AMERICAN ARBITRATION ASSOCIATION

EMPLOYMENT ARBITRATION TRIBUNAL

IN THE MATTER

OF

ARBITRATION

BETWEEN

DAVID PEREZ

AND

HEALTHCARE VENTURE PARTNERS, LLC

AND

JOHN MCKAY

Dates of Hearing:	December 7 and 8, 2017
Location:	Property Management Offices; PNC Center, Cincinnati, Ohio
Case No:	01-17-0002-0566
Date of Award:	March 2, 2018

Finding: The Claimant's case has merit, and damages are awarded as indicated in detail, below.

Claimant Representative:

Robert A. Klingler
Attorney
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Cincinnati, OH 45202-3133

Respondent Representative:

David K. Montgomery
Jackson Lewis P.C.
PNC Center
201 E. Fifth Street, 26th Floor
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OPINION AND AWARD

Michael Paolucci
Arbitrator

Administration

By correspondence dated May 23, 2017, from Bryan Corbett, the Manager of ADR Services with the American Arbitration Association, the undersigned was informed of his designation to serve as arbitrator in an arbitration procedure between the Parties. On December 7 and 8, 2017, hearings went forward in which the Parties presented testimony and documentary evidence in support of positions taken. The record was closed upon the submission of post-hearing briefs from both Parties, and the matter is now ready for final resolution.

Question to be Resolved

The Complaint alleges four (4) Claims as follows:

Claim 1 – Fraud;
Claim 2 – Fraudulent Inducement;
Claim 3 – Promissory Estoppel; and,
Claim 4 – Breach of Contract.

The Complaint demands $250,000 for each claim, a removal of all restrictive covenants; an award of punitive damages in excess of $250,000, and for attorney fees. The demand for $250,000 in the complaint was made more precise at the hearing, and is set forth below.

Factual Background

The Company operates two (2) facilities in the Cincinnati area; an in-patient facility with approximately 15 beds referred to as The Ridge, and an out-patient facility referred to as Northland. Both facilities are for the treatment of alcohol and drug dependent patients. The Company is guided by an Operating Agreement that lists two (2) people as co-managing Members – John McKay and Keith Stuckert. McKay lives in Chicago and travels frequently to Cincinnati to manage the facility, but by his own description is not on site on a day-to-day basis and spent approximately ½ of his time

in the Company office, and ½ at home in Chicago. He testified that regardless of where he was located – either Chicago or Cincinnati, he was in constant communication with the office and its operation. Stuckert was described by McKay as a passive investor, but it was agreed that he was formally the co-managing Member. The Respondents claimed that Stuckert's input into the managing of the facilities was limited and had no influence on decision making for hiring and firing employees. The Claimant's position was that Stuckert had much more input into the operation and that his control was a main source of the dispute that arose.

In early 2016 the owners agreed to sell the business. Although a purchase agreement was entered into, sometime in April/May 2016 the sale failed to complete. One of the main reasons the potential purchasers chose to back out of the purchase was the lack of an experienced executive to manage the business. Without a person running the business with a background in the industry, the opinion of the purchasers was that the value of the Company was much less than the agreed upon sale amount and they therefore declined to move forward with the purchase. As a direct result of the sale falling through, the partners agreed to hire a headhunter to find a new CEO or Executive Director ("ED"). Notwithstanding this agreement to hire a headhunter, when it came time to actually hire the person the headhunter had found, namely the Claimant, a dispute between McKay and Stuckert arose.

During the period between the cancellation of the purchase of the Company and the dispute over hiring a new CEO/ED, the Claimant was contacted by the headhunter that the Company had hired. The Claimant had first come into contact with the headhunter sometime earlier, and she reached out to him in the fall of 2016. Following her description of the Company, the Claimant became interested in the opportunity, and agreed to meet with McKay for an interview.

Because of the dispute over actually hiring someone, McKay wrote to Stuckert on October 20, 2016, advising him of the upcoming interview of the Claimant, and inviting him to participate

(Claimant's Exhibit – E). Part of that letter recounts that McKay has had to cover for Stuckert causing him to work "well over 50 hours per week"; and that a new ED/CEO hire is "crucial to better manage daily operations and to grow the business more successfully and profitably." McKay testified that Stuckert did not respond to this letter.

Following the October 20, 2016 letter, McKay met with the Claimant and his wife. The Claimant was the preferred candidate and his resume showed that he had 34 years in the industry; a Master's Degree in Health and Addiction; he was a licensed therapist in Florida and Colorado; and had held management positions in treatment centers for approximately 17 years. The Claimant and his wife traveled from Memphis to Cincinnati and met McKay for dinner on October 30, 2016. If the Claimant was going to take the position, his wife was going to have quit her job and career in Memphis, and so she was involved in the discussions. According to the Claimant's wife, Paula Perez, McKay described a situation where the Company needed help in certain areas; some employees were not performing and needed to be replaced; and that although McKay had a partner, he had not had any interaction with Stuckert for the last 2 years. It was Perez' testimony that the impression left by McKay at the meeting was that Stuckert had no active role in the Company. Her impression was that the day-to-day operation was chaotic; there was a lack of depth in industry knowledge; and that McKay was completely in charge and had the authority to hire the Claimant.

The Claimant also testified about that dinner meeting, and added that the Company was generally in poor shape. The description that McKay gave of Stuckert was that, in addition to being out-of-touch for two (2) years, he was an alcoholic, hundreds of pounds overweight, and that he had been out of it since his brother died – Stuckert's brother was the founder of the Company and had passed away two (2) years prior. McKay added that Stuckert just wanted to be bought out. McKay advised that he had a 100 day plan; that he wanted to "hit the ground running"; and that he wanted to

get a lot done but needed someone to bring everyone together. The Claimant testified that he was excited by the challenge; that he had done this sort of "fix" before; and that he was looking forward to working for the Company. The Claimant testified that at this meeting McKay let him know that he was fully in charge; that he had full authority; and that nothing was said about Stuckert and his reluctance to make the hire.

The testimony of Claimant and his wife included several other items as follows:

- the Company was a disorganized and disjointed organization;
- McKay planned to leave the Company to start a Skyline Chili restaurant in Illinois where he lived;
- McKay had several drinks at dinner leading both the Claimant and his wife to believe that he could also be an alcoholic;
- McKay said that the Company was a struggling organization and that the facilities were rife with in-fighting amongst employees;
- the Company was underperforming and bleeding money;
- the Company had operational limitations and lacked leadership;
- That the accounts receivable clerk (Geneva Brody) had skills "a mile wide and inch deep";
- the CFO (Todd Wahl) was "inept" and "weak" and "goofy" (among other critical comments);
- the Executive Clinical Director (DeeAnn Mock) was good clinically, but weak operationally and another key employee was "lazy."
- The Intake person (Lindsay Reed) was a legacy family member and he was not sure what she did;
- The Marketing Coordinator (Melissa Bantos) did not know how to close a sale.

