 2002 Lease gave rise to cause for termination under section V(B)(9) of the Agreement. *Id.* Dr. McIntyre requested that Affordable respond and provide "its plan for an orderly disaffiliation within 10 days so that we can make the necessary and appropriate decisions related to our practice, and the continuing care of our patients, following disaffiliation from Affordable." *Id.* at 2;12/14/2020 Tr . 104211059. Dr. McIntyre proposed that disaffiliation be completed by November 4, 2019. Joint Ex. 8;12/14/2020 Tr. 10614-18.

99. Also on September 18, 2019, the PC sent a letter to Affordable and ADDL giving notice that the PC was terminating the ADDL Agreement. Joint Ex. 8 at 34; 12/14/2020 Tr. 106: 520. In the letter, Dr. Raeline McIntyre explained that ADDL was in breach of the ADDL Agreement because it was no longer performing the work contemplated under the ADDL Agreement in the time and manner required. Joint Ex. 8 at 3. Dr. McIntyre also explained that the ADDL Agreement was automatically terminated because of the PC's termination of the Services Agreement. *Id.* at 34.

100. Dr. Neil McIntyre met with the staff of the PC and the Gulfport ADDL laboratory on September 18, 2019 to inform them that the PC had terminated its Agreement with Affordable. 12/3/2020 Tr. 27615-25. After the meeting, staff members, including ADDL

employees, approached Dr. Neil McIntyre to ask for employment following the disaffiliation from Affordable. *Id.* 277:14-18; *id.* 278:11-13. Dr. Neil McIntyre told the employees who asked that he did not know what the future held, but he would do his best to employ them. *Id.* 277:6-12.

101. Karol Twilla responded to the September 18, 2019 termination letters by letter dated September 27, 2019. Joint Ex. 9. Ms. Twilla denied that there was cause to terminate the Agreement, and asserted that Affordable had complied with the Agreement and had not interfered with the PC's professional decision making. *Id.* Ms. Twilla did not offer a plan for disaffiliation. *Id.*; *see* 12/14/2020 Tr. 107:23-108:2.

102. Affordable never provided a plan for disaffiliation from the PC. 12/14/2020 Tr. 105:19-25; *id.* 106:24-25.

Initiation of Arbitration and Court Proceedings:

103. Instead, on November 1, 2019, Affordable filed its initial Demand for Arbitration. Joint Ex. 10. Affordable alleged that there was no cause for termination of the Agreement, and sought declaratory judgment that the Agreement was not terminated. *See id.*

104. Also on November 1, 2019, Affordable sued JNM in federal court seeking declaratory judgment that Affordable was not in default on the lease between JNM and Affordable for the 505 Cowan Road office, as a result of Affordable's failure to make certain rent payments to JNM. Cl. Ex. 14.

105. On November 20, 2019, Respondents answered the Demand and denied Affordable's allegations,

thus reasserting that the PC had terminated the Agreement for cause. Joint Ex. 11.

106. On November 24, 2019, Karol Twilla sent another letter to the PC, this time notifying the PC that Affordable believed there was a minimum cash balance deficiency based on October 31, 2019 financial statements. Joint Ex. 12. Ms. Twilla stated that the PC had two options to remedy the deficiency and, if the parties did not agree on either option, either party could terminate the Agreement immediately. *Id.* In the letter, Ms. Twilla purported to enclose the financial statement on which she relied to calculate a minimum cash balance deficiency. *Id.* The copy of Ms. Twilla's letter introduced at the hearing has no enclosures. *Id.* Although Ms. Twilla testified about the letter, she did not explain whether an enclosure was missing or what it contained. 12/2/2020 Tr. 50922.

107. Prior to the November 25, 2019 letter, Affordable had never given the PC notice of a minimum cash balance deficiency. 12/14/2020 Tr. 10815518.

108. By February 2020, Affordable still failed to cooperate in disaffiliation from the PC.

109. Because Affordable retained control of all revenues of the PC and refused to relinquish that control despite the termination of the Agreement, the PC could not disaffiliate from Affordable. *See* 12/14/2020 Tr. 17055 18. In order to set up a bank account that Affordable did not control, so that Affordable could not continue to sweep revenues earned after the termination of the Agreement, Dr. Raeline McIntyre formed a new entity, Dr. Raeline K. McIntyre, DMD, PLLC ("Raeline PLLC"), and set up a bank account in the name of the new entity. 12/3/2020 Tr. 25236; 12/14/2020 Tr.

170518. Dr. Raeline McIntyr e was the sole owner of Raeline PLLC. 12/4/2020 Tr. 47110.

February 24, 2020 Letter and Further Litigation:

110. On or about February 24, 2020, the PC delivered a second letter to Affordable, stating that the PC was terminating the Agreement immediately under section III(B). Joint Ex. 13. In the letter, Dr. Raeline McIntyre explained that the PC did not agree to either option to remedy the cash balance deficiency, and therefore invoked its right to terminate the Agreement immediately. *Id.* Again, in the interest of continuity of patient care, Dr. McIntyre asked Affordable to work with the PC to provide "an orderly transition." *Id.*

111. In response to the February 24, 2020 letter, Affordable took immediate action to interfere with the McIntyres' ability to continue to practice dentistry. On or about February 26, 2020, Affordable cut off the computer system in the office so that the McIntyres could not access their patient records or take Xrays or images. 12/4/2020 Tr. 5262552710; *id.* 52611221. Affordable also directed ADDL employees not to return to work. 12/2/2020 Tr. 10811920.

112. All of the ADDL employees at the Gulfport laboratory resigned from employment with ADDL. 12/2/2020 Tr. 1082022.

113. Although the evidence showed that Affordable ceased performing services for the PC on February 24, 2020, *supra*, Ms. Twilla testified that the current status of the Agreement between the PC and Affordable is "[t]hat it is still in existence, that we still have affiliation." 12/1/2020 Tr. 11011415.

114. During the week of February 24, 2020, Raeline PLLC began to operate a dental practice at 505 Cowan Road. 12/4/2020 Tr. 46436. Dr. Raeline McIntyre, Dr. Neil McIntyre, and Dr. Palmore practiced under Raeline PLLC. *Id.* 471244726; *id.* 5171723. The McIntyres removed signage and indications that the practice was affiliated with Affordable. 12/4/2020 Tr. 5221220; *id.* 524211; *id.* 5251113. Raeline PLLC hired the former ADDL Gulfport laboratory employees, after they contacted Dr. Neil McIntyre to ask for employment. 12/3/2020 Tr. 2771424; *id.* 2781422; 12/4/2020 Tr. 5171216.

115. On February 27, 2020, Respondents secured a temporary restraining order that prohibited Affordable from interfering with their ability to practice dentistry. Cl. Ex. 17.

116. On February 28, 2020, Affordable sought leave to amend its Demand for Arbitration. Cl. Ex. 45.[7]

117. In its Amended Demand for Arbitration ("Demand") (Joint Ex. 14), Affordable brought seventeen claims for relief:(1) declaratory relief pursuant to the Agreement; (2) attorneys' fees and indemnification pursuant to the Agreement; (3) declaratory relief pursuant to the 2002 Lease and "the sublease"; (4) breach of contract—"minimum cash balance"; (5) breach of contract—"failure to vacate the premises"; (6) breach of contract—"failure to pay all debts"; (7)

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[7] Affordable was granted to leave file its Amended Demand for Arbitration. AAA Scheduling Order #. Although Affordable did not actually file the Amended Demand for Arbitration until June 3, 2020, Joint Ex. 14, the Amended Demand it ultimately filed was submitted with its motion for leave on February 28, 2020, Cl. Ex. 45.

breach of contract—confidentiality; (8) breach of contract—"solicitation of Claimant's employees"; (9) breach of contract—"taking of Claimant's property and equipment"; (10) breach of contract—"failure to allow Claimant access to the Premises"; (11) misappropriation of trade secrets; (12) tortious interference with "business relations";(13) tortious interference with "business relationships";(14) unfair acts or practices in violation of N.C. Gen. Stat. § 751.1; (15) unjust enrichment—"Claimant's property and equipment"; (16) unjust enrichment—"the Premises"; and (17) conversion. Demand ¶¶ 95261. Affordable alleged that there was no cause for the PC to terminate the Agreement. *Id.* ¶ 20. Affordable also alleged that the PC breached the Agreement by failing to remedy the alleged minimum cash balance deficiency, *id.* ¶ 138; failing to vacate 505 Cowan Road upon termination of the Agreement, *id.* ¶¶ 14869;allegedly taking Affordable's property and equipment, *id.* ¶¶ 19192;soliciting ADDL employees, *id.* ¶¶ 18182, and using Affordable's confidential information, *id.* ¶ 172. Affordable's tort and statutory claims arise from the same facts as the breach of contract claims. *See id.* ¶¶ 20461.

118. Raeline PLLC continued to operate at 505 Cowan Road, and continued to serve the McIntyres' patients. 12/3/2020 Tr. 272:2327319. Respondents did not pay rent during the month of March 2020. *Id.* 273172748. Affordable offered no evidence of the fair market value of the 505 Cowan Road property during that time.

119. Affordable filed a motion in federal court in the JNM case seeking to enforce a joint stipulation between JNM and Affordable that was intended to preserve the status quo during litigation. Cl. Ex. 43 at

9;Cl. Ex. 44. At the hearing on the motion to enforce the stipulation, Affordable asked the court to order the McIntyres to vacate 505 Cowan Road. 12/14/2020 Tr. 236810. Affordable represented to the court that it was ready to start operating with a new affiliated practice immediately. *Id.* 2361117. On March 17, 2020, Affordable obtained a court order requiring the McIntyres and their practice to vacate 505 Cowan Road no later than March 27, 2020. Cl. Ex. 1.

120. The next day, on March 18, 2020, Dr. Neil McIntyre set up Neil McIntyre, DMD, PLLC ("Neil PLLC"). Cl. Ex. 46. Dr. Neil McIntyre is the sole owner of Neil PLLC. 12/4/2020 Tr. 537510.

Events Following March 27, 2020:

121. The McIntyres complied with the court order and vacated 505 Cowan Road on March 27, 2020. 12/2/2020 Tr. 8368. Raeline PLLC ceased operating on March 27, 2020. 12/3/2020 Tr. 2731113. Dr. Raeline McIntyre stopped practicing dentistry at that time. 12/3/2020 Tr. 281242822; 12/4/2020 Tr. 536254.

122. Despite Affordable's representation in federal court, *supra*, an Affordableaffiliated practice did not begin operating at 505 Cowan Road until October 5, 2020. 12/14/2020 Tr. 237311.

123. Upon leaving 505 Cowan Road, the McIntyres did not take any dental equipment. 12/3/2020 Tr. 280810. They did not take any property owned by Affordable. *Id.* 2801114; *see* 12/2/2020 Tr. 8325. Dr. Neil McIntyre took only some of his personal belongings. 12/3/2020 Tr. 280152815. The McIntyres left behind property and equipment that they purchased in order to avoid any question that they had fully

complied with the federal court's order. 12/4/2020 Tr. 348813.

