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ARBITRATOR

JAMS ARBITRATION

KENNETH KILROY, ROSS KILROY, M&A SECURITIES GROUP, INC.,

Claimants,

v.

ADRIENNE SMITH WORLEY,

Respondent.

ADRIENNE SMITH WORLEY,

Counter-claimant,

v.

BERKELEY RESEARCH GROUP, LLC, CARL LLOYD SHEELER, M&A SECURITIES GROUP, INC.,

Counter-respondents.

JAMS Ref. No. 1210033774

FINAL AWARD

Parties and Counsel

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M&A Securities Group, Inc.
(Collectively "the Kilroys")

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Arbitrator

The parties have appointed as sole Arbitrator:

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Place of Arbitration: JAMS, San Diego

Date of Hearing: March 26 through 30, 2018

Witnesses: Ken Kilroy, Ross Kilroy, Noah Herbold, Scott Magee, Adrienne Smith Worley, Carl Sheeler, Marvin Tenenbaum, Robert Copeland (in person and by deposition), Adam Streisand, Rod Uy (by deposition). In addition, the Arbitrator reviewed deposition designations and counter-designations of the above witnesses.

Exhibits: All exhibits as introduced per record.

Procedural History: On December 30, 2016, the Kilroys filed with JAMS in Los Angeles a demand for arbitration against Worley for failure to pay $2,995,000.00 in fees due under an agreement with M&A Securities Group ("MAS Agreement") in connection with the sale of Worley's interests in Young's Holdings, Inc. ("Young's"). On January 23, 2017, Worley filed a response to the demand generally and specifically, denying all material allegations made in the demand and asserting twenty-one affirmative defenses. Worley also further asserted three counterclaims against the Kilroys for breach of contract, breach of the covenant of good faith and fair dealing, and seeking declaratory relief that the MAS Agreement is unconscionable.

Worley also impleaded BRG and Sheeler in these proceedings, asserting four counterclaims against them for fraud, negligent misrepresentation, rescission, and declaratory relief with regard to the engagement agreement between BRG and Worley. BRG then pursued a counter-claim against Worley for breach of contract and breach of the duty of good faith and fair dealing, as well as against Sheeler, for equitable indemnity and contribution for any damages, judgment or other awards recovered by Worley in her counterclaims herein.

In a separate and distinct arbitration proceeding, BRG is pursuing claims against Sheeler for his alleged theft and conversion of fees belonging to BRG for Worley's engagement. These claims are not being heard by the Arbitrator in these proceedings.

Following the close of the arbitration hearing, the parties submitted closing briefs. The parties' initial post-hearing briefs were submitted on May 25, 2018, and their post-hearing reply briefs were submitted on June 15, 2018. Given the complex nature of the dispute and the extensive documentation, the parties, by counsel, agreed to the extension of the filing of the Award to August 31, 2018.

Agreement to Arbitrate: Arbitration clauses are contained in the letter Agreement dated February 23, 2015 between Worley, Kenneth Kilroy, Ross Kilroy, and M&A Securities Group, Inc. and the engagement Agreement between Berkeley Research Group, LLC and Worley dated December 22, 2014.

Applicable Law and Rules: The Arbitrator shall apply the JAMS Comprehensive Arbitration Rules and Procedures ("Rules"). The applicable substantive law is the law of the State of California.

THE UNDERSIGNED ARBITRATOR, having examined the submissions, proof and allegations of the parties, finds, concludes and issues this Interim Award as follows.

To the extent that any of the Findings of Fact differ from any of the party's positions, that is the result of determinations by the Arbitrator as to credibility and relevance, burden of proof considerations, legal principles, and the weighing of the evidence, both oral and written.

FINDINGS

Worley and her brother, George Smith ("Smith"), are beneficiaries of trusts created by their parents, Robert and Janet (Underwood) Smith. Shares of stock in Young's, a closely-held business headquartered in Tustin, California, were the principal asset of the trusts. Vernon Underwood ("Underwood"), Worley's uncle and Janet's brother, has, at all times relevant to the instant dispute, been the CEO, Chairman of the Board and a shareholder of Young's. Underwood was also trustee of Worley and Smith's trusts. The Young's Stockholders' Agreement, dated December 13, 1993, (the "Stockholders' Agreement"), including the amendments thereto, includes restrictions on the sale of shares outside Young's. Specifically, the Stockholders' Agreement requires the consent of a high percentage of shareholders for any sale of the shares to a third party.

