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June 20, 2012

Via U.S. Mail and Email

Katherine L. Kenney, Esq.
Peabody & Arnold, LLP
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210

Re: Nataly Minkina, M.D. v. Laurie A, Frankl, Esq., et al.
Suffolk County Superior Court C.A. No.: 09-1961-C

Dear Ms. Kenney:

I am writing to provide you with an original and one copy of the following documents:

1. Plaintiff's Opposition to Defendants' Motion for Summary Judgment;
2. Consolidated Combined Statement of Undisputed Facts; and
3. Joint Appendix of Exhibits.

I am also providing you with an electronic Word version of the Consolidated Statement of Undisputed Facts and the Joint Appendix, and PDF of the Opposition.

Very truly yours,

Christopher Maffucci

CM/kld
Enclosure
8209.1/533817.1

cc: Nataly Minkina (*via email*)

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

SUPERIOR COURT
CIVIL ACTION NO. 2009-1961-C

NATALY MINKINA, M.D.,
Plaintiff,

v.

LAURIE A. FRANKL, ESQ., JONATHAN J. MARGOLIS, ESQ., and RODGERS, POWERS & SCHWARTZ, LLP,
Defendants.

PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Nataly Minkina opposes defendants Laurie A. Frankl, Jonathan J. Margolis and Rodgers, Powers & Schwartz, LLP's (collectively "RPS") motion for summary judgment. In opposing RPS's motion, Minkina states as follows:

Introduction

This legal malpractice action arises out of Minkina's underlying employment discrimination case against her former employer, Affiliated Physicians Group ("APG"). RPS represented Minkina in the underlying employment case during a critical time when Minkina's employers successfully compelled her to arbitrate her claims. Minkina asserts that RPS breached the standard of care for employment law specialists during its handling of her case.

First, Minkina claims that RPS was negligent in its handling of Minkina's opposition to a motion to compel arbitration. Minkina's theory on this claim is straightforward—had RPS raised the proper argument in opposing the motion to compel arbitration she more than likely would not

have lost her right to a jury trial.[1] (SOF ¶ 86, Ex. 36). As a result of RPS's failure to raise the proper argument—that the narrow scope of her contract's arbitration clause did not authorize arbitration of employment discrimination and other statutory claims—Minkina was compelled to arbitrate her claims. (SOF ¶ 86, Ex. 36).

Once Minkina lost her opportunity to have her claims tried before a jury she sustained substantial damages in the form of uncompensated and superfluous legal fees. (Ex.27, 47, 51). In addition, Minkina sustained significant damages because had she been able to try her case before a jury she would have likely received a greater compensatory award as well as punitive damages from a jury. Moreover if Minkina had not lost her right to a jury trial, the settlement value of her case not would have been higher since punitive damages would have been available. As such, she likely could have settled in excess of the arbitrator's award. (Ex.36).

Second, Minkina claims, and RPS does not dispute, that Frankl incorrectly informed her about whether Minkina would have to pay for one-half of the cost of the arbitration. Throughout RPS's representation of Minkina, RPS had indicated that Minkina's employer would be responsible for nearly the entire cost of the arbitration if the matter were arbitrated. In May 2006 and days before RPS was going to submit a claim with the AAA for arbitration of the matter, Frankl informed Minkina that she would be responsible for one-half of the arbitration cost (which ended up being over $23,000). (Ex.27).

When Minkina pressed Frankl on the abrupt and belated change of a significant issue, Frankl became annoyed with her client and essentially told her "if you don't like it you can get another lawyer." (SOF ¶ 105). As a result of Frankl's actions, Minkina complained to the

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[1] In fact, a year later another female physician employed by Harvard Medical Faculty Physicians (the parent corporation of APG) filed gender discrimination and retaliation case on the same argument that RPS failed to consider and use. When the employer moved to compel arbitration the trial court ruled in the employee's favor. See *Warfield v. Beth Israel Deaconess Med. Ctr.,* Memorandum of Decision and Order (9/12/2008), Suffolk County Superior Court, No. 01067-B (2008). The Supreme Judicial Court affirmed the trial court's decision. *Warfield v. Beth Israel Deaconess Med. Ctr.,* 454 Mass. 390 (2009). RPS refers only to the SJC decision but ignores the fact that the Superior Court in the Warfield matter found an identical arbitration clause unenforceable.

supervising partners at RPS, one of whom (Margolis) was representing Minkina in the matter. Rather than address the client's concerns, Margolis summarily terminated RPS's representation of Minkina in an email, despite her repeated requests that RPS not do so. (SOF ¶107, 108). Minkina asserts that Margolis' and Frankl's actions in this regard were a breach of their fiduciary duty to their client.

Fourth, Minkina claims that RPS's unilateral termination of her representation was a breach of its fiduciary duty and a violation of the rules governing attorney conduct which caused her monetary damages as well as significant emotional distress. (Ex. 48, Ex. 53, p.52). When RPS terminated Minkina, it did so at a critical time in her case and it required Minkina use valuable time and resources to locate successor counsel. The stress caused by RPS's termination was exacerbated by the fact that Minkina had had two prior lawyers representing her. (Ex. 53, p.53). The first (Nance Lyons) was fired by Minkina but the second lawyer (Andrew Crouch) referred Minkina to RPS because he did not feel he had the experience or the resources to prosecute Minkina's claims. Thus, when RPS terminated Minkina, she faced the prospect of having to retain counsel in her case for a fourth time. She believed that another successor attorney sent a terrible message to the defendants in her case—that her prior lawyers did not believe in her case, or worse. (Ex. 53, p.53). This combination of events caused Minkina significant damages and emotional distress.

Finally, Minkina has learned during discovery in this case that Frankl's misrepresentations Minkina in May 2006 were more likely than not fabricated and not innocent misstatements.[2] At her deposition, Frankl described a telephone conversation she had with a AAA case manager in May of 2006 in which the case manager purportedly told Frankl that Minkina's employment contract requires that the parties split the arbitration costs. After

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[2] This issue is raised in Minkina's recently served Motion for Leave to File Second Amended Complaint.

concluding the depositions of Frankl, Margolis and Spruce (APG's counsel), Minkina contacted the AAA and learned that under the AAA's operating rules, it will only assign a case manager *after* a case is filed with the AAA. Throughout RPS's representation of Minkina it never filed a claim with the AAA on behalf of Minkina thus no case manager or case administrator was assigned who would have spoken to Frankl. Even if Frankl had spoken to someone at the AAA case managers or other employees are not permitted to orally convey substantive legal opinions *ex parte.* Given that there is no evidence that Frankl provided Minkina's contract to the AAA during her alleged conversation with the AAA, Frankl's statement to Minkina that she was advised of a substantive legal opinion during a telephone call with a AAA case manager appears to be false. This falsehood led directly to Minkina's termination by RPS and all the issues and damages that flowed from the termination including increased attorneys' fees, emotional distress, increased litigation and tactical advantages to Minkina's adversary, APG.

Facts

Minkina relies on and incorporates by reference the parties' Consolidated Statement of Facts.

Argument

A. Minkina Has Proffered Sufficient Evidence to Support Her Malpractice Claim.

The elements in a legal malpractice case[3], are (1) an attorney-client relationship; (2) the attorney's relevant standard of care; (3) a breach of the standard of care; (4) damages proximately caused by the attorney's subpar performance. Fishman v. Brooks, 396 Mass. 643, 646-647. (1986). That Minkina has satisfied the first two elements of her malpractice claim is not in dispute and warrants little discussion. In May 17, 2005, RPS undertook to represent Minkina on an hourly fee basis. (SOF ¶ 76). RPS is an law firm specializing in employment law and boasts in advertising that several of its attorneys are considered "super lawyers." (SOF ¶ 78,

[3] Minkina's malpractice claims include Professional Negligence (Count I); Negligent Misrepresentation (Count II) and Breach of Fiduciary Duty (Count III).

Ex. 50). As such, the standard of care for RPS in Minkina's legal malpractice case that of a reasonably competent employment law specialist.[4]

1. *RPS's Handling of APG's Motion to Compel*

As for the third element of her malpractice claims, Minkina has proffered sufficient evidence that RPS breached its standard of care because it omitted the strongest argument to defeat APG's motion to compel arbitration, and had it not failed to do so Minkina's chances of defeating APG's motion would have substantially increased. As Minkina's expert liability witness (Professor Samuel Estreicher) opined RPS "violated its duty of care to Dr. Minkina ... because they failed to make and press an argument that would have substantially increased the likelihood of a jury-tried civil action of her employment discrimination [claims]." (Ex. 36 at ¶5). Professor Estreicher also stated that given "the importance of preserving a jury trial for a plaintiff with Dr. Minkina's professional profile, *competent employment counsel* would have made and pressed the argument that the arbitration clause in her employment agreement...was a narrow one and did not authorize arbitration of employment discrimination and other statutory employment claims." (Ex. 36 at ¶5, emphasis added).

Moreover, Professor Estreicher goes on to state that "competent counsel would have understood that the Mugnano-Bornstein v. Crowell, 42 Mass.App.Ct. 347, 677 N.E.2d 242 (1997) on which the trial court...heavily relied, was plainly distinguishable" because the arbitration clause in *Mugnano* "referred to employment disputes and was not limited to claims arising under the employment agreement, as was true of Minkina's arbitration agreement..." (Ex. 36 at ¶6). In his analysis of RPS's work product opposing the motion to compel arbitration, Professor Estreicher "found no evidence that RPS made this critical scope of the arbitration

[4] Mass.R.Prof.C. 7.4(c). Comment (3) elaborates by stating that lawyers who imply expertise in a particular field or area of law will be held to the "standard of practice of a recognized expert in the field or area." See also Klein v. Catalano, 386 Mass. 701 718 (1982) (to exercise "that skill and judgment which can be reasonably expected from similarly situated professionals.")

clause argument..." (Ex. 36 at ¶7). RPS made this error not only before the trial court but again during Minkina's appeal to the single justice of the Appeals Court. (Ex. 36 at ¶¶7-9). Finally, RPS "overstated Dr. Minkina's ability to raise successfully opposition to arbitration in the course of judicial review of an arbitration award." (Ex. 36 at ¶9). Thus, there can be no dispute Minkina has proffered sufficient evidence to satisfy the first three elements of her malpractice claim.