124. Dr. Neil McIntyre continued to practice dentistry under Neil PLLC at 382 Courthouse Road in Gulfport. 12/14/2020 Tr. 2371215. Neil PLLC hired the former ADDL employees who had worked for Raeline PLLC and set up a dental laboratory. 12/4/2020 Tr. 538312.

125. Neil PLLC continues to operate a dental practice in Gulfport, Mississippi. 12/4/2020 Tr. 32417-19;12/14/2020 Tr. 2371215; *id.* 2391823.

126. In its Demand and at the hearing, Affordable raised a variety of complaints about the events following the termination of the Agreement in September 2019, and the events following the February 24, 2020 letter.

Access to 505 Cowan Road:

127. On examination by Affordable's counsel, Ms. Twilla testified that Affordable was denied access to 505 Cowan Road after February 24, 2020. 12/3/2020 Tr. 149710. On crossexamination Ms. Twilla admitted that she was never denied access to 505 Cowan Road, and she was not aware that Affordable actually sent anyone to the building to attempt to access it. *Id.* 1671114684.

128. The Arbitrator does not credit Ms. Twilla's testimony that Affordable was denied access to 505 Cowan Road. She appeared to agree with Affordable's litigation position, despite her admitted lack of knowledge to support that position.

129. Affordable did not offer any evidence to support the allegations in its Demand that "Respondents have locked Claimant out of the Premises," Demand ¶ 199, even assuming that Affordable is referring to 505 Cowan Road rather than the Premises. There is no credible evidence that Affordable was denied access to 505 Cowan Road at any time.

Competition by Neil PLLC:

130. Ms. Twilla testified that the PC had the ability to stop Dr. Neil McIntyre from competing with the PC, and to seek an injunction and/or damages. 12/2/2020 Tr. 93:5-16. However, Dr. Neil McIntyre testified that he had no employment agreement with the PC. 12/3/2020 Tr. 187:12-13; *id.* 189:5-9. Affordable offered as evidence a document purporting to amend an employment agreement between Dr. Neil McIntyre and the PC. *Id.* 188:1-13;Cl. Ex. 5. Dr. Neil McIntyre explained that he signed the amendment in 2006 because he was at an Affordable seminar with other dentists, and the "corporate people" from Affordable had a table of amendments at the front door to the room. 12/3/2020 Tr. 189:13-190:1. The Affordable corporate personnel said all the dentists had to sign the amendments before they left; Dr. Neil McIntyre testified that he signed the amendment so he could leave. *Id.* Affordable failed to prove that Dr. Neil McIntyre had a written employment agreement with the PC and failed to offer any evidence that Dr. Neil McIntyre was subject to a restrictive covenant with the PC. Affordable also offered no evidence that Dr. Neil McIntyre was a party to any agreement with Affordable.

131. Ms. Twilla testified that the Agreement requires associate dentists of the PC to sign employment agreements, and that the Agreement sets minimum requirements for those employment agreements. 12/1/2020 Tr. 145:1–12:1; *id.* 155:14–18. Ms. Twilla testified that the Agreement required Dr. Raeline McIntyre to have Dr. Neil McIntyre execute an employment agreement with the PC. *Id.* 154:8.

132. In the Agreement, the PC agreed to enter into an employment agreement with "each dentist who is a shareholder in the PC." MSA § II(D). Regarding the employment of other dentists, the Agreement stated:

> The terms and conditions of an Employment Agreement with a dentist who is not a shareholder in the PC may be such as the PC determines to be prudent, provided, however that all such Employment Agreements must contain provisions substantially identical to those of Paragraphs 6 (Prohibited Marketing Practices), 7 (Confidential Information), 8 (Nonsolicitation of Employees) and 11 (Third Party Beneficiary) of the sample Associate Dentist Employment Agreement attached hereto as Exhibit D2.

Id. Nothing in the Agreement required the PC to enter into an employment agreement with a dentist who was not a shareholder. *See id.* Affordable did not offer evidence that a sample Associate Dentist Employment Agreement was attached to the Agreement.

133. The terms of the Agreement contradict Ms. Twilla's testimony that the PC was required to have Dr. Neil McIntyre sign an employment agreement. Ms. Twilla's interpretation of the Agreement, unsupported

by the plain language of the Agreement, has no evidentiary weight.

134. On August 5, 2002, Dr. Neil McIntyre signed a temporary employment agreement with the Poe PC. 12/3/2020 Tr. 192:11-24; Cl. Ex. 4. The temporary employment agreement contained a covenant not to compete with the practice for two years after the termination of the agreement. Cl. Ex. 4 ¶ 5. As noted above, the PC purchased the assets of the Poe PC on November 1, 2002. In the bill of sale, the Poe PC agreed to assign to the PC its "rights, benefits and interest under those certain contracts and agreements, written or oral, relating to the operations of the Practice defined as 'Assigned Contracts' under the Professional Assets Purchase Agreement." Joint Ex. 6 at 9-10. However, nothing in the Professional Assets Purchase Agreement lists "Assigned Contracts." *See id.* at 16. Therefore, there is no evidence that Dr. Neil McIntyre's temporary employment agreement with the Poe PC was assigned to the PC.

Hiring of Former ADDL Employees:

135. Ms. Twilla testified that as of February 2020, ADDL employed Caleb Cantrell, Rachel Dykes, Russell Dykes, and Christina Hodge at the Gulfport location. 12/2/2020 Tr. 109:15-110:8. Ms. Twilla testified that these four employees resigned on or about February 24, 2020 and were hired by Dr. Raeline McIntyre. *Id.* 110:9-15.

136. Ms. Twilla also testified that Dr. Raeline McIntyre and Dr. Neil McIntyre were prohibited by contract from soliciting ADDL employees. 12/2/2020 Tr. 107:24-108:6. Ms. Twilla te stified that Affordable and ADDL had a nonsolicitation provision because

there was "a lot of work" that goes into recruiting and training laboratory staff members. *Id.* 112:17-113:4.

137. Ms. Twilla testified that Affordable has affiliated locations in about forty states across the United States. 12/2/2020 Tr. 126:9. She also testified that ADDL has a laboratory at each affiliated location, and therefore ADDL had laboratories in about forty states. *Id.* 126:10-15.

138. As noted hereinabove, the nonsolicitation provision in the MSA contains no time limitation. It prohibits solicitation of any employees of Affordable and all its affiliates. Therefore, on its face, the nonsolicitation provision prevents solicitation for employment of employees who work in approximately forty states.

139. Dr. Neil McIntyre testified that in February 2020, he hired former ADDL employees to work for Raeline PLLC, when those employees asked him for a job. 12/3/2020 Tr. 277:14-24; *id.* 278:14-22. He also testified that he later hired former ADDL employees to work for Neil PLLC. *Id.* 197:16-199:11.

Alleged Confidential Information and Trade Secrets:

140. Ms. Twilla also testified that Affordable maintained confidential information and trade secrets. 12/2/2020 Tr. 111:20; *id.* 113:14-114:12. She testified that the confidential information at issue in Affordable's breach of contract claim was the same information Affordable contended was a trade secret. 12/3/2020 Tr. 552:15-84.

141. In response to questions about what Affordable considered a trade secret, Karol Twilla testified:

> So as a support service that we offer, you know, when you think about a business asset and you think about servicing patients, in this instance there are forms that are created and recommended.
>
> Now, the doctor has the ability to say no, that they don't want to use them or to alter them; but the templates of those forms, the format of those forms, how those forms are communicated to patients, how those forms are processed throughout the patient's visit, you know, the office, how the office runs, how they answer phones, how they utilize the Dentrix, the operating system and, you know, making sure that a schedule is optimized, all of those are certainly, you know, trade secrets.

12/2/2020 Tr. 113211141O. Ms. Twilla also testified that "the manner in which we train office staff" was a trade secret. 12/3/2020 Tr. 541121. Ms. Twilla testified that if an unaffiliated practice hired former employees of an affiliated practice, the employees would be "light years ahead as far as the way that they talk to patients, the way they schedule patients, the way that they, you know, create ASAP lists." 12/2/2020 Tr. 115624.

142. On crossexamination , Ms. Twilla admitted that the Affordable template patient form was accessible to tens of thousands of patients who were under no obligation to keep the form confidential. 12/3/2020 Tr. 585627. Immediately after acknowledging this fact, she persisted in testifying that the form was secret. *Id.* 612023.

143. Ms. Twilla also admitted that patients and other visitors to the practice, as well as ADDL and PC staff members, had the opportunity to observe how the office operated, including how staff answered the phones and how patients were scheduled. 12/3/2020 Tr. 587594. Affordable offered no evidence that any of the PC staff members who observed how the PC operated were restricted from disclosing that information, or subject to postemployment covenants.

144. Ms. Twilla testified that the Dentrix operating system was customized for Affordable's affiliated practices, and that the operating system is considered confidential and is a trade secret. 12/3/2020 Tr. 1201018. However, Dr. Raeline McIntyre testified that Dentrix was not a proprietary program of Affordable; rather, it was a thirdparty provider that licensed software to dental practices. 12/4/2020 Tr. 52215; *id.* 55636; *see id.* 557714. The Arbitrator does not credit Ms. Twilla's conclusory testimony that the Dentrix operating system is proprietary to Affordable.

145. Affordable also did not offer evidence that Respondents used or disclosed any aspect of the customized Affordable Dentrix system. Dr. Raeline McIntyre testified that after February 24, 2020, her new practice used the computer system only to identify the number associated with a patient's hard copy file. 12/4/2020 Tr. 5261221. Dr. Ra eline McIntyre explained that the hard copy files were organized by numbers; in order to locate a hard copy file, staff had to search in the computer to find the patient number associated with a patient's name. *Id.* 531916. Dr. Raeline McIntyre testified that they did not use the Dentrix software system. *Id.* 5271114.

146. When asked what Affordable considered a trade secret "with respect to the laboratory," Ms. Twilla responded:

> If you compare an ADDL laboratory with a commercial lab, the processes and even the materials used and how they're used in an ADDL lab are significantly different and they are done so in order to still have a quality product in a quicker time frame, enabling the client dentist to service their patients in a same day service.

12/2/2020 Tr. 111820.

147. ADDL employees and the PC's staff could also observe the materials and processes used in the laboratory, and there was no evidence that those employees were subject to confidentiality agreements or postemployment rest rictions. 12/4/2020 Tr. 4393-16. Instead, there was evidence that ADDL employees left to work for competitors. 12/14/2020 Tr. 851624.

148. Although Ms. Twilla testified that providing sameday denture service wa s "unique," she admitted that she was not saying that ADDL was the only dental laboratory offering sameday service. 12/3/2020 Tr. 153111115. Ms. Twilla admi tted that there were competitors in the market and testified she did not know whether they provided sameday service. *See id.* 153161515425. She acknowledg ed knowing of at least one company that advertised sameday denture service. *Id.* 15459.

149. Kevin Hudi testified that the ADDL employees had valuable training. *See* 12/4/2020 Tr. 399134009. However, Mr. Hudi later admitted that he lacked knowledge of any training that Affordable

or ADDL provided to Caleb Cantrell, Rachel Dykes, Russell Dykes, or Christina Hodge. *Id.* 440254423.

