AMERICAN ARBITRATION ASSOCIATION
Employment Arbitration Tribunal

In the Matter of the Arbitration Between:

RE: 01-18-0000-1720
Dr. Robert Goldberg
and
Touro College

DECISION AND PARTIAL FINAL AWARD

TABLE OF CONTENTS

I, THE UNDERSIGNED ARBITRATOR, having been duly designated in accordance with the arbitration agreement dated September 8, 2016, entered into between Claimant Dr. Robert Goldberg ("Claimant") and Respondent Touro College ("Respondent") (collectively, the "Parties"), and Claimant having been represented by Ganfer Shore Leeds & Zauderer LLP (Steven J. Shore, Esq., Ira Brad Matetsky, Esq., and Madeline R. Greenblatt), and Respondent having been represented by Meyer, Suozzi, English & Klein, P.C. (Paul F. Millus, Esq., and Daniel B. Rinaldi, Esq.), and having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby FIND and AWARD as hereinafter set forth.

I. DECISION

A. Nature of Dispute

This is a dispute between Claimant, a former senior employee of Respondent, concerning whether Claimant is entitled under his employment agreement with Respondent (the "Agreement") to a lump sum payment of $559,125 (the "Lump Sum Payment"), based on Respondent's having allegedly entered into a successful affiliation with another educational institution, the New York College of Podiatric Medicine ("NYCPM"). The case also involves Claimant's application for sanctions based on Respondent's alleged egregious non-compliance with its discovery obligations and the discovery orders of this Tribunal in this arbitration.

1. The Merits

Under the Agreement, Claimant served as Advisor to Respondent's Senior Vice President and Director of Strategic Medical Initiatives and General Counsel Michael Newman (the "SVP"), responsible, *inter alia*, to work with the SVP on all aspects of Respondent's program to affiliate with or acquire other educational institutions and affiliate with medical institutions for rotational opportunities for Respondent's students.

Respondent at all relevant times was in an expansionist mode. It had affiliated, acquired, or merged with numerous other educational institutions and affiliated with numerous medical institutions over recent years and was keenly interested in further expanding. NYCPM was a particular target of interest for Respondent because of extensive potential synergies between the two institutions of considerable potential value to Respondent and the substantial financial value of NYCPM, including in Manhattan real estate, which, if moved onto Respondent's books, would, in the view of Respondent's SVP, hopefully make Respondent an "over billion dollar institution," taking Respondent up there with the "big boys." (Tr. 2141-42). It was an exciting prospect of great interest to Respondent's SVP as the person in charge of strategic initiatives for Respondent.

Claimant, who had been dean of one the colleges in Respondent's corporate family, was hired by the SVP to work on the NYCPM and other strategic initiatives, with the express intent of Claimant and the SVP, that, if NYCPM were acquired, Respondent would be appointed President of the acquired institution once Dr. Louis Levine, its then current President, stepped down following such an acquisition. Claimant was particularly attractive to the SVP to work on the NYCPM strategic initiative because of Claimant's long-standing positive personal relationship with the then President of NYCPM.

Claimant and the SVP were also friends. The SVP, in hiring Claimant to aid in strategic initiatives, was in a sense rescuing Claimant and solving an internal political and potential legal problem within Respondent, since Claimant had developed strained relations with Respondent's President and other leading figures at Respondent, based on Claimant's having taken certain positions within Respondent critical of certain hiring and administrative practices of Respondent, interventions that Claimant characterizes as of a whistle-blowing nature, including Claimant's

objection that the President of Respondent had been unwilling to hire the successful candidate for a clinical dean position at TouroCOM because the candidate was an African-American woman. The Agreement purported to resolve ("conclude") such disputes among Claimant and Respondent's President and other officials or employees of Respondent "with no admission or finding of violations by any party" and included broad mutual releases. Claimant's prior employment agreement with Respondent had run through June 30, 2019.

In an effort to incentivize Claimant, the SVP provided, in the draft of the Agreement provided to Claimant, in language that got into the final document, for additional compensation to be paid Claimant—the compensation at issue in this arbitration—"in the event of the successful acquisition and/or merger and/or affiliation" with NYCPM on or before December 31, 2017.

By letter dated November 10, 2016, Respondent, through an affiliated medical college owned by Respondent and also through the overall group of entities making up Respondent, entered into a relationship with NYCPM. The central substantive issue in this arbitration is whether the relationship between Respondent and NYCPM reflected in that letter, which was countersigned by the President of NYCPM, constituted a "successful affiliation" of Respondent with NYCPM.

2. Sanctions

Claimant contends Respondent materially failed to provide the discovery it was directed to provide in this arbitration in a timely fashion and in some respects failed to provide such discovery at all. Based on such alleged misconduct, Claimant seeks to recover his attorneys' fees and the costs and expenses of this arbitration in sanctions. Respondent denies any wrongdoing in this regard and disputes this Tribunal's authority as a matter law to award

Claimant sanctions. The Parties have agreed that, if this Tribunal awards Claimant sanctions, the amount thereof shall be determined in a subsequent phase of this arbitration.

B. The Agreement

The Agreement in Section 1.3 sets forth the provisions thereof primarily at issue between the Parties on the question of whether Claimant is entitled to the additional compensation he seeks in this arbitration. Section 1.3 contains two paragraphs. The first defines the term of the Agreement (the "Term") and various rights of the Parties concerning several possible extensions ("Renewals") of the Term. The second paragraph provides for the above-referenced additional compensation that Claimant might potentially receive if Respondent were to enter into one or more of the types of relationships with NYCPM specified therein.

The first paragraph of Section 1.3 provides:

> 1.3 Term. The term of this Agreement shall start from the Effective Date and end on June 30, 2017 (the "Term"). Touro shall have the sole and absolute right to determine whether to reappoint Employee through December 31, 2017. This determination will be made, in part, based upon Employee's performance, as well as other factors as determined in the sole and absolute discretion of Touro. In the event that Touro chooses not to reappoint Employee, or fails to give notice thereof, or in the event that Employee elects not to accept such reappointment then Employee's employment shall cease at the end of the Term, and Employee will be entitled to, after good and collegial service to Touro and promoting harmony in its ranks, separation pay in the form of and an amount equal to 26-weeks salary and all accrued vacation pay. If Touro elects to reappoint Employee through December 31, 2017, and Employee accepts, all of the terms and conditions of this Agreement shall apply during the new term. In the event that Employee's appointment is renewed (and Employee accepts) through December 31, 2017, at Touro's sole and absolute discretion, Touro may elect to reappoint Employee for an additional 6-month term expiring on June 30, 2018 ("Renewals"), which appointment Employee may or may not accept. At the termination of Employee's employment he shall receive all accrued vacation pay.

The second paragraph of Section 1.3 provides in relevant part:

> Notwithstanding the Renewals, in the event of the successful acquisition and/or merger and/or affiliation with New York College of Podiatric Medicine on or

> before December 31, 2017, Employee will be eligible, in the sole and absolute discretion of Touro and in its sole option, for either: (1) an employment renewal term, expiring on June 30, 2019, or (2) upon Employee's execution of Touro's standard Separation Agreement separation payment in the form of and [*sic*] an amount equal to the salary due calculated as the difference between the separation date and June 30, 2019 paid in equal installments in accordance with Touro's normal payroll cycle or a lump sum (at Touro's option). Employee if afforded the opportunity to continue working may elect in his sole discretion to take the lump sum payment. In no event shall Touro's obligation under this Agreement extend beyond June 30, 2019. Notwithstanding the foregoing, other than accrued vacation pay, no further payment shall be due Employee if he accepts and commences employment with New York College of Podiatric Medicine or any other entity pursued while at Touro.

The Parties disagree as to such matters as the following with respect to the above language of Section 1.3 of the Agreement:

- Whether Section 1.3 requires merely an "affiliation" or instead a "successful affiliation;
- The meaning of the term "successful affiliation," if applicable;
- Whether under Section 1.3 Claimant needed to be employed by Respondent to be entitled to the Lump Sum Payment referenced in Section 1.3;
- Whether the payment of the Lump Sum Payment under Section 1.3 was in the discretion of Respondent and what this meant; and
- Whether Section 1.3 required that the subject affiliation or the like had to be with Respondent directly, as opposed to with some other entity within Respondent's family of educational institutions, particularly the New York Medical College ("NYMC"), a college owned by Respondent, or with the Touro College & University System (Touro) ("Touro").

C. The November 10, 2016 Letter

By letter dated November 10, 2016 of the President of Respondent, in his capacity as President of NYMC, a medical college owned by Respondent, and on behalf of Touro, extended what the Touro President, in a document drafted by Respondent's SVP, called an "offer to affiliate" to NYCPM (the "November 10, 2016 Letter"). The November 10, 2016 Letter was headed "Affiliation with New York Medical College." On November 18, 2016, NYCPM,

through its President, signed the November 10, 2016 Letter under the words "READ, UNDERSTOOD & AGREED."