The Claimant testified that McKay informed him about the criticism received from potential buyers and that his main objective was to prepare the Company for sale in which the Claimant could participate in receiving bonuses from. He was seeking to fulfull those needs by hiring the Claimant as CEO.

After the dinner meeting on October 30, 2016, the Claimant was offered a contract and he signed it on November 22, 2016 (Claimant Exhibit C). The contract had to be re-signed on December 2, 2016 (Claimant Exhibit D). The Employment Agreement included a non-compete clause that prevented the Claimant from working within 150 miles of the facilities. After hiring the Claimant,

and because he had received no response from Stuckert following his October 20, 2016 correspondence, referenced above, McKay sent a follow up letter dated December 5, 2016, which reads in pertinent part as follows (Claimant's Exhibit – F/Respondent Exhibit – 8):

> …I have attempted for over a year, especially since Jeff Stuckert's death and the departure of the ineffective COO we hired, to undertake with you the duties Jeff performed and which the COO should have performed, and replace the operational management void created by those two circumstances. You have done nothing except peripherally participate in the failed attempt to sell the Company, while I have devoted an average of at least 50 hours per week to the tasks of managing the businesses for years. Although you've done virtually nothing to help in the management of the business (including your having visited the facilities only twice in the past two years), you continue to take a deferred salary of $150,000 per year, as have I, partially funded by the loans we now owe to the Company.
>
> This must be changed, as I have urged and warned you for over a year.
>
> …As a result, as I informed you, I wanted to start taking a salary as of September 26, 2016 in lieu of further salary deferrals/loans. As is your practice with virtually every proposal, you vetoed this in September.
>
> …I asked Jeri to conduct a search for a CEO who has the qualities, skills and industry experience essential for our Company. You also recently disapproved of the evident need for this. In fact, your disapproval originated over a year ago, resumed and continues.
>
> In spite of your opposition, I continued the job search for the CEO position and have interviewed and assessed a highly qualified candidate who is willing to accept the job…Note that his start date is January 9, 2017.
>
> Because of your continual vetoing of the critical and necessary changes for the business which I have proposed, I retained an attorney to advise me on what I can do to perform the duties I believe are essential for our business and investors. It turns out that the remedy already is contained in the Healthcare Venture Partners, LLC Amended and Restated Limited Liability Company Agreement (the Operating Agreement).
>
> Article 3.2(b) of the Operating Agreement says:
>
> "Managing Members. Subject to the provisions of this Agreement, (i) each of the Managing Members, on behalf of the Company, may enter into and perform any and all documents, agreements and instruments and may amend and modify same, and (ii) each of the Managing Members may authorize any Person to enter into and perform any documents, agreements and instruments on behalf of the Company, and to amend and modify same.

Despite our history of jointly approving certain actions, our joint approval is not required by the Operating Agreement or, according to my attorney, required by law, and Section 3.2(b) controls the authority of the Managers.

As a result, I am notifying you that I am taking and implementing the following actions in the best interests of the Company:

1. Hiring David Perez as the CEO; his executed contract is attached.
2. Taking a paid salary of $275,000 per year, beginning as of Sept. 26, 2016, and continuing for such time as I am performing my duties as a Manager for an average of 40 hours or more per week either at the facilities or from my home in Geneva, IL, with the salary to be allocated 80% to Ridge and 20% to Northland.

* * *

6. Taking other such actions as I think prudent and in the best interests of the Company, as I will inform you.

Please do not countermand any of these actions by your orders to our CFO or to any other person or employee. If an employee does not comply with my directions, it may be cause for their discharge.

* * *

According to McKay, Stuckert did not respond to the second letter. Although McKay claimed that this provision allowed him to hire the Claimant, he also conceded that it allowed Stuckert to discharge him almost immediately by simply signing a notice of termination as Co-Managing Member. The Respondents concede that the Partners disagreed on the need for hiring the Claimant, but contended that the communications were just normal interplay between business partners. It contends that after the letter was sent, Stuckert had no other involvement in the decision making of the Company.

After he signed the Employment Agreement, the Claimant handed in his resignation at his then-current job at The Oaks at La Paloma, he sold his house in Memphis, and he bought a house in Cincinnati. The Claimant testified that at the time he resigned he was making $168,000, with a likely 40% bonus if he stayed through the first quarter of 2017, and then a 5% annual increase. He claimed

that he only walked away from the bonus because of the promised CEO position at $225,000 per year, plus incentives. After his discharge here the Claimant made $125,000 per year for 2017. He left that job at the end of 2017, just prior to the arbitration hearing, and was moving to Nashville, Tennessee, for a job that paid $150,000 per year. In addition, the Claimant testified that he lost $104,000 in equity in the sale of his Cincinnati home.

The Claimant's first day on the job was Monday, January 9, 2017. However, he testified that, without explanation McKay asked him to meet at the hotel where the Claimant was staying. The Claimant did not come to the facility at all the first day. On Tuesday, January 10, 2017, when the Claimant arrived for work he claimed that it was obvious the employees were not expecting him, did not know who he was, and was not prepared for a new CEO. He testified that the receptionist did not know who he was and had to get McKay to escort him to the conference room which he then began to use as his office. After spending most of the day introducing himself and explaining why he was there, the Claimant testified that he asked McKay why no one knew who he was. He testified that McKay's response was "Don't worry – we will get to that." The Claimant testified that it was never again addressed.

The Claimant testified that since no email had gone out announcing his start, he asked that it be done on his third day of employment. The Claimant described a situation (unique in his experience) where the employees did not know who he was; had no idea why he was there; did nothing to welcome him to the Company; and made it known that everything that McKay had asked him to do was being objected to by the employees. In addition, he began to learn that there was a division in the Company between "Keith [Stuckert] people" and "John [McKay] people."

At the end of the first week, the Claimant testified that he had identified problems in billing. He suggested, and it was agreed, that he should bring in someone from his Memphis Tennessee

position who understood Accounts Payable much better. He testified that with that person's help he uncovered $320,000.00 in bills that were going uncollected.

On January 17, 2017 – eight (8) days after starting and only the fifth (5^{th}) working day, the Claimant received a call from Stuckert. The Claimant testified that Stuckert told him that he had opposed his hiring from the beginning; that he said it was an issue between himself and McKay and that they were meeting with the lawyers the following week; and that they will have to "work it out" then. Importantly, Stuckert did not testify. The Claimant had never met Stuckert before the phone call, and testified that it was a short phone call where the only thing really discussed was the fact that Stuckert had opposed his hiring. The Claimant testified that he answered Stuckert by saying that he hoped he could give him a chance to prove himself, and turn the Company around.

Claimant testified that he then immediately called McKay and asked "what the hell is going on" and then explained the phone call. His testimony was that McKay said "don't worry… I have full authority." The Claimant testified that McKay then went on to explain that he and Stuckert had once been good friends, that they had other businesses together, that a very bad rift had occurred, and that Stuckert felt hurt by the rift. None of this information was shared with the Claimant prior to being offered the position.