150. On the fourth day of the hearing, Dr. Neil McIntyre testified that when he was setting up the laboratory at Neil PLLC, he consulted with Russell Dykes, and looked at a list of equipment provided to him in 2013 or 2014 by Affordable's director of purchasing. 12/4/2020 Tr. 328223301. The Affordable employee who provided the list did not ask Dr. Neil McIntyre to keep the list confidential. *Id.* 3301920. Dr. Neil McIntyre also testified that the dental laboratory at Neil PLLC did not have the same layout as the laboratory at 505 Cowan Road. 12/14/2020 Tr. 238162397.

151. After Dr. Neil McIntyre testified, Kevin Hudi testified that ADDL had a "standard equipment order" and a particular layout for its laboratories, and that the equipment list was "extremely valuable." 12/4/2020 Tr. 400104018. Affordable di d not introduce a copy of the equipment list during this testimony. *See id.*

152. After the hearing recessed on December 4, 2020, and before it resumed on December 14, 2020, Dr. Neil McIntyre searched his files and located the list to which he had referred in his testimony. 12/14/2020 Tr. 21872219; Resp. Ex. 9. Dr . McIntyre testified that the list he had referred to in his prior testimony was a series of six items in an email from Minnie Whaley forwarded to Dr. McIntyre by T.J. Thomas. 12/14/2020 Tr. 221162231. Affordable offered no evidence that the list was proprietary to Affordable, or that it was kept secret.

153. When Affordable recalled Mr. Hudi as a rebuttal witness, Affordable's counsel elicited testimony

about an Excel spreadsheet. 12/15/2020 Tr. 6317-6419; *see* Cl. Ex. 72. Mr. Hudi testified that the spreadsheet "appear[ed] to be a list of various pieces of equipment and tools that would be purchased to set up an ADDL laboratory." 12/15/2020 Tr. 642123. Mr. Hudi testified that the purchasing department used the list to open new ADDL laboratories. *Id.* 656663. Mr. Hudi, who was first employed by ADDL in 2018, *id.* 741820, testified that the list was the current list for ADDL laboratories, *id.* 671418. He did not testify that the list reflected the equipment that would have been used to stock the dental laboratory at 505 Cowan Road when it opened in 2014. *See id.*

154. Mr. Hudi testified that the equipment list was the result of fortyseve n years of operations, and that ADDL would not want a competitor to have it. 12/15/2020 Tr. 68226915. Howeve r, Affordable offered no evidence that Respondents or Dr. Neil McIntyre ever had or used the equipment list to which Mr. Hudi referred in his testimony.

Alleged Damages to Affordable:

155. Affordable forecasted in its opening statement that it would show evidence of "significant damages" resulting from Respondents' conduct. 12/1/2020 Tr. 4516; *see id.* 461112; *id.* 471011; *id.* 5221.

156. ADDL witness Kevin Hudi testified that it "could take two, three years" to hire and train a staff comparable to the four ADDL employees who resigned from the Gulfport lab in February 2020. 12/4/2020 Tr. 4251217. He testified that the cost range "would be in the hundreds of thousands of dollars." *Id.* 42522-4261. Mr. Hudi did not te stify about what costs Affordable or ADDL actually incurred to hire and train

staff as a result of the departure of the four ADDL Gulfport employees.

157. Affordable offered no evidence of any expenses actually incurred to staff the laboratory that ADDL is currently operating in Gulfport. Affordable also offered no evidence that it incurred expenses beyond what it or ADDL would otherwise pay to operate a laboratory.

158. Karol Twilla testified that Affordable believed the PC's revenue would "continue to grow" in 2020, 12/2/2020 Tr. 102241032, despit e financial statements showing that revenue had been declining since 2017, Cl. Ex. 11A. As discussed above, the Arbitrator does not credit Ms. Twilla's testimony about the PC's finances. A witness could not credibly testify that the PC's revenue was growing based on the financial statements offered through Ms. Twilla's testimony.

159. Ms. Twilla did not offer a calculation of what profit the PC would be expected to earn, and thus what management fees Affordable might earn, in 2020 or beyond if the PC had not terminated the Agreement. *See* 12/2/2020 Tr. 10224 1032. Affordable offered no other evidence of what the PC or Affordable could have been expected to earn if the Agreement had not been terminated. Affordable also offered no evidence of the costs it would have incurred in meeting its obligations under the Agreement if the Agreement had not been terminated.

160. Evidence at the hearing showed that Affordable had another affiliated practice operating in Gulfport by the fall of 2020. 12/14/2020 Tr. 237611. Affordable, therefore, had knowledge of what fees it actually earned and failed to offer such evidence.

161. In its posthearing brief, Affordable appears to rely exclusively on Claimant's Exhibit 32 as evidence of its alleged damages. *See* Cl. Br. 17, 22, 26.

162. Karol Twilla testified at the hearing that Claimant's Exhibit 32 was "a summary of the financial packet" for 2015 to 2019. 12/2/2020 Tr. 104:21-105:4. She testified that it was a summary of the "Affordable Care fees that are listed, that were listed in the financial package" that the PC paid to Affordable. *Id.* 105:5-12. Ms. Twilla testifie d that if the Agreement remained in effect, Affordable's "position as to the rent and fees" was "[t]hat they would be due." *Id.* 107:17-20. Ms. Twilla did not testify about how Affordable's alleged damages could be calculated from Claimant's Exhibit 32. No other witness testified about Claimant's Exhibit 32.

CONCLUSIONS OF LAW

Termination of the Services Agreement:

163. The PC had good cause to terminate the MSA and did terminate the MSA effective September 18, 2019.

164. "Where the terms are plain and explicit the court will determine the legal effect of a contract and enforce it as written by the parties." *Church v. Hancock*, 136 S.E.2d 81, 83 (N.C. 1964).

165. The plain language of the MSA allows termination for cause for any of nine identified reasons. MSA § V(B). The PC gave notice of termination on September 18, 2019, for two reasons:(1) Affordable's breach of a material term of the Agreement;and (2) the termination of the 2002 Lease. Each reason was

independently sufficient to provide cause for the PC to terminate the Agreement.

Termination Pursuant to Section V(B)(2):

166. First, the PC had cause to terminate the Agreement pursuant to section V(B)(2), because Affordable failed to manage the business aspects of the dental practice with the PC's best interest in mind.

167. Because it was the PC's agent, as a matter of law, Affordable owed the PC fiduciary duties with respect to all matters within the scope of Affordable's agency. *Honeycutt v. Farmers & Merchants Bank*, 487 S.E.2d 166, 168 (N.C. Ct. App. 1997).

168. Affordable also owed the PC a fiduciary duty because of the nature of their arrangement. The PC placed its trust and confidence in Affordable to manage all business aspects of the practice. Because of the level of influence and control Affordable exercised over the PC's business, Affordable owed a fiduciary duty to the PC. *See Abbitt v. Gregory*, 160 S.E. 896, 906 (N.C. 1931) (recognizing that fiduciary duty arises from the legal relation of principal and agent, and "extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other").

169. Because of its fiduciary relationship to the PC, Affordable had a duty to act in the best interest of the PC. *Dallaire v. Bank of Am., N.A.*, 760 S.E.2d 263, 266 (N.C. 2014).

170. Affordable also had a contractual duty to manage the practice "with the PC's best interest in mind." MSA § I(A).

171. The PC gave notice in its letter of September 18, 2019, that Affordable failed to manage the practice with the PC's best interest in mind. Joint Ex. 8. As discussed above, the PC gave some examples in its letter of incidents that reflected Affordable's failure to manage in the best interests of the PC.

172. As noted hereinabove, evidence at the hearing showed that Affordable privileged its own financial interests over the best interests of the PC by delaying and denying expenses that necessarily would have reduced the PC's net income and, therefore, reduced Affordable's management fees.

173. By putting its own interest in maximizing its management fees ahead of the PC's best interests, Affordable breached its fiduciary duties to the PC. *See Miller v. McLean*, 113 S.E.2d 359, 362 (N.C. 1960) ("[F]iduciaries must act in good faith. They can never paramount their personal interest over the interest of those for whom they have assumed to act."). By the same actions, Affordable breached its contractual duty to manage in the best interests of the PC.

174. The promise to manage the practice with the PC's best interest in mind is a material term of the Agreement. "In determining whether a given term of an agreement is material, courts have looked to the purpose and nature of the agreement itself." *McCarthy v. Hampton*, 2015 NCBC 67 ¶ 27 (quotation omitted) The stated purpose of the Agreement was for the PC to engage Affordable to perform a fiduciary function: to act as the PC's agent "in the management of the business aspects of the Practice." MSA at 1 ("whereas" clauses).

175. Affordable also contends that the PC did not have cause to terminate the Agreement under section V(B)(2) because (1) Affordable's breaches were cured; and (2) the PC waived the right to terminate. *See* Cl. Br. 8-10. Each of these arguments fails.

176. Focusing on the individual examples listed in the September 18, 2019 letter, Affordable contends that it cured any breach of the Agreement. *See* Cl. Br. 8. However, the evidence at the hearing showed that Affordable repeatedly and persistently failed to manage the practice in the PC's best interest. Evidence Affordable relied on to show that it sometimes eventually allowed the PC to purchase necessary equipment, increase dentist salaries, and purchase dental implants does not show that Affordable cured its persistent failure to manage in the best interests of the PC. The breach of section I(A) was not cured.

177. Further, Affordable's failure and refusal to acknowledge the problems in its management practices reflected that Affordable was unwilling or unable to cure. *See* Joint Ex. 9. Affordable's repeated breach of its fundamental responsibility to manage in the best interests of the PC and ongoing commitment to maintain its management practices were not curable.

178. Affordable also contends that the PC waived its right to terminate based on Affordable's material breach of the Agreement. *See* Cl. Br. 8-9. As discussed below in reference to section V(B)(9), the PC did not waive any express termination rights under the Agreement. After terminating the Agreement on September 18, 2019, the PC did not manifest an intention to waive its termination right. Rather, the PC explicitly stated the reason for its conduct—to

ensure an orderly disaffiliation and protect the interests of the patients.

179. Affordable's breach of section I(A) therefore gave rise to cause for termination under section V(B)(2) of the Agreement. The PC did not waive its right to termination under section V(B)(2). The PC terminated the Agreement under section V(B)(2) on September 18, 2019.

Termination Pursuant to Section V(B)(9):

180. The Agreement expressly allowed termination of the Agreement for cause because of "[a]ny termination of any lease between Manager and PC." MSA § V(B)(9).

181. Affordable's lease of the Premises terminated no later than 2014, when the Premises were destroyed. *See Taylor v. Hart*, 18 So. 546, 547 (Miss. 1895) (destruction of leased building terminates lease).

182. Because the 2002 Lease terminated automatically upon the termination of Affordable's lease of the Premises, the 2002 Lease necessarily terminated no later than 2014.