The November 10, 2016 Letter provided:

> I write further to our constructive conversations, and the prior conversations you and your Board had with the Touro College & University System (Touro). New York Medical College (NYMC) and Touro, by virtue of this letter, extends an offer to affiliate with your institution, New York College of Podiatric Medicine (NYCPM).
>
> Such affiliation would promote the value, prestige and standing of the DPM degree on the whole, and NYCPM in particular. As discussed, we believe there is mutual value in the association.
>
> Moreover, as our affiliation matures, NYMC could provide (subject to a more definitive agreement) certain promotional or back office support to NYCPM. Not only that, but NYMC could assist NYCPM in its recruitment of qualified candidates from the applicant pool of NYMC's and Touro's master's degree program and students in other affiliated programs as well. NYCPM could look forward to onboarding full classes. Additionally, NYMC and its affiliates could assist NYMC in improving occupancy rates in its student housing facilities located in East Harlem. Of course, the specific terms of such bundled services would be agreed to more specifically between the parties.
>
> I hope that if our affiliation is mutually beneficial in the next eighteen to thirty months, that our respective institutions could work toward a more lasting and evermore symbiotic relationship.
>
> I hope that you will countersign this affiliation offer. If and when you do I will instruct NYMC's Compliance Unit to transmit a more detailed Memorandum of Understanding for your consideration.

Central substantive issues in the case are whether Respondent's relationship with NYCPM described in the November 10, 2016 Letter constituted a "successful acquisition and/or merger and/or affiliation" with NYCPM under the second paragraph of Section 1.3 of the Agreement, and, if it did, whether Claimant thereby became entitled to recover the Lump Sum Payment referenced in that paragraph. More specifically, the first issue is whether the November

10, 2016 Letter constituted an "affiliation" or "successful affiliation" with NYCPM under the Agreement.

D. Procedural History

The hearing in this matter was held on July 17, 18, 24 and 25, 2018, September 12 and 13, 2018, October 8, 2018, November 14, 2018, and December 11 and 12, 2018. Most of the hearing was taken up by testimony, largely from Respondent's SVP, as to the position Respondent asserted into the case as to the meaning of the term "affiliation," as used in the Agreement. Much of the hearing was also taken up by evidence and arguments concerning Respondent's alleged misconduct in the discovery phase of this arbitration.

The Parties submitted substantial post-hearing papers, largely relating to Respondent's defense as to the meaning of "affiliation" and to Claimant's application for recovery of sanctions from Respondent, with the last papers being submitted on March 8, 2019.

E. Damages

The amount of damages—the $559,125—to which Claimant is entitled if he establishes liability is not contested by Respondent in this arbitration.

F. Partial Final Award

The Parties agreed to defer to a later phase of this arbitration the question of the *amount* of sanctions to be awarded Claimant, if the Tribunal determines that Claimant is entitled to recover sanctions. Accordingly, based on the Tribunal's determination, as set forth hereinafter, that Claimant is entitled to recover sanctions, this award is issued as a Partial Final Award, so as to resolve all other issues in the case but leave open the issue as to the amount of sanctions Claimant is entitled to recover from Respondent and the allocation of the fees of the American

Arbitration Association (the "AAA") and the compensation of the Arbitrator as between the Parties.

II. ANALYSIS AND CONCLUSIONS

Respondent is obligated to pay Claimant the Lump Sum Payment in the amount of $559,125 because the November 10, 2016 Letter constituted a successful affiliation between Respondent and NYCPM under Section 1.3 of the Agreement and Claimant has satisfied the prerequisites to his recovering this Lump Sum Payment under the Agreement.

A. The Meaning of the Term "Affiliation" Under the Agreement

The Parties' most fundamental disagreement is over the meaning of the term "affiliation," as used in the Agreement. Claimant contends the term has its normal English language meaning and thereby encompasses a wide range of possible associations or relationships Respondent might have with other educational or medical institutions such as the relationship with NYCPM under the November 10, 2016 Letter.

Respondent contends the term "affiliation," as used in the Agreement, does not have its ordinary English language meaning, but rather has a specialized meaning that only can be discerned from (1) Respondent's established practices as to what constitutes an affiliation, as represented by Respondent's use of the term in connection with other relationships it has negotiated or entered into, and (2) industry custom, practice, and usage.

Respondent's contention as to specifically what the term "affiliation," as used in the Agreement, means has morphed over the course of the case. In the discovery and general pre-hearing phases of the case, Respondent generally contended the term "affiliation," as used by Respondent and in the industry, required that there be a formal, written and enforceable contract of affiliation, a very precise, detailed and specific legal document—*i.e.*, that an "affiliation," as

used in the Agreement, was not just a relationship, but a very specific kind of relationship memorialized in a very specific form of contract.

The evidence overwhelmingly supports Claimant's contention as to the meaning of the term "affiliation," as used in the Agreement. Respondent's contentions on this point, based on the evidence presented, turned out to be so unfounded as to be frivolous to the point of being nonsensical. Specifically, the evidence adduced at the hearing—evidence painstakingly obtained by Claimant from Respondent through repeated efforts at enforcement of this Tribunal's discovery orders—overwhelmingly establishes that Respondent has regularly and repeatedly used the term "affiliation" to describe relationships and potential relationships with other educational and medical institutions of a relatively unstructured and informal nature that are often contemplated and represented by Respondent to be first steps, or potential first steps, towards more formal agreements of affiliation and, ultimately, acquisitions.

Respondent's own documents put the lie to Respondent's central defense in the case that the term "affiliation," as it used the Agreement, necessarily required that Respondent have entered into a formal, written and enforceable contract of affiliation. Respondent's own documents, including pitch documents it used to interest potential counterparties in "affiliations" with Respondent, have stated that "[t]here is no standard affiliation" with Respondent and that Respondent's "affiliation process is bespoke and thus no cookie-cutter template exists."

Indeed, specifically as to the association in question here—Respondent's association with NYCPM under the November 10, 2016 Letter—Respondent repeatedly characterized that association publicly as constituting an affiliation. For example, Respondent's December 2, 2016 email to some of its recent graduates touted Respondent's new affiliation with NYCPM. The email was directed to "Master of Sciences Graduates at Touro College of Osteopathic Medicine

(TouroCOM) and New York Medical College (NYMC)" and stated, *inter alia*: "We are pleased to announce our new affiliation with the New York College of Podiatric Medicine (NYCPM)."

The e-mail went on to advise Respondent's graduates that both NYMC and TouroCOM Master's graduates were "eligible to use . . . a fast-track application process to NYCPM's January program" and also that "NYCPM currently has limited spots that they are saving for NYMC and Touro graduates such as yourself." The e-mail further stated, *inter alia*, that "[a]s you know NYCPM students share faculty with our medical schools as well as other prestigious institutions. . . ."

Respondent's SVP at the time commented on the email, "WE ARE A GO. GO! GO! GO! FOR TODAY SO THAT THE STUDENTS CAN USE THIS WEEKEND AND NEXT TO APPLY." Further e-mails of Respondent encouraging its Master's students to apply to NYCPM and containing the same reference to "our new affiliation with the New York College of Podiatric Medicine," went to Respondent's constituent educational institutions as far away as California.

Another such email following the November 10, 2016 Letter notified Respondent's students that, "[p]er our affiliation," NYCPM was reserving places for Respondent's Master's students in its incoming class. The evidence is uncontested that Respondent's SVP knew this email was being sent out and did not object to it.

NYCPM's public communications similarly touted the affiliation between Respondent and NYCPM. In June 2017, NYCPM prepared a letter to Master's graduates of one of Respondent's colleges, inviting them to consider applying to NYCPM. This letter was forwarded by Respondent with the e-mail subject line "FW: Congratulations and IMPORTANT MESSAGE from our new affiliate, the New York College of Podiatric Medicine."

There were financial and other benefits to both parties to this new relationship. For example, during 2017, NYCPM received at least $156,000 in revenue from students of Respondent's affiliated schools who had obtained housing at NYCPM. This arrangement benefited Respondent as well because several of Respondent's schools in New York City had no student housing, making it valuable for Respondent to be able to offer dormitory space to out-of-area applicants.

A further benefit of Respondent's new affiliation with NYCPM was that it helped Respondent deal with a structural problem with its substantial pre-med operations. Many of Respondent's pre-med students would regularly fail to gain admission into medical school, making it important for Respondent to be able to offer such students other potential paths forward in their professional lives, so they would not have wasted their time in their pre-med studies at Respondent's colleges. The facilitated ability of Respondent's students to gain admission to NYCPM, a podiatric school, offered a significant offramp for Respondent's students who did not get into medical school.

Based on the totality of the evidence in the case, it is evident that Respondent, in its implementation of its relationship with NYCPM following the November 10, 2016 Letter, and in its general practices with respect to affiliations, used the term "affiliation" in the broad, English language meaning of the term as a broad cooperative association of Respondent with other such educational and medical institutions, and that that was the meaning Respondent generally ascribed to the term.

Respondent's SVP's shifting explanations of the meaning of "affiliation" at the hearing were not credible. Early in his testimony, he defined an affiliation as representing a transaction different from an acquisition or merger in that the term "affiliation" applies to a member

situation, as with New York Medical College and Hebrew Theological College, where Respondent took over those entities through being substituted in as the member entity that owned them.

Later in his testimony, the SVP acknowledged on cross-examination that at times Respondent uses the term affiliation in a colloquial every-day sense, an admission that, if made at the outset of the proceedings, rather than Respondent's adamant contention of the specialized meaning of the term in Respondent's usage, would, if accompanied by compliance with discovery orders on what would have been a narrower scope of discovery, have obviated something probably on the order of magnitude of 60%-70% of the time and expense in the case, including for attorneys' and arbitrator's fees and court reporter costs.

The SVP's further iteration of the meaning of the term "affiliation" at the hearing was that it depends on whether one is talking about "little a" or "big A," with "little a" being the colloquial use of the term and "big A" being the more formal use of the term, when parties agree in detail on mutual obligations and the like. (Tr. 2125). Tellingly, however, the SVP then went on to acknowledge that the term "affiliation," as used in the Agreement, "did not have a big A." It was used in the "little a" sense, *i.e.*, the colloquial sense. (Tr. 2125-26).