On November 2, 2013, Janet passed away. After Janet's death, the Young's stock held in trust for Worley and Smith was to be divided and placed in a generation-skipping exemption trust and "Children's Trusts" for them. Differences arose between Worley and Underwood regarding Worley's entitlement to distributions of principal and income from the trust. Worley retained the services of Noah Herbold ("Herbold"), a trusts and estates attorney, to assist her in her dealings with Young's and with respect to her interest in her mother's trust, including her interest in Young's. Smith retained the services of attorney Scott Magee ("Magee").

Shortly after Janet passed, Young's commissioned an FMV Report to establish the fair market value of Worley and Smith's shares in Young's as of November 2, 2013. That report, dated July 30, 2014, valued the 2,736.32 shares of voting common stock and 344.44 shares of non-voting common stock in Young's as of November 2, 2013 at $37,369,000. (Ex.

20.) Worley believed that the FMV Report significantly undervalued Worley's and Smith's shares.

Sometime in or around June, 2014, Worley began utilizing Roderick Uy ("Uy") as her financial advisor.

On August 7, 2014, Young's made a proposal to purchase Worley's and Smith's shares for roughly $55,000,000 combined ($37,368,818 for Worley's shares and Smith's shares in the Survivor's Trust and $17,949,247 for Worley's and Smith's shares in their respective Gift Trusts). (Ex. 21.) A Revised Term Sheet was issued reflecting this offer on October 15, 2014.

On December 9, 2014, Worley and Smith entered into a Valuation Engagement with Carl Sheeler (the "BRG Valuation Agreement"). (Ex. 62.) Sheeler was, at all relevant times herein, Managing Director and equity member of Berkeley Research Group ("BRG"), until he was terminated by BRG on December 12, 2016.[1] This Agreement included BRG's Standard Commercial Terms. Herbold signed the BRG Valuation Engagement Agreement on behalf of Worley on December 23, 2014. Smith's attorney, Magee, signed the BRG Valuation Agreement on behalf of Smith. Pursuant to the BRG Valuation Agreement, Sheeler would serve as the project manager for the assignment and would prepare a valuation of Worley's and Smith's interest in Young's.

The BRG Valuation Agreement provided for hourly fees at Sheeler's standard hourly billing rate of $600, which, together with the cost of valuation of the real property outlined in Exhibit A to the BRG Valuation Agreement, would not exceed $500,000. (Ex. 62.) The manner of payment to BRG set forth in the Agreement was by wire or check.

[1] The Director Agreement between Sheeler and BRG was executed on October 15, 2013.

Worley and Smith entered into a second engagement with BRG, this time for consulting services and advice in connection with the monetization of their interest(s) in Young's (the "BRG Consulting Agreement"). (Ex. 63.) The BRG Consulting Agreement was dated December 22, 2014 and was signed by Herbold on Worley's behalf and Magee on Smith's behalf one day later. The BRG Consulting Agreement also included BRG's Standard Commercial Terms.

The BRG Consulting Agreement provided Worley and Smith with three options regarding fees. (*See* Ex. 63.) Herbold, on behalf of Worley, selected "Option 2," which provided that Worley would pay BRG a "Success Fee" of five percent of whatever value she was offered for her shareholder interest in Young's in excess of three times Young's proposal, which was based on the FMV Report. The success fee, therefore, was dependent upon achieving an offer of at least $36,389.22 per share. (*Id.*)

The BRG Consulting Agreement also provided for an "Additional Fee" if Worley and Smith were able to monetize their interest in Young's between 90 and 180 days of their response to Young's proposal, and it called for Worley and Smith to pay "expenses" that accrued under the BRG Consulting Agreement. As with the BRG Valuation Agreement, the BRG Consulting Agreement set forth the manner of payment to BRG to be by wire or check.

In January, 2015, Sheeler, on behalf of BRG, issued to Worley and Smith, through their respective counsel, an invoice dated January 16, 2015 for $373,500 (to be split between the two), for the Valuation Engagement (the "Valuation Invoice"). (Ex. 115.) Worley paid her half of the Valuation Invoice in full in February, 2015. (Ex. 161.)