183. The termination of the 2002 Lease was cause for termination of the Agreement under section V(B)(9).

184. Although Affordable alleged in its Demand that the 2002 Lease continues in full force and effect, Demand ¶¶ 35, 127, Affordable does not contend in its posthearing brief that the 2002 Lease is in effect. Instead, Affordable argues that if the 2002 Lease terminated because Affordable's lease of the Premises terminated, Affordable had an obligation to use

reasonable best efforts to obtain equivalent office space and lease such space to the PC. Cl. Br. 13. Affordable admits that "Affordable had an obligation to find 'equivalent office space.'" *Id.* Under the terms of the 2002 Lease, that obligation existed only if the 2002 Lease terminated. 2002 Lease § 2. Therefore, Affordable appears to concede that the 2002 Lease terminated.

185. Affordable nevertheless argues that there was no cause for termination under section V(B)(9). According to Affordable, the PC would have the right to terminate under section V(B)(9) only if the 2002 Lease terminated *and* Affordable failed to find equivalent office space for the PC to lease. Affordable contends that "once Respondents accepted the equivalent office space—the Cowan Road Location—and remained in the location for more than five years, their right to terminate the MSA based on this issue no longer existed." Cl. Br. 13. The plain language of section V(B)(9) forecloses Affordable's arguments.

186. According to section V(B)(9), "[a]ny termination of any lease between Manager and PC" was cause for termination. Section V(B)(9) does not qualify or condition the termination right on Affordable's failure to identify equivalent office space to lease to the PC. The Agreement will be construed according to its plain language. *Church*, 136 S.E.2d at 83. It will not be rewritten to add terms on which the parties did not agree. *See, e.g.*, *Majestic Cinema Holdings, LLC v. High Point Cinema*, 662 S.E.2d 20, 22 (N.C. Ct. App. 2008) (courts will not "rewrite the contract or impose liabilities on the parties not bargained for and found therein").

187. Affordable contends that "[o]ne certainly would not sign a twenty year MSA if they believed it

could be terminated shortly thereafter due to the planned office move." Cl. Br. 12. But Affordable drafted and signed the Agreement and the 2002 Lease. As discussed above, Affordable knew at the time it entered into the MSA and the 2002 Lease that the Ship Island Lease was set to end on October 31, 2005, while the term of the MSA would extend until November 1, 2022, unless terminated earlier. Affordable also knew that the PC was under no obligation to accept a new lease if the 2002 Lease terminated, even if Affordable located equivalent office space. Knowing that its lease of the Premises may well expire or terminate long before 2022, causing the automatic termination of the 2002 Lease, Affordable drafted the MSA to include section V(B)(9), which plainly allowed either party to terminate the MSA for cause due to the termination of "any lease" between them. MSA § V(B)(9). Affordable could have drafted section V(B)(9) to allow termination only if the 2002 Lease terminated *and* Affordable failed to provide equivalent office space. It did not. The Agreement will be enforced as written. *See Church*, 136 S.E.2d at 83.

188. Because the 2002 Lease terminated, there was cause for termination under section V(B)(9). Further, this termination of the earlier lease and sublease, without ever implementing with the PC a new lease or sublease containing clear terms and conditions, was an ongoing problem and not just a onetime occurrence well in the past. As noted hereinabove, the failure on the part of Affordable up through the events of 20192020 to provide a new lease to cover not only the property, but also furnishings and equipment has significantly contributed to the current disputes as to rights of occupancy and access to the Cowan Road

location and ownership of the equipment and personal property that were/are being used at the Cowan Road location.

189. Affordable also contends that the PC waived its right to terminate the Agreement. *See* Cl. Br. 13-14.

190. The PC did not waive its express contractual right to terminate the Agreement under section V(B)(9).

191. "A party seeking to show waiver of a contractual right must demonstrate that the waiving party intended to relinquish the benefit at issue and manifested that intention either expressly or impliedly." *Heron Bay Acquisition, LLC v. United Metal Finishing, Inc.*, 2014 NCBC 15 ¶ 33, *aff'd*, 781 S.E.2d 889 (N.C. Ct. App. 2016). Courts disfavor finding waiver by implication. *See Fairview Developers, Inc. v. Miller*, 652 S.E.2d 365, 369 (N.C. Ct. App. 2007).

192. Affordable failed to establish that the PC intended to relinquish its right to terminate the Agreement for cause under section V(B)(9).

193. Affordable offered no evidence that the PC expressly waived its right to terminate the Agreement.

194. The evidence does not support waiver by implication.

195. Although the 2002 Lease terminated no later than 2014, the fact that the PC did not exercise its right to terminate until 2019 is not evidence of implied waiver. Nothing in the Agreement limited the time within which either party could exercise its right to terminate the Agreement under section V(B)(9) – essentially, the MSA became terminable at will by either party.

196. Affordable's arguments that, although it had no written agreement with the PC, it leased office space at 505 Cowan Road to the PC, do not support its argument that the PC waived an express termination right in the Agreement. *See* Cl. Br. 13‒14. Affordable cites cases for the proposition that a party to a lease can waive a breach of the lease, and that a lease can be created, renewed, or extended without a writing. *See id.* 13. Affordable also relies on facts surrounding the PC's move to the 505 Cowan Road office. Affordable contends that Dr. Raeline McIntyre was happy to move, that she believed the Cowan Road office was better for patients, and that Dr. McIntyre benefitted from the move to Cowan Road because she was an owner of JNM Office Property, LLC, the building owner. *Id.* 13‒14. According to Affordable, because Dr. Raeline McIntyre was happy to move to the Cowan Road office, "Respondents waived any issues with respect to the Sublease." *Id.* 14. However, whether Affordable breached a lease term, and whether the PC waived the right to complain about such breach, is not at issue. Rather, the right Affordable contends that the PC waived is an express termination right provided by the Agreement. Evidence that Dr. McIntyre benefitted from having the PC operate at the Cowan Road office does not show that the PC intended to give up the express contractual right to terminate the Agreement.

197. The principal case Affordable relies on, *Wheeler v. Wheeler*, 263 S.E.2d 763 (N.C. 1980), is inapposite because it does not address waiver of an express contractual termination right. Under *Wheeler*, a party to a contract may, in the event of a breach by the other party, waive the right to be excused from performance of the contract by continuing to accept

the breaching party's performance. *See* Cl. Br. 13. In *Wheeler*, the plaintiff sued the defendant for breach of a separation agreement after the defendant ceased making alimony payments. 263 S.E.2d at 764. The defendant argued that he was excused from performance of the separation agreement because the plaintiff allegedly failed to comply with other terms of the agreement. *Id.* The *Wheeler* Court set out the test the jury should apply to determine whether the defendant waived the right to cease performance of the contract by continuing to accept the benefits of the contract. *Id.* at 76667.

198. Affordable misapprehends the PC's basis for termination of the Agreement. By invoking section V(B)(9), the PC terminated the Agreement because the express terms of the Agreement allowed termination; the PC did not assert that it was excused from performance because Affordable breached the Agreement. The issue is whether the PC waived an express contract right to terminate the Agreement upon the existence of cause for termination, not whether the PC waived a right under the common law to be excused from performance as a result of Affordable's breach. *Wheeler* does not address the waiver of an express contractual termination right. Similarly, the Summary Judgment Decision of the federal court in the JNM case, noted *supra* in para. 5, is inapposite because that decision involved claims of breach of lease and relied on Mississippi law.

199. Further, the parties agreed that no provision of the Agreement could be waived, "except by a written instrument executed by the parties hereto." MSA § VI(E). North Carolina courts enforce express non-waiver provisions like section VI(E). *E.g.*, *Long Drive*

Apartments v. Parker, 421 S.E.2d 631, 634 (N.C. Ct. App. 1992); *Heron Bay*, 2014 NCBC 15 ¶¶ 3638.

200. The PC did not execute a written waiver of its right to terminate the Agreement under section V(B)(9). 12/2/2020 Tr. 167714.

201. Affordable also offered no evidence that the PC intended to waive the requirement of a writing. Absent evidence that the PC intended to waive the nonwaiver provision in section VI(E), that provision forecloses a finding of waiver. *See* 13 Williston on Contracts § 3936 (4th ed. 2020) ("In order to establish that an antiwaiver clause is not enforceable, the party asserting a waiver must show a clear intent to waive both the clause and the underlying contract provision.").

202. The PC's conduct after the September 18, 2019 termination letter also did not establish a waiver of the PC's express termination right under section V(B)(9). *See* Cl. Br. 2 (arguing that the PC continued to perform for five months after sending September 2019 letter). In the termination letter, the PC explained that it would continue to act in the best interests of the patients, and also requested that Affordable cooperate in the disaffiliation process so that the PC could make appropriate plans for patient care. *See* Joint Ex. 8. The PC's conduct after the termination letter is not evidence of waiver, but rather evidence of its intent to protect patient care following termination of the Agreement and to effectuate an orderly and reasonable disaffiliation with Affordable.

203. Affordable understood that the September 18, 2019 letter sought to terminate the Agreement. Affordable disagreed that there was cause for termination, Joint Ex. 9, and instead of participating in the

disaffiliation process as requested, Affordable filed its initial Demand for Arbitration on November 1, 2019, alleging that there was no cause to terminate the Agreement, Joint Ex. 10. On November 20, 2019, Respondents filed an answer denying Affordable's allegation that there was no cause for termination, thus reasserting that the PC's position that it had terminated the Agreement for cause. Joint Ex. 11.

204. The PC terminated the Agreement for cause on September 18, 2019. As of that date, the PC had no further contractual obligations to Affordable, except to the extent the parties agreed that certain obligations would survive termination of the Agreement. *See N.L.R.B. v. Cone Mills Corp.*, 373 F.2d 595, 598 (4th Cir. 1967) ("It is axiomatic in contract law that parties to an agreement are relieved of their mutual obligations upon termination of the agreement.");MSA § V(C) (listing provisions that survive termination).

Affordable's Claims for Relief:

205. Any claims not pleaded in Affordable's Demand, including any claim against Dr. Raeline McIntyre for violation of the Employment Agreement, or any claim of any kind against Dr. Neil McIntyre, who is not a party to this proceeding, are not properly before the Arbitrator and will not be decided. *See* AAA Commercial Rule 6(b) ("Any new or different claim . . . shall be made in writing and filed with the AAA, and a copy shall be provided to the other party. . . .").

First Cause of Action:

206. In Count 1, Affordable seeks declaratory judgment that (1) Affordable fully complied with the

terms of the Agreement;an d (2) Respondents breached the Agreement by failing to remedy the minimum cash balance deficiency. Am. Demand ¶¶ 95104. Affordable contends that cause does not exist to terminate the Agreement. *Id.* ¶ 103.

207. Affordable is not entitled to declaratory relief that it fully complied with the terms of the Agreement because, for the reasons discussed above, Affordable breached the Agreement by failing to manage the practice with the PC's best interests in mind and by failing to fully and adequately perform its contract obligations. Cause existed to terminate the MSA on September 18, 2019, and the PC terminated the MSA pursuant to sections V(B)(2) and V(B)(9).

208. Affordable is not entitled to declaratory relief that Respondents breached the MSA by failing to remedy the alleged minimum cash balance deficiency.

209. Any obligation to maintain a minimum cash balance ended when the MSA was terminated on September 18, 2019. Affordable failed to offer any evidence that a cash balance deficiency arose at any time prior to the termination of the MSA.