Equally unpersuasive was the testimony of Rabbi Moshe Krupka, Senior Vice President of Respondent, that his use of the term "affiliation" in a court filing in another case to describe certain of Respondent's relations with another educational institution did not count because he was using the term in a colloquial, not a formulaic sense—that he was using the term *as a "verb."* (Tr. 936-37.) This witness's testimony that, when he referred in court papers to the other educational institution with which Respondent had a relationship as an affiliated entity, he did not mean that the entity was actually affiliated with Respondent, but rather that he was

merely using the term as a "verb." Over and again, he testified that the relationship he had described as an affiliation in the court filing in the other case was not an affiliation because it was a "verb." (Tr. 947-949, 997-998).

Equally unpersuasive as contrary to Respondent's own documents and the overwhelming weight of the evidence was Rabbi Krupka's testimony that Respondent does not have affiliations with any entities that it does not own and that it does not refer to relationships as affiliations unless it owns the entities in question. (Tr. 946, 948).

Rabbi Krupka's testimony (Tr. 946-947) and that of other witnesses of Respondent at the hearing that Respondent could not get regulatory approval from state accrediting entities for affiliations with other institutions that Respondent did not own—a theme that Respondent pressed until late in the hearing——was admitted by Respondent's SVP later in the case to be inaccurate. Respondent's SVP, after this defense had been trotted out at the hearing several times, acknowledged on cross-examination that, for the kinds of actions Respondent and NYCPM, as affiliates, had taken after the November 10, 2016 Letter, such as sharing students and dormitory space, regulatory approval was not generally required.

There is no question that affiliations, as Respondent has regularly used the term in its other relationships and pitches, are at one end of a spectrum, with full-fledged mergers and acquisitions at the other end. As Respondent told potential targets in a number of its pitches, Respondent's affiliations are of a bespoke nature, often starting with cooperative activities, with the hope that such affiliations will mature into more formalized affiliations and then, hopefully, assuming the continuation of mutual interest and the reaching of acceptable terms, into mergers or acquisitions.

Indeed, one of Respondent's early pitches to NYCPM expressly noted that contract documents, term sheets, even the negotiation and execution of an affiliation agreement, are not necessary for an affiliation. Respondent told NYCPM, "Affiliation and the associated cost savings and program feasibility studies could occur within one to three months. Efforts to promote applications by superior candidates would begin immediately." The memorandum went on to tell NYCPM, "Next steps would include the presentation of a term sheet, the negotiation and execution of an affiliation agreement, the conduct of due diligence, and then the preparation of acquisition/merger documents with the appropriate disclosure schedules."

There is no doubt, on the facts of this case, that not only the November 10, 2016 Letter, but also the actions taken by Respondent and NYCPM following that Letter reflect Respondent's achievement of an affiliation, indeed a very successful affiliation, with NYCPM prior to December 31, 2017.

B. "Affiliation" versus "Successful Affiliation"

Respondent is correct that the natural reading of the contract language is that the adjective "successful" modified each of the terms "acquisition," "merger," and "affiliation." Respondent's further position, however, that the requirement that an affiliation be successful meant that Claimant's eligibility for payment required him to wait for an unspecified period of time—perhaps for years—for Respondent to wait and see how an affiliation worked out and whether, according to Respondent's unspecified standards, the affiliation ultimately proved successful, is not credible. Also not credible is the SVP's testimony that, to qualify as successful, an affiliation would have to mature into an acquisition or merger.

Respondent's argument that a "successful" affiliation would have to have matured into an acquisition or the like ignores the fact the language of the second paragraph of Section 1.3 is in

the disjunctive—"successful acquisition and/or merger and/or affiliation." The SVP, at least in hindsight, may feel that he intended or would have intended that Claimant would only potentially receive the additional compensation specified in Section 1.3 if Respondent achieved an affiliation with NYCPM that matured into an acquisition that brought NYCPM's financials into Respondent's financials, taking Respondent into the "big boy" realm of educational institutions of over a billion dollars. However, that is not what the Agreement he and his staff drafted says, in making Claimant eligible for the additional compensation in question, if Respondent achieved a successful affiliation.

Nor is there anything in the contract language or drafting history that credibly reflects an intent of the Parties to make Claimant's potential additional compensation under Section 1.3 so utterly devoid of promise or commitment by Respondent as to subject Claimant to Respondent's subsequent unilateral, unprincipled evaluation months or years after the fact.

Respondent's proposed reading would make the Agreement's holding out of additional compensation to Claimant essentially nugatory. That this could have been the intent of the Parties is not credible, given the June 30, 2019 term of Claimant's then existing employment contract and the fact that the Agreement served as the settlement of potential claims between Claimant and Respondent, in a context where the SVP and Claimant recognized the continuing risk that the strained relationship between Claimant and the President of Respondent would continue, leading to Claimant's potentially needing to leave his employment at Respondent.

On balance, Claimant's argument is persuasive that what the term "successful" added to the meaning of the second paragraph of Section 1.3 was the requirement that the acquisition, merger, or affiliation be actually achieved, as opposed to merely sought or contemplated or inchoate. Respondent, the drafter of the applicable contract language through the SVP and his

legal staff, has offered no persuasive argument or evidence as to any broader meaning of the term. While Claimant's reading of the contract language arguably makes the term "successful" somewhat redundant or certainly weak in meaning, it is more credible than the alternate interpretation that it essentially rendered nugatory Respondent's promise of additional compensation to Claimant upon Respondent's becoming successfully affiliated with NYCPM within the contractually specified time. In any event, Respondent having drafted the subject language, it is appropriate to interpret this ambiguity against Respondent.

In addition, even if some level of success was necessary beyond NYCPM's accepting the offer to affiliate contained in the November 10, 2016 Letter, the level of synergistic interaction between Respondent and NYCPM starting immediately after the Letter shows the success of the resultant affiliation between the two entities.

C. Whether the November 10, 2016 Letter Constituted a Successful Affiliation

It is noteworthy that, while Respondent's SVP in his testimony minimized the November 10, 2016 Letter as a "feel good" letter without any contractual or other broader significance, his immediate reaction, as communicated to NYCPM, when NYCPM returned the executed copy of the Letter to him, was "Hallelujah!!" after the NYCPM representative had stated, "And so it begins…." (Exh. 85).

Given the broad and general meaning of the term "affiliation" under the Agreement, it is clear that the November 10, 2016 Letter constituted a successful affiliation under the Agreement. The November 10, 2016 Letter said it was an "offer to affiliate." Respondent designated the Letter an "Affiliation with New York Medical College." Respondent's President signed it on behalf of one of Respondent's wholly owned colleges and on behalf of Respondent's overall "System" of related educational entities. NYCPM's President countersigned it. Both Respondent

and NYCPM publicly characterized it as an affiliation and broadly promoted it as such. Respondent had told NYCPM in an early pitch letter that this affiliation could exist before Respondent and NYCPM would agree to a term sheet or negotiate and execute an affiliation agreement. The Letter provided that the affiliation being offered and which NYCPM accepted could mature into further steps of affiliation, a "more lasting and ever more symbiotic relationship," and further agreements, including a "more definitive" agreement.

Respondent's argument that the November 10, 2016 Letter was only an agreement to agree is not persuasive in light of the express language of the Letter and the Parties' fulsome implementation of the Letter, including through virtually immediate steps of affiliation and, over time, further steps along the spectrum Respondent had projected in its early pitch to NYCPM of moving from an affiliation to a term sheet (which has, in the interim, been accomplished), to an affiliation agreement and potentially beyond.

Against the overwhelming consistency of Respondent's own documents, practices, and actions outside this arbitration as to the broad and informal nature of affiliations Respondent has, by its own characterization, pitched to strategic targets and used in characterizing other relationships, Respondent's espousal in this arbitration of an Alice-in-Wonderland world in which the term "affiliation," which it did not define in the Agreement, means something entirely different in the Agreement is unpersuasive. Far more persuasive is Respondent's use of the term in its statements to targets of interest, including NYCPM, Respondent's public emails to students, Respondent's statements on its website, and Respondent's statements in other court filings in other cases.

The evidence was overwhelming that, following the November 10, 2016 Letter, both Respondent and NYCPM widely and repeatedly held themselves out as affiliated with each other

and acted on the affiliation by implementing numerous mutually beneficial synergies, such as by Respondent's placing students with NYCPM on a preferred basis and Respondent's placing its students in NYCPM's dormitories.