The following week, as Stuckert indicated would happen, a meeting was held between McKay, Stuckert, and their respective attorneys. McKay testified that the meeting focused on renewed efforts to sell the company, and on Stuckert's desire to be "bought out" by McKay. Stuckert was not called to support McKay's version of the meeting. McKay denied that the subject of the Claimant's hiring was discussed, and claimed that Stuckert had no other input on the Claimant's hiring. A few days after the meeting McKay called the Claimant and said he had met with Stuckert and everything was fine.

As a counter to McKay's claims of Stuckert's non-involvement, the Claimant argued that Stuckert took actions that proved he was very involved. As an example the Claimant cited an instance where Stuckert directed that he not be included as a permitted signatory on the Company's checking account. Although it would be expected that the Claimant, as CEO, would have been added to the Company checking account, Stuckert stopped that from occurring. Soon after the Claimant's hiring, Stuckert contacted Wahls, the CFO, and instructed him to prohibit the Claimant from being added as an authorized signatory for the Company. This is one of several instances the Claimant argued proved that Stuckert was involved in the management of the Company.

On January 31, 2017, two (2) weeks after the first phone call from Stuckert, and a week after the meeting between McKay and Stuckert and their attorneys, McKay called the Claimant and placed him on an administrative leave. According to the Claimant McKay refused to advise him as to the basis for the leave and would only say that he will get back to him. Three days later, on October 3, 2017, the Claimant was notified of his discharge. The Claimant testified that the reason he was given was disrespect of staff and a lack of credentials. From Claimant's perspective, he had not received any complaint from anyone, except some who thought he was licensed in Ohio. The Claimant's tenure amounted to eighteen (18) work days, or nineteen (19) if Martin Luther King's day is included.

During the approximately 10-day period between the meeting between the owners and their lawyers and the Claimant's administrative leave, all of the complaints against Perez were collected, and were then used to justify his termination. The Respondents contended that the complaints began almost immediately, but the evidence of the collection of the complaints show that they were done shortly after the meeting between McKay and Stuckert, and their lawyers.

The complaints were submitted as part of the Respondents defense. An initial issue related to Perez not having a clinical license in Ohio. During the Claimant's third (3rd) week, on approximately

Wednesday, January 25, 2017, (four (4) days before his administrative leave) an "all" staff meeting was held where about forty (40) employees attended – including McKay and the management team. McKay asked the Claimant to present his plan to the group on how the Company planned on moving forward. At some point a therapist asked the Claimant about his background. In response the Claimant provided information that he was a "licensed counselor." He also discussed his background and proficiency in specific clinical techniques. There was some testimony that he offered to see a patient at one of the facilities. While he does have a license in Florida and Colorado, some of the participants interpreted his statement to mean he was licensed in Ohio. As a factual matter there was no dispute that he is not licensed in Ohio.

After the meeting where the statement was made, the Respondents' witnesses claimed that an attempt was made to look up the Claimant's national provider number so that it could be entered for billing. It is not clear why this had to be done on the same day that the statement regarding licensure was made. When the database showed that he had no license in Ohio, Mock, the Company's Executive Clinical Director, called the Director of the Ohio Licensing Board. The Licensing Board confirmed that Perez was not licensed to practice in Ohio and had not submitted an application. Mock testified that she then became alarmed and that she looked up Ohio law, saw that the Company had some exposure, and considered it a serious issue. Mock took the issue to the Company's Medical Director, Dr. Marc Whitsett, and called McKay to report it. McKay told Mock and Whitsett that if the Claimant had not actually seen any patients, he was not alarmed.

Sometime thereafter, the question of Claimant's Ohio licensure was raised to Wahls, who then conveyed the complaint to the Claimant. The Claimant decided it was best to confront the issue head-on and wrote an email to all of the employees. He testified that he wanted to clarify the issue –

in the email he admits that he is not licensed in Ohio. That email (Respondent Exhibit – 1) was dated January 25, 2017 at 4:50 p.m., and reads in pertinent part as follows:

> I want to clear up a misstatement I may have made. I am not yet a Licensed Professional Counselor in the State of Ohio. I am currently licensed in Florida and am completing my application for Ohio licensure. This is a very important distinction as only a licensed profession can call themselves that and can provide professional services. It was not my intention to portray myself as licensed when I am not but I recognize that some heard that implication in some things I said. I regret that and will work to be more awake to things I say.

It was the Claimant's position that management employees do not need to be licensed in Ohio; that he never represented that he was licensed in Ohio; and that many CEO's in the industry do not hold licenses in the state where they act in a management capacity. He testified that his email was an attempt to smooth over the disruption and was not an admission of wrongdoing.

Although the Respondents claimed at the hearing that this was an important, major issue, at the time it occurred McKay determined that it was not an issue since the Claimant did not actually see a patient. His testimony at the hearing was that it was not a major issue, yet the record indicates that it partly formed the basis for the discharge. The email that the Claimant wrote was on the same day that the meeting was held, and the effort to discover the status of his license appears to have also occurred on that day.

The Company claimed that another basis for the Claimant's discharge had to do with complaints it began receiving from different sources. Mock testified that she received a series of texts from an unidentified source complaining about harassment by the Claimant (Respondent Exhibit – 12). The texts were not only anonymous, but the author said the number would be deleted as soon as the texts ended. There was no specific event complained of, just that the Claimant was making "inappropriate comments to several female staff." The evidence submitted also failed to include several pages of the text string, and no explanation was given for the omission. The texts

state that the number was untraceable and would be deactivated as soon as the texts were sent. No other identification of the person sending the texts was submitted.

After Mock received the text message, she spoke to Lindsey Reed, the Admissions Coordinator, about the message. Reed is also Stuckert's daughter. In response to Mock's questions, Reed relayed to Mock a prior incident where the Claimant made her feel uncomfortable. She described that she had mentioned having a court date in front of Perez. This allegedly occurred around January 23, 2017 (a week before the administrative leave). The Claimant asked her if she was a "felon" and if he should put her up against a wall and frisk her. Reed also reported an instance on January 19, 2017 where she mentioned she was tired and jokingly asked who could carry her back to her office. She explained that the Claimant came toward her with open arms asking what would people do if he "really did carry her" back to her office. Mock directed Reed to Human Resources. Reed completed a written statement and testified to Perez's behavior at the hearing. (Respondent Exhibit - 4.)

The Respondent claimed that it received complaints from seven employees who each completed Staff Grievance Forms. Only some were signed by the complaining employee, and others were submitted anonymously but outlined specific complaints regarding Perez. After fielding numerous complaints about Perez's behavior and receiving the written Staff Grievance Forms, Mock and Whitsett called McKay to report the incidents. Mock felt strongly enough that she told McKay: "He's gotta go*!*" McKay then hired outside counsel, Jon Goldman, to investigate the complaints – although the precise time of the hiring was not clear. Goldman interviewed each of the identified witnesses, created interview summaries, and testified at the hearing.