210. A letter dated November 25, 2019 is the only occasion when Affordable gave notice of a purported deficiency, after the termination of the Agreement. In the letter, Karol Twilla referred to enclosed financial statements from October 2019, after the September 18, 2019 termination letter; however, no enclosures were included in the copy of the letter introduced into evidence, and Ms. Twilla did not testify that there were any enclosures. Karol Twilla's letter asserting that a deficiency existed and claiming that $135,140.09 was "necessary to restore the minimum cash balance

required by Section III(B)," Joint Ex. 12, is insufficient for Affordable to carry its burden to show that there was a minimum cash balance deficiency even at that time.

211. Therefore, Affordable failed to prove that Respondents breached the Agreement by refusing to remedy the minimum cash balance deficiency.

212. Affordable also failed to prove that the PC breached the Agreement by failing to maintain the minimum cash balance, because even during the term of the Agreement, Affordable, not the PC, was responsible for maintaining the minimum cash balance. Contrary to Affordable's allegations, Demand ¶ 132, the Agreement does not state that *the PC* was required to maintain the minimum cash balance. The Agreement is silent as to which party must maintain the balance and does not define the account in which the balance is to be maintained. Because section III(B) "leaves it uncertain as to what the agreement was," this provision is ambiguous. *See Novacare Orthotics & Prosthetics E., Inc. v. Speelman*, 538 S.E.2d 918, 921 (N.C. Ct. App. 2000). Affordable drafted the Agreement, 12/3/2020 Tr. 168141692, and thus the ambiguity is construed against Affordable, "the party responsible for choosing the questionable language." *Novacare Orthotics*, 538 S.E.2d at 921.

213. Interpreting section III(B) to require Affordable to maintain a minimum cash balance is consistent with the parties' relationship, course of dealing, and the other terms of section III(B). Affordable managed the PC's finances, received the PC's bank statements, and controlled the balance in the PC's depository checking account by sweeping funds on a daily or neardaily basis. *Supra* ¶ 56. Given Affordable's

control of the account, the PC could not have maintained any balance in the depository checking account—Affordable could and did manipulate the balance by sweeping the funds. *Id.* Affordable also retained the unilateral ability to determine, under any circumstances, whether there was a "minimum cash balance" deficiency. MSA § III(B). By definition, the "minimum cash balance" included "an amount deemed necessary by Manager to be adequate for contingencies." *Id.*

214. The only reasonable interpretation of section III(B) is that Affordable—the party with the ability to both decide the minimum balance and to control the balance in the accounts—was responsible for maintaining what it deemed a minimum cash balance, and notifying the PC if it fell short, so that the parties could consider whether to remedy the cash balance or terminate the Agreement. Therefore, Affordable cannot prove that the PC breached the Agreement by failing to maintain a minimum cash balance.

215. Respondents are entitled to judgment in their favor on Count 1.

Second Cause of Action:

216. In Count 2, Affordable seeks "indemnification" and attorneys' fees, citing section IV(B) of the Agreement. Demand ¶ 111.

217. Affordable's argument that it is entitled to indemnification for purported damages caused by Raeline PLLC and Neil PLLC competing with the PC fails for multiple reasons. *See* Cl. Br. 17-18. Raeline PLLC and Neil PLLC did not exist or begin operating until after the Agreement was terminated. Because Affordable is not seeking indemnification and attorneys'

fees based on any act or omission that occurred "during the term of the Agreement," the indemnification provision does not apply. Moreover, Affordable failed to show that the PC had any right to prevent competition by Dr. Neil McIntyre, let alone any obligation to Affordable to prevent competition. Further, the apparent intent of the Indemnification provision in para. IV (B) of the MSA, as per its wording, was to cover indemnity from claims by third parties arising out of the performance of dental services – such as dental malpractice claims – and not contractbased claims between the parties to the MSA.

218. Respondents are entitled to judgment in their favor on Count 2.

Third Cause of Action:

219. In Count 3, Affordable seeks declaratory judgment that it is not in default under the 2002 Lease, that the 2002 Lease "remains in full force and effect," and that Respondents breached "the sublease." Demand ¶ 127. Affordable did not address Count 3 in its posthearing brief.

220. Affordable's first request for declaratory relief in Count 3 fails because Affordable offered no evidence that there is a "genuine existing controversy" between the parties about whether Affordable is in default on the 2002 Lease. *See N.C. Consumers Power, Inc. v. Duke Power Co.*, 206 S.E.2d 178, 182 (N.C. 1974).

221. Affordable's second request for declaratory relief in Count 3 fails because the 2002 Lease terminated automatically no later than 2014 and is, therefore, not in full force and effect. Affordable offers

no argument in its posthearing brief that the 2002 Lease is in effect.

222. Affordable's final request for declaratory relief in Count 3 fails because it did not offer evidence that Respondents breached a term of "the sublease." Affordable alleged in its Demand that "Respondents have breached the sublease by terminating the Services Contract, but not vacating the sublease." Demand ¶ 126. As with any claim for breach of contract, Affordable must show the existence of a valid contract, and a breach of its terms. *Poor v. Hill*, 530 S.E.2d 838, 843 (N.C. Ct. App. 2000). To the extent Affordable had an oral sublease agreement with the PC for 505 Cowan Road, there is no evidence that the parties agreed that Respondents were required to "vacat[e] the sublease" immediately upon termination of the Agreement. Therefore, Affordable failed to prove that Respondents breached any term of "the sublease." *Davis v. Chase Home Fin., LLC*, No. COA121246, 2013 WL 2407191, at *3 (N.C. Ct. App. June 4, 2013) (no breach of contract where no contractual provision required defendant to do what plaintiff alleged defendant failed to do).

223. Respondents are entitled to judgment in their favor on Count 3.

Fourth Cause of Action:

224. In Count 4, Affordable contends that Respondents breached the Agreement by failing to maintain a minimum cash balance and refusing to rectify an alleged deficiency in the balance. *See* Demand ¶¶ 129-42.

225. Because the Agreement did not require the PC to maintain a minimum cash balance, Affordable cannot show that the PC breached the Agreement due to an alleged cash balance deficiency.

226. Because any obligation to maintain a minimum cash balance existed only during the term of the Agreement, and Affordable failed to show a cash balance deficiency prior to the termination of the Agreement on September 18, 2019, any deficiency was not a breach of the Agreement.

227. Affordable also cannot establish a breach of contract because Affordable failed to prove that there was a cash balance deficiency at any time.

228. Respondents are entitled to judgment in their favor on Count 4.

Fifth Cause of Action:

229. In Count 5, Affordable alleges that Respondents breached "the sublease" by failing to vacate "the Premises" upon termination of the Agreement. Demand ¶¶ 14351.

230. Because the Premises ceased to exist in 2014, Affordable cannot prove any claim by alleging that Respondents failed to vacate the Premises upon termination of the Agreement.

231. There is no evidence that the parties had an agreement that the PC would vacate Cowan Road immediately upon termination of the Agreement. Therefore, Affordable failed to prove that Respondents breached any term of "the sublease." *See Davis*, 2013 WL 2407191, at *3.

232. Respondents are entitled to judgment in their favor on Count 5.

Sixth Cause of Action:

233. In Count 6, Affordable alleges that under the Agreement "Respondents were required to repay all loans, debts, and advancements immediately upon termination" of the Agreement. Demand ¶¶ 15262. Affordable also alleges that Respondents terminated the Agreement, and that they failed to repay all loans, debts, and/or advancements immediately upon termination. *Id.* ¶¶ 15558. Affordable made no argument in support of Count 6 in its posthearing brief.

234. Because no term of the Agreement requires the repayment of debts immediately upon termination, Affordable cannot prove that failure to immediately repay debts is a breach of the Agreement. *See Davis*, 2013 WL 2407191, at *3.

235. Further, because Affordable also failed to prove that Respondents owed Affordable any "loans, debts, and advancements," or in what amount, Affordable's claim fails. The only evidence offered at the hearing was that the PC did not owe Affordable any debts. *See* 12/2/2020 Tr. 97912 (alleged cash balance deficit was not a loan by Affordable to the PC); 12/3/2020 Tr. 5113522 (as of February 27, 2020, no failure by the PC to pay any amounts due under Agreement).

236. Under the Agreement, Affordable could only pay Practice Expenses (thus loaning money to the PC) "with the approval of the PC." MSA § III(C). Affordable offered no evidence that it ever obtained the PC's approval to pay Practice Expenses beyond revenues

collected. The lack of evidence of the PC's approval further supports the inference that Affordable did not loan the PC money.

237 Respondents are entitled to judgment in their favor on Count 6.

Seventh Cause of Action:

238. In Count 7, Affordable alleges that Respondents breached the Agreement by "using and disclosing" Affordable's confidential information in connection with operating "their own disaffiliated dental organization." Demand ¶ 170. This claim fails because Affordable did not prove either the purported "confidentiality" of any particular information or that Respondents used any such confidential information.

239. As discussed above, the confidentiality provision of the Agreement covered "materials or proprietary knowledge which the Manager treats as confidential," and did not cover "material in the public domain" or "patient records."

240. Because the information Affordable claims is confidential was accessible to patients and other visitors to the PC's office and to employees and former employees of the PC and ADDL, Affordable failed to prove that the information it contends is "Confidential Information" under the Agreement was actually treated as confidential.

241. In its brief, Affordable argues that because Dr. Raeline McIntyre was able to operate a practice after ending her affiliation with Affordable, Dr. McIntyre must have used Affordable's confidential information. *See* Cl. Br. 2122. But Affordable offered

no evidence at the hearing that confidential information of any kind is necessary to operate a dental practice.

242. Respondents are entitled to judgment in their favor on Count 7.

Eighth Cause of Action:

243. In Count 8, Affordable alleges that Respondents breached the nonsolicitation provision in section V(C) of the Agreement by soliciting and hiring ADDL employees to work for an unaffiliated practice. Demand ¶¶ 18182. Affordable's claim fails because the nonsolicitation provision is unenforceable, and because Affordable failed to prove that Respondents solicited for employment any ADDL employee.

244. North Carolina law applies to the nonsolicitation covenant in section V(C) of the Agreement pursuant to the parties' express agreement that "[t]he validity, interpretation and performance of this Agreement shall be governed by and construed in accordance with the laws of the State of North Carolina except that issues concerning the practice of dentistry shall be governed by the laws of the State where the Center is located." MSA § VI(G).

245. The parties' agreement that the PC would not "solicit for employment any employees" of Affordable or ADDL is a restraint of trade that is subject to scrutiny for reasonableness. *See Sandhills Home Care, LLC v. Companion Home Care-Unimed, Inc.* , 2016 NCBC 59 ¶ 42.

246. "A restriction on solicitation of employees generally is subject to the same requirements as other restrictive covenants." *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 827 S.E.2d 458, 471 (N.C. 2019). Restrictive

covenants "must be (1) in writing, (2) based upon valuable consideration, (3) reasonably necessary for the protection of legitimate business interests, (4) reasonable as to time and territory, and (5) not otherwise against public policy." *Kennedy v. Kennedy*, 584 S.E.2d 328, 333 (N.C. Ct. App. 2003).