Claimant, in his post-hearing brief, persuasively cites such examples as the following of Respondent's using the terms "affiliate," "affiliated," or "affiliation" to describe its relationship with NYCPM, and in which NYCPM correspondingly described itself as affiliated with Touro and NYMC:

- A November 7, 2016 e-mail from Michael Newman to Melvin E. Anthony, Harold K. Sirota, and Martin Diamond (all of Touro) which Newman labeled confidential, stating that "NYMC is pursuing an exclusive affiliation with NYCPM". (Ex. C-84).
- The Affiliation Letter itself – signed by Alan Kadish, M.D., President of NYMC and Touro, and by Dr. Louis Levine, the President of NYCPM, after receiving express approval from his Board of Trustees. In this letter, NYMC and Touro extended an "offer to affiliate" to NYCPM, and NYCPM "read, understood, and agreed" to the "affiliation offer". (Ex. C-21; *see* pages 13-17, 19-20 above).
- A November 18, 2016 response email from Michael Newman to Joel Sturm (who had sent him an email with subject line "Signed Agreement") with subject line "NYMC & NYCPM Affiliation". (Ex. C-85).
- A December 2, 2016 email from Michael Newman to Francis Belloni, Arthur Prancan, and Stephen Jones (ccing Kristen Boland, Beth Portnoy, Dr. Goldberg, Lisa Lee, and Joel Sturm) stating "WE ARE A GO. GO! GO! GO! FOR TODAY SO THAT THE STUDENTS CAN USE THIS WEEKEND AND NEXT TO APPLY" attaching a flyer directed to "Master of Science Graduates at New York Medical College (NYMC) and Touro College of Osteopathic Medicine (TouroCOM)" stating: "To that end, we are pleased to announce our new affiliation with the New York College of Podiatric Medicine." (Ex. C-87).
- A December 2, 2016 email from Arthur Prancan to Beth Portnoy attaching a flyer directed to "Master of Sciences Graduates at Touro College of Osteopathic Medicine (TouroCOM) and New York Medical College (NYMC)" stating: "To that end, we are pleased to announce our new affiliation with the New York College of Podiatric Medicine." (Ex. C-86).
- A December 5, 2016 email from Lisa Lee to Michael Newman and Dr. Goldberg (ccing Louis Levine and Michael Trepal) which stated: "Prior to our affiliation, we have accepted the following graduates from your program(s)". (Ex. C-88).
- A December 6, 2016 email in which Michael Newman forwarded to Dr. Goldberg an email blast from Kristen Boland which attached a flyer directed to "Master of Sciences Graduate at New York Medical College (NYMC) and Touro College of

Osteopathic Medicine (TouroCOM)" and stating: "To that end, we are pleased to announce our new affiliation with the New York College of Podiatric Medicine." (Ex. C-89).

- A letter dated December 7, 2016 signed by Alan Miller on Touro University California letterhead, directed to "Master of Sciences Graduates" which stated: "To that end, we are pleased to announce our new affiliation with the New York College of Podiatric Medicine (NYCPM)." (Ex. C-90).
- An undated letter signed by Francis Belloni on New York Medical College letterhead, directed to "Master of Sciences Graduates from the Graduate School of Basic Medical Sciences of New York Medical College (NYMC)" which stated: "To that end, we are pleased to announce our new affiliation with the New York College of Podiatric Medicine (NYCPM)." (Ex. C-92).
- A January 11, 2017 email in which Dr. Goldberg forwarded to Louis Levine and Lisa Lee (with a cc to Michael Newman) a revised flyer for a workshop to take place on January 19, 2017 at 11:00AM called "Introduction to the Careers in Medicine: The Doctor of Podiatric Medicine (DPM)" to introduce Touro Master's students to "programs offered by Touro and its affiliates" (a reference to NYCPM). (Ex. C-28).
- A January 17, 2017 email from Dr. Goldberg to Francis Belloni, Kenneth Lerea, and Libor Velisek (ccing Michael Newman) notifying them about a project with New York College of Podiatric Medicine, a "new NYMC affiliate". (Ex. C-30 at 2).
- A January 18, 2017 email from Dr. Goldberg to Louis Levine, and Lisa Lee, and ccd to Newman and others, notifying them that a reminder blast for the January 19, 2017 11:00AM "Introduction to the Careers in Medicine: The Doctor of Podiatric Medicine (DPM)" workshop had been sent to Master's students describing "programs offered by Touro and its affiliate.". (Ex. C-29).
- A January 18, 2017 email from Lisa Lee to Dr. Goldberg (with a cc to Louis Levine) with letter attachment which she stated he was welcome to send out, directed to "Master of Sciences Students and Graduates at Touro College of Osteopathic Medicine (TouroCOM) and New York Medical College (NYMC)" which stated: "Per our affiliation, NYCPM has agreed to guarantee ten spots for our graduates who meet their admissions standards." (Ex. C-31 at 1-2).
- A flyer for a workshop to take place on January 19, 2017 at 12:00PM called "Introduction to the Health Care Professions: The Doctor of Podiatric Medicine (DPM)" to introduce Touro Master's students to learn about "programs offered by Touro and its affiliates". (Ex. C-35).
- A February 23, 2017 email from Dr. Goldberg to Libor Velisek which stated: "Thank you for talking with me about our new affiliate-NYCPM's opportunities for your students."(Ex. C-96 at 2).
- A flyer for a workshop to take place on February 28, 2017 at 11:30AM called "Introduction to the Careers in Medicine: The Doctor of Podiatric Medicine (DPM)" to introduce Touro Master's students to learn about "programs offered by Touro and its affiliates" (again meaning NYCPM). (Ex. C-36).

- A March 15, 2017 email from Dr. Goldberg to Libor Velisek which states: "We are very interested in introducing your students to representatives from our new affiliate, the New York College of Podiatric Medicine." (Ex. C-96 at 1)
- A May 17, 2017 email from Dr. Goldberg to Michael Newman which contained a draft email to be directed to "Art Prancan and Steve Jones/copies to Marty Diamond and Ken Steier" which stated: "Our new affiliate, the New York College of Podiatric Medicine, wants to invite your MS graduates to consider making application to their program." (Ex. C-97)
- A May 17, 2017 email from Dr. Goldberg to Libor Velisek and Ken Steier which stated: "Our new affiliate, the New York College of Podiatric Medicine, wants to invite your MS graduates to consider making applications to their program. . . ." (Ex. C-98 at 2).
- A June 2, 2017 reply email from Michael Newman to Dr. Goldberg and Alan Miller (ccing Michael Clearfield, Steven Davis, Zachary Shapiro, and Matthew Lieberman) with subject line "NYCPM Affiliation – Letter to MS Grads". Significantly, prior e-mails in this chain had a less specific subject line ("Letter to MS Grads") and the subject line was changed to "NYCPM Affiliation" by Michael Newman. (Ex. C-45 at 1-2)
- A graduation program from the Commencement Ceremony of New York College of Podiatric Medicine's Class of 2017 which lists as one of NYCPM's "Affiliates"- "NEW YORK MEDICAL COLLEGE/TOURO UNIVERSITY." (Ex. C-99)
- A June 5, 2017 email chain between Michael Newman, Stephen C. Jones, Jerry F. Cammarata, Kenneth J. Steier, and Dr. Goldberg, with subject line: "Congratulations and IMPORTANT MESSAGE from our new Affiliate, the New York College of Podiatric Medicine". (Ex. C-100)
- A June 5, 2017 email from Dr. Goldberg to a student at Touro stating: "As discussed, I have attached the letter from our new affiliate, The New York College of Podiatric Medicine." (Ex. C-101)
- A July 6, 2017 email from Dr. Goldberg forwarding a letter which was on NYCPM letterhead to Michael Lipkin, Director at the Office of Institutional Research at Touro, which subject line stated "FW: Congratulations and IMPORTANT MESSAGE from our new Affiliate, the New York College of Podiatric Medicine." (Ex. C-102)
- A July 19, 2017 email from Dr. Goldberg to Michael Newman attaching a summary of a NYCPM meeting held on 7/18/2017 in which it was noted in the attached document that: "The meeting was to continue to the momentum for the further development of the affiliation between NYCPM and NYMC/TCUS." (Ex. C-103)
- A print-out from the New York College of Podiatric Medicine's website (captured on December 7, 2017) which provides: "NYCPM is affiliated with a number of leading medical institutions in the New York City area, including... New York Medical College/Touro University." (Ex. C-107)
- An undated script for a telephone call which provided: "I am calling to follow up on the email from Dean Belloni about our new affiliation with the New York

> College of Podiatric Medicine ... we have worked to build an affiliation with the College of Podiatric Medicine ..." (Ex. C-104)

Without addressing each of these asserted instances in detail, it is clear that the evidence in this case is overwhelming that Respondent, as well as NYCPM, regularly characterized and treated the relationship between themselves, as established under the November 10, 2016 Letter, as an affiliation.

D. Contractual Deadline for Achieving a Successful Affiliation

The Agreement is clear on its face that, for Claimant to be eligible for the Lump Sum Payment, Respondent had to achieve the successful affiliation with NYCPM by December 31, 2017. The November 10, 2016 Letter was countersigned by NYCPM on November 18, 2016 and hence satisfied this contractual deadline, as did the extensive follow-up actions by Respondent and NYCPM prior to December 31, 2017.

E. Claimant's Delay in Asserting His Entitlement to a Lump Sum Payment

Respondent argues that Claimant's slowness in asserting his entitlement to the Lump Sum Payment under the Agreement reflects Claimant's awareness and acknowledgement and that of his attorney that he is not entitled to such payment. In June 2017 and thereafter, as the June 30, 2017 end of the Term of Claimant's Agreement approached and then passed, Claimant, by his own admission and notwithstanding that he was represented by counsel, did not seek the Lump Sum Payment from Respondent, but rather only sought the extension of the Term of the Agreement to December 31, 2017.

It is noteworthy in this respect that, as was clear from Claimant's testimony and actions, Claimant did not even really want the extension to December 31, 2017, since, under the Agreement, if Respondent did not reappoint Claimant for that additional six months, or if

Claimant chose not to accept such a reappointment offered by Respondent, Respondent would be obligated to pay Claimant "separation pay" in the amount of 26 weeks of salary and accrued vacation pay.

The Agreement thus presented Claimant with the anomalous situation, one of several, whereby he could accept reappointment for the next six months and get paid his regular salary or not work for that period and still get paid the same salary. It was clear from Claimant's testimony at the hearing that he preferred to get paid without working.