McKay testified that his review of the interview summaries from Goldman, and the terms of the Employment Agreement that allowed for termination "for any reason or no reason" within the first

six months, allowed him to discharge the Claimant. Significantly, Goldman did not interview the Claimant. On cross examination when asked whether he would normally interview an accused employee, and whether a full investigation would involve interviewing an accused, he conceded that such was normal. McKay decided that discharge was appropriate and he called Stuckert to inform him of this decision. Despite this involvement of Stuckert, McKay asserted that Stuckert did not attempt to influence McKay's decision at all. On February 3, 2017, McKay contacted the Claimant and discharged him.

At the hearing the Company presented some of the employees who submitted written complaints. Will Beaver generally described the Claimant as belittling. A review of that testimony showed that Beaver had a selective memory; that it was sketchy on anything of detail; and that other than the Claimant saying that the Company's program could be "so much better", Beaver could not provide any details as to his belittling attitude. Beaver did express a general concern that his job, along with others, was at risk.

Although Reed testified consistent with that stated above as told to Mock, her cross-examination was instructive. Reed claimed that she had no discussions with her father about what was happening at the facility, and that she had no idea about what was going on between McKay and her father. However, she did admit that she had the "feeling" that her father did not like the fact that McKay had hired the Claimant without his knowledge. Her testimony regarding her father was, at best, evasive.

The Company also had Kelley Peskin testify that on January 26, 2017, the Claimant gave her an odd hug in response to her having a bad day because her mouse didn't work. She wrote that she felt that it was "not professional." (Respondent Exhibit – 6). The Claimant denied ever touching her and testified he would never touch an employee, certainly not without permission. Peskin also

claimed that she overheard the Claimant ask another employee, Geneva Brooks, who was trying on a t-shirt that was too small - "Do you want to come into my office and model that for me?" (Respondent Exhibit – 7). The Claimant testified that the clothing was a jacket, not a "t-shirt," and denied asking her to come to his office and model it.

In addition to the defenses to each complaint, the Claimant presented testimony that in his entire work history, he never had a complaint or charge for inappropriate workplace conduct. After the discharge, the Claimant immediately attempted to look for another position, but could not find one. The first job he was offered was in New Jersey. To maintain his relationship he was forced to travel back and forth from New Jersey to keep in touch with his wife who had to remain in Cincinnati with their home. The Claimant testified that they were on the verge of bankruptcy and thought that they would have to file. Both the Claimant and his wife testified to the amount of stress and trauma they suffered due to the discharge.

After the complaint was filed hereunder, the Claimant learned for the first time, through discovery, that the Company's Operating Agreement made Stuckert a co-managing member. Further, Stuckert is named as the President, and the President is designated as the person that would make management decisions regarding the hiring of a CEO.

Contention of the Parties

Claimant Contentions

The Claimant claims fraudulent inducement because he was solicited to quit his job and work for the Company when McKay concealed the material fact that Stuckert objected to his hiring. The Claimant contends that the Respondents case relies on the admission of an astonishing fact - that

Stuckert had made it clear that he was strongly against the hiring of a CEO. Since McKay never informed the Claimant of this fact, it argues that fraudulent inducement was proven.

The Claimant argues that the phone call from Stuckert, the meeting with the attorneys, and then his discharge occurred in such a fashion that the only explanation is the input of Stuckert. It asserts that the facts show a strong, continual and undeniable opposition of Stuckert to the Claimant's hiring, and that the failure to advise the Claimant of this fact proves his case. The Claimant contends that the failure of Stuckert to testify proved the Respondent's poor explanation for what really occurred. It contends that it is fair to conclude that Stuckert's truthful testimony would not have been helpful to the Respondents, and thus was not offered.

The Claimant rejects all of the defenses raised by Respondents. It contends that McKay was an unreliable witness since every answer he provided was that he either does not remember the Claimant coming to him worried about the content of the phone call from Stuckert, or that he flatly denied the Claimant saying Stuckert told him he was against his hiring. It argues that McKay had to deny the facts because he could not afford to admit that Stuckert was deeply involved in the decision making within the Company. It argues that Stuckert was more than a passive investor; that the call to the Claimant proves this fact; that the letter from McKay proves how involved Stuckert was; and that the remaining facts show that Stuckert was not pacified following the Claimant's hiring. It argues that the record is clear that Stuckert wanted the Claimant gone; that the meeting with the attorneys was the proximate cause of his discharge; and that McKay's claim that the meeting with the attorneys involved no discussion about the Claimant was not believable.

The Claimants argue that the collection of statements was suspicious, and that in light of the remaining facts, each must be viewed with skepticism. It asserts that none of the statements could reasonably be expected to form the basis for a discharge. It contends that the complaints were

pretextual and points to his long work history with absolutely no negative complaints as proof that the allegations were evidence of a concerted effort to create a reason to discharge him. It contends that the testimony showed that the minor problems each employee had was then solicited by Mock who went around gathering as much dirt as she could find. It asserts that the fact that these complaints reached the level that they did within three weeks, against a man who had never had a harassment or improper conduct complaint made against him after years of experience in the industry, actually proves that his behavior was not the real issue.

The Complainant asserts that the treatment and lack of support he received proved that the Respondents were guilty of a lack of good faith and fair dealing. From the failure to announce his hiring; to the lack of notice that there was a rift in the ownership; to the "investigation" that did not include interviewing him; to the failure to notify him that complaints were being made about his management; it contends that the Respondents were proven to have violate the tenet of good faith and fair dealing.

The Claimant asserts that the unidentified and incomplete text messages to Deanna Mock should be ignored. The Claimant was the biggest threat to Mock's job and authority, and it argues she should be found lacking credibility. Not only was she McKay's main assistant and contact at the time of the dispute, but since the Claimant's discharge she has moved up to assume much of the responsibilities he would have had.

The Claimant contends that the licensure allegations were at once bizarre, petty, and proven incorrect. Since the witnesses universally agreed that he never said he had an Ohio license, and since the complaint was used to justify his termination and was proven wrong, then it argues that it was proven to be a false claim. It discards the testimony of Beaver who claimed "disrespect" as being vague, unreliable and of no impact. However, it contends that this witness actually showed that the

Company was in search of something, anything, that would be perceived as a complaint against the Claimant. It argues that the allegations of inappropriate interactions with female employees were proven sporadic, disputed, and benign. The Claimant denied ever hugging or touching any employee, and testified credibly that he would never do so without permission from the person.

The Claimant's contends that Peskin was angry, and her testimony did not have any corroboration despite the fact that she claimed the Claimant gave her a hug in front of other employees. It argues that Reed was not reliable since her father is Stuckert; since no one corroborated her testimony that the Claimant asked if he should "frisk" her; and since her testimony was proven unreliable.