On February 13, 2015, Worley and Smith entered into an amendment to the BRG Consulting Agreement (the "First Amendment"). (Ex. 19.) Herbold and Worley both signed

the First Amendment on Worley's behalf, and Magee signed it on behalf of Smith. The First Amendment eliminated the three fee options set forth in the Consulting Agreement and replaced them with a single Success Fee "consistent with the percentages and amount in the table set forth in Attachment A." (Ex. 19.)

On February 23, 2015, BRG issued its Valuation Report, valuing Worley's and Smith's 48.5% equity interest in Young's at roughly $800 million total. (Ex. 471.)

Sheeler recommended to Worley and Smith that they hire investment bankers to help facilitate the monetization of their shares in Young's because investment banking services were "necessary" for "a transaction of this nature." Sheeler lacked the training and credentials to serve as an investment banker, and BRG had a "specific policy" that it would not render investment banking services. (Tr. 1188:22-1189:16; 1188:2-1189:16; 802:13-803:17) Of Sheeler's recommendations, Worley and Smith chose to retain Kenneth Kilroy and Ross Kilroy of Unity Investment Partners, LLC (collectively, the "Kilroys"), registered representatives for M&A Securities Group, Inc., a registered broker-dealer ("MAS").

Worley, with Herbold's assistance, and Smith, with Magee's assistance, entered into agreements with the Kilroys for investment banking services in connection with the monetization of their interests in Young's on February 23, 2015 (the "MAS Agreement").[2] Pursuant to the terms of the MAS Agreements, the Kilroys' three primary duties included (1) preparing offering materials, (2) marketing Worley and Smith's shares, and (3) negotiating the sale of those shares. (Ex. 1, ¶1.) Specifically, the MAS Agreements stated that the Kilroys would "evaluat[e] indications of interest and proposals regarding the Transaction from third parties, the Company [Young's], and/or the Company's existing

[2] Worley alone signed the MAS Agreement, although her attorney – Herbold – assisted with the negotiations.

owners." At the hearing, Magee testified that when Worley, Smith and their attorneys decided to hire the Kilroys, "it didn't really make any difference whether it was an outside third party or whether it was Young's" who was buying their shares, so long as a higher price than the FMV price was paid by the ultimate buyer. (Tr. 471:7-472:8.) Credible testimony was also introduced at the hearing that Worley and Smith were interested in marketing to third parties, in part, to drive up the price of any offer by Young's. (Tr. 145:14-20; 350:14-352:4; 489:11-20; 561:11-562:6.)

Each of the MAS Agreements was heavily negotiated. For example, the monthly retainer was reduced from $20,000 per month to $5,000, a cap was placed on expenses, the success fee was capped, and an option to sell shares to pay estate taxes was carved out.

In the MAS Agreement signed by Worley, she acknowledged BRG's representation of her and she warranted that no other parties had an interest in any compensation due to the Kilroys. The Kilroys also warranted that they had no interest in any compensation due to BRG. Both Worley and Smith were obligated to pay fees to the Kilroys according to a schedule set forth in the MAS Agreements. (*See* Ex. 1 at E. 001-0002.) That schedule reflects their agreement to pay up to a five percent success fee for a sale of up to some $82,000,000. The MAS Agreement also provided that if Worley wished to terminate the agreement, she would have to do so in writing.

Shortly after the Kilroys were retained, they solicited 15-20 "family offices" [3] regarding acquisition of Worley and Smith's Young's interests. The Kilroys received three verbal or written indications of interest in the Young's shares. One such indication of interest came from Roger Bulloch ("Bulloch") who made an oral offer of $100 million for

[3] *See* Tr. 1171:16-1173:2 for discussion of what a "family office" is.

Worley and Smith's shares combined. (Tr. 426:17-427:11.) Bulloch later submitted a written LOI to purchase the shares for between $80 million and $100 million. (*Id.*; Ex. 313.) Lindsay Goldberg also sent an expression of interest to the Kilroys to purchase Worley and Smith's shares for 7.5-8.5 times EBITDA. (Ex. 330; Tr. 392:21-394:1; 170:4-171:21.)

At the time of its August 7, 2014 offer through early spring, 2015, Underwood and Young's indicated a reluctance to market Worley and Smith's shares to third parties. This reluctance was demonstrated, in part, by Underwood's refusal to provide Worley and Smith with any additional financial information about Young's without the execution of a restrictive Non-Disclosure Agreement ("NDA") that would essentially prohibit Worley and Smith from sharing the information with any potential third-party investors. (Tr. 67:17-68:4; 68:12-69:24; 85:24-87:8; Exs. 83-85.) The Kilroys advised Worley and Smith not to sign the NDA as it would impede them from speaking to third party investors and rob them of their ability to improve their bargaining position with Young's. Worley and Smith followed the Kilroys' recommendation.

On May 7, 2015, Worley, Smith and their advisers (*i.e.*, the Kilroys, the Kilroys' associate Tom Clerkin, Herbold and Magee) held a meeting with Underwood and other individuals from Young's to discuss the aforementioned offers and test Underwood's interest in selling to third parties. Underwood continued to express his reluctance to deal with third parties, but for the first time he agreed to negotiate the price that Young's would pay for Worley and Smith's shares. (Tr. 103:12-104:4; Herbold Designated Testimony, 85:4-13.) Sheeler (who was not present at this meeting), Magee and Herbold were all pleased with the progress that occurred at this meeting. (Tr. 1277:6-1278:11, 494:15-21, Herbold Designated Testimony, 84:14-85:3; Ex. 88.)

On July 28, 2015, Herbold and Magee again met with Young's' representatives. At this meeting, Herbold and Magee presented Young's with a counter-offer on behalf of Worley and Smith to sell one-half of their respective interests in Young's for $55,000,000. (Ex. 27.) Prior to this meeting, the Kilroys were asked to prepare materials to support Worley and Smith's counter-offer, which they did in the form of a slide deck. (Tr. 114:9-117:2; 496:5-497:9; Ex. 319.) On August 26, 2015, Young's responded to this counter-offer by offering $55,000,000 each ($110,000,000 total) for *all* of Worley's and Smith's shares. (Ex. 28.) Young's sent Worley and Smith a letter of intent with regard to this offer on August 25, 2015. (Ex. 320.) The Kilroys, upon Worley and Smith's request, prepared a memorandum in response to this request setting forth their recommendations. (Ex. 92; Ex. 320; Tr. 125:4-18; 124:20-125:7.)

Worley and Smith had very different responses to Young's offer. Worley decided to counter at a $250 million valuation, or $125 million for her shares.[4] In early October, 2015, however, Smith indicated that he did not want to participate in Worley's planned subsequent counter-offer to Young's, explaining that he was inclined to accept Young's pending offer of $55,000,000 for all of his shares, which he did.[5] When Smith accepted Young's agreement, his acceptance contained the caveat or option that, if Young's ultimately purchased Worley's shares at a higher price, he could opt to take that deal instead.

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[4] "In an e-mail to Ken Kilroy, Sheeler suggested that the Kilroys should either support Sheeler's high valuation of Worley's shares or split the highest success fee with Sheeler, despite the terms of the respective agreements (Ex. 321.) The Kilroys were not comfortable with Sheeler's suggestion.

[5] As discussed *infra*, Worley ultimately managed to increase Young's offer, and Young's paid Smith $60,000,000 for his shares.

Smith's attorney – Magee – continually sought the Kilroys' advice on his client's deal with Young's, and the Kilroys helped to negotiate several important terms of the sale. (Tr. 129:21-130:5; 133:4-134:10; 140:3-141:4; Ex. 324.) Herbold also asked the Kilroys to look at his client's offers/demands. (Tr. 126:18-128:9; Exs. 324, 325.) Smith received a signed LOI with Young's in March, 2016. (Tr. 521:5-522:12; Ex. 327.)

On October 27, 2015, Worley presented Young's with her counter-offer for $125,000,000 for all of her shares. (Ex. 31.) Young's rejected this counter-offer on October 30, 2015 and thereafter ceased negotiations with Worley. (Ex. 162.)

At this point, Worley had determined to proceed that she had no recourse but litigation to pressure her uncle into purchasing her shares at a higher value than set forth in Young's LOI.

On November 16, 2015, Sheeler presented Worley, via e-mail, with a draft second amendment to the BRG Consulting Agreement (the "Second Amendment"). (Ex. 123.) Worley signed the Second Amendment to the BRG Consulting Agreement, which was dated December 1, 2015, on December 2, 2015 in the presence of Rod Uy ("Uy"), Worley's financial advisor. Smith was not a party to the Second Amendment. Litigation was in the offing and Sheeler wanted the amendment to reflect his change in responsibilities, which would now include litigation assistance.

Notably, the draft of the Second Amendment that was initially sent to Worley contained a seven percent success fee. Worley marked-out this change, however, replacing seven percent with five percent. The Second Amendment that was ultimately executed contained Worley's revision. (Ex. 165.)

On December 21, 2015, Worley signed an engagement agreement, dated December 16, 2015, with Sheppard, Mullin, Richter & Hampton, LLP ("Sheppard Mullin"). (Ex. 147.) On December 22, 2015, Herbold informed the Kilroys that, "until I know whether and to what extent Adrienne is continuing with the Young's matter . . . it does not make sense to continue on the monthly compensation basis outlined in your agreement." (Ex. 33.) Ross Kilroy responded, informing Herbold that they would need "formal written notice" from Worley if she intended to terminate their relationship. (*Id.*) Worley never sent any written notice of termination of the MAS Agreement. On February 2, 2016, Ross Kilroy sent an email to Bulloch advising: "likely dropping AW soon but want to discuss with you." (Ex. 498.) The Kilroys never "dropped" Worley as a client, however.

Worley, her Sheppard Mullin Attorneys, Sheeler and Uy attended a mediation with Young's on May 9, 2016. (Undisputed Fact, ¶59.) As a result of the mediation, Worley was offered, and she accepted, $60,000,000 for all of her interest in Young's.

On May 10, 2016, Sheppard Mullin was sent the MAS Agreement and confirmed that they were reviewing it. (Ex. 191.) On August 16, 2016, Sheeler presented Worley with another invoice, this one totaling $3,451,950. (Ex. 35.) Three million of the $3,451,950 represented a "5% Fee", and $451,950 of the $3 million represented 753.25 hours billed for Consultation at a $600 hourly rate. The invoice did not reference BRG – it was on Sheeler's personal letterhead with his personal business address and website. The invoice called for payment to Sheeler's personal bank account.

Just days before issuing the invoice, Worley and Sheeler's wife Sara, with whom Worley had become friends, traveled to Sedona together on a holiday. Sara Sheeler also represented herself as "Kelly Passmore" when she was acting as Sheeler's administrative

assistant and corresponding with Worley, Uy and BRG. Worley was not informed that Sara Sheeler and Kelly Passmore were the same person. In September, following the Sedona trip, Worley invited Sara Sheeler to her cabin in Tahoe, still not knowing Sara Sheeler and Kelly Passmore were one and the same. (*See* Tr. 717:5-6.) When asked at the hearing, why his wife Sara Sheeler used an alias, Sheeler stated that, "[i]n the 20 years that [Sara] . . . was my wife as well as my assistant, we had found that people weren't taking her seriously if she was my wife, but they would take her more seriously under a pseudonym, so we kept that. It was nothing more than that." (Tr. 1296:6-14.) Why this was still necessary after Worley and Sara Sheeler had become friends was not addressed at the hearing.

On August 17, 2016, Worley signed the closing documents to sell her ownership interest in Young's, and on August 19, 2016, the purchase and sale of Worley's shares at the $60,000,000 price closed.

Worley's Sheppard Mullin attorneys advised her not to pay Sheeler's invoice until they could further investigate the parties' understanding regarding the potential 5% success fee cap. Nonetheless, on September 14, 2016, Worley authorized Uy to pay Sheeler's August 16, 2016 invoice in full, which he did, wiring the payment to Sheeler's personal bank account as instructed. (Undisputed Facts, ¶66.)

On September 19, 2016, Sheeler made a wire payment to Uy in the amount of $10,000 as a gratuity for his services. (Ex. 272.) Sheeler made another gratuity-based wire payment to Uy in the amount of $35,000 on September 26, 2016. (*See* Exs. 272.) At the hearing, Worley and her counsel sought to have payments made to Uy labeled a "bribe." The evidence does not support this contention and this accusation is completely rejected by this Arbitrator. Worley knew that Sheeler was going to send Uy "dinero" as recognition

of the extraordinary efforts he made in serving Worley. Worley did not know the amount and there is no evidence that she ever asked about the amount. There is no credible evidence whatsoever to support a finding that Uy did anything during the course of his engagement with Worley that was not in the furtherance of her interests or at her direction and insistence. There is no evidence that Uy was influenced by this gift or that as a result of this known gratuity he altered his advice or behavior. Uy also consistently reminded Worley at every decision making point that he was not an attorney and urged her to seek legal counsel.

On October 11, 2016, the Kilroys sent Worley a demand for payment of a success fee under the MAS Agreement, which, as noted *supra*, had never been terminated. Specifically, the Kilroys were demanding payment of $2,995,000, or 5% of the $60,000,000 million less $5,000, which had already been paid in fees. (Ex. 329.) Worley never responded, nor did she pay. (Tr. 398:12-13.) On November 30, 2016, Worley sent Sheeler a letter copied to BRG's General Counsel, demanding that Sheeler and BRG indemnify her with respect to the Kilroys' success fee claim. (Ex. 58.)

Unable to reach any agreement, this arbitration ensued.

ANALYSIS

As noted in the Procedural History section of this Award, *supra*, multiple claims have been asserted by and against multiple parties in this arbitration. In the interest of creating a clear and efficient Interim Award, the Arbitrator shall parse through each cause of action brought by each party on a claim-by-claim basis.

I. *The Kilroys' Claims Against Worley*

As explained, *supra*, on December 30, 2016, the Kilroys filed with JAMS in Los Angeles a demand for arbitration against Worley for failure to pay $2,995,000.00 in fees due under the MAS Agreement in connection with the sale of Worley's interests in Young's. The Kilroys' Demand asserts, in theory, a simple breach of contract claim. As these proceedings have demonstrated, however, there is nothing simple about the parties and their relationships.

In California, to succeed on their breach of contract claim, the Kilroys must prove (1) the existence of a contract; (2) their performance or excuse for nonperformance on the contract; (3) Worley's breach of the contract; and (4) resulting damages. (*Oasis W. Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

It is undisputed that Worley and the Kilroys entered into a contract on February 23, 2015 by which Worley agreed to engage the Kilroys "as [her] exclusive representative and financial advisor in seeking, arranging, negotiating and generally advising with respect to one or a series of private (unregistered) transactions involving the sale of [her] interest(s) in [Young's] assets . . . to a third-party acquirer, [Young's], and/or [Young's] existing owners." (*See* Ex. 1.) Pursuant to the agreement, the Kilroys were to provide "financial advice and assistance in connection with [the sale of her Young's shares], which [was to] involve . . . advice and assistance in connection with (i) developing and distributing selected information, documents and other materials about [Young's]; (ii) evaluating indications of interest and proposals regarding the [sale of her Young's shares] from third parties, the Company, and/or the Company's existing owners; and (iii) negotiating the financial terms and structure of [the sale]." (*Id.*, ¶1.) Also pursuant to that agreement, Worley was

obligated to pay a success fee pursuant to a schedule of fees based on the value of the sale of her Young's shares at the close of such transaction. (*Id.*, ¶3.)

The Kilroys contend that they performed on the contract; Worley and BRG maintain they did not. Based on the evidence adduced at the arbitration hearing, the Kilroys have proven that they substantially performed. In other words, the Kilroys proved that they provided the material services for which they were hired under the clear terms of the MAS Agreement. (*See* Cal. Civ. Code §1638 ["The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."].)

The Kilroys contacted numerous potential purchasers of Worley's shares. (Tr. 69:16-72:24; 356:22-358:17.) Those who indicated initial interest and signed an NDA received a package of materials. including the FMV appraisal, the draft BRG appraisal, financial information for Young's, including projections for 2014 and a budget for 2015, and the Young's shareholder agreement. (Tr. 75:9-76:9, 77:2-17; Exs. 305, 307, 308.) The Kilroys also helped Worley and Smith pull together materials supporting their original plan to demand from Young's $110 million for all of their shares,[6] and it was only after the Kilroys met with Underwood that Underwood first allowed for Young's to bargain on the price it would pay for Worley's and Smith's shares. (Tr. 115:15-116:2; Ex. 319.) Each of these actions demonstrates sufficient and substantial performance by the Kilroys on the MAS Agreement.

Worley and BRG contend that the Kilroys breached their agreement by failing to sufficiently present third party offers, but this argument is of no avail. First, the language of the agreement specifically contemplates that the Kilroys would be providing financial

[6] As noted, *supra*, that demand was changed to $110 million for one half of Worley's and Smith's respective interests.

advice and assistance with regard to the sale of Worley's shares to third parties, Young's *and* Young's existing owners. In no way was the Kilroys' engagement limited to the sale of Worley's shares to third parties, nor did the contract even prioritize such third-party sales. Second, the Kilroys *did* solicit over