However, under the second paragraph of Section 1.3 of the Agreement, to potentially have the opportunity to elect the Lump Sum Payment, Claimant needed to be "afforded the opportunity to continue working." The inference is compelling that this contractual requirement incentivized Claimant to seek reappointment from Respondent, so he would have satisfied this prerequisite to exercising that election. Specifically, if Respondent had not afforded Claimant that opportunity, an opportunity he clearly had no interest in taking, Claimant potentially may not have had the opportunity to elect the Lump Sum Payment.

Given this contractual arrangement, it is not surprising Claimant pressed Respondent for the extension in June 2017, while delaying asserting his right to the Lump Sum Payment until after he had received the requested extension from Respondent. The inference is compelling that Claimant, if he had pressed for the Lump Sum Payment in June 2017 while seeking the extension, not only would not have received the extension, but also would not have received, at least at that time, the "separation pay."

Respondent has presented no persuasive reason why Claimant's proceeding in this way, ostensibly to maximize his potential recovery under the Agreement, was in any way wrongful as to Respondent or serves as a basis for laches or estoppel or the like as against Claimant. While,

standing alone, Claimant's delay in asserting his right to the Lump Sum Payment in June 2017 may have been seen as potentially evidencing Claimant's view or that of his lawyers that he was not entitled to recover the Lump Sum Payment, when this matter is looked at in the context of the actual language in the Agreement, it becomes evident that the more persuasive explanation for Claimant's deferral of asserting his claimed entitlement in this regard was to maximize the prospects of his qualifying for the Lump Sum Payment.

In addition, even if Respondent's arguments were accepted—that Claimant's delay in asserting his purported right to the Lump Sum Payment evidenced his state of mind or that of his lawyers at the time to the effect that Claimant had no right to such payment—Respondent has not established any factual or legal reason, on the facts of record in this case, why Claimant could not thereafter assert whatever rights he may have in this regard, even if he or his counsel only belatedly discovered them, as long as any applicable statutes of limitations had not run and no bases for laches or equitable estoppel or the like had arisen in the meantime.

F. Respondent's Offering Claimant the Renewal of the Term of His Agreement

The second paragraph of Section 1.3 of the Agreement states, as noted above, that, to qualify for the Lump Sum Payment, Claimant needed to have been offered renewal by Respondent. There is no dispute about the fact that, on June 30, 2017, Respondent offered Claimant the renewal of the Agreement to December 31, 2017.

Respondent argues that that offer of renewal was not adequate to potentially qualify Claimant for the Lump Sum Payment because Claimant was no longer employed by Respondent when in July 2017 he made his demand upon Respondent for the Lump Sum Payment. However, whether Claimant was employed in July 2017 would not seem to matter under the contract language. Even if one adopts Respondent's argument that, for an employee's

employment to be renewed, the employee needs to be employed at the time of renewal, the fact is that, on June 30, 2017, when Respondent offered to renew Claimant's employment, Claimant *was* employed by Respondent. As of that time, Respondent was offering to Claimant the renewal of his existing employment.

In addition, Claimant's right under the second paragraph of Section 1.3 to elect the Lump Sum Payment was unqualified in that, if Respondent afforded Claimant the right to continue working for Respondent, Claimant was entitled to impose upon Respondent Claimant's election to be paid the Lump Sum Payment. Section 1.3 imposes no specific deadline for Claimant to demand the Lump Sum Payment after receiving Respondent's offer to renew and Claimant was clearly entitled under the contract language to decline the offer of renewed employment and elect the Lump Sum Payment.

The question arises, however, as to whether Respondent's June 30, 2017 offer to Claimant to renew through December 31, 2017 was sufficient to trigger Claimant's right to elect to receive the Lump Sum Payment or whether such a right would only have been triggered by an offer by Respondent to renew through June 30, 2019.

That is in a sense the ultimate question to this arbitration: Was Claimant entitled to the Lump Sum Payment under Section 1.3? There is no mystery about the fact Respondent was not prepared to acknowledge a right of Claimant to receive the Lump Sum Payment when Claimant demanded it on July 28, 2017 and no doubt it would not have acknowledged such a right a month earlier in June 2017.

The testimony by Respondent's SVP that Claimant did not qualify for the Lump Sum Payment because he had not been renewed through December 31, 2017 and then through June

30, 2018, does not withstand analysis, given the fact that, under the second paragraph of Section 1.3, the successful affiliation needed to have been achieved by December 31, 2017.

Specifically, by December 31, 2017, the successful affiliation (or other qualifying event) would either have happened or not happened. If it had happened by then, Claimant would potentially be entitled to the additional compensation referenced in the second sentence of Section 1.3 of the Agreement. He would not need the extension through June 30, 2018 and there would have been no reason for Respondent to have offered that interim extension to him since he would, in that eventuality, have already potentially qualified for the extension through June 30, 2019 or the Lump Sum Payment, whether Respondent recognized his potential entitlement or not.

Similarly, if, as events unfolded, the successful affiliation occurred before June 30, 2017, there was no need or even reason, other than the technical requirements of the second paragraph of Section 1.3, for the extension even through December 31, 2017, since Claimant would have already potentially qualified for the extension through June 30, 2019.

If, on the other hand, the successful affiliation had not happened by December 31, 2017, it could not happen thereafter, given the contractual deadline. Given these realities, it simply cannot be the case that Claimant was required to have first gotten the extension through December 31, 2017 and then through June 30, 2018, before he could potentially qualify for the extension through June 30, 2019.

In any event, as events unfolded, Respondent's successful affiliation with NYCPM occurred on November 18, 2016, when NYCPM, through its President, countersigned the November 10, 2016 Letter. As of that time, the Agreement ran until June 30, 2017, so that the

next potential extension arose as of June 30, 2017, an extension that Respondent, in fact, offered to Claimant on June 30, 2017.

Given this state of the facts, Claimant's interpretation that he needed to have been extended through December 31, 2017 to qualify for the additional compensation provided for in the second paragraph of Section 1.3 was reasonable, given the convoluted nature of the additional compensation clause written by Respondent and included in the Agreement. While this particular timing may have been unexpected, the fact is that Claimant's rights under the second paragraph of Section 1.3 matured prior to the second possible extension contemplated under the first paragraph of Section 1.3.

Based on the above considerations and the opaqueness of the contract language, it seems reasonable to construe the contract language against Respondent as the drafter and conclude that, insofar as Claimant's right to the Lump Sum Payment was dependent on Respondent's having afforded Claimant the opportunity to continue working, Respondent did so through its June 30, 2017 offer of renewal to Claimant.

G. Significance of the "Notwithstanding the Renewals" Language of Section 1.3

The same conclusion is reached when considered in light of the "Notwithstanding the Renewals" language at the beginning of the second paragraph of Section 1.3. That language on its face means that Claimant potentially gets the benefits of what follows without regard to the potential Renewals of the Agreement under the first paragraph of Section 1.3.

This contractual language supports the inference that Claimant could qualify for the compensation provided for in the second paragraph of Section 1.3 regardless of what may have happened with respect to the possible Renewals referenced in the first paragraph of Section 1.3, *i.e.,* even if one or more of those Renewals had not been offered to Claimant or had not been

accepted by him. While this conclusion is somewhat at odds with the language of the second paragraph of Section 1.3 to the effect that Respondent might potentially, at least in the first instance, elect to pay Claimant the additional compensation contemplated under Section 1.3 through renewal of the term of his employment through June 30, 2019, it seems appropriate to resolve this ambiguity against Respondent as the drafter of the subject contract language.

H. Scope and Extent of Respondent's Discretion under Section 1.3

The language of the second paragraph of Section 1.3 of the Agreement is ambiguous as to whether what is in Respondent's sole and absolute discretion is (1) whether to pay Claimant the additional compensation at all in the event of a successful affiliation or (2) whether Respondent's discretion only extends to whether to pay that compensation in the form of salary versus a Lump Sum Payment. The contract language can be read either way.

The overall circumstances and ostensible intent of the second paragraph of Section 1.3 tend to support the inference that it was only the form of payment that was in Respondent's discretion. The ostensible purpose of the second paragraph of Section 1.3 was to incentivize Claimant to do all he could, capitalizing on his relationship with the President of NYCPM, to achieve a successful affiliation, merger or acquisition with NYCPM. Such incentivization would hardly be achieved by a provision that was wholly in Respondent's discretion, particularly given the recent serious strife between Claimant and the President of Respondent and between Claimant and other senior personnel at Respondent.

Given the ambiguity of the contract language, it seems reasonable to interpret this language against Respondent as drafter and conclude that Respondent's discretion in this regard extended merely to whether to pay Claimant the additional compensation as salary or as a Lump Sum Payment, particularly since language added later in that paragraph at Claimant's request on

its face potentially gave Claimant the authority to select the Lump Sum Payment, even if Respondent had elected to make the payment on a periodic basis as salary. The unqualified nature of Claimant's potential right in this regard to select the Lump Sum Payment suggests that Claimant was entitled to receive the Lump Sum Payment, assuming a successful affiliation, merger or acquisition was reached within the contractually specified deadline.

Respondent's broader assertion—that it had discretion to determine whether any affiliation it might enter into with NYCPM was "successful"—does not, as discussed above, withstand analysis. In addition, once this matter came into the arbitration process, determining the appropriate construction of the Agreement fell to the Tribunal.