The Claimant argues that the Company's attorney, Jon Goldman, proved the inadequacy of the Company's case. Although he claimed that he normally interviews alleged wrongdoers in this type of situation, he did not interview the Claimant. It contends that his explanation for not interviewing the Claimant – because the purpose of his investigation was not to determine the truth of any allegations, but to tell McKay whether or not he could terminate the Claimant – does not ring true. It argues that since the Claimant never had an opportunity to address any of the allegations against him until the hearing, 10 months after his employment ended, and since he did not know about any of the allegations until after his termination, then it contends that the claims were not material to the Company's decision. Indeed, he did not know of any of the complaints, except for the licensure issue, until after he had been terminated.

The Claimant argues that it proved fraud in the inducement since he was induced to enter into the Employment Agreement through fraud or misrepresentation. The Claimant cites the standard of fraudulent inducement as when there is:

- proof that the defendant made a knowing, material misrepresentation with the intent of inducing the plaintiff's reliance, and that the plaintiff relied

> upon that misrepresentation to his detriment. *ABM Farms, Inc. v. Woods,* 81 Ohio St. 3d 498 (1998), 1998-Ohio-612.

In this case, Claimant cites case law for the proposition that when there is a duty to disclose, concealment of a fact that is material to the transaction satisfies the misrepresentation element of the claim. *Yo-Can, Inc. v. The Yogurt Exch., Inc.,* 2002-Ohio-5194, ¶ 42, 149 Ohio App. 3d 513, 525, 778 N.E.2d 80, 89.

Claimant also cites the Ohio First District Court of Appeals for the proposition that "public policy dictates that every contract contains an implied duty for the parties to act in good faith and to deal fairly with each other. Any agreement – whether a lease, a secured loan, or something else – has an implied covenant of good faith and fair dealing that requires not only honesty but also reasonableness in the enforcement of the contract." *Littlejohn v. Parrish*, 163 Ohio App.3d 456, 462, 839 N.E.2d 49 (1st Dist. 2005).

The Claimant contends that the Respondent's fraudulent inducement damaged him in the amount of $331,772.00, and warrants punitive damages. It argues that from the time of the termination until the hearing there was a loss of $222,172.00 in income that he would have earned had he stayed at his prior position. (Claimant Exhibit - L). In addition, the Claimant paid $5,600 in COBRA premium payments that were due solely to his discharge, and he lost $104,000 on the sale of his home in Cincinnati. His total economic loss is thus $331,772.00.

As it applies to the punitive damage claim, the Claimant argues that Respondent's conduct was willful and wanton, and demonstrated reckless disregard for the rights and welfare of Claimant. It asserts that McKay:

- withheld material information that he knew the Claimant was entitled to
- did nothing to protect Claimant from the bizarre witch-hunt that was used to justify the termination.
- acquiesced in a discharge that he knew was wrong.

The Claimant asserts that the emotional damage this caused to Perez and his wife was evident from their testimony. The wasted time and career set-back for both Perez and his wife are obvious. The damage was great, and it was foreseeable. Under these circumstances, a punitive damages award against Respondents in the amount of $250,000.00 is justified, and Claimant requests that amount, in addition to an award for his economic damages.

Finally, since Claimant has incurred substantial attorney fees in bringing these claims to right an egregious wrong, and requests an award of his reasonable attorney fees, in addition to his economic and punitive damages.

Respondent Contentions

The Respondent argues that the evidence showed that the Claimant was terminated for legitimate business reasons that had nothing to do with any alleged misrepresentations or failure to disclose during the recruitment and hiring process. It asserts that it proved that within days of starting:

- the Claimant misrepresented his status as a licensed counselor; and,
- the Claimant made inappropriate comments to female employees.

It argues that either of these would justify the Claimant's discharge, and that both were proven. Since the Claimant does not dispute the licensure issue, it argues that it was proven. And since the witnesses all provided written statements and testified at the hearing, then their version of events should be believed. It asserts that these facts establish lawful reasons for termination of an at will employee according to all available legal authority.

The Respondents argue that nothing was misrepresented to the Claimant prior to his hiring. McKay was authorized to hire him, and he represented that fact accurately. Moreover, it asserts that

there is no duty for an employer to volunteer any and all potentially troubling information to an applicant during the recruiting process. *Gouge v. Bax Global Inc.*, 252 F.Supp.2d 509, 517 n.2 Ohio 2003) (noting courts universally have held an employer has no affirmative duty to reveal facts about its financial status or business dealings to at-will employees). It contends that McKay was actually more forthcoming than most employers prior to hiring as proven by the fact that he disclosed that:

- both co-managers of Respondent's rehab facilities were alcoholics;
- one of the co-managers was also severely depressed because his brother, Respondent's founder, had recently died;
- the facilities were "rife with in-fighting" amongst employees;
- many of the key managers were "floundering," "weak," and/ or "incompetent;"
- the facilities were "under capacity" and "bleeding money;" and
- the owners had failed in their recent attempts to sell the company.

It argues that it is inconsistent to claim that the Claimant was not given all relevant information when he never asked for any additional information, let alone the information that he now claims should have been disclosed. Since the Claimant accepted the position on an at-will basis, then it contends that he knew the risks. In fact, the Respondent asserts that it could discharge the Claimant, as he agreed, for any reason, a good reason, a bad reason or no reason at all. It argues that the Claimant fully understood that if termination occurred within the first six months he would be entitled to no severance. Indeed, he conceded that he accepted the position because he "likes a challenge" – not because of any false representations or hard sell by McKay.

The Respondents cite the following as the standard for fraudulent misrepresentation:

(1) a representation, or where there is a duty to disclose, a concealment of a fact;
(2) which is material to the transaction at hand;
(3) falsely made, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred;
(4) with the intent of misleading another into relying upon it;
(5) justifiable reliance upon the representation or concealment; and
(6) a resulting injury proximately caused by the reliance.

Burr v. Stark Cty. Bd. of Commrs, 23 Ohio St.3d 69, 491 N.E.2d 1101 (1986). It contends that the elements of a fraudulent inducement claim are essentially the same. *Information Leasing Corp. v. Chambers*, 152 Ohio App.3d 715, 2003-Ohio-2670 (1st Dist.).

The Respondents point out that McKay informed the Claimant of the exact conditions that he found, and that the Claimant accepted those condition prior to his employment. It contends that since the Claimant's need for a "challenge" was the reason the Claimant took the job, then it would be wrong to claim that he took the job because of anything that McKay represented.

The Respondents argue that the Claimant was discharged due to his own behavior, and it cites each of the complaints that were filed as evidence. It asserts that the question of whether Stuckert approved of Perez being hired is immaterial because Stuckert never instructed McKay not to hire him and Stuckert's opinion played no part in the decision to terminate Perez whatsoever. It contends that the large number of complaints from employees unaware of any dispute between McKay and Stuckert established the proper reason for the discharge. Since the complaints were independently investigated and verified, and since the witnesses all testified under penalty of perjury, it argues that there were legitimate business reasons for the discharge. Since none of the complaints were solicited or encourage by McKay, or anyone else, then it argues that they were proven as true, the Claimant was proven to have acted inappropriately for both the licensure issue, and with female employees, and the discharge had good reason.