247. In determining whether a restrictive covenant is reasonable, courts review the restrictive covenant as written. "The courts will not rewrite a contract if it is too broad but will simply not enforce it." *VisionAIR, Inc. v. James*, 606 S.E.2d 359, 362 (N.C. Ct. App. 2004).

248. Affordable, as the party seeking enforcement, has the burden of proving that the nonsolicitation covenant is reasonable. *See Wells Fargo*, 827 S.E.2d at 466. Affordable failed to meet this burden.

249. The nonsolicitation pr ovision in section V(C) is broader than necessary to protect any legitimate interest of Affordable, unreasonable in time and territory, and therefore unenforceable.

250. The covenant contains no time or territory limitations. *See* MSA § V(C);12/3/2020 Tr. 70412. It purports to prevent the PC, for all time, from soliciting for employment all Affordable or ADDL employees who are spread across forty states.

251. Even where a restrictive covenant contains a time limitation, courts scrutinize the scope of the covenant. In *Wells Fargo*, the North Carolina Supreme Court struck down a covenant restricting the defendants from soliciting any employees of the plaintiff or its affiliates, regardless of location or line of business, for two years after termination of the defendants' employment, where the plaintiff failed to show that it had any legitimate interest in preventing the defendants from

soliciting employees of the plaintiff and its affiliated businesses across a "vast geographic area." 827 S.E.2d at 471.

252. The covenant at issue in this case is even broader than the covenant struck down in *Wells Fargo*, because section V(B)(9) lacks any time limitation. The absence of a time limitation renders the nonsolicitation covenant unenforceable. *See DuoFast Carolinas, Inc. v. Scott's Hill Hardware & Supply Co.*, 2018 NCBC 2 ¶ 47 (covenant that would prevent defendant from ever soliciting plaintiff's customers was unenforceable); *see also Farr Assocs., Inc. v. Baskin*, 530 S.E.2d 878, 881 (N.C. Ct. App. 2000) ("A fiveyear time restriction is the outer boundary which our courts have considered reasonable, and even so, fiveyear restrictions are not favored.").

253. To the extent that Affordable contends that it was reasonable to restrict the PC from soliciting current employees of ADDL at the Gulfport location immediately after the termination of the Agreement, that argument cannot salvage the nonsolicitation covenant. *See* Cl. Br. 23. A court cannot enforce a restrictive covenant within a reasonable geographic scope while ignoring that the covenant is facially unreasonable. *See DuoFast Carolinas* , 2018 NCBC 2 ¶ 38 ("The Court cannot enforce a covenant not to compete only as to the 'reasonable' geographic areas selected by a former employer and ignore those overbroad restrictions that are not reasonably related to its business interests."). The covenant cannot be rewritten to narrow its scope and make it enforceable. *See Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC*, 784 S.E.2d 457, 461 (N.C. 2016) ("[W]hen an agreement not to compete is found

to be unreasonable, we have held that the court is powerless unilaterally to amend the terms of the contract.").

254. Because the nonsolicitation covenant is unenforceable, Affordable's claim for breach necessarily fails.

255. In addition, Affordable failed to prove that Respondents solicited for employment any ADDL employee. It is appropriate to use dictionary definitions to determine the meaning of words in a contract. *E.g.*, *Guyther v. Nationwide Mut. Fire Ins. Co.*, 428 S.E.2d 238, 241 (N.C. Ct. App. 1993). "Solicit" is defined as "to make a petition to," "to approach with a request or plea," "to urge (something, such as one's cause) strongly," "to entice or lure especially into evil," "to proposition (someone) especially as or in the character of a prostitute," or "to try to obtain by usually urgent requests or pleas." *MerriamWebster Online Dictionary* , https//www.merriamwebster.com/dictionary/solicit (last visited Jan. 25, 2021). The North Carolina Court of Appeals has applied the dictionary definition of "solicit" to conclude that solicitation involves "active persuasion, request, or petition." *See Inland Am. Winston Hotels, Inc. v. Crockett*, 712 S.E.2d 366, 370 (N.C. Ct. App. 2011). The parties agree that this interpretation of "solicit" is the correct one. *See* Cl. Br. 3; Resp. Br. 2021.

256. When a prospective employee contacts the prospective employer to seek employment, the prospective employer has not solicited the employee. *See Inland Am. Winston Hotels*, 712 S.E.2d at 371; *see also Mona Elec. Grp., Inc. v. Truland Serv. Corp.*, 56 F. App'x 108, 11011 (4th Cir. 2003) (per curiam) (reviewing covenant not to solicit customers and concluding that

"plain meaning of 'solicit' requires the initiation of contact") (applying Maryland law).

257. The only evidence at the hearing was that ADDL employees approached Dr. Neil McIntyre to ask for employment. That is not evidence that Respondents solicited ADDL employees for employment. Affordable offered no evidence that either of the McIntyres initiated contact with any ADDL employee to persuade them to leave ADDL.

258. Evidence simply that former ADDL employees went to work for Dr. Neil McIntyre's current practice is also insufficient to show that Respondents solicited ADDL employees. The act of hiring an employee is not solicitation. *See Inland Am. Winston Hotels,* 712 S.E.2d at 371; *see also Prometheus Grp. Enters., LLC v. Viziya Corp.*, No. 5:14CV32BO , 2014 WL 3854812, at *67 (E.D.N.C. Aug. 5, 2014) (plaintiff failed to state claim for breach of nonsolicitation agreement by alleging that employees left plaintiff's employ to work for defendant) (applying North Carolina law).

259. Affordable's claim for breach of section V(C) thus fails for the additional reason that it failed to prove that Respondents solicited any ADDL or Affordable employees.

260. Although Affordable did not attempt to plead a claim for breach of the Employment Agreement in Count 8 or elsewhere in its Demand, in its post-hearing brief, Affordable argues that the Employment Agreement never terminated and the nonsolicitation provision in the Employment Agreement applies. Cl. Br. 2223. To the extent th at Affordable now seeks to bring a claim for violation of the Employment Agreement, that claim fails for several reasons.

261. AAA rules require that "[a]ny new or different claim . . . shall be made in writing and filed with the AAA, and a copy shall be provided to the other party . . . ." AAA Commercial Rule 6(b). Affordable did not make a claim for violation of the Employment Agreement in writing and is precluded from asserting a new claim.

262. Even if Affordable could assert a claim for violation of the Employment Agreement, that claim would fail on its merits.

263. Mississippi law would apply to a claim under the Employment Agreement pursuant to the choice of law provision in that Agreement. *See* MDEA ¶ 10.

264. Affordable is not a party to the Employment Agreement between Dr. Raeline McIntyre and the PC. *See* MDEA at 1 (identifying parties).

265. As a nonparty to the Agreement, Affordable lacks standing to bring a claim for breach unless it can show that it is a thirdparty beneficiary. *See Rosenfelt v. Miss. Dev. Auth.*, 262 So. 3d 511, 519 (Miss. 2018). "A third party beneficiary may sue for a breach of the contract only when the condition which is alleged to have been broken was placed in the contract for his direct benefit." *Id.* Affordable makes no argument in its posthearing brief, and did not allege in its Demand, that it is a thirdparty beneficiary of the Employment Agreement. In any event, Affordable offered no evidence that the nonsolicitation provision in Dr. Raeline McIntyre's Employment Agreement was included for Affordable's direct benefit.

266. In paragraph 11 of the MDEA, the PC and Dr. McIntyre agreed that Affordable and its subsidiaries and affiliates were "third party beneficiaries of certain

provisions of this Agreement." MDEA ¶ 11. Affordable witness Karol Twilla claimed at the hearing that Affordable was a thirdparty beneficiary of the nonsolicitation provision in the Employment Agreement "[b]ecause it affects Affordable Care." 12/2/2021 Tr. 2131123. Ms. Twilla did no t testify that she was involved in the negotiation of the Employment Agreement and did not testify that the nonsolicitation provision was included for the direct benefit of Affordable. Evidence that the provision might affect Affordable does not show that Affordable was a thirdparty beneficiary. Therefore, Affordable lacks standing to sue for breach of the terms of the Employment Agreement, including the nonsolicitation covenant. *See Rosenfelt*, 262 So. 3d at 519.

267. Affordable also failed to show that the nonsolicitation provision in the Employment Agreement is enforceable.

268. In Mississippi as in North Carolina, the party seeking to enforce a restrictive covenant has the burden of proving the covenant's reasonableness. *See Thames v. Davis & Goulet Ins., Inc.*, 420 So. 2d 1041, 1043 (Miss. 1982). Mississippi courts consider the reasonableness and specificity of the covenant's terms, focusing on the duration of the restriction and its geographic scope. *Easy Reach, Inc. v. Hub City Brush, Inc.*, 935 So. 2d 1140, 1143 (Miss. Ct. App. 2006).

269. The nonsolicitation provision states that "[i]n the event of termination of the Agreement for any reason, the Dentist agrees that he or she will not solicit for employment any employees of the [PC], Affordable Care, Inc., or its subsidiaries or affiliates." MDEA ¶ 8. Like the nonsolicitation covenant in the Agreement, paragraph 8 of the Employment Agreement

is unlimited in time and territory. It purports to prohibit Dr. McIntyre from ever soliciting any employee of Affordable or ADDL, regardless of location, for all time. The nonsolicitation covenant is unreasonable and thus unenforceable. *See, e.g.*, *Easy Reach*, 935 So. 2d at 1143 (restrictive covenant that was not limited in duration or location was unreasonable and invalid).

270. Affordable's contention in its post-hearing brief that "[t]here is no valid argument against the enforcement of the ADDL nonsolicitation provision under Mississippi law" is unsupported by the only authority Affordable cites. *See* Cl. Br. 23 (citing *Brown & Brown of Miss., LLC v. Baker*, No. 1:16-CV-327-LG-RHW, 2018 WL 8805937 (S.D Miss. Apr. 10, 2018)). Affordable's parenthetical description of the *Brown & Brown* case as concluding that "nationwide non-solicitation found valid and enforceable" is inaccurate. *See* Cl. Br. 23. In *Brown & Brown*, the defendant challenged a restrictive covenant that prohibited her from soliciting certain customers for two years after the termination of her employment. 2018 WL 9905937, at *2-3. The defendant argued that the non-solicitation clause was a broad "nationwide restriction." *Id.* at *3. The court disagreed, concluding that the covenant did *not*, as the defendant argued, prohibit the defendant from competing against the plaintiff nation-wide; rather, it only prevented her from soliciting with whom she had "material contact" during her last two years of employment. *Id.*

271. The nonsolicitation provision in the Employment Agreement is unenforceable. Any claim for violation of that provision would necessarily fail.

272. Finally, for the same reasons stated above, Affordable also failed to show that Dr. Raeline McIntyre solicited any ADDL or Affordable employee.

273. Respondents are entitled to judgment in their favor on Count 8.

Ninth Cause of Action:

274. In Count 9, Affordable alleges that "[u]pon termination of the sublease, Respondents were required to return all property and equipment to Claimant," and contends that Respondents failed to return all property "in breach of the Services Contract." Demand ¶¶ 190, 192.