I. Meaning of "Eligible" in Section 1.3

A further question is what "eligible" means, as used in the second paragraph of Paragraph 1.3—specifically, whether that term meant "entitled." The Parties disagree on this point. Claimant testified that, if he became eligible for the additional compensation, he thereby became entitled to it (Tr. at 642), and Claimant regularly used the two terms interchangeably in this arbitration. Respondent contends the fact Claimant may become eligible for compensation under Section 1.3 did not mean that he thereby becomes entitled to such compensation. Nonetheless, it is noteworthy that Respondent's SVP on several occasions in his testimony seemed to equate eligibility with entitlement. (*See* Tr. at 1697-99).

The contract language on its face is ambiguous on the point. On the one hand, it is credible to interpret this language as meaning that Claimant will receive the additional compensation specified in the second paragraph of Section 1.3 if he becomes eligible for it through Respondent's having reached a successful affiliation, acquisition or merger with

NUCPM. On the other hand, the words "eligible" and "entitled" are different words with potentially different meanings.

There was no decisive parol evidence on the point. On balance, and given the fact that the second paragraph of Section 1.3 was ostensibly intended to incentivize Claimant and that the subject language was drafted by Respondent, it seems reasonable to interpret this contract language against Respondent and conclude that, under the Agreement, Claimant was entitled to receive the compensation he was eligible to receive.

This is particularly the case given the efforts of the SVP, as General Counsel of Respondent, in drafting the November 10, 2016 Letter, to change his earlier drafts of that letter so as to have the letter come, not from Respondent directly, but rather from NYMC, a college owned by Respondent, and from the Touro "System," the overall group of Touro educational institutions. Respondent's General Counsel/SVP acknowledged on cross-examination that one of his reasons for making this change was to undermine any contention by Claimant that the November 10, 2016 Letter constituted a successful affiliation. Ostensibly, if that witness had thought that the payment of the additional compensation under the second paragraph of Section 1.3 was entirely subject to Respondent's unbridled discretion and only accorded Claimant the possibility, but not the right, to receive additional compensation, he may not have bothered to make such revisions to the draft Letter.

J. Whether the NYCPM Affiliation Was with Respondent

Respondent further defends on the basis that the November 10, 2016 Letter was only between NYMC and NYCPM—and that Respondent, itself, was not a party to the Letter. Respondent argues that, on this basis, Claimant is not entitled to the additional compensation provided for in the second paragraph of Section 1.3 of the Agreement.

Claimant disputes these arguments, noting that the November 10, 2016 Letter also states that it was extended on behalf of the "Touro College and University System (Touro)." Claimant further points to the fact that, as testified by Respondent's SVP, Touro College acquired NYMC in 2011 and that NYMC is thus part of Respondent and that Respondent, on its own publicly released organizational charts, listed NYMC as coming under Respondent in the structure of Respondent's overall group of education institutions. Claimant further points to the fact that his job responsibilities under the Agreement included pursuing the affiliation with NYCPM, regardless of whether the affiliation would be in the name of TouroCOM or NYMC. Claimant additionally contends that Respondent's key witness on the point, the SVP, acknowledged that Claimant's responsibility to pursue NYCPM as a strategic target for Respondent continued after the November 10, 2016 Letter, as it had before. Claimant further argues that the key language of the Agreement—"in the event of the successful acquisition and/or merger and/or affiliation with New York College of Podiatric Medicine on or before December 31, 2017"—does not require that the affiliation be with any particular institution within Touro.

Claimant's arguments are persuasive on this issue. The record is clear that Respondent, with limited exceptions not relevant here, is the overall corporate parent of the educational institutions within Respondent's corporate family—and specifically that Respondent owns NYMC, so that Respondent owned an entity that entered into the November 10, 2016 Letter with NYCPM.

The record is also clear that the "Touro College and University System (Touro)" (the "Touro System"), as reflected on Respondent's organizational chart and on the November 10, 2016 Letter, is the term broadly used by Respondent to encompass Respondent's overall group of educational entities (owned by Respondent, Tr. 1432-34)—and that that was the group on

behalf of which the November 10, 2016 Letter was extended to NYCPM, as well as being extended on behalf of NYMC. Indeed, Respondent's lead officer at to strategic initiatives for whom Claimant served as advisor functioned as General Counsel/SVP for the Touro System. Claimant's obligation under his Agreement and scope of activity while he was at Respondent was to advise and assist the SVP as to strategic initiatives with respect potential initiatives concerning any of the entities within the Touro System, including NYMC.

Accordingly, the November 10, 2016 Letter constituted a successful "affiliation" between Respondent and NYCPM.

K. Claimant's Claim for Unjust Enrichment

Claimant's claim for unjust enrichment is denied as redundant and duplicative of Claimant's claim under the Agreement

L. Pre-Award Interest

Claimant seeks pre-award interest on the $559,125 Lump Sum Payment he seeks, pursuant to the 9% New York rate of interest provided for under CPLR 5004, seeking to have such interest calculated from July 28, 2017, the date when Claimant first demanded the Lump Sum Payment. Respondent, while disputing Claimant's entitlement to recover any principal amount under the Agreement, has not disputed Claimant's claim for interest if he succeeds on the merits.

It is hereby determined that Claimant is entitled to receive such pre-award interest.

M. Sanctions

Claimant stated in his supplemental post-hearing briefing that he is limiting his sanctions application to a request for the actual attorneys' fees, arbitration costs, and other out-of-pocket expenses (such as court reporter fees) he incurred as a result of Respondent's alleged failures and

delays in producing documents as directed by the Tribunal—and is not seeking monetary damages beyond that. Claimant has presented the following summary of what he asserts to be Respondent's discovery abuses in this arbitration:

- Failing to produce numerous key categories of documents in this case, which were in Touro's possession, custody, and control and were within the scope of Claimant's document requests and the Arbitrator's orders to produce;
- Continuing to fail to produce the key categories of documents even after the Arbitrator issued a series of specific orders finding that Respondent had failed to produce documents and repeatedly emphasizing that it must do so;
- In at least one instance, failing to locate a key e-mail (Ex. C-109) on its system even after being provided with a copy of the e-mail, impelling the conclusion that this e-mail together with other relevant documents were deliberately deleted from Touro's computers;
- Producing thousands of pages of responsive documents, which should have been produced with Respondent's initial production in April 2018, only after weeks or months of time-consuming and expensive efforts by Claimant and his counsel and by the Arbitrator, thereby significantly increasing the costs of the arbitration;
- Conducting its document searches and production through an inexperienced paralegal who was not provided with the necessary explanations and training that he would have needed to perform satisfactory document productions, was not provided with appropriate IT support, and was not properly supervised – even after the Arbitrator explicitly found, over and over again, that Respondent had failed to produce documents, had missed deadlines, and was subject to a motion for sanctions;
- Admittedly failing to search for responsive documents, including both electronic and hard-copy documents, in numerous places where it should have been obvious that responsive documents were likely to be located;
- Failing to conduct searches for documents located at TouroCOM's Middletown campus, at NYMC, at Touro California or Nevada, and for several months at TouroCOM in Harlem;
- Admittedly failing to provide Claimant with access to his computers at both the Seventh Avenue and Harlem/TouroCOM for months after such access should have provided, failing to search those computers itself, and failing to search the passport drive of Dr. Goldberg's Harlem computer files that was located in Michael Newman's desk;
- Concealing thousands of pages of relevant documents by producing them in individual, non-searchable files on a thumb drive, while representing that the same documents would be produced a few days later in a more formal, Bates-labeled production, and then omitting numerous categories of key documents from the latter production;

- By Respondent's own admission, directly refusing to produce categories of documents relating to affiliation agreements, in the face of a direct order to do so by the Arbitrator, and refusing to provide an affidavit from Michael Newman, Touro's Senior Vice President and General Counsel, also despite having been ordered to do so by the Arbitrator.

Respondent disputes the authority of this Tribunal to award sanctions and further contends that there is no basis on the facts of this case for the Tribunal to award sanctions to Claimant. Respondent contends it proceeded in good faith, even if, in a handful of instances, it fell somewhat short during discovery.

1. Authority of This Tribunal to Award Sanctions

Respondent disputes the authority of this Tribunal to award sanctions in this case, arguing that New York arbitration law is applicable to the case and denies such authority to arbitrators. Claimant contends the Federal Arbitration Act (the "FAA") is applicable to this arbitration and gives the Tribunal authority to award sanctions. Claimant further argues that the Employment Arbitration Rules of the AAA similarly give the Tribunal the authority to award sanctions in this case.

It is generally the case that arbitrators have authority under the FAA to award sanctions, whereas under New York arbitration law they do not. *See, e.g., ReliaStar Life Insurance Co. v. EMC National Life Co.*, 564 F.3d 81 (2d Cir. 2009); *Matter of Grynberg v. BP Exploration Operating Co. Ltd.*, 92 A.D.3d 547, 938 N.Y.S.2d 439 (NY Co. 2010); *see also,* the underlying decision at trial term in *Grynberg*: *Grynberg v BP Exploration Operating Ltd.*, 2010 N.Y. Misc. LEXIS 5985, 2010 NY Slip Op 33401(U) (NY Co. 2004).

Given these different rules of the FAA and New York arbitration law, the question in the first instance becomes, Which arbitration law, the FAA or New York arbitration law applies to the instant dispute?

It is evident at the first level of analysis that the FAA applies to the instant dispute if it involves interstate commerce, unless the Parties by their Agreement have selected New York arbitration law. Under contemporary Supreme Court authority, the FAA applies to all arbitrations, whether pending in state or federal court, that involve interstate commerce. Interstate commerce has been so broadly defined by the Supreme Court for purposes of the applicability of the FAA to arbitrations that it would be hard to find an arbitration in an executive employment or commercial case that does not involve interstate commerce. *See, e.g., Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003).