The Respondents argues that it was odd, but that the Claimant admitted at the hearing to some of the bad conduct. It contends that his testimony showed that he admitted to:

- asking Peskin if she needed a hug (but denied that he offered her a hug);
- seeing Brooks try on a shirt that did not fit (but denying he asked her to model it);
- referring to Reed, jokingly, as a "felon" (but not offering to frisk her against a wall);
- not denying that he offered to carry Reed to her office with outstretched arms.

Since the Agreement specifically states that the Claimant could be terminated for any reason or no reason, and since a similar provision has been regularly upheld in Ohio, then it argues that the claim has no merit. *See Salyers v. Brennan Builders, Inc.*, 2015 U.S. Dist. LEXIS 33654, *41 (S.D. Ohio 2015) (upholding employee's termination where employment relationship began with a six month "trial period" during which the employee could be terminated at any time for any reason).

The Respondents argue that McKay wanted the Claimant to succeed. It points out that even after the phone call from Stuckert, McKay encouraged the Claimant to move forward and succeed at the Company. Moreover, after the licensure issue was raised to McKay, he chose to discount the issue and encouraged everyone to move forward with the Claimant's leadership. It contends that McKay slowed down the complaints by insisting on a third party investigator, and that he sent the Claimant an email the day before he was placed on administrative leave discussing his bonus criteria for the year. It argues that all of this points to a person who wants the Claimant to succeed, not someone who is attempting to discharge him without cause.

The Respondents assert that the facts do not support a fraudulent representation claim based on McKay concealing some secret desire not to honor the Agreement. It contends that it would make no logical sense for McKay to go out of his way to hire the Claimant, including a signing bonus, paying relocation costs, a recruiting fee, when he really intended to discharge him days later.

The Respondent maintains that the Agreement precludes a promissory estoppel/unjust enrichment claim. It points out that although the third claim states it is a promissory estoppel claim, it lists the elements of an unjust enrichment claim. Regardless, it cites the elements of a promissory estoppel claim as follows:

(1) the existence of a clear and unambiguous promise
(2) upon which one would reasonably and foreseeably rely, and
(3) plaintiff actually relied on the promise
(4) to plaintiff's detriment.

Steele v. Mara Enters., 2009- Ohio-5716, 2009 Ohio App. LEXIS 4808, P13 (10th Dist.).

Since Claimant does not allege a clear and unambiguous promise he relied upon, it argues that his claim fails as a matter of law. It contends that even if an unjust enrichment claim were intended, it would fail as a matter of law because Ohio law "does not permit recovery under the theory of unjust enrichment when an express contract covers the same subject." *Padula v. Wagner*, 2015-Ohio-2374, 37 N.E.3d 799, 2015 Ohio App. LEXIS 2282, P47 (9th Dist.) (citing *Ullmann v. May*, 147 Ohio St. 468, 475 (1947).) It argues that the Agreement of the Parties prevents recovery under unjust enrichment.

The Respondents reject the Breach of Contract claim since the Agreement gives the Company the right to discharge the Claimant for any reason, or for no reason. It cites the definition of "good faith as follows:

> "[g]ood faith is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties." *McClure v. Northwest Ohio Cardiology Consultants, Inc.*, 2012-Ohio-1106, 2012 Ohio App. LEXIS 967, P22 (6th Dist.)

And, as it applies to the terms of an agreement, it cites:

> "[f]irms that have negotiated contracts are entitled to enforce them to the letter, even to the great discomfort of [another party], without being mulcted for lack of good faith . . . [Good faith] is not an invitation to the court to decide whether one party ought to have exercised privileges expressly reserved in the document." *Id*. at P27 (quoting *Ed Schory & Sons v. Francis*, 75 Ohio St.3d 433, 443, 662 N.E.2d 1074 (Ohio 1996)).

Applied here, the Respondents argue that the Agreement expressly permitted the Company to do what it did—to terminate the Claimant for any reason. It argues that as a result, the Claimant cannot prevail on a claim for breach of the covenant of good faith and fair dealing. The Parties

negotiated the explicit terms of the contract that the Company followed in Claimant's termination and his breach of contract claim has no basis.

Discussion and Findings

A review of the record reveals that Claimant's fraudulent inducement and promissory estoppel claims have merit and that each Respondent is responsible for the damages imposed. The basis for this finding is that the Claimant proved that the terms of his Employment Agreement were fraudulently misrepresented; that McKay did not have authority, alone, to hire him; and that the basis for which he was induced into entering the Agreement was patently false and violated the tenets of promissory estoppel and fraudulent inducement.

At the outset the credibility of the Claimant, and the Respondent's attempt to describe him as being unfit for the position must be addressed. The Claimant's testimony was straightforward, honest and believable. When minor negative facts were claimed, he conceded points that could be construed as negative, but then credibly put them in context. His long history in the industry with executive experience and no apparent negative reviews made the subsequent claims of the Company's witnesses difficult to believe. His long history, by itself, gave him the appearance of professionalism. In order to believe the Respondents description of him as being something less than professional, convincing evidence must have been produced to overcome the Claimant's background.

In addition to having this uphill factual problem, the speed in which the Respondent facts are claimed to have occurred weaken its case. To prevail, the Respondents must have proven that the Claimant was unprofessional, dismissive, patronizing, dishonest, unethical in the use of his license, sexually harassing, and generally inappropriate with the female staff. Not only must the Respondents have proven these characteristics, but it must prove that these characteristics revealed themselves in

three (3) weeks of work. When weighed against the Claimant's history, and when the specific evidence is considered, the Respondents' defense fails.

As a general statement of the dispute, this case presents a difficult issue due to the competing forces presented. The Claimant is not only a sympathetic case, the Company witnesses were almost universally bad. The Claimant proved himself to be believable, well-intentioned, and truthful in his recounting of events. In contrast, the Company witnesses were patently biased, suddenly forgetful or vague on matters that would portray them negatively, and generally untrustworthy with regard to how events unfolded.

Despite this measure of how the Parties' factual case presented itself, the Company has much of the law on its side. In Ohio the power of the at-will doctrine is strong. Generally speaking, and absent other protections, an employer may discharge an employee for any reason, no reason, with or without cause, and on a whim. There is no question that the discriminatory laws are of no relevance here – therefore the Claimant, to succeed, must have presented a case based on other sections of the law than the well-known employment discrimination doctrines. And the Employment Agreement reflects this reality. The Claimant entered a contract that reflects Ohio law – the at-will doctrine is basically contained in the Employment Agreement at issue. The Claimant's case is based on other considerations, and it must be determined whether those claims have any application here.

Before analyzing the law any deeper, it is best to set forth the facts that were proven. Contrary to the Respondents' case, the Claimant was able to prove two (2) critical facts – that Stuckert was involved in the day-to-day operations, and McKay did not have the authority that he claimed. Addressing the issue of Stuckert's day-to-day involvement first, the evidence proved that he was involved in the Company, and the proof established this fact beyond doubt.