275. This claim fails because Affordable offered no evidence that the parties had an agreement requiring the PC to return "all property and equipment" to Affordable upon termination of "the sublease" or the Agreement. *See Davis*, 2013 WL 2407191, at *3.

276. Affordable also cannot establish a breach of any contract, because Affordable offered no evidence of any particular piece of property or equipment Affordable owned that Respondents failed to return. To the contrary, pursuant to the federal court's order on Affordable's motion to enforce the joint stipulation between Affordable and JNM, the McIntyres vacated the 505 Cowan Road office on March 27, 2020, leaving behind equipment and property they purchased to avoid any suggestion that they were taking property Affordable claimed to own. Pursuant to the federal court's order, Affordable is occupying the office space at 505 Cowan Road, and has possession of the McIntyres' property and equipment at that location.

277. Respondents are entitled to judgment in their favor on Count 9.

Tenth Cause of Action:

278. In Count 10, Affordable alleges that "Respondents [sic] have the right to access the property that it leases pursuant to the 2002 Lease Agreement." Demand ¶ 198. Affordable further alleges that Respondents "locked [Affordable] out of the Premises and have refused access of the Premises to [Affordable]." *Id.* ¶ 199. Affordable alleges that Respondents' conduct is in breach of the 2002 Lease, the Agreement, and the sublease. Count 10 fails for several reasons.

279. Because the Premises ceased to exist in 2014, and the 2002 Lease terminated no later than 2014, Affordable cannot assert any rights under the 2002 Lease, and cannot have a claim that it was denied access to the Premises.

280. To the extent Affordable contends that it was denied access to 505 Cowan Road, Affordable's claim fails because it offered no evidence that "the sublease" included an agreement for Respondents to allow Affordable to access 505 Cowan Road at any particular time (there was no written sublease for 505 Cowan Road).

281. Affordable also failed to prove any breach of contract because it offered no evidence to support a claim that it was denied access to 505 Cowan Road. As discussed above, Karol Twilla, the only witness Affordable called to testify about access to the 505 Cowan Road office, admitted that she was never denied access, and she was not aware that Affordable sent anyone to the building to attempt to access it.

282. Respondents are entitled to judgment in their favor on Count 10.

Eleventh Cause of Action:

283. In Count 11, Affordable alleges that Respondents misappropriated trade secrets in violation of N.C. Gen. Stat. § 66‑152.

284. A trade secret misappropriation claim has two elements:(1) the existence of a trade secret, and (2) misappropriation. *See N.C. Elec. Membership Corp. v. N.C. Dep't of Econ. & Cmty. Dev.*, 425 S.E.2d 440, 44445 (N.C. Ct. App. 1993). A trade secret is "business or technical information" that (a) derives value "from not being generally known or readily ascertainable";and (b) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." N.C. Gen. Stat. § 66‑152(3).

285. Affordable's claim fails because it did not establish the existence of a trade secret.

286. By offering vague descriptions of Affordable's general business processes, Affordable's witnesses failed to identify a trade secret. *E.g.*, *Krawiec v. Manly*, 811 S.E.2d 542, 549 (N.C. 2018) (allegations that plaintiffs had "original ideas and concepts" for their business, and "marketing strategies and tactics," were insufficient to allege trade secret); *Allegis Grp., Inc. v. Zachary Piper LLC*, 2013 NCBC 13 ¶ 51 (general allegation that employee acquired knowledge of company's business methods insufficient to plead trade secret claim).

287. Affordable cannot show that its business information is a trade secret because it did not show that any of the information was not generally known

or readily ascertainable. *See* N.C. Gen. Stat § 66152 (3)(a). To the contrary, the evidence showed that patients and staff members alike had the opportunity to observe Affordable's business practices, and to view Affordable's patient forms.

288. Affordable's failure to offer any evidence that it took reasonable steps to maintain the secrecy of its business information also forecloses its trade secret claim. *See* N.C. Gen. Stat. § § 66152(3)(b). Information that Affordable disclosed to patients and employees who had no obligation to keep the information confidential cannot be a trade secret. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984) ("If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished."); *Safety Test & Equip. Co. v. Am. Safety Util. Corp.*, 2015 NCBC 37 ¶ 77 (information provided "without restricting the information's further use or dissemination . . . does not qualify as a trade secret").

289. Respondents are entitled to judgment in their favor on Count 11.

Twelfth Cause of Action:

290. In Count 12, Affordable asserts a claim for tortious interference with business relations based on allegations that it has "business relationships" with its employees and with employees of ADDL, that Respondents had knowledge of those relationships, and that Respondents "intentionally interfered" with Affordable's relationships with the employees of ADDL. Demand ¶¶ 21924.

291. To prove a claim for tortious interference with contract, a plaintiff must show: "(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person;(2) the defendant know s of the contract;(3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification;(5) resulting in actual damages to plaintiff." *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988)).

292. Because Affordable conceded at the hearing that Count 12 "rises and falls" with its claim for breach of the nonsolicitation provision in Count 8, 12/4/2020 Tr. 5891720, Respondents are also entitled to judgment in their favor on Count 12.

293. In addition, Affordable's tortious interference claim in Count 12 fails because Affordable failed to prove that the alleged interference with its relationships with ADDL employees caused Affordable to suffer actual damages.

294. A tortious interference plaintiff also must show that it suffered actual damages as a result of the defendant's conduct. *United Labs.*, 370 S.E.2d at 387. A speculative assertion of alleged damages is insufficient. *See LeCann v. Cobham*, 2012 NCBC 56 ¶¶ 5457.

295. The evidence Affordable offered was speculative and hypothetical, and therefore insufficient to establish any damages. Mr. Hudi testified about what would or could occur, and not what did occur;he did not testify about what costs Affordable actually incurred as a result of the departure of the ADDL employees, or what income Affordable claims to have lost.

296. Respondents are entitled to judgment in their favor on Count 12.

Thirteenth Cause of Action:

297. In Count 13, Affordable asserts a claim for tortious interference with business relationships based on its allegation that Dr. Raeline McIntyre interfered with Affordable's "business relationship" with the PC, causing the PC to terminate or breach that relationship. Demand ¶¶ 22829.

298. As stated above, the elements of tortious interference with contract are: "(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person;(2) the defendant know s of the contract;(3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification;(5) resulting in actual damages to plaintiff." *United Labs.*, 370 S.E.2d at 387. Affordable's claim fails because it did not show that Dr. Raeline McIntyre's interference with the Agreement was unjustified, or that Affordable suffered actual damages as a result of the alleged interference.

299. As the sole shareholder and president of the PC, Dr. Raeline McIntyre held a qualified privilege to interfere with contractual relations between the PC and other parties. *See Embree Constr. Grp., Inc. v. Rafcor, Inc.*, 411 S.E.2d 916, 924 (N.C. 1992); *Kerry Bodenhamer Farms, LLC v. Nature's Pearl Corp.*, 2017 NCBC 27 ¶ 40. Dr. McIntyre's acts in causing the PC to "sever contractual relations" with Affordable are "presumed to have been done in the interest of the corporation." *See Wilson v. McClenny*, 136 S.E.2d 569,

578 (N.C. 1964); *Kerry Bodenhamer Farms*, 2017 NCBC 27 ¶ 40.

300. Affordable's claim for tortious interference fails because it did not offer evidence to overcome the presumption that Dr. McIntyre was acting on behalf of the PC in terminating the Agreement. The evidence showed that Dr. McIntyre's interests were aligned with the PC's interests—in addition to being the sole shareholder of the PC, Dr. McIntyre guaranteed the PC's performance of its obligations under the Agreement. MSA § VI(A). Affordable's arguments that Dr. McIntyre was not acting on behalf of the PC because she later caused the PC to transfer assets to another entity are misplaced. *See* Cl. Br. 27. At the time Dr. McIntyre sent a letter on behalf of the PC terminating the Agreement, Raeline PLLC and Neil PLLC did not exist. Evidence of actions Dr. McIntyre took in February 2020 to address Affordable's refusal to cooperate in disaffiliation does not rebut the presumption that Dr. McIntyre was acting on behalf of the PC when she terminated the Agreement in September 2019.

301. Because Affordable failed to overcome this presumption, it cannot prove that Dr. Raeline McIntyre's actions were unjustified.

302. Affordable also failed to prove the damages element of its tortious interference claim, because it did not show that it suffered actual damages as a result of Dr. McIntyre's alleged interference with the Agreement. Affordable cannot recover lost profits that it claims it would have earned if the Agreement had not been terminated, because Affordable failed to offer evidence from which such profits can be calculated with reasonably certainty. *Catoe v. Helms Constr. & Concrete Co.*, 372 S.E.2d 331, 334 (N.C. Ct. App. 1988).

Affordable offered no evidence of what fees it expected to earn if the Agreement had not been terminated, or what costs it would have incurred in meeting its performance obligations. In its posthearing brief, Affordable relies on Exhibit 32 as the measure of alleged damages. *See* Cl. Br. 17, 22, 26. However, Affordable offered no evidence from which Claimant's Exhibit 32 could be used to measure alleged damages. Therefore, Affordable failed to prove that it suffered actual damages as a result of the termination of the Agreement.

303. Respondents are entitled to judgment in their favor on Count 13.

Fourteenth Cause of Action:

304. In Count 14, Affordable alleges that Respondents committed unfair or deceptive acts by purportedly misappropriating Affordable's confidential information and trade secrets, taking Affordable's property and equipment, and improperly soliciting ADDL employees. Demand ¶¶ 23339. In its posthearing brief, Affordable also argued that Dr. Raeline McIntyre's purported "misappropriation of funds" by creating SparklePro and Bravo Lawn is an unfair act. Cl. Br. 28.

305. To establish a claim for violation of N.C. Gen. Stat. § 751.1, the plaintiff must prove that (1) the defendant committed an unfair or deceptive act; (2) the act was in or affecting commerce; and (3) the act proximately caused injury to the plaintiff. *Bumpers v. Cmty. Bank of N. Va.*, 747 S.E.2d 220, 226 (N.C. 2013). Whether an act is unfair or deceptive is a question of law. *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000).

306. To the extent Affordable's claim is based on alleged misuse of confidential information and/or trade secrets, taking Affordable's property and equipment, and solicitation of ADDL employees, Affordable's claim fails because Affordable did not prove that Respondents committed any of those acts.

307. Affordable's claim that Dr. Raeline McIntyre committed an unfair act by creating SparklePro and Bravo Lawn fails because Dr. McIntyre's conduct was not unfair or deceptive. As discussed above, nothing in the Agreement prevented the PC from retaining services for cleaning and landscaping and spending the PC's funds on those expenses. The PC was under no obligation, contractual or otherwise, to maximize Affordable's management fees by forgoing cleaning and landscaping services. Nothing in the Agreement prevented the McIntyres from owning other businesses, or restricted Dr. Raeline McIntyre from choosing to spend the PC's funds to retain a business owned by the McIntyres. Affordable's counsel conceded at the hearing that Respondents did not have a fiduciary duty to Affordable that would require them to disclose the ownership of SparklePro and Bravo Lawn;rather, Affordable's position was that it was "simply a breach of the contract" for the PC to pay SparklePro and Bravo Lawn. 12/3/2020 Tr. 31:1725. Because "a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under" section 751.1, *Branch Banking & Tr. Co. v. Thompson*, 418 S.E.2d 694, 700 (N.C. Ct. App. 1992), Affordable cannot make out a section 751.1 claim based on the payments to SparklePro and Bravo Lawn.