Minkina has also proffered evidence of the fourth element of malpractice claim, namely that her damages were proximately cause by RPS's breach of its duty of care. In general, the issue of proximate cause in a legal malpractice case is one of fact for the jury. Girardi v. Gabriel, 38 Mass.App.Ct. 553, 558 (1995). While a malpractice plaintiff must present proof of a viable original claim in order to establish causation, that issue is not present in the instant case since Minkina won her underlying employment discrimination case. The issue in instant case is whether Minkina "but for" RPS's negligence, would have "obtained a better result had the attorney exercised adequate skill and care" because she probably would not have been compelled to arbitrate. Fishman, 396 Mass. at 643. Since Minkina's employment agreement's arbitration clause precluded punitive damages, she lost a powerful and valuable component of her case when she was compelled to arbitrate.

Minkina has sustained significant damages as a result of losing her right to a jury trial and being compelled to arbitrate. As such, Minkina asserts the issues of causation should be left to the jury. Fishman, 396 Mass. at 647 ("no expert testimony from an attorney is required to establish the cause and extent of the plaintiff's damages"). But expert testimony may be used to establish causation. DiPiero v. Goodman, 14 Mass.App.Ct. 929, 930 (1982) (implying propriety of expert legal opinion on causation); Colucci v. Rosen, et al., 25 Mass.App.Ct. 107, 115 (1987) (expert legal testimony on injunction motion necessary even though ordinarily an issue of law for the court).

In a legal malpractice action a plaintiff who alleges his attorney was negligent in the prosecution of a claim will prevail if he proves that he probably would have obtained a better result had the attorney exercised adequate skill and care. Fishman, 396 Mass. at 647. A "former client suffers a loss due to an attorney's negligence only if that negligence is shown to have made a difference to the client." Poly v. Moylan, 423 Mass. 141, 145 (1996) quoting Jernigan v. Giard, 398 Mass. 721, 723 (1986).

Professor Estreicher stated in no uncertain terms that had "Dr. Minkina been able to obtain a jury trial in this case, she would *likely* have obtained a significantly larger award than she in fact obtained from the arbitrator." (Ex. 36 ¶10). Fishman, 396 Mass. at 647 n.1 ("plaintiff whose case was settled too low because of his attorney's negligence lost a valuable right, the opportunity to settle the case for a reasonable amount without a trial" citing Drury v. Butler, 171 Mass. 171, 175 (1898)). Professor Estreicher added that because "of the potential availability of punitive damages, and other factors [among other things such as Minkina's professional profile], competent defense counsel, fearing such a prospect, would likely have settled the case at a level in excess of the award" Minkina obtained from the arbitrator. (Ex. 36 ¶10). Expert testimony regarding the underlying case's value is completely in line with Massachusetts law. Fishman, 396 Mass. at 647 ("except as to reasonable settlement value, no expert testimony from an attorney is required").

2. *RPS's Misstatements About the Arbitration Costs*

RPS made several erroneous statements to Minkina about the costs of arbitrating her claim. From the beginning of its representation, RPS assured Minkina that if her case were compelled to arbitration, her employer (APG) would pay for the costs[5] of the arbitration. (SOF ¶81 In a letter to Minkina on May 19, 2006, RPS's associate on the case (Frankl) reiterated this

[5] Except for a small filing fee.

position to Minkina. (Ex.41). On May 23, 2006 Frankl emailed Minkina and indicated that she was incorrect about the cost of arbitration. (Ex. 43). Instead, Frankl told Minkina that Minkina would responsible for one-half the costs of arbitrating her case. (Ex.43). There is no dispute that Frankl made these misstatements. As a result Frankl's May 23, 2006 email, Minkina pressed Frankl for an explanation which caused Frankl to essentially respond to her client's queries "that if you don't like it, get another lawyer." (Ex. 44). As a result of this interaction with Frankl, Minkina complained to Frankl's supervising attorney (Margolis) at RPS. (Ex. 13). Margolis did not address his client's concerns but instead summarily discharged Minkina as a client through an email. (Ex.14). Frankl's misstatements to Minkina about the arbitration costs were not only breach of the standard care, but they resulted in significant damages to Minkina.

After being unilaterally terminated by RPS, Minkina had to search for new counsel. When Minkina eventually retained successor counsel, she had to pay approximately $12,000 for counsel to familiarize themselves and get up to speed with Minkina case. Once in the arbitration forum, Minkina had to spend another $7,000 arguing that she should not have to pay one-half of the cost of arbitration. Minkina eventually prevailed in arbitration on this issue which allowed her to be reimbursed $23,187.50 she paid in arbitration fees, but she was never reimbursed for her attorney's fees in pursuing that ruling. (Ex.27).

Thus Frankl's not knowing whether or not Minkina would have to pay for the significant costs of her arbitration was clearly below the standard of care for employment counsel. Moreover, if Frankl did not know whether Minkina would or would not have to shoulder the cost of the arbitration, Frankl should have informed her client of that fact. Frankl should not have presented her client with a definitive position for an entire year (i.e. the employer pays the

arbitration) and then without sufficient explanation present a new definitive position diametrically opposed to what she previously explained to her client.[6]

B. The Professional Judgment Rule Does Not Apply.

Initially it should be noted that the professional judgment rule as a defense is to be submitted to the trier of fact. Mallen & Smith, Legal Malpractice, Vol.4 § 33.5 (2012 ed.). Courts considering the professional judgment rule require the predicate of a sufficient investigation upon which to base the "judgmental decision." Id. citing Olds v. Donnelly, 291 N.Super.222, 229-230, 677 A.2d 238, 241 (App.Div. 1996), judgment aff'd, 150 N.J. 424 (1997) ("jury could have inferred from the content of defendant's file as presented to the jury a lack of diligence").

As such, the professional judgment rule does not immunize RPS from its negligent handling of Minkina's opposition to APG's motion to compel arbitration. Minkina's claim arises out of RPS's failure to recognize, consider and press her most compelling argument in opposing APG's motion to compel arbitration—namely that the arbitration clause in her employment agreement with APG was a narrow one that did not authorize arbitration of employment discrimination and other statutory employment claims. Given that RPS represented to Minkina that its lawyers were employment law specialists, RPS failure to press this critical argument violated its duty of care to Minkina and the professional judgment rule is not a defense.

1. *Good Faith is Not a Defense to Negligence.*

RPS's argument that it is entitled to immunity for its "good faith tactical decisions" is misplaced because RPS never considered the narrow scope of the arbitration clause in Minkina's contract with APG when it opposed APG's motion to compel arbitration. There is no evidence

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[6] As discussed in Minkina's Motion for Leave to File Second Amended Complaint, Minkina has learned during discovery in this case that Frankl's misrepresentations Minkina in May 2006 were more likely than not fabricated and not innocent misstatements.

in the record that RPS made this critical scope of the arbitration clause argument. Minkina's position is that competent employment counsel would have made and pressed the argument that the arbitration clause in her employment agreement with APG was a narrow one and did not authorize arbitration of employment discrimination and other statutory employment claims. RPS made this error not only before the trial court on the motion to compel arbitration but again during Minkina's appeal to the single justice of the Appeals Court.

Thus, Minkina's claims against RPS does not involve the situation where counsel weighed the strengths and weaknesses of its potential arguments and then pursued a strategy that ultimately failed. Meyer v. Wagner, 429 Mass. 410, 419, 424 (1999) ("whether the attorney acted in good faith in representing a client has no bearing on liability…a subjective good faith exercise of judgment or honest belief will not protect an attorney from an otherwise negligent act or omission."). Rather, Minkina's claim involves the situation where RPS failed to consider and press an argument that would have increased the likelihood of her defeating the motion to compel. Consequently, RPS "has failed to exercise the degree of skill and care of [employment law specialists] and that failure has resulted in a loss or damage to the client…" Id.

2. *RPS's Negligence Reduced Minkina's Likelihood of a Jury Trial.*

RPS also argues that Minkina cannot show that the omitted argument would have made a difference in the underlying matter. To that end, RPS argues that it "was confronted with a 40 year-old body of law favoring arbitration." Notwithstanding that RPS's position is, in essence, that employees should not waste their time challenging arbitration provisions in their contracts, RPS's argument that even if the omitted argument had been made, Minkina still would have ended up in the same position is simply wrong, as is RPS's claim Minkina cannot provide a "logical explanation" of how RPS's negligence caused her a loss.

Given the general rule in Massachusetts that in a legal malpractice action a plaintiff who alleges his attorney was negligent in the prosecution of a claim "*will prevail if he proves that he probably would have obtained a better result had the attorney exercised adequate skill and care,*" RPS cannot show as a matter of law that its omission had no impact on Minkina's underlying case. Fishman, 396 Mass. 643, 647 (1986) (emphasis added). A "former client suffers a loss due to an attorney's negligence only if that negligence is shown to have made a difference to the client." Poly v. Moylan, 423 Mass. 141, 145 (1996) quoting Jernigan v. Giard, 398 Mass. 721, 723 (1986).