The actions of McKay, alone, prove the point. In his October 20th letter, McKay asks Stuckert to participate in interviewing the Claimant. If Stuckert has no involvement in the operation of the Company, why would this request come? McKay then complains in a letter to Stuckert that he has had to "cover" for Stuckert. Why would McKay ever have to "cover" for someone who is not involved in the business? If he has to cover for Stuckert, and if he feels obligated to involve Stuckert in the interview of the Claimant, why did he tell the Claimant that Stuckert had not been involved for over two (2) years? Each of these separate elements build the case that Stuckert is actually very involved, that Stuckert has been involved in hiring decisions, and that McKay misrepresented this fact to the Claimant during the interview process.

The case for the Respondents does not improve from here. After McKay hires the Claimant, he writes a threatening letter in December to Stuckert complaining that he has had to take action under the Operating Agreement. Why would it be necessary to threaten Stuckert if Stuckert did not also have control? There is no reason to write to a partner who is not involved asking for his approval to hire an executive, and only after the executive is hired to assert that the right already exists. Finally, as an afterthought McKay asks that Stuckert not "countermand" any of his actions. If Stuckert truly is not involved in the day-to-day operation, the request would not be necessary. The power to "countermand" orders is the same as not having the power, alone, to make those orders and is devastating to the Respondents' claims regarding Stuckert's involvement.

Indeed, the testimony of McKay underscores this last point, and proved that he did not really have the authority to hire the Claimant. Although the Operating Agreement gives McKay the power to take action as a "Co-Manager", McKay agreed that any order that he could give could be immediately "countermanded" by Stuckert. McKay's claimed "power to hire" was illusory. If full knowledge of the Operating Agreement were provided, no reasonable person would accept an action

taken by McKay unless Stuckert also signed off. Without the assent of both Co-Managers, there is no real authority under this Operating Agreement. The power to take an action that can be immediately countermanded is no power at all. The representation of McKay that he had the power to enter into the Employment Agreement was therefore false.

Other facts support this conclusion. The need for the Claimant's first day to be at the hotel was unusual, but was then made more so by the fact that none of the employees seemingly knew why the Claimant was there. These showed that McKay had not only lied to the Claimant, he misrepresented the Claimant's role to the other employees – something that was explained by the Claimant's observation regarding "McKay employees and Stuckert employees." The phone call from Stuckert proved that the Employment Agreement was done without the full authority of the Co-Managers of the Company. The fact that no office for the Claimant existed proved the haphazard nature of the Claimant's hiring. The timing of the meeting with "the lawyers" was both suspicious and not reasonably explained by McKay. Indeed, why would a meeting with the lawyers be held and the major subject of the Claimant's hiring not be discussed at all? Stuckert's action to prevent the Claimant from being added as a signatory proved both that he maintained control of the Company, and that he did not expect the Claimant to be around for very long. And the investigation was unfair, and proved that the Company was making an effort to create a defense where none existed. By the Company's attorneys own account, he has never before conducted an investigation where he does not interview the accused. No explanation was given for why it was not done here, and it is fair to conclude that it was not done because his role was not to find the truth, but to create a defense. Finally, the alleged complaints against the Claimant were untrustworthy, were pretextual, and showed that the Respondents knew that they had to create a more reasonable justification for terminating the Claimant than would have been necessary if his at-will status was the only risk it faced.

The evidence was overwhelming. Each in and of itself was proof that the Respondents hired the Claimant under false pretenses; knew that they had exposure to the improper hiring; and were taking action to protect themselves. Together each of the facts provided clear and convincing evidence that the Claimant's hiring was done under false pretenses. As a factual matter, the conclusion becomes unavoidable by the failure of Stuckert to testify. Despite his involvement and interest in the outcome of this case, he failed to testify. As recounted above, Stuckert was not only interested in the operation of the Company, he was willing to take aggressive steps to interfere with McKay's decisions. McKay's written correspondence showed his frustration; acknowledged past "vetoing" of Stuckert; and asked that his decisions not be "countermanded." Yet when it came time to help defend the Company by explaining the innocence of his actions, of the meetings with the lawyers, and with his involvement with the discharge of the Claimant, Stuckert was missing. When a party to a dispute fails to produce a critical, material witness, it is fair to conclude that it is because they want to avoid the facts that the truthful testimony would provide. When the aforementioned facts are added to the failure of Stuckert to testify, the case against the Respondents is devastating, and definitive.

The Respondents' defenses provide no relief. A review of the testimony of the Respondents' witnesses show that, for different reasons, they provided no reliable evidence. In fact, the description of the Company's atmosphere that McKay gave to the Claimant at their first dinner meeting is a reliable background for the negative feelings that were expressed. The testimony of Beaver matched many of the anonymous complaints that were submitted. His general description is that of being treated with disrespect. This is something that would be reasonable to expect given McKay's original orders to the Claimant that he needed better management to improve profitability. If the atmosphere of the employees is one that needs drastic change, it is expected that tensions are going to rise,

feelings are going to be hurt, and the person who is responsible for the change is going to bear the brunt of the complaints.

Instead of recognizing this as something that the Claimant was being asked to do, and instead of considering it the very purpose for which he was hired, the Respondents attempted to use it as a justification for his discharge. What it instead proved was that the Respondents were in desperate search for a reason to justify the discharge based on the facts that it had. Beaver's testimony was both unhelpful to the Respondents, and proved much of the Claimant's case as it regards his claim that he had no notice that a problem existed.

Indeed, the witnesses were universally evasive on cross examination. Sharp memories that existed on direct were suddenly made forgetful during cross examination. Beaver, in particular, had a selective memory when it came to details about his conversations, and provided the true basis for his complaint against the Claimant when he said he was worried about his job. Similarly, Reed's testimony regarding the Claimant asking if she needed to be frisked was not believable. Reed's testimony was that she had no conversations with her father regarding the hiring of the Claimant; that she did not speak to him about the ongoing operation of the business that he was a major investor in; and that she only had a vague feeling about his objecting to the hiring of the Claimant. It is not clear how she could never have a conversation about the operations, but somehow got a feeling about her father's objections. While this fits within the Respondents' version of events, it is not a believable account and made all that Reed touched untrustworthy.

What it does prove is that Reed was close with Mock since their stories merge early on. The claim that Reed just happened to talk to Mock on the same day that the licensure issue arose reeks of pretext. The action of Mock that following that day are also instructive. From the moment there was a claimed licensure issue, she just happened to check for the Claimant's national billing number, then

was able to review the Ohio Revised Code, then was able to call the Ohio Board of Licensure, and then was able to discover that Reed had, by her account, an "unprofessional" incident with the Claimant. Mock's feigned innocence was not believable, but her aggressive investigation efforts proved her true intention – to get rid of the Claimant. Mock was proven to have been most threatened by the power that the Claimant was given by McKay. She not only was second in command, she was at the operations on a daily basis and was able to take over once the Claimant was fired. Her bias was made manifest by her reaction to the licensure issue, and proved she was an unreliable witness.