308. Affordable also cannot prevail on its section 751.1 claim because it failed to prove that the PC's

engagement of SparklePro and Bravo Lawn proximately caused any damages to Affordable. Because Affordable did not present any evidence that the fees charged by SparklePro and Bravo Lawn exceeded rates charged by businesses not owned by the McIntyres, Affordable cannot show that it would have earned greater management fees if the PC had retained other companies to perform the same services. Therefore, Affordable cannot show that Dr. McIntyre's actions proximately caused Affordable to suffer damages.

309. Respondents are entitled to judgment in their favor on Count 14.

Fifteenth Cause of Action:

310. In Count 15, Affordable alleges that Respondents were unjustly enriched by the amount of Affordable's property and equipment that Respondents purportedly took. Demand ¶¶ 24145.

311. "In order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party, and the benefit must not be gratuitous and it must be measurable." *Krawiec*, 811 S.E.2d at 551 (quotation and brackets omitted).

312. Affordable cannot prevail on Count 13 because it failed to show that Respondents took property and equipment that Affordable owns, or of the value of possessing the property and equipment.

313. Affordable's failure to show that it conferred measurable benefit on Respondents is fatal to its unjust enrichment claim. *See Krawiec*, 811 S.E.2d at 551.

314. Respondents are entitled to judgment in their favor on Count 15.

Sixteenth Cause of Action:

315. In Count 16, Affordable alleges that Respondents were required to vacate 505 Cowan Road upon the termination of the Agreement, and that Respondents were unjustly enriched by continuing to use that space. *See* Demand ¶¶ 24655.

316. To establish an unjust enrichment claim, Affordable must show that it conferred a measurable benefit on Respondents. *See Krawiec*, 811 S.E.2d at 551.

317. While Affordable contends that the PC did not pay rent from March 1, 2020, until March 27, 2020, Affordable offered no evidence of the terms of any sublease regarding the Cowan Road property which would require some payment that was not made nor of the fair market value of using the office space for that time period. Therefore. Affordable cannot show that Respondents were unjustly enriched.

318. Respondents are entitled to judgment in their favor on Count 16.

Seventeenth Cause of Action:

319. In Count 17, Affordable alleges that it was "the proper owner of the property and equipment taken by Respondents," and that Respondents converted such property and equipment to their own use. Demand ¶¶ 25760.

320. Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration

of their condition or the exclusion of an owner's rights." *Hamby v. Thurman Timber Co.*, 818 S.E.2d 318, 322 (N.C. Ct. App. 2018). A plaintiff must establish two essential elements of a conversion claim:(1) ownership of the property by the plaintiff; and (2) wrongful conversion by the defendant. *Id.*

321. Affordable cannot prevail on its conversion claim because it failed to show that it actually owns any of the property located at 505 Cowan Road.

322. Affordable argues in its posthearing brief that "[o]wnership and possession of Cowan Road Location and the property and equipment therein was decided by the Southern District of Mississippi when it ordered Respondents to vacate the Cowan Road Location and to leave Affordable's property and equipment pursuant to the joint stipulation." Cl. Br. 5. According to Affordable, the federal court's order "is the law of the case and controls the issue set forth in this Arbitration." *Id.* Affordable's argument is unsupported either by the federal court's order or the applicable law.

323. In its order on Affordable's motion to enforce the joint stipulation, the federal court made no findings about which party owned or had the right to possess any property. *See* Cl. Ex. 1.

324. Affordable's reliance on *In re Ford Motor Co.*, 591 F.3d 406 (5th Cir. 2009), is misplaced. *See* Cl. Br. 5. In that case, the Fifth Circuit applied the law of the case doctrine to a multidistrict litigation ("MDL") matter. The Fifth Circuit ruled that the law of the case doctrine applied to a decision by the MDL court, and therefore the transferor court should have reconsidered the MDL court's order only for manifest injustice.

Ford Motor, 591 F.3d at 414. The Fifth Circuit applied the law of the case doctrine because the same case was involved, as is required for that doctrine to apply. *E.g.*, *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967) ("a decision of a legal issue or issues by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case"). The order Affordable relies on was not issued in this proceeding; it was issued in a federal case to which Respondents are not parties. The law of the case doctrine, therefore, has no application here.

325. At the hearing and in its response to Respondents' prehearing mo tions in limine, Affordable also argued that the federal court's order on the motion to enforce the joint stipulation had preclusive effect. 11/27/2020 Brief in Opp'n to Mot. in Limine at 4 ("Respondents are barred by res judicata and/or collateral estoppel from relitigating the issue with respect to Affordable's right to the Cowan Road Location and the ownership of its property, as these items were litigated to a final resolution in the Federal Lawsuit.");12/1/2020 Tr. 182224 ("So number one, we do believe it is res judicata, and we will present those legal arguments in the post hearing brief."); *id.* 1982325 ("It is res judicata as to, we, Affordable Care had the right to possess the property from February 24, 2020, to March 27, 2020."). Affordable did not argue in its posthearing brief that the federal court's order has res judicata or collateral estoppel effect. There is no plausible argument that the order has preclusive effect. *See Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 571 (5th Cir. 2005) (res judicata requires that "the prior action was concluded by a final judgment on the merits"); *In re Lewisville Props., Inc.*,

849 F.2d 946, 949 (5th Cir. 1988) (for collateral estoppel to apply "the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that earlier action"). Contrary to Affordable's assertion in its brief in opposition to Respondents' motions in limine, the federal lawsuit has not been litigated to final resolution.

326. Respondents are entitled to judgment in their favor on Count 17.

Respondents' Setoff Defense:

327. In their Answer, Respondents pleaded the defense of setoff against any award in favor of Affordable.

328. A party to a contract has the right to set off, as a defense to any sums due under the contract, any amounts that would otherwise be due to the party under the contract. *Sartin v. Carter*, 332 S.E.2d 521, 524 (N.C. Ct. App. 1985). However, in this case the Arbitrator finds that no amounts are due to be paid to the Claimant, and, therefore, no finding regarding set-off need be made.

Attorneys' Fees and Expenses:

329. AAA Commercial Rule 47(d)ii authorizes an award of attorneys' fees "if all parties have requested such an award or it is authorized by law or their arbitration agreement." Both parties seek attorneys' fees in this matter. Rule 47 also provides that the arbitrator "shall assess" fees and expenses.

330. In consideration of what attorneys' fees and expenses to assess, if any, this Arbitrator takes into account, among other things, the following:

- Claimant is seeking recovery of damages totaling between $4,289,694 and $8,556,840, depending on how the calculation is made for actual and treble damages [Claimant offers two alternate calculations of actual damages for lost fees] – plus unspecified amounts of punitive damages for at least three of Claimant's claims.
- In its Amended Demand, Claimant has asserted no less than seventeen different causes of action, including simple contract claims, tort claims, a claim for declaratory judgment, and various statutory claims; Claimant has failed to justify or prove any of these claims.
- During the course of this arbitration, the record reveals that the parties engaged in written and deposition discovery, had several disputes and a hearing before the former arbitrator regarding discovery, a motion for summary judgment with accompanying memoranda, three prehearing conferences, a motion in limine, a motion regarding witnesses permitted to testify, and six days of evidentiary hearings plus 2 partial days for closing arguments.
- Indicative of the complexity of the issues addressed is the submission by the parties of proposed findings of fact and conclusions of law totaling 83 and 124 pages, respectively – in addition to their 30page posthearing briefs.
- Respondents, having multiple reasons for good cause, undertook to terminate the MSA and

ADDL Agreements on a reasonable and orderly basis by virtue of their September 18, 2019 letters. Claimant rejected these efforts and vigorously fought to continue the Agreements in force and effect. Claimant did this even though the MSA had only three years remaining on its 20-year term and even though Claimant and its affiliate had proven unable to adequately provide the promised services in the MSA and ADDL Agreements. Respondents were thus compelled, likewise, to vigorously contest the multiple claims and issues raised herein by Claimant.

- Claimant solely drafted and has sought to enforce a series of interwoven agreements including the MSA, expired Lease, ADDL Agreement, Managing Dentist Agreement, and Associate Dentist Agreements. Claimant has aggressively sought to enforce certain terms of these agreements, while ignoring or denying various other terms such as:
    - Claimant's fiduciary duty to manage the Practice as agent for the PC with the PC's best interest in mind;
    - Claimant's obligation to provide a lease for the office space, furnishings, and equipment;
    - the explicit right on the part of either party to terminate the MSA for cause in the event of any termination of any lease;
    - the sole right of the PC to control the provision of all professional services, which

must necessarily include dental equipment and service providers;

- the provision that the MSA may not be modified or any provisions waived except in writing, signed by the parties.

Claimant's litigation positions regarding these terms are unsupportable.

- Claimant initially submitted a request for award of its pre-hearing attorneys' fees in the amount of $539,662. After the conclusion of the hearings and oral arguments, upon instruction of the Arbitrator that the parties' requests should include only the attorneys' fees and expenses relating directly to the arbitration, Claimant significantly reduced its request to $165,023, but did not provide any indication as to which bills, previously submitted in evidence, would support its revised claim for attorneys' fees, nor did Claimant submit any new bills for the months of December, 2020 or JanuaryFebruary, 2021 during which substantial work was done by the attorneys for both sides, nor did Claimant include any claim for costs.

- Respondents' request for attorneys' fees amounts to $568,752 plus expenses totaling $14,430.75. Claimant has filed an objection to the award of any attorneys' fees to Respondents and to the amount of fees claimed, contending that the fees are excessive as compared with the much smaller amount now claimed in Claimant's Affidavit of Slezak. However, Claimant provides little basis for

reasonable comparison since it failed to provide it attorney time records during the most intensive portion of the arbitration nor any claim for costs. This Arbitrator finds that an award of attorneys' fees to Respondents in the amount of $379,168 is reasonable under all the circumstances, plus recovery of Respondents' costs of $14,430.75.

- The administrative filing fees of the American Arbitration Association totaling $16,175 and the compensation of the arbitrators totaling $42,142.50 shall be borne by Claimant. Therefore, Claimant shall reimburse Respondent the sum of $21,075.25 for that portion of arbitrator compensation incurred by Respondent, upon demonstration by Respondent that said fees have been paid in full.

CONCLUSION

For the reasons stated above, Affordable shall recover nothing, and this Final Decision and Award is entered in favor of Respondents on all claims. Respondents shall recover from Affordable their reasonable attorneys' fees incurred in defending this action in the amount of $379,168 plus costs in the amount of $14,430.75. Interest shall run on these amounts at the N.C. legal rate of 8% per annum commencing from the date of this Award.

This Award is in full settlement of all claims submitted in this arbitration. Any claim not expressly granted herein is hereby denied.

This the 19th day of March, 2021.

Charles R. Holton
Arbitrator