As noted in Minkina's expert opinion (Professor Samuel Estreicher) if RPS had not failed to argue the narrow scope of her contract's arbitration clause, RPS would have *substantially increased the likelihood* of a jury-tried civil action of Minkina' underlying employment discrimination case. (Ex.36 at ¶ 5). As such Minkina is not claiming that "the Court would have denied APG's motion to compel" *per se*. (RPS Memo. at p. 1). Rather, Minkina's position is that had RPS put forth Minkina's strongest argument, Minkina's chances for a positive outcome on the motion to compel would have been substantially increased. RPS's negligence denied her that chance.

As for the causal connection between RPS's negligence and Minkina's harm, the "logical explanation" that RPS claims is lacking is in fact manifest. First, Minkina expended significant sums to oppose APG's motion to compel which omitted Minkina's strongest argument. RPS compounded the error of omission when Minkina petitioned to the Single Justice of the Appeals Court. (Ex. 36 at ¶ 8). By failing to properly make the omitted argument in seeking single justice appellate review, RPS reduced "significantly the chances of a reversal of the motion to compel arbitration." (Ex. 36 at ¶ 8). Minkina expended legal resources for her futile appeal to the Single Justice.

Second, Minkina lost valuable rights when she lost her right to prosecute her case in court since the arbitration provision in her employment agreement precluded punitive damages. As Estreicher explained "the importance of preserving a jury trial for a plaintiff with Minkina's professional profile" was important and had Minkina "been able to obtain a jury trial in this case, she would likely have obtained a significantly larger award than she in fact obtained from the arbitrator. Because of the potential availability of punitive damages, and other factors, competent defense counsel, fearing such a prospect, would likely have settled the case at a level in excess of the award she received from the arbitrator."

Third, when Minkina was compelled into arbitration, she lost valuable substantive rights beyond losing the right to a jury trial. Once in the arbitration forum, the arbitrator limited claims and issues to APG's actions subsequent to August 1, 2004, when APG made the decision to fire Minkina. Thus, the arbitrator precluded any claims or liability evidence concerning the environmental issues at APG, its violation of Massachusetts' whistleblower statute, APG's gender discrimination feigned as a Bona Fide Occupational Qualification or that APG forced Minkina to relocate into the office slated for closing. Without these claims or evidence, any chance for an evaluation by the arbitrator concerning punitive damages was at best remote.

3. *RPS Was Negligent in Opposing APG's Motion to Compel, Not Predicting a Change in Massachusetts Law.*

In its motion papers, RPS incorrectly asserts that Minkina faults RPS for not predicting the Supreme Judicial Court's holding in the Warfield v. Beth Israel Deaconess Medical Center, 454 Mass. 390 (2009). After setting up this straw-man argument, RPS proceeds to knock it down. However, Minkina has never asserted that RPS failed to foresee the change in the law that the Warfield case established.

Minkina has asserted that RPS failed to properly distinguish the existing case law at the time when it failed to present Minkina's strongest argument in opposition to APG's motion to compel. As Estreicher noted, long before the Supreme Judicial Court's decision in Warfield (July 29, 2009), or the trial court decision presaging that holding (Sept. 12, 2008), "competent counsel would have understood that the Mugnano-Bornstein v. Crowell, 42 Mass. App. Ct. 347 (1997), on which the trial court in [the APG case] heavily relied, was plainly distinguishable, as the arbitration clause in that case referred to employment disputes and was not limited to claims arising under the employment agreement, as was true of Minkina's arbitration agreement" with APG.

C. Collateral Estoppel or Issue Preclusion Does Not Apply.

RPS argues that Minkina is collaterally estopped from "relitigating" whether APG's conduct warranted punitive damages.

In determining whether collateral estoppel or issue preclusion applies, a court looks to four factors. Alba v. Raytheon Co., 441 Mass.836, 841 (2004). First, whether there was a final judgment on the merits; second whether the issue decided was essential to the prior adjudication; third whether the issue decided in the prior adjudication was identical to the one presented in the latter action, and four, whether the party against whom estoppel is asserted was a party, or in privity with a party, to the prior adjudication. Id. Only factors two and three warrant discussion.

1. *Punitive Damages Were Neither Essential Nor Identical to Minkina's Arbitration.*

Citing Miles v. Aetna Cas. and Sur.Co., 412 Mass. 424, 427 (2004), RPS argues that the issue of punitive damages in Minkina's underlying arbitration was "the product of full litigation and careful decision." However, in Minkina's arbitration hearing, the arbitrator did not even consider punitive damages as before him. In his fifty-five page decision, the arbitrator dismissed consideration of Minkina's claim for punitive damages:

> [Minkina's] employment agreement precludes an award of punitive damages and this provision has already been ruled upon by the Superior Court , and review was denied by the Appeals Court.

(App. 21 at p.53). As such, Minkina was effectively denied from pursuing punitive damages. While Minkina attempted to present evidence of punitive damages at the arbitration hearing, the arbitrator, based on a AAA procedural rule, precluded events prior to August 1, 2004 from being arbitrated. (App. 21 at p.39). As a result, Minkina ability to present and prosecute claims arising from events between June 2002 and August 2004 were effectively foreclosed.

Although Minkina was able to prevail in arbitration on her retaliation claim under Chapter 151B, the arbitrator's preclusion of punitive damages was not essential to the case. Jarosz v. Palmer, 436 Mass. 526, 529 (2002) (holding that issue preclusion requires that "the issue be essential to the merits of the underlying case"). RPS's reliance on Bailey v. Metropolitan Property and Liability Ins. Co., 24 Mass.App.Ct. 34, 37 (1987) in support of issue preclusion is misplaced.

Bailey involved a personal injury plaintiff who sued to recover on underinsurance clauses in two of defendant's insurance policies, after receiving an arbitration award from the defendant. The Bailey court correctly found that issue preclusion barred plaintiff's underinsurance claim since he "had a full and fair opportunity to litigate the issue [of damages] and the issue was actually decided by the arbitrator." Id. In fact, damages was the only issue the Bailey arbitrator was charged to decide. Id. at 38.

Whereas in Minkina's case, the arbitrator deemed punitive damages precluded from his deliberations and he barred all of Minkina's claims arising prior to August 1, 2004. (Ex.21, p.53). In addition, the arbitrator had to adjudicate numerous other issues in the case including liability, compensatory damages, attorney's fees and arbitration cost allocation. Thus, it cannot

be seriously argued that Minkina "had a full and fair opportunity to litigate the issue" of punitive damages or that the issues were essential or identical to underlying proceeding.

2. *Lack of Review of the Arbitration Precludes Collateral Estoppel.*

Collateral estoppel or issue preclusion cannot apply where there is no "avenue for review of the prior ruling on the issue." Sena v. Commonwealth, 417 Mass. 250, 260 (1994). Minkina asserts that judicial review of an arbitrator's decision is so limited (i.e. essentially limited to fraud) that it provides no meaningful review. As such, RPS's issue preclusion defense should be denied for this reason also.

While the Bailey court did state that the plaintiff had a "right to review of the arbitrator's decision pursuant to G.L. c. 251 § 12" case law since 1987 (when Bailey was decided) casts a significant shadow over whether an arbitrator's decision should have any preclusive effect. Bailey at 38. In Jarosz v. Palmer, 436 Mass. 526, 535 (2002) the Supreme Judicial Court found that the prospect of interlocutory relief was "so limited" that it was not sufficient to "invoke the doctrine of issue preclusion." Id. As with interlocutory relief, the prospect of a litigant seeking review of an arbitrator's ruling is at best remote. In actuality, it is far more difficult to obtain review of arbitrator's decision than to obtain interlocutory relief from an appellate court. As such, RPS's assertion of issue preclusion should be denied.

D. Minkina's Claims Are Not Speculative.

As in its other motions, RPS misstates Minkina's position in order to paint itself a more attractive target to attack. Minkina has not claimed that "but for" RPS's negligence "Minkina's case *would have* remained in court and that she *would have* obtained a larger jury verdict or settled her case for more than the arbitrator's award because of the possible availability of punitive damages." (RPS Memo. at p.17) (emphasis added). Rather, Minkina has asserted, and her expert witness Samuel Estreicher has opined, that if RPS had not failed to identify and to

press Minkina's best argument in opposing APG's motion to compel, it would have substantially increased the likelihood of a jury-tried civil action of her employment discrimination and other statutory employment claims. Had Minkina been able to obtain a jury trial in this case, she would likely have obtained a significantly larger award than she in fact obtained from the arbitrator. In addition because of the potential availability of punitive damages, and other factors, competent defense counsel, fearing such a prospect, would likely have settled the case at a level in excess of the award she received from the arbitrator. This meets the requirements set forth in Fishman v. Brooks, 396 Mass. 643, 647 (1986) ("[a] plaintiff who claims that his attorney in the prosecution of a tort claim will prevail if he proves that he probably would have obtained a better result had the attorney exercised adequate skill and care.").

RPS also mischaracterizes Minkina's position by asserting that Minkina's claim is "based on a theory that a trial in a different venue would have produced a better outcome." (MSJ at p.17). Again, Minkina is claiming no such thing. Rather, Minkina is only asserting the obvious— that is had her case remained in court her case would have likely had a greater settlement or verdict value given among other things the potential for punitive damages. Since the arbitrator had barred Minkina's claims arising from events prior to August 1, 2004, and had deemed punitive damages unavailable, the harm her case sustained when RPS omitted a critically important argument in opposing APG's motion to compel was real.[7]

E. Minkina Has Sustained Damages As a Result of RPS's Unilateral Withdrawal

Minkina claims that RPS's unilateral withdrawal of its representation of Minkina was a breach of its duty to her and prejudiced and harmed her, especially since Minkina specifically requested that RPS not discharge her.

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[7] Since neither Minkina nor RPS selected arbitration as the forum, RPS's reliance on Mallen & Smith, Legal Malpractice, Vol. 4 § 33.:20 is not on point. Section 33:20 analyzes the "attorney's initial decision in selecting the appropriate court in which to institute the action...If the error is one of law and results from negligence, the attorney can be liable for damages. Causation, however, may be difficult to prove and speculative."