The instant dispute certainly involves interstate commerce. Respondent's strategic initiative to seek to affiliate with and eventually acquire other educational institutions and affiliate with medical institutions was an interstate initiative, involving the SVP and Claimant in scouting out and soliciting numerous prospective targets of affiliation and acquisition outside as well as within New York. In addition, Respondent's students come from many states throughout the country and from abroad. Respondent's educational activities are national and indeed international.

However, as Respondent, in part, argues, the law is also clear that, even though the FAA would otherwise be applicable to a dispute because of its interstate nature, other arbitration law—such as New York arbitration law—may generally be chosen by parties in place of the FAA as the arbitration law to govern any dispute under their Agreement. Relying on the *Grynberg* line of cases, Respondent argues that New York arbitration law is applicable in the instant case, as it was in *Grynberg*.

Respondent is correct that the *Grynberg* line of cases, which have a storied, even notorious history and have been up and down to the Appellate Division several times, stand,

inter alia, for the proposition that, as referenced in the Appellate Division's 2010 Decision, arbitrators as a matter of public policy do not generally have authority to award sanctions under New York arbitration law, given that sanctions are deemed punitive and hence precluded from arbitrability under the New York Court of Appeal's decision in *Garrity*. *See Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976).

However, the distinctive point about the underlying decision in *Grynberg* was that Justice Solomon, in a finding not altered on appeal, found that New York arbitration law applied to the case *because the parties to that case had expressly chosen New York arbitration law in their agreement* thorough providing, "The arbitration shall be regulated by the procedures of the New York Arbitration Act [CPLR Article 75]." *See* 2010 N.Y. Misc. LEXIS at 3-4. Thus, *Gryberg* was a case involving the parties' express selection of New York arbitration law.

The instant case is factually different, in that, in this case there is no such provision in the Parties' Agreement specifically addressing the subject of arbitration law, let alone selecting New York arbitration law. What is present in the instant case is a general choice of law clause contained within the same paragraph as the arbitration clause, without specific reference to arbitration law.

Respondent suggests that in these circumstances the Parties' general selection of New York law makes New York arbitration law applicable to this arbitration. The U.S. Supreme Court's decision in *Mastrobuono* addressed this question of whether a general choice of law clause constituted the selection of arbitration as well as substantive law, finding it did not. The Court stated:

> We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read "the laws of the State of New York" to encompass substantive principles that New York courts would apply, but not to include

> special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other....

Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52, 63-64, 115 S. Ct. 1212, 131 L. Ed. 2d 76, (1995).

The Court in *Mastrobuono* further stated that, in circumstances where a choice of law clause introduces an ambiguity as to the scope of the accompanying arbitration agreement (as permitting, in *Mastrobuono*, punitive damages), such ambiguity should be resolved in favor of the arbitrability of the subject issue (there, punitive damages; here, sanctions). *See* 514 U.S. at 62. The Court further noted that any uncertainty as to the interaction of the choice of law and arbitration provisions of an agreement should be construed against the drafter. *See* 514 U.S. at 62.

Significantly, the contract language at issue in *Mastrobuono* was similar to that in the instant case, with the choice of law and the arbitration provisions being contained in the same paragraph. The Court stated:

> Shearson's standard-form "Client Agreement," which petitioners executed, contains 18 paragraphs. The two relevant provisions of the agreement are found in paragraph 13. The first sentence of that paragraph provides, in part, that the entire agreement "shall be governed by the laws of the State of New York." App. to Pet. for Cert. 44. The second sentence provides that "any controversy" arising out of the transactions between the parties "shall be settled by arbitration" in accordance with the rules of the National Association of Securities Dealers (NASD), or the Boards of Directors of the New York Stock Exchange and/or the American Stock Exchange.

514 U.S. at 58-59.

Thus, the point of the Supreme Court was that, where parties' arbitration clause is broad, the parties are deemed to have broadly intended that all issues between themselves be arbitrated,

including issues that under parallel state law might not be arbitrable (*e.g.*, under New York arbitration law, sanctions and punitive damages).

On this basis, the conclusion is compelling that the New York choice of law clause in the Agreement constituted the Parties' selection of New York substantive law but not New York arbitration law, leaving the FAA applicable to the Agreement, given that the Parties' dispute involves interstate commerce.

The Second Circuit in its decision in *ReliaStar* attributed similar significance to the agreement by the parties in that case to a broad arbitration clause. The Court stated:

> Where an arbitration clause is broad, arbitrators have the discretion to order such remedies as they deem appropriate. . . . Consistent with this principle, we here clarify that a broad arbitration clause, such as the one in this case . . . confers inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith and that such a sanction may include an award of attorney's or arbitrator's fees.

564 F.3d at 86-87.

The Agreement in the instant case, like the arbitration clause in *ReliaStar*, contained a broad arbitration clause, whereby "any dispute, claim, or controversy arising out of, related to, or in connection with [Claimant's] employment or the separation therefrom" shall be resolved by arbitration. Under *ReliaStar*, such a broad delegation of authority to an arbitrator in a case under the FAA includes the authority to award sanctions. Specifically, the parties, by such a clause, have expressed the intention that essentially any issue, including issues as to sanctions and the like, be presented to the arbitrator as within his or her jurisdiction.

It is also the case that the Parties' choice of law clause in the instant case did not include the provision that New York law was applicable to the "enforcement" of the Parties' rights under the Agreement, the use of which term would, under decisions of the New York Court of Appeals,

have been deemed to communicate the Parties' intent to select New York arbitration law. *See, e.g., Diamond Waterproofing Sys. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 826 N.E.2d 802, 793 N.Y.S.2d 831 (2005).

The conclusion is, therefore, compelling that the Parties' selection of New York law in their general choice of law clause in the Agreement in this case did not constitute their selection of New York arbitration law, with the result that the FAA applies since the case involves interstate commerce.

It is noteworthy, as Claimant contends, that Rule 39(d) of the AAA's Employment Arbitration Rules, the Rules applicable to this dispute, accords arbitrators the authority to award attorneys' fees when permitted by law. Given the applicable rule of law under the FAA, as discussed above, that this Tribunal has jurisdiction to award sanctions, Rule 39(d) of the AAA's Employment Arbitration Rules bolsters and confirms that authority.

Respondent's contention is unfounded that this Tribunal lacks authority to award sanctions in this case because of the following provision in Section 9 of the Parties' Agreement: "The costs of the arbitration shall be shared equally. Each Party shall be responsible for their own attorneys' fees." Such a provision in an arbitration clause is generally understood as setting forth the "American Rule" as to attorneys' fees to the effect that each party is responsible for its own costs and attorneys' fees, *absent bad faith*.

This issue was addressed by the Second Circuit in *ReliaStar* concerning the legal significance of an arbitration clause that, like the arbitration clause in the instant case, contained a "general statement that each [side would] bear the expenses of its own arbitrator and its own attorneys." 564 F.3d at 83-84. The Second Circuit found such a general arbitration clause not to bar the arbitrator's awarding attorneys' and arbitrators' fees for *bad faith* conduct:

> [The above-referenced contract language] simply states the general American Rule that each party will bear its own attorney's fees and extends the principle to apply also to the fee of the arbitrator selected by each party. Thus, [the subject provision] is fairly understood to reflect the parties' agreement as to how fees are to be borne, regardless of the arbitration's outcome, in the context of *good faith* dealings. . . Nothing in the section, however, signals the parties' intent to limit the arbitrator's inherent authority to sanction *bad faith* participation in the arbitration. Certainly, nothing in [the arbitration agreement] references *bad faith* or sanction remedies. . . The section does not signal the parties' intent to limit the conferral of comprehensive authority by precluding an award of attorney's or arbitrator's fees when a party's bad faith dealings create a recognized exception to the American Rule. . . .

564 F.3d at 88.

Also unfounded is Respondent's contention that this Tribunal has no jurisdiction to award sanctions because Claimant did not seek sanctions in his Notice of Claim in this arbitration. The pleadings requirements in arbitration are less demanding than those under the Federal Rules of Civil Procedure or the New York Civil Practice Law and Rules. Cases can go to arbitration with only a short form statement of claim without specifics as to the substance of the claims. Under arbitration practice, there is no requirement for Claimant to have amended his Statement of Claim in order to seek sanctions in the case. Sanctions issues come up very rarely in arbitration, given the professional manner in which parties generally conduct themselves in arbitration and the quickness of the process, which makes parties want to stay in compliance since non-compliance becomes so quickly discernable. However, when the issue does come up, it becomes the subject of an application by a party for sanctions, but does not require a party to formally amend its statement of claim in order to be able to assert it, and it would be unusual to see such a request to amend. The pleadings simply do not have the role in arbitration that Respondent argues they have.

In addition, Claimant's application for sanctions in this case arose in the course of the arbitration when Claimant made it clear during the discovery phase of the case that he was seeking sanctions for Respondent's alleged misconduct in complying with its discovery obligations in the case. Respondent was well aware during the discovery period and thereafter that Claimant was contending he was entitled to sanctions because of Respondent's conduct as to discovery. The Tribunal on several occasions expressly reserved on Claimant's applications for sanctions, leaving such matters to be decided following the evidentiary hearing in the case.

It is therefore clear that this Tribunal has authority to award Claimant sanctions in this arbitration.