The licensure issue was best summed up by McKay who concluded that since the Claimant did not actually treat a patient, and since he took immediate action to clarify what he intended, then there was no issue. This conclusion is fair and reasonable since it weighs the reaction of the employees upset with the Claimant with the context in which the statement was made. The question that this raises is how could the same incident become a reasonable basis to justify discharge? If the initial reaction by one of the owners is that it was not a big deal – what changed? The only thing that changed was that the Company needed a justification for the discharge since there was more risk if the truth was known that Stuckert was vetoing (again) McKay's action of hiring the Claimant.

In sum then, the Respondents' witnesses were universally bad, and proved pretext rather than a true justification for the Claimant's discharge. Moreover, the facts prove that McKay did not have the sole authority to hire the Claimant, and he misrepresented that fact to the Claimant. The remaining issue is whether these facts support any of the Claimant's causes of action.

The Ohio Supreme Court has found that the tort of fraud requires the following elements:

(a) a representation or, where there is a duty to disclose, concealment of a fact
(b) which is material to the transaction at hand,
(c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
(d) with the intent of misleading another into relying upon it,

(e) justifiable reliance upon the representation or concealment, and
(f) a resulting injury proximately caused by the reliance.

Burr v. Board of County Com'rs of Stark County, 23 Ohio St.3d 69, 491 N.E.2d 1101 (1986), citing *Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167, 169, 462 N.E.2d 407, and *Friedland v. Lipman* (1980), 68 Ohio App.2d 255, 429 N.E.2d 45. In addition fraudulent inducement requires the following elements:

(1) a representation material to the transaction;
(2) made falsely, with knowledge of its falsity, or with utter disregard and recklessness regarding its truth or falsity;
(3) with the intent to mislead another into reliance;
(4) justifiable reliance on the representation or concealment;
(5) injury proximately resulting from such reliance.

Isaac v. Alabanza Corp., 2007-Ohio-1396, 05 JE 55 (Court of Appeals of Ohio, Seventh District, Jefferson County, March 22, 2007), citing *Burr*, above.

Fraud in the inducement exists when there is proof that the defendant made a knowing, material misrepresentation with the intent of inducing the plaintiff's reliance, and that the plaintiff relied upon that misrepresentation to his detriment. *ABM Farms, Inc. v. Woods*, 81 Ohio St. 3d 498 (1998), 1998-Ohio-612. This was proven beyond doubt by the Claimant's case. McKay made a material misrepresentation of his power when he knew that his hiring of the Claimant could be "countermanded" at any time; he advised the Claimant that he had the authority to hire him; and the Claimant relied upon that misrepresentation in making his decision to move from Memphis to Cincinnati. The Claimant's reliance was justifiable, the misrepresentation of McKay's power and the concealment of Stuckert's ability to veto McKay's decision, was unreasonable and lead to the Claimant's reliance in making his decision. Finally, the Claimant's injuries were a direct and proximate result of his reliance on McKay's representations and concealment of facts. As a result, the Claimant's fraudulent inducement claim is granted.

Additionally, using the Respondents' case citation for the elements of a promissory estoppel claim (*Steele v. Mara Enters., infra)* shows that Claimant would prevail under that cause of action. The Claimant proved that there was a clear and unambiguous promise that McKay had the authority to hire him; the Claimant reasonably relied upon that promise from the putative owner of the business; and the Claimant suffered as result. Under this analysis, the promissory estoppel claim is also granted.

As for damages, the Claimant is entitled to a make whole remedy. This would place him back at the position he would have been had the improper causes of action not been taken. He is to receive full compensation for the difference in pay; and reimbursement for COBRA expenses. The loss of equity in the home is not a valid damage to be recovered as part of the employment relationship and is denied. The request for attorney fees is more difficult.

The general rule in Ohio regarding attorney fees is that "absent a statutory provision allowing attorney fees as costs, the prevailing party is not entitled to an award of attorney fees unless the party against whom the fees are taxed was found to have acted in bad faith. *State ex rel. Chapnick v. E. Cleveland City School Dist. Bd. of Edn*., 2001-0090 (Supreme Court of Ohio) October 17, 2001, citing *State ex rel. Kabatek v. Stackhouse* (1983), 6 Ohio St.3d 55, 55-56, 6 OBR 73, 74, 451 N.E.2d 248, 249, quoting *State ex rel. Crockett v. Robinson* (1981), 67 Ohio St.2d 363, 369, 21 O.O.3d 228, 232, 423 N.E.2d 1099, 1103. The cited case law indicates that attorney fees may be granted for certain intentional torts involving bad faith, but the record here did not prove that McKay's actions in entering the Employment Agreement was done in bad faith. The facts show that his efforts were genuinely intended to improve the Company for sale, although his negligence was the cause of the problem. What occurred in the short three (3) weeks after the hire was not proven to have been done in bad faith, but instead were done in an effort to reverse the decision to hire the Claimant. While the

Respondents case on nearly every other aspect was bad, bad faith for attorney fees was not established.

The total compensatory damages are calculated at $227,772.00 and attorney fees are not ordered. The remaining issue is punitive damages.

Punitive damages are required when there is evidence of wanton, willful, and reckless disregard for the rights of the Claimant. Although no Party cited the Ohio Revised Code, 2315.21 is a reasonable guideline. In applying the facts to these standards, it was established that the treatment of the Claimant that began after McKay and Stuckert struggled for control was an effort to discharge him without good reason, the actions were willful and reckless. An executive level management professional relies on their image, reputation, and history for their livelihood. The actions taken here disregarded the impact that the treatment would have on the Claimant. The facts clearly and convincingly showed that there was willful and reckless disregard for the Claimant, and punitive damages are justified.

Although punitive damages are necessary, the method used by Claimant in calculating this claim was not substantiated. The proper reimbursement for the punitive damage claim is an additional year of compensation from the date of this decision forward plus the costs of the arbitration, with normal deductions for mitigated damages. Based on his salary at the time of the hearing being $150,000, and based on his income promised of $225,000, the difference for one (1) years of salary would be $75,000.00. That amount is ordered as punitive damage compensation. The total is thus $227,772.00 of compensatory damages, and $75,000.00 in punitive damages for a total of $302,772.00 to the Claimant, plus a reimbursement to the appropriate party of the costs of AAA, and the undersigned. The AAA costs have been inserted based on AAA's representation of same.

Award

The Respondents are hereby ordered, under joint and several liability, to pay to the Claimant the amount of $302,772.00. The Parties are each responsible for their own attorney fees.

The administrative fees of the American Arbitration Association, totaling $11,200.00 and the fees and expenses of the arbitrator, totaling $8,913.75 shall be borne by the Respondents.

_____

Michael Paolucci
March 2, 2018
Cincinnati, Ohio