RPS's termination of Minkina arose after Frankl incorrectly informed Minkina of an error she had made concerning Minkina's responsibility for the arbitration costs. When Frankl notified Minkina of her mistake, Minkina was understandably upset and she pressed Frankl on the question (Minkina had previously brought several billing errors in RPS's favor to Frankl's attention). (Ex. 37, 39). After a brief email exchange, Frankl essentially told Minkina "if you don't like it you can get another lawyer." (Ex. 44). When Minkina complained to the partners at RPS, her representation was terminated, despite Minkina's pleas to the contrary.

RPS claims that it terminated Minkina's representation because of deterioration of the relationship with the client ("As the attorney-client relationship had clearly broken down, on May 24, 2006, RPS informed Minkina of its intention to withdraw from representing her.") (SOF ¶ 23). However, under the Massachusetts Rules of Professional Conduct, an attorney may not terminate an agreement to represent a client simply because the attorney no longer wishes to continue the representation. In re Kiley, 459 Mass. 645, 649 (2011) citing, Rusinow v Kamara, 920 F.Supp. 69, 72 (D.N.J. 1996) ("Sudden disenchantment with a client or a cause is no basis for withdrawal. Those who cannot live with risk, doubt and ingratitude should not be trial lawyers"). "Even if an attorney has not entered an appearance on behalf of the client, the attorney may withdraw in accordance with rule 1.16 only if the withdrawal will not have a material adverse effect on the client's interests or if at least one of the circumstances requiring or permitting withdrawal is present. Id.

Although RPS claims it "delayed its withdrawal until Minkina found other counsel, and attempted to help Minkina locate a new attorney." (SOF ¶ 27). In reality, RPS presented Minkina with a command to find another attorney and had refused to even meet with her or consider any other alternatives. RPS was unconcerned that Minkina might not be able to find new counsel at a critical

point in her case, or about the financial and emotional impact on her.[8] RPS never requested permission from the court to withdraw from Minkina's case before it unilaterally terminated the representation. Instead it merely "delayed its withdrawal" until Minkina found a new counsel.

As the Kiley court noted: "Regardless whether a lawyer must or may withdraw in these circumstances[9], where the lawyer has entered an appearance on behalf of the client and "the rules of a tribunal" require approval of the withdrawal by the tribunal, the lawyer shall not withdraw the appearance without the tribunal's permission. Kiley at 648-649 citing Mass. R. Prof. C. 1.16 (c).

Minkina claims that RPS unilateral termination of Minkina's representation was a clear violation of the Massachusetts Rules of Professional conduct and therefore expert opinion evidence is not required. It has been a well-established exception to the rule requiring expert's testimony in a legal malpractice case that where the attorney's breach of duty is so clear or obvious, that negligence may be inferred by the jury based. Pongonis v. Saab, 396 Mass.1005 (1985).

RPS's unwarranted termination of representation plagued Minkina long after she secured new counsel. When Minkina's post-RPS counsel eventually filed with the AAA, the AAA case manager made a determination that Minkina's employment contract was Employer Promulgated. However APG was able to challenge that decision with arbitrator because of a July 2006 AAA

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[8] During RPS' representation another RPS attorney, Robert Mantell had been involved in the case (arguing the opposition to the motion compel and petitioning to the Single Justice). Minkina had sought to discuss with RPS having Mantell replace Frankl but RPS never considered it.

[9] Where withdrawal will have a material adverse effect on the client's interests, a lawyer may withdraw only if at least one of the following circumstances is present: (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (2) the client has used the lawyer's services to perpetrate a crime or fraud; (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent; (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or(6) other good cause for withdrawal exists." Mass. R. Prof. C. 1.16(b).

rule change allowing such challenges. (Ex. 46). The delay in filing of the case with the AAA (caused by RPS' unilateral termination of Minkina requiring her to retain new counsel) allowed APG this opportunity, which ended up costing Minkina thousands of dollars as well as significant emotional stress.

Minkina's case was delayed by RPS's unilateral withdrawal due requiring Minkina to locate successor counsel. See Kourouvacilis v. AFSCME, 65 Mass.App.Ct. 521, 533 (2006) (noting that the plaintiff was "put to the unanticipated burden of retaining new counsel in mid-stream" upon counsel's withdrawal which "inevitably results in added transition costs"). When Minkina eventually retained successor counsel, she incurred significant legal costs. (Section A.2. *supra*).

1. *Minkina's Emotional Distress*

Minkina alleges that as a result of RPS's unilateral decision to withdraw their representation of Minkina, she suffered emotional distress. For a claim of negligent infliction of emotional distress, a plaintiff must show not only negligence, emotional distress and causation, but also "physical harm manifested by objective symptomatology." Sullivan v. Boston Gas. Co., 414 Mass. 129 (1993). Minkina has testified that RPS's withdrawal and abandonment caused her severe emotional distress which resulted in Minkina sustaining headaches, anxiety, vertigo, facial numbness, neck pain and arm tingling. (Ex. 48). As a result of these and other symptoms, Minkina conferred with Dr. Magdy Selim, a neurologist who has treated Minkina since June 2003. Minkina underwent a series of tests which ruled out "any structural, vascular or inflammatory condition as a cause for her symptoms" but notes that Minkina was "under increasing tension and stress at that time." (Ex. 48 at p.1). Although Selim's report does not state that it was RPS's unilateral withdrawal that led to this stress, Minkina has testified that it was RPS's termination which significantly exacerbated her stress and caused her great anxiety

and distress. This evidence meets the "physical harm manifested by objective symptomatology" requirement. (Ex. 53 at. P.53).

Contrary to RPS's position Massachusetts bars a claim for negligent infliction of emotional distress arising out of an attorney malpractice involving only an economic interest, there is Massachusetts authority recognizing such claims. Lingis v. Waisbren, 2006 WL 452942, * (Mass.Super.) (court awarded $100,000 in damages to client as a result of attorney's infliction of emotional distress).

WHEREFORE, plaintiff Nataly Minkina respectfully requests that the court deny defendants' motion for summary judgment.

Respectfully submitted,
NATALY MINKINA
By her attorneys,

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303 Congress Street
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June 20, 2012

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon opposing counsel by U.S. Mail and email on June 20, 2012.

Christopher Maffucci

8209.1/533239.1

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

SUPERIOR COURT
CIVIL ACTION NO. 2009-1961-C

NATALY MINKINA, M.D.,
Plaintiff,

v.

LAURIE A. FRANKL, ESQ., JONATHAN J. MARGOLIS, ESQ., and RODGERS, POWERS & SCHWARTZ, LLP,
Defendants.

CONSOLIDATED STATEMENT OF UNDISPUTED FACTS WITH RESPECT TO DEFENDANTS LAURIE A. FRANKL, ESQ., JONATHAN J. MARGOLIS, ESQ. AND RODGERS, POWERS & SCHWARTZ, LLP'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Superior Court Rule 9A(b)(5), plaintiff Nataly Minkina responds to the defendants, Laurie A. Frankl, Esq., Jonathan J. Margolis, Esq. and Rodgers, Powers & Schwartz, LLP (collectively, "RPS") Statement of Facts and Appendix of Exhibits with respect to defendants' Motion for Summary Judgment as to the Plaintiff, Nataly Minkina's First Amended Complaint against them:

1. In June 2002, Minkina accepted a full-time position at Affiliated Physicians Group ("APG"), a physicians' group affiliated with Beth Israel Deaconess Medical Center. Exhibit 1 (Employment Agreement).

Response: Minkina does not dispute.

2. Minkina's Employment Agreement included the following language:

> [A]ny dispute arising out of or relating to this Agreement, including without limitation any dispute regarding the validity, breach of or termination of this Agreement . . . . ***shall be finally settled by arbitration conducted expeditiously in accordance with the rules of the American Association*** (the "[AAA] Rules") . . . .

> The arbitrator is not empowered to award damages in excess of compensatory damages. (emphasis added)

Exhibit 1, ¶ 18 (Employment Agreement).

Response: Minkina does not dispute that Exhibit 1 is a true and accurate copy of her employment contract with APG.

3. In September 2004, APG terminated Minkina's employment. Exhibit 2, ¶¶ 78-79. (Complaint Against APG).

Response: Minkina does not dispute that APG notified her on September 30, 2004 of the termination of her employment effective November 5, 2004, and that Minkina was terminated without cause due to the Pond Avenue office closing. Exhibit 34 (APG termination Letter)

4. On December 17, 2003 Minkina (who was represented by counsel other than RPS) filed a discrimination claim against APG with the MCAD. Exhibit 2, ¶ 52 (Complaint Against APG).

Response: Minkina does not dispute that attorney Nance Lyons filed a discrimination claim against APG with the MCAD on or about December 17, 2003.

5. Minkina – still represented by prior counsel – removed the matter to the Superior Court in November 2004. Exhibit 2 (Complaint Against APG).

Response: Minkina does not dispute that attorney Andrew Crouch removed the MCAD matter to Superior Court on or about November 18, 2004.

6. Minkina's Complaint repeatedly referenced and sought relief for APG's termination and breach of the Employment Agreement. Exhibit 2, ¶¶ 25, 31, 32, 51, 80 (Complaint Against APG).

Response: Minkina does not dispute that she sought relief for

APG's termination and APG's breach of the Employment Agreement, in addition to seeking relief under G.L. c. 151B.

7. APG filed an answer, claimed a jury and sought discovery. Exhibit 3, at 2 (Memorandum of Decision and Order on Motion to Compel Arbitration).

Response: Minkina does not dispute that APG filed answer with a jury demand, unsuccessfully moved to dismiss Minkina's G.L. c. 151B claims and served discovery.

8. In May 2005, Minkina retained RPS. Exhibit 4 (RPS' Notice of Appearance).

Response: Minkina does not dispute that on or about May 17, 2005, she retained the services of RPS. Exhibit 35 (RPS fee agreement)

9. Nine days after RPS filed its appearance, APG moved to compel arbitration. Exhibit 5 (Motion to Compel).

Response: Minkina does not dispute that on June 9, 2005, APG served its motion to compel arbitration on RPS.

10. RPS opposed APG's motion to compel arbitration on the grounds that (1) the arbitration clause's limitation on punitive damages rendered the agreement unconscionable and unenforceable; (2) APG's delay in demanding arbitration, and extensive participation in the litigation process constituted a waiver of its right to arbitrate the claims; (3) APG's failure to comply with the procedural terms of the arbitration clause also effected a waiver of the arbitration clause; and (4) the arbitration clause did not apply to Minkina's claims against APG's president, Dr. Jeffrey Liebman. Exhibit 6 (Opposition to Motion to Compel).

Response: Minkina does not dispute that on June 27, 2005, RPS served Minkina's

opposition to the motion to compel on APG and that RPS's argued in opposition that the arbitration clause did not allow for an award of punitive damages or attorney's fees and was therefore unconscionable and unenforceable, along with the arguments stated above.

11. While awaiting the Court's decision on APG's motion, RPS, on Minkina's behalf, conducted discovery on her claims. Exhibit 7 (Interrogatories and Document Requests); Exhibit 8 (First Two Pages of Transcript of Deposition of Weihong Zheng).

Response: Minkina does not dispute that on July 26, 2005, RPS served edited discovery requests that had been drafted by attorney Crouch and that on October 28, 2005, the deposition of Dr. Weihong Zheng began.

12. In July 2005, Minkina served interrogatories and requests for production of documents on Dr. Liebman and APG. Exhibit 7 (Interrogatories and Document Requests).

Response: Minkina does not dispute that in July 2005, RPS served edited interrogatories and requests for production of documents upon Dr. Liebman and APG.

13. In October 2005, Minkina also took the deposition of one of her former APG colleagues, Weihong Zheng. Exhibit 8 (First Two Pages of Transcript of Deposition of Weihong Zheng).

Response: Minkina does not dispute that the deposition of Dr. Weihong Zheng began on October 28, 2005.

14. In July and November 2005, RPS defended Minkina's deposition. Exhibit 9 (First Page of Transcripts of Deposition of Nataly Minkina).

Response: Minkina does not dispute this statement.

15. In November 2005, the Superior Court (Hines, J.) heard oral arguments on APG's motion to compel. Exhibit 10, ¶ 22 (First Amended Complaint, *Minkina v. Frankl, et al.*).

Response: Minkina does not dispute that on November 16, 2005 RPS attorney Robert Mantell argued Minkina's opposition to APG's motion to compel and that RPS attorney Jonathan Margolis attended the hearing. (SOF ¶ 93)

16. In February 2006, the Court issued a Memorandum of Decision allowing the motion; Judge Hines based her ruling in part on the "strong presumption of arbitrability." Exhibit 3, at 9 (Memorandum of Decision and Order on Motion to Compel).

Response: Minkina does not dispute that the quoted language is from the Court's Memorandum of Decision.

17. RPS filed a timely single justice petition under G.L. c. 231, § 118, on Minkina's behalf, which was denied in April 2006. Exhibit 11 (Single Justice Petition and Memorandum); Exhibit 12, at NM 001130-31 (Notice of Docket Entry – Denial of Single Justice Petition, April 14, 2006).

Response: Minkina does not dispute this statement.

18. Minkina chose not to file an appeal with the Supreme Judicial Court. Exhibit 12, at NM 001127 (Email from Minkina to Robert Mantell Dated April 18, 2006).

Response: Minkina does not dispute this statement.

19. In May 2006, Minkina directed RPS to commence arbitration proceedings against APG. Exhibit 10, ¶¶ 28-29 (First Amended Complaint, *Minkina v. Frankl, et al.*).

Response: Minkina does not dispute this statement but RPS never initiated arbitration proceedings.

20. In doing so, on May 19, 2006, Frankl told Minkina that Minkina would only need to pay a small filing fee to the AAA. Exhibit 10, ¶ 27 (First Amended Complaint, *Minkina v. Frankl, et al.*).

Response: Disputed. On May 19, 2006, "Frankl again told Minkina that the

arbitrator's fees would be paid by APG (both Frankl and Margolis advised Minkina from the very beginning of RPS's representation that APG would be responsible for arbitration costs and that Minkina would pay only a small filing fee..."). Exhibit 10, ¶ 27.

21. Four days later, Frankl informed Minkina that the AAA's rules required Minkina to split the arbitration costs equally with APG. Exhibit 10, ¶ 30 (First Amended Complaint, *Minkina v. Frankl, et al.*).

Response: Disputed. "On May 23, 2006, Frankl notified Minkina that she had erred about APG being required to pay for the arbitrator....[and that] Minkina and APG would be required to split the costs of the arbitrator with Minkina having to pay approximately $30,000 in unanticipated arbitration fees." Exhibit 10, ¶ 30.

22. In response, Minkina sent an email to RPS' partners in which she complained of Frankl's "gross negligence and unprofessionalism" and "mistaken actions" and accused Frankl of "being more concerned about complying with APG's attorney [sic] demands than helping my case." Exhibit 13 (Minkina Email Dated May 24, 2006).

Response: Disputed. The email was sent after Frankl advised Minkina that if she was unhappy with Frankl's service, she could retain a new attorney. The quoted content of Exhibit 13 is not disputed. (SOF ¶ 105)

23. As the attorney-client relationship had clearly broken down, on May 24, 2006, RPS informed Minkina of its intention to withdraw from representing her. Exhibit 14 (Margolis Email Dated May 24, 2006).

Response: Disputed. On May 24, 2006, Margolis signaled his intent to unilaterally withdraw RPS's representation of Minkina and against her express pleas to the contrary.

24. In July 2006, Minkina filed a complaint with the Massachusetts Board of Bar Overseers (the "BBO") in which she alleged that RPS violated the Rules of Professional Conduct (the "Rules") in withdrawing from representing her. Exhibit 15, Vol. II, 125:1-127:5 (Transcript of Deposition of Nataly Minkina).

Response: Minkina does not dispute this statement but the complaint was filed with the Office of Bar Counsel ("OBC").

25. On October 30, 2006, the BBO issued a written decision in which it determined that RPS' withdrawal did not violate the Rules and may have been required under them in light of the irretrievable breakdown in Minkina's relationship with RPS. Exhibit 16 (BBO Decision Issued by Susan Strauss Weisberg, Assistant Bar Counsel, Dated October 30, 2006).

Response: Disputed. The OBC letter to Minkina states that "not every error or omission by an attorney constitutes a violation of these rules calling for the imposition of discipline. In essence, your allegations of error are claims of negligence or malpractice for which individual remedies exist, and claims of that nature should be decided by a court in the first instance. This office is a disciplinary agency only. We cannot provide legal advice or representation, and we do not express any opinion about the merits of any legal claims...." Exhibit 16.

26. Minkina's subsequent requests that the BBO reconsider and that the Supreme Judicial Court overturn the decision were denied. Exhibit 17 (BBO Denial of Request for Review, Dated December 1, 2006); Exhibit 18 (Letter from Pamela Lyons, Supreme Judicial Court Administrative Attorney, Dated January 30, 2007).

Response: Minkina does not dispute part of this statement, It was the administrative attorney of the SJC, Pamela Lyons, who rejected Minkina's request.

27. RPS attempted to help Minkina locate a new attorney. Exhibit 19 (Emails from Jonathan J. Margolis to Minkina, Dated June 1-2, 2006).

Response: Disputed. RPS merely provided the of names of two attorneys to possibly replace RPS in representing Minkina, neither were retained by Minkina.

28. In June 2006, Minkina retained counsel at the law firm of Zalkind, Rodriguez, Lunt, & Duncan, LLP. Exhibit 20 (Email from Malick Ghachem to Minkina, Dated June 9, 2006).

Response: Disputed. Minkina had retained the Zalkind law firm prior to June 9, 2006 for another matter. Minkina does not dispute that on or about June 9, 2006, Minkina retained the Zalkind law firm to prosecute her case against APG.

29. In October 2007, Minkina filed for arbitration of her claims against APG before the AAA. Exhibit 10, ¶ 37 (First Amended Complaint, *Minkina v. Frankl, et al.*).

Response: Minkina does not dispute that the matter was formerly filed with the AAA on October 26, 2007.

30. Mark Irvings, Esq. (the "Arbitrator") conducted arbitration hearings on June 2-3 and September 15, 2008. Exhibit 10, ¶ 37 (First Amended Complaint, *Minkina v. Frankl, et al.*); Exhibit 21 (Opinion and Interim Award).

Response: Minkina does not dispute this statement.

31. As a result of the 17-month delay in commencing arbitration, the Arbitrator ruled that certain of Minkina's claims were barred by the statute of limitations. Exhibit 21, at 38-41 (Opinion and Interim Award).

Response: Disputed. Even though Minkina timely initiated her action against APG in the MCAD in December 2003 and removed the matter to Superior Court in November 2004, the Arbitrator determined that under AAA rule 4(b)(i)(1) only events after August 1, 2004 were arbitrable . Exhibit 21, at p. 39. (Opinion and Interim Award)

32. Specifically, the Arbitrator did not permit Minkina to present evidence regarding APG's alleged discriminatory conduct from prior to May 2004. Exhibit 21, at 38-41 (Opinion and Interim Award).

Response: Disputed. The Arbitrator did not permit Minkina to present evidence of APG's wrongful conduct prior to August 1 2004. Exhibit 21, at 38-41.

33. During the arbitration hearings, the parties addressed whether Minkina was entitled to a punitive damages award. Exhibit 22, Vol. 1 –19:3-17 (Arbitration Transcript Excerpts).

Response: Disputed. Exhibit 22 only shows that punitive damages were mentioned by Minkina's counsel during opening statements.

34. Before the arbitration hearings, Minkina submitted a "Specification of Claims" to the Arbitrator in which she requested an award of punitive damages. Exhibit 23 (Specification of Claims, Dated May 16, 2008).

Response: Minkina does not dispute this statement.

35. Specifically, she argued that:

> [a]n employee's right to punitive damages pursuant to Chapter 151B cannot be waived by a mandatory pre-dispute arbitration clause. Arbitration provisions that waive substantive statutory rights have consistently been found unenforceable . . . . Minkina is entitled to statutory damages for Respondents' oppressive conduct done in reckless disregard of the plaintiff's rights or in callous indifference to the plaintiff.
>
> Exhibit 23, at 4 (Specification of Claims, Dated May 16, 2006).

Response: Disputed. Paragraph 35 does not fully quote from Minkina's Specification of Claims and omits a significant portion of the paragraph and then blends the next paragraph into the quoted paragraph. As such, it does not accurately quote from Minkina's Specification of Claims. Exhibit 24 at p.4.

36. During opening statements at the arbitration hearings, Minkina's counsel also argued that her claims warranted an award of punitive damages. Exhibit 22, Vol. 1 – 19:3-17 (Arbitration Transcript Excerpts).

Response: Minkina does not dispute that her counsel recited certain facts that supported punitive damages during opening statements.

37. Minkina's counsel described the evidence which would support a punitive damages award as follows:

> the only – the main piece of evidence we have regarding what might be appropriate for punitive damages would be in the fall of 2004, APG filed a physician's (sic) statement with the MCAD saying that Minkina had suffered no adverse employment action when they had already made the decision to close the Pond Avenue office. And that was the decision to terminate her, even though they hadn't notified her yet of the decision, they had already made the decision.

Exhibit 22, Vol. 1 – 19:3-17 (Arbitration Transcript Excerpts).

Response: Paragraph 37 does not fully quote from the transcript as it omitted the words "I'd say probably" at the beginning of line 8, page 19. Minkina does not dispute, given that the Arbitrator prohibited evidence of APG's wrongful conduct prior to August 1, 2004, that the remaining quoted text described the evidence which would support a punitive damages. Exhibit 22.

38. During arbitration, Minkina presented evidence which she believed supported her punitive damages claim. Exhibit 22, Vol. 1 – 19:3-17; Vol. 3 – 130:21-137:15. (Arbitration Transcript Excerpts).

Response: Minkina does not dispute that during the Arbitration she was allowed to present some evidence of punitive damages, but that she was prohibited from introducing

sufficient evidence of APG's wrongful conduct prior to August 1, 2004 which would have supported her claim for punitive damages.

39. Sworn testimony was given by: (1) Minkina; (2) her husband, Leonid Winestein; (3) APG's Medical Director, David Ives; (3) two former colleagues of Minkina: David Fairchild, M.D. and Weihong Zheng, M.D.; and (5) Liebman, Minkina's direct supervisor. Exhibit 15, Vol. II, 161:2-6 (Transcript of Deposition of Nataly Minkina).

Response: Minkina does not dispute this statement that during discovery and the arbitration, the individuals identified in paragraph 39 testified along with a defense expert, Dr. David Fairchild.

40. After filing her arbitration claim, Minkina also took depositions of Liebman and two other doctors who worked with her at APG, Stuart Bless and Joseph Pines. Exhibit 24 (Cover Pages to Transcripts of Liebman, Bless and Pines Depositions).

Response: Minkina does not dispute this statement.

41. Minkina also served two sets of interrogatories and requests for production of documents on APG and Liebman. Exhibit 25 (Discovery Requests).

Response: Minkina does not dispute this statement.

42. In this matter, Minkina has testified that she was satisfied with how her arbitration counsel presented evidence at the hearings and cannot identify any other witnesses who she would have called had her case proceeded to a jury. Exhibit 15, Vol. II, 162:1-172:24 (Transcript of Deposition of Nataly Minkina).

Response: Minkina does not dispute that she was satisfied with her attorney's presentation of evidence at the arbitration but disputes that during her deposition in February

2011 she could not identify any other witnesses she would have called at the arbitration or at a trial. She would have called the air conditioning technician. Exhibit 15, Vol. II, 162:22 – 163:1.

43. Following the arbitration hearings, Minkina submitted 71 pages of proposed conclusions of law which included an analysis of evidence allegedly supporting a punitive damages award. Exhibit 26 (Proposed Conclusions of Law).

Response: Minkina does not dispute that on pages 68 to 70 of her proposed conclusions of law, she argued that she was entitled to punitive damages.

44. Minkina presented 18 pages of legal and factual analysis of her claimed damages. Exhibit 26, at 53-71 (Proposed Conclusions of Law).

Response: Minkina does not dispute this statement.

45. Her brief contained two pages of argument regarding punitive damages; she claimed that she was entitled to them "because [APG] misled the MCAD in an attempt to get her case dismissed." Exhibit 26, at 68-70 (Proposed Conclusions of Law).

Response: Paragraph 45 does not sufficiently quote the text which set forth that "Dr. Minkina is entitled to punitive damages because [APG] misled the MCAD in an attempt to get her case dismissed. Mr. Liebman made the decision to close the Pond Avenue office and terminate Dr. Minkina in late August 2004. [citation omitted]. However, notwithstanding the fact that this decision had been made, on September 17, 2004, [APG] filed an Amended Verified Position Statement in which they argued that Dr. Minkina's claims were meritless because, inter alia, she had not been subjected to an adverse employment action. [citation omitted]." Exhibit 26 at 69-70.

46. In March 2009, the Arbitrator issued a decision in which he found that APG had engaged in unlawful employment practices against Minkina. Exhibit 21 (Opinion and Interim Award).

Response: Minkina does not dispute this statement. The Arbitrator's decision found, among other things, "that [APG] retaliated against Minkina, in violation of c. 151B, when they terminated her employment." Exhibit 21 at p.49.

47. The Arbitrator denied Minkina punitive damages, holding that:

> The employment agreement precludes an award of punitive damages and this provision has already been ruled upon by the Superior Court, and review was denied by the Appeals Court. In any event, Minkina prevailed on the basis of a burden-shifting analysis, not because there was clear evidence of the type of outrageous conduct which would justify an award of punitive damages.

Exhibit 21, at 53 (Opinion and Interim Award).

Response: Disputed. The Arbitrator never considered punitive damages as part of Minkina's claims. Exhibit 21, at 53 (Opinion and Interim Award).

48. The Arbitrator did award Minkina damages, arbitration fees and attorney's fees as follows:

(1) $102,456.05 in compensatory damages, emotional distress damages and pre-judgment interest;
(2) $95,192.75 in attorneys' fees for representation up through her initial petition for attorneys' fees;
(3) $33,940 in pre-fee petition costs;
(4) $1,381.05 in post-judgment interest on the damage and pre-judgment interest amount;
(5) $5,785.15 in post-judgment interest on the pre-fee petition legal fees and costs;
(6) $4,547.50 in post-March 20, 2009 fees and costs; and
(7) Reimbursement of the $23,187.50 in arbitration fees and costs which she incurred.

Exhibit 27, at 12-13 (Ruling on Attorneys' Fees and Costs and Final Award).

Response: Minkina does not dispute this statement but states that Arbitrator's award of $95,192.75 in attorneys' fees was the sum after the Arbitrator discounted Minkina's fee petition by more than 50% of Minkina's petition .

49. In total, Minkina recovered over $266,000. Exhibit 27, at 12-13 (Ruling on Attorneys' Fees and Costs and Final Award).

Response: Minkina does not dispute this statement.

50. Minkina accepted APG's payments of these damages, fees and costs. Exhibit 28, ¶¶ 3-5 (Affidavit of Sally O'Neill).

Response: Minkina does not dispute this statement but states that since she had no realistic expectation of any judicial review of the Arbitrator's decision, she had no choice in accepting or rejecting APG's payments based on the Arbitrator's decision.

51. Minkina did not move to vacate or modify the Arbitrator's award by August 17, 2009. Exhibit 29 (Memorandum of Decision and Order on Plaintiff's Motion for Relief from Judgment).

Response: Minkina does not dispute this statement.

52. Instead, on August 5, 2009, Minkina filed with the Arbitrator a "Limited Motion to Correct and/or Reconsider the Arbitrator's Ruling on Attorney's Fees," in which she argued that, under *Warfield v. Beth Israel Deaconess Medical Center*, 454 Mass. 390 (2009), the arbitration clause in her Employment Agreement did not apply to her claims against APG. Exhibit 30 (Limited Motion to Correct and/or Reconsider).

Response: Minkina does not dispute the statement that "on August 5, 2009, Minkina filed with the Arbitrator a 'Limited Motion to Correct and/or Reconsider the Arbitrator's Ruling on Attorney's Fees,' but denies RPS's summation of what Minkina argued in the motion.

53. In the motion for reconsideration, Minkina only sought recovery of attorney's fees which she incurred in opposing APG's motion to compel arbitration. Exhibit 30 (Limited Motion to Correct and/or Reconsider).

Response: Disputed. Minkina denies the statement in paragraph 53 that she "only sought recovery of attorney's fees which she incurred in opposing APG's motion to compel arbitration."

54. The Arbitrator denied the motion. Exhibit 31 (Decision Denying Limited Motion to Correct and/or Reconsider).

Response: Minkina does not dispute this statement.

55. In 2010, Minkina filed a Motion for Relief from Judgment with the Superior Court, which the Court (Muse, J.) denied on the basis that "there was no appeal from the arbitration award, which was meant by the parties to be a final resolution of their dispute." Exhibit 32 (Motion for Relief from Judgment); Exhibit 29 (Memorandum of Decision and Order on Plaintiff's Motion for Relief from Judgment).

Response: Minkina does not dispute this statement.

56. In May 2009 (after the arbitrator had ruled in her favor on her claims against APG), Minkina filed this legal malpractice lawsuit in which she brings four claims: (1) Professional Negligence (Count I); (2) Negligent Misrepresentation (Count II); (3) Breach of Fiduciary Duty (Count III); and (4) Negligent Infliction of Emotional Distress (Count IV). Exhibit 10, ¶¶ 39-57 (First Amended Complaint).

Response: Minkina does not dispute this statement.

57. Minkina has disclosed an expert, Samuel Estreicher, who has opined that if RPS had included different legal arguments in the opposition to APG's motion to compel arbitration, the motion would have been denied and a jury would have awarded Minkina punitive damages.

Exhibit 33 (Plaintiff Nataly Minkina's Second Supplemental Response to Defendants' First Set of Interrogatories).

Response: Minkina disputes that Estreicher stated "the motion [to compel arbitration] would have been denied and a jury would have awarded Minkina punitive damages." Rather, Estreicher stated that "RPS violated its duty of care to Dr. Minkina…because [RPS] failed to make and press an argument that would have substantially increased the likelihood of a jury-tried civil action of her employment discrimination and other statutory claims." Exhibit 33, Estreicher Opinion at paragraph 5.

58. Minkina has identified her physician, Dr. Magdy Selim, as her sole expert witness on emotional distress damages but admitted at her deposition that she never discussed RPS' withdrawal with him and that he would not be able to testify that RPS' conduct caused her emotional distress. Exhibit 15, Vol. II, 63:14-16, 65:17-22 (Transcript of Deposition of Nataly Minkina.)

Response: Minkina does not dispute that she did not tell Dr. Selim about RPS' withdrawal from representation, but Minkina states that she informed Dr. Selim that during that time period there was "a lot of stress in [her] life…And [she] felt horrible… [and she] had emotional distress caused by …[her]fight with APG, but it was made much worse by the actions of RPS." Exhibit 15, Vol. II; 63:14-16, 65:17-22.

Plaintiff's Additional Statement Facts

59. On or about June 4, 2002, Minkina was hired by APG as physician specializing in internal medicine. Exhibit 1 (APG employment contract)

Response:

60. In October 2002, Minkina began to notice a noxious odor in APG's Chestnut Hill office where she practiced which by February 2003 had grown more frequent and stronger. Minkina began to have a physical reaction to the odors an experienced headaches, nausea and breathing difficulty. Exhibit 2, ¶7-8 (Complaint against APG)

Response:

61. Minkina notified APG about the situation and APG assured Minkina that the matter would be investigated and the problems fixed. Exhibit 2, ¶9-11 (Complaint against APG)

Response:

62. At a meeting in August 2003, APG requested that Minkina not contact regulatory agencies about her complaints. Exhibit 2, ¶12 (Complaint against APG)

Response:

63. In August 2003, APG asked Minkina to relocate to another office on a trial basis while air quality issues were addressed. APG assured Minkina that if she were not satisfied with the new office she could return to the Chestnut Hill office. Exhibit 2, ¶13-15 (Complaint against APG)

Response:

64. After declining APG's offer, Minkina noticed other staff members began treating Minkina in a negative fashion. APG accused Minkina of using her health as an excuse to leave the practice. Exhibit 2, ¶17-18 (Complaint against APG)

Response:

65. Sometime thereafter Minkina filed a complaint with OSHA. After investigating, OSHA found several problems at Minkina's work site and OSHA reported that several APG employees at the Chestnut Hill office told OSHA investigators that they were afraid to come

forward with their own allegations after seeing how Minkina had been treated. Exhibit 2, ¶20-21 (Complaint against APG)

Response:

66. In October 2003, Minkina learned that APG announced at a staff meeting that Minkina would be moving her practice full-time to APG's Pond Avenue office. Exhibit 2, ¶39 (Complaint against APG)

Response:

67. When Minkina asked APG for the reasons why she was permanently transferred to the Pond Avenue office, APG responded that it had hired a male physician to replace Minkina at the Chestnut Hill office. APG also informed Minkina that a male doctor can do a better job attracting and retaining male patients. Exhibit 2, ¶47-50 (Complaint against APG)

Response:

68. In December 2003, Minkina filed a complaint with the MCAD. At the time she filed the MCAD complaint, Minkina was represented by Attorney Andrew Crouch. Exhibit 2, ¶52 (Complaint against APG)

Response:

69. After Minkina filed her MCAD complaint, APG began retaliating against Minkina by interfering with Minkina's involvement with Harvard Medical School's clinical preceptor program and her participation in its clinical teaching program. Exhibit 2, ¶53-59 (Complaint against APG)

Response:

70. APG further retaliated against Minkina by interfering with her ability to see and treat patients. After APG permanently relocated Minkina to the Pond Avenue office, it did not

provide her office space, proper equipment to practice medicine or a telephone and computer. Exhibit 2, ¶62-65 (Complaint against APG)

Response:

71. At the end of 2003 to early 2004, APG decided to convert the Pond Avenue office into an exclusive health care facility called "MD/VIP" requiring substantial renovations. Conversion of the facility would require other Pond Avenue physicians to vacate the premises. Exhibit 2, ¶69-76 (Complaint against APG)

Response:

72. When Minkina learned on APG's plans to transition the Pond Avenue office, she questioned APG about the matter but never received any response to her questions. Exhibit 2, ¶77-78 (Complaint against APG)

Response:

73. On September 17, 2004, APG denied that it discriminated or retaliated against Minkina but on September 30, 2004, APG terminated Minkina's employment without cause. Exhibit 2, ¶ 85 (Complaint against APG) and Exhibit 34 (APG Termination Letter).

Response:

74. On November 18, 2004, Minkina removed her MCAD action to Suffolk Superior Court. Exhibit 2, (Complaint against APG)

Response:

75. On May 17, 2005, Minkina retained RPS to represent her in her action against APG. Exhibit 35 (RPS fee agreement)

Response:

76. Minkina retained RPS when her current attorney Andrew Crouch referred her to RPS. (Exhibit 52; Vol. I, 15:3-22) (Minkina Deposition Transcript)

Response:

77. Crouch told Minkina that he was overwhelmed because he was a sole practitioner and because RPS had more experience in employment law. (Exhibit 52; Vol. I, 15:15-16:10) (Minkina Deposition Transcript)

Response:

78. In a meeting with Minkina and her husband, Crouch showed her a magazine referring to an RPS lawyer as a "super lawyer" and that RPS might obtain a better result for Minkina. Exhibit 52; Vol. I, 15:15 -15:24 (Minkina Deposition Transcript)

Response:

79. RPS's fees established rates of $200 per hour for associate attorney Laurie A. Frankl and $250 per hour for attorney Jonathan Margolis. The agreement required that Minkina pay a $5,000 retainer and pay monthly bills for services upon receipt. Exhibit 35 (RPS fee agreement)

Response:

80. Shortly after RPS began representing Minkina, APG moved to compel arbitration based on an arbitration clause in her employment contract. Exhibit 1, ¶18 (Employment Agreement) and Exhibit 5 (Motion to Compel)

81. In communications between RPS and Minkina as early as May or June 2005, RPS had expressed to Minkina that if arbitration was compelled, APG would bear the cost of the arbitration. (Exhibit 52; Vol. I, 109:1 -110:6) (Minkina Deposition Transcript)

Response:

82. The employment contract's arbitration clause precluded any "damages in excess of compensatory damages." Exhibit 1, ¶18 (APG employment contract)

Response:

83. Frankl prepared RPS's opposition to APG's motion to compel which she served on APG on June 27, 2005. Exhibit 56; Vol. I, 139:17-23 (Frankl Deposition Transcript) and Exhibit 6 (Opposition to Motion to Compel)

Response:

84. Frankl conferred with RPS attorney Robert Mantell about Minkina's opposition to APG's motion to compel. Exhibit 56; Vol. I, 139:24-140:9 (Frankl Deposition Transcript)

Response:

85. Frankl is not sure when she reviewed Minkina's employment contract: "I don't have a memory of when I reviewed her employment contract." Exhibit 56; Vol. I, 123:17 (Frankl Deposition Transcript)

Response:

86. In RPS's opposition to APG's motion to compel RPS did not argue that the arbitration clause in Minkina's employment contract was narrow and therefore did not authorize arbitration of employment discrimination and other statutory employment claims. Exhibit 1 (Employment Agreement), Exhibit 6 (Opposition to Motion to Compel) and Exhibit 36,¶5 (Summary Opinion of Samuel Estreicher)

Response:

87. On August 30, 2005, Frankl wrote to Minkina and apologized for a billing error which overstated Margolis hourly rate by $50. Exhibit 37 (Letter from Frankl to Minkina dated 8/30/05)

Response:

88. On October 11, 2005 Frankl notified Minkina that she would be out of work on a medical leave and that RPS attorneys Robert Mantell or Jonathan Margolis would cover APG's motion to compel arbitration hearing on November 16, 2005. Exhibit 38 (Email from Frankl to Minkina dated 10/11/05)

Response:

89. In October 2005, Mantell reduced his work hours because of the arrival of his first child. (Exhibit 55; Vol. II, 100:1 -24) (Mantell Deposition Transcript)

Response:

90. In November and December 2005 and part of January 2006, Frankl was on medical leave from RPS. (Exhibit 56; Vol. I, 127:14 -22) (Frankl Deposition Transcript)

Response:

91. Frankl or Margolis asked Mantell to cover the November 16, 2005 hearing. When Mantell was asked to cover the hearing, the briefs had already been submitted. (Exhibit 54; Vol. I, 39:20 -40:3, 41:1-8) (Mantell Deposition Transcript)

Response:

92. In preparation for the hearing Mantell reviewed the briefs and the employment contract's arbitration provision. (Exhibit 54; Vol. I, 47:2 -20) (Mantell Deposition Transcript)

Response:

93. Both Mantell and Margolis attended the hearing but Mantell argued the opposition. (*Exhibit* 54; Vol. I, 61:16 -21) (Mantell Deposition Transcript)

Response:

94. On November 16, 2005, the hearing was held on APG's motion to compel arbitration and RPS attorney Robert Mantell argued the Minkina's opposition to the motion. (Exhibit 54; Vol. I, 43:6 -22) (Mantell Deposition Transcript)

Response:

95. On December 7, 2005, Margolis wrote to Minkina stating that he had "finally straightened out the system to bill you at the proper rates." Exhibit 39 (Letter from Margolis to Minkina dated 12/7/05

Response:

96. On February 14, 2006, the Superior Court allowed APG's motion to compel arbitration. Exhibit 3 (Memorandum of Decision)

Response:

97. Being compelled to arbitration precluded Minkina from any possibility of being awarded punitive damages in her case against APG. Exhibit 1, ¶18 (APG employment contract)

Response:

98. On March 13, 2006, RPS filed a G.L. c.231§ 118 Petition which was denied on April 14, 2006. Exhibit 11 (Single Justice Petition) and Exhibit 12 (Email thread from Mantell to Minkina)

Response:

99. On April 19, 2006 Frankl emailed Minkina stating that the "next step is to contact Tracey Spruce and discuss the selection of an arbitrator." Exhibit 40 (Email from Frankl to Minkina dated 4/19/06)

Response:

100. On May 19, 2006, Frankl mailed and email Minkina a letter discussing the initiation of arbitration and a case evaluation. In the letter, Frankl advised Minkina that "AAA Rules provide that the arbitrator's compensation (an hourly fee) will be paid in total by the employer (APG)." Exhibit 41 , p.4 (Letter from Frankl to Minkina dated 5/19/06)

Response:

101. On May 22, 2006, Frankl emailed Minkina stating that she was "initiating the arbitration claim today." Neither Frankl nor RPS initiated the arbitration claim on May 22, 2006 or any date thereafter. Exhibit 42 (Email from Frankl to Minkina dated 5/22/06)

Response:

102. On May 23, 2006, Frankl emailed Minkina stating she had "just learned some very important information from a case manager" at the AAA. Frankl went on to state that her earlier information in her May 19th letter concerning arbitration costs was incorrect. Instead Minkina would have to "split the cost of the arbitrator's compensation" and that he arbitrator's compensation was expected to be between "$250.00 - $300 per hour." In addition Frankl informed Minkina she would have to "pay a filing fee of $1,800." Exhibit 43 (Email from Frankl to Minkina dated 5/23/06)

Response:

103. Frankl never provided Minkina with any documentation of her communication with the AAA and Minkina believed that Frankl had not provided a copy of her contract to the AAA. Exhibit 53; Vol.II, 10:23 -12:5 (Minkina Deposition Transcript)

Response:

104. In response to Frankl's May 23, 2006 email, Minkina emailed Frankl expressing that she was "very much disappointed with your email and handling of my case." Exhibit 44, p.2 (Email from Minkina to Frankl dated 5/23/06)

Response:

105. Approximately six hours later Frankl emailed Minkina stating among other things "you may choose to retain new counsel." Exhibit 44, p.1 (Email from Frankl to Minkina dated 5/23/06)

Response:

106. On May 24, 2006, Minkina wrote to the partners at RPS complaining about Frankl and asking for a meeting. Exhibit 13 (Email from Minkina to Frankl dated 5/24/06)

Response:

107. Approximately nine hours later, Margolis emailed Minkina stating "we shall withdraw from representing you. We shall, however, give you time to find new counsel. Please inform me of how much time you believe you will need." Exhibit 14 (Email from Margolis to Minkina dated 5/24/06)

Response:

108. Minkina pleaded with RPS not to discharge her. Exhibit 53; Vol. II, 52:11 -53:2 (Minkina Deposition Transcript)

Response:

109. Minkina's request for a meeting was ignored: "I asked for a meeting but it never happened." Exhibit 52; Vol. I, 108:9 -11 (Minkina Deposition Transcript)

Response:

110. The law firm of Zalkind, Rodriguez, Lunt and Duncan ("Zalkind"), who had represented Minkina on another matter eventually represented Minkina after RPS's termination of representation. Exhibit 20 and Exhibit 45 , (Letter from AAA to counsel dated 11/5/07), Exhibit 52; Vol. I, 115:19 -116:3 (Minkina Deposition Transcript)

Response:

111. Zalkind filed for arbitration with the AAA and on November 5, 2007, the AAA notified the parties that Minkina's contract was "employer promulgated" and therefore APG would be responsible for the cost of the arbitrator. Exhibit 45 , (Letter from AAA to counsel dated 11/5/07)

Response:

112. On November 7, 2007, APG challenged the AAA's interpretation of Minkina's contract. Exhibit 46 , (Letter from Spruce to AAA dated 11/7/07)

Response:

113. On June 2-3, 2008 and September 15, 2008, the AAA held arbitration hearings in Minkina's case against APG. Exhibit 10 ¶ 37 (First Amended Complaint)

Response:

114. After the arbitrator issued an interim award on March 4, 2009, Minkina filed a petition for reimbursement of her attorney fees in the amount $223,623.50. Exhibit 47, p.3 (Selected portions of Proposed Calculation of Damages and Petition for Attorney Fees)

Response:

115. RPS billed Minkina $31,678 in attorney's fees in working on her case against APG. Exhibit 47, p.3 (Selected portions of Proposed Calculation of Damages and Petition for Attorney Fees)

Response:

116. On July 17, 2009, the arbitrator issued his final after his interim award of March 4, 2009. Exhibit 27, p.12-13 (Final Award)

Response:

117. Of the $223,623.50 in attorney's fees and costs Minkina incurred, the arbitrator awarded $95,192.75 in attorney fees, or less than 43% of the fees Minkina incurred. Exhibit 27, p.12-13 (Final Award)

Response:

Respectfully submitted,

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By her attorneys,

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Respectfully submitted,

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Dated: June 20, 2012

CERTIFICATE OF SERVICE

I, Christopher P. Maffucci, Esq., hereby certify that on June 20, 2012, I have caused to be mailed, by first class mail, postage prepaid, a copy of the foregoing document to all counsel of record.

Christopher P. Maffucci

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO. 2009-1961-C

NATALY MINKINA, M.D.,
Plaintiff

v.

LAURIE A. FRANKL, ESQ., JONATHAN J. MARGOLIS, ESQ., and RODGERS, POWERS & SCHWARTZ, LLP,
Defendants

JOINT APPENDIX OF EXHIBITS

Pursuant to Mass. Super. Ct. Rule 9A(b)(5)(vi), plaintiff Nataly Minkina respectfully submits the following exhibits in opposition to Defendants' Motion for Summary Judgment:

Exhibits in Connection with Opposition of Plaintiff Nataly Minkina to Defendants' Motion for Summary Judgment

Exhibit	34.	September 30, 2004 Letter from APG to Minkina
Exhibit	35.	May 17, 2005 RPS Fee Agreement with Minkina
Exhibit	36.	December 5, 2011 Summary of Opinion of Samuel Estreicher
Exhibit	37.	August 30, 2005 Letter from RPS to Minkina
Exhibit	38.	October 11, 2005 Email from Frankl to Minkina
Exhibit	39.	December 7, 2005 Letter from RPS to Minkina
Exhibit	40.	April 19, 2006 Email from Frankl to Minkina
Exhibit	41.	May 19, 2006 Letter from RPS to Minkina
Exhibit	42.	May 22, 2006 Email thread from Frankl to Minkina

Exhibit	43.	May 23, 2006 Email from Frankl to Minkina
Exhibit	44.	May 23, 2006 Email thread from Frankl to Minkina
Exhibit	45.	November 5, 2007 Letter from AAA to Counsel
Exhibit	46.	November 7, 2007 Letter from Spruce to AAA
Exhibit	47.	Minkina's Proposed Final Calculation of Damages and Petition for Attorney's Fees and Costs (3 pp.)
Exhibit	48.	November 20, 2010 Summary of Opinion of Magdy Selim
Exhibit	49.	October 2002 Memorandum on Punitive Damages by Robert Mantell
Exhibit	50.	Undated biography of Robert Mantell
Exhibit	51.	RPS billing statements for legal services to Minkina
Exhibit	52.	Deposition Transcript of Nataly Minkina, Vol. I, January 18, 2001
Exhibit	53.	Deposition Transcript of Nataly Minkina, Vol. II, February 14, 2001
Exhibit	54.	Deposition Transcript of Robert Mantell, Vol. I, January 11, 2011
Exhibit	55.	Deposition Transcript of Robert Mantell, Vol. II, January 25, 2011
Exhibit	56.	Deposition Transcript of Laurie Frankl, Vol. I, August 1, 2011

Respectfully submitted,
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By her attorneys,

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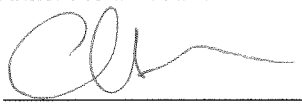
Dated: June 20, 2012

CERTIFICATE OF SERVICE

I, Christopher P. Maffucci, Esq., hereby certify that on June 20, 2012, I have caused to be mailed, by first class mail, postage prepaid, a copy of the foregoing document to all counsel of record.



Christopher P. Maffucci

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