2. The Appropriateness of Awarding Claimant Sanctions

The question of whether the November 10, 2016 Letter constituted a successful affiliation under Section 1.3 of the Agreement was, of course, in the first instance, a question of how one interprets the terms "affiliation" and "successful affiliation," as used in the Agreement. If this proceeding had moved forward on that basis, towards a determination of the plain meaning of the subject contract language and the significance thereof, perhaps with a limited amount of discovery as to parol evidence concerning the drafting history and the like, this would have been a short arbitration—and, indeed, an efficient and economical one, with the hearing likely extending over, at most, some 2-3 days, resulting in a level of process proportionate to the claims in the case.

What unfortunately happened, however, was that Respondent vociferously, even vehemently, took the position in the pre-hearing phase of the case, as discussed above, that the term "affiliation" in Section 1.3 did not have its ordinary meaning, the normal English language dictionary meaning of the term, but rather was used in the Agreement, pursuant to Respondent's

specialized practices and industry practice, as denoting a very specialized kind of agreement, such that an "affiliation" did not exist without certain very specific and precise contract language.

The inevitable result was that Claimant sought discovery with respect to this defense of Respondent's, discovery as to Respondent's alleged practices that purportedly reflected the specialized meaning of the term "affiliation," as used in the Agreement.

The rub in the case became that Respondent, after having opened the door to broad discovery as to other instances in which it had used the term "affiliation," took the position that such broad discovery was unreasonable and repeatedly failed to provide such discovery or delayed in doing so, resulting in an extraordinarily extended iteration of motions to compel and for sanctions by Claimant, which, in turn, furthered the cycle of repeated and prolonged delays and failures by Respondent to conduct the necessary searches and produce the necessary documents.

Specifically, when the Tribunal ordered Respondent, on a repeated basis, to produce such documents after repeated non-disclosure, Respondent, in some instances directly refused to comply and in others purported to comply, but did not, or did so only on an incomplete and untimely basis. The Tribunal's pre-hearing/procedural orders in the case reflect the extent to which the same discovery issues were raised by Claimant over and again, following non-compliance or incomplete compliance by Respondent.

While, over time, Respondent produced some documents—eventually many documents—concerning its defense as to the meaning of the term "affiliation," such production was extremely delayed and required an inordinate process of compliance conferences and reiterated orders. Indeed, rather than being completed in the pre-hearing phase of the case,

Respondent's response to the Tribunal's discovery orders continued throughout the hearing—and even thereafter.

Given Respondent's non-compliance in this regard, it is impossible to have any confidence that, even as of the end of the hearing, Respondent produced all of the documents it was directed to produce by orders of this Tribunal, or even all the key documents in the case.

This conduct by Respondent, as discussed above, greatly expanded the scope and length of the discovery phase of this case and of the evidentiary hearing, taking us from what would likely have been some 2-3 discovery conferences and 2-3 hearing days, at most 4, to multiple discovery and compliance conferences and evidentiary hearings extending over some 10 days.

Some of the reasons for Respondent's failure to make reasonable document production in this case were revealed when Respondent's paralegal, who had conducted Respondent's document searches in the case, testified at the hearing. It quickly became apparent that Respondent's documents searches had been conducted in a willfully noncompliant way.

Respondent's paralegal had no idea what he was doing. He was given no meaningful instruction by an attorney or anyone else as to how to conduct the searches. He had no idea what the case was about or what he was searching for, no understanding in many instances what the document requests sought or the Tribunal's orders had ordered. No one oversaw what he was doing. He was not even familiar with Respondent's computer and other electronic systems that could be expected to have documents that were the subject of the Tribunal's orders.

Even when the Tribunal had issued orders on an repeated basis for Respondent to go back and "search again" for documents whose production had previously been ordered, no attorney or experienced person as to such matters, or any person at all within Respondent, gave the paralegal any guidance or made any effort to have him conduct a good faith search. The paralegal had no

idea—and no attorney or anyone else told him—whose files, hard and electronic, and what locales and offices of Respondent needed to be searched, given the activities that were the subject matter of the document requests and orders.

The General Counsel of Respondent, who, as discussed above, was also Respondent's SVP of strategic initiatives—and hence had lived through and knew about Respondent's efforts and actions as to affiliations and where applicable documents would be—declined to play any role in the paralegal's document searches and professedly gave no guidance to him, even after becoming aware that Respondent's production in the case was off track. When a former colleague of Claimant's at Respondent gave Claimant, on a personal basis, a copy of a relevant document in the case, Respondent fired that person.

This is not how discovery is supposed to work. Arbitration, like court-based litigation, depends on the good faith conduct of counsel in their own actions and in their direction of the actions of their paralegals and other personnel so as to assure that appropriate searches are done, and when they fail to do so after being on repeated notice that searches are not being done properly, the conclusion is unavoidable that their non-compliance is willful. No civil case, whether in court or in arbitration, could be efficiently or fairly conducted if parties acted as Respondent did in this case concerning its discovery obligations.

Claimant testified at the hearing that, shortly after his attorney sent Respondent's General Counsel and SVP a lawyer's letter asserting Claimant's rights under the Agreement, the General Counsel/SVP told Claimant that, if he pursued his claims against Respondent, the General Counsel/SVP was going to personally bankrupt Claimant. The conclusion is unavoidable that Respondent prolonged and obstructed this arbitration to punish Claimant for asserting his claims herein.

Respondent's lack of good faith in its conducting of this arbitration was also evidenced by its defense as to the meaning of the term "affiliation" under the Agreement. As discussed above, Respondent, for most of the case, defended against Claimant's claims on the basis that the term "affiliation," as used by Respondent in its dealings with other prospective strategic targets and in other relationships, was used in a very detailed, specific and formalized way, requiring a very specific type of detailed contract. This defense turned out, from Respondent's own documents, to be, as discussed above, frivolous to the point of being nonsensical. Among other things, Respondent, acting through its key witness in the arbitration, its General Counsel and SVP for strategic initiatives, had repeatedly stated, in connection with various strategic initiatives of Respondent, that the forms of affiliation in which Respondent regularly entered and was prepared to enter with potential strategic targets were flexible, bespoke, and the like, and that affiliations into which Respondent was prepared to enter were often of a preliminary nature, only later leading to term sheets, letters of intent, and formal agreements of affiliation. The conclusion is compelling that Respondent's very projection of this defense, against what it had to have known could come out at the hearing, was done, as Respondent's General Counsel/SVP had threatened Claimant, to bankrupt Claimant if he pursued his claims against Respondent in this arbitration.

Accordingly, Claimant is entitled to recover the sanctions he seeks in this arbitration, in an amount, as the Parties stipulated, to be determined in a later phase of this arbitration.

N. Other

I have considered the Parties' other arguments and contentions. Unless they are adopted herein, they have been found to be consistent with the conclusions reached herein or without merit.

III. PARTIAL FINAL AWARD

Based upon the foregoing, I hereby issue this PARTIAL FINAL AWARD as follows:

1. Claimant is entitled to recover $559,125.00, plus pre-award interest in the amount of $85,478.10, for a total recovery by Claimant from Respondent of $644,603.10, which amount Respondent is directed to pay Claimant within 30 days of the date of this PARTIAL FINAL AWARD.

2. It is determined and declared that Claimant is entitled to recover sanctions and arbitration costs, including fees of the American Arbitration Association and compensation of the Arbitrator ("Arbitration Costs") from Respondent in an amount to be determined in a later phase of this case.

3. All issues the Parties have presented in this case are resolved by this PARTIAL FINAL AWARD, except issues as to the amount of sanctions and Arbitration Costs, with the latter issues being reserved for a later phase of this arbitration.

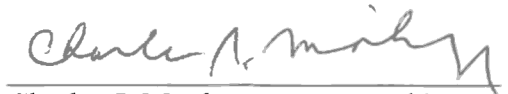
4. It is the intent of the Tribunal that this PARTIAL FINAL AWARD is final on all issues in this case, except as to the above-referenced issues as to sanctions and Arbitration Costs, which issues are reserved for a later phase of this arbitration.

5. It is further intended that this Tribunal retain jurisdiction concerning the above-referenced issues as to sanctions and Arbitration Costs, which issues are reserved for a later phase of this arbitration.

6. This DECISION AND PARTIAL FINAL AWARD is in full and complete settlement and satisfaction of any and all claims, counterclaims, defenses, and set-offs properly submitted to the jurisdiction of this arbitration. Any claim, counterclaim, defense or set-off not specifically granted herein is hereby denied.

7. As to the next phase of this arbitration, the Parties are directed to submit their papers as to the amount of sanctions and Arbitration Costs to the Tribunal pursuant to the following schedule, or such other schedule as may be agreed by the Parties on notice to the Tribunal, with such papers in each instance to be limited to a maximum of 10 pages, not counting exhibits: Claimant's papers by April 22, 2019 and Respondent's papers by May 6, 2019.

Dated: New York, New York
April 5, 2019



Charles J. Moxley, Jr., Esq., Arbitrator

01-18-0000-1720
Dr. Robert Goldberg and Touro College
DECISION AND PARTIAL FINAL AWARD

State of New York)
) ss:
County of New York)

I, Charles J. Moxley, Jr., Esq., do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Decision and Partial Final Award of Arbitrator.

April 5, 2019
Date

Charles J. Moxley, Jr., Esq., Arbitrator

State of New York)
) SS:
County of New York)

On this 5th day of April, 2019, before me personally came and appeared Charles J. Moxley, Jr., Esq., to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

NOTARY PUBLIC

SHERI I. WITZLING
Notary Public, State of New York
No. 01W14768208
Qualified in New York County
Commission Expires 01/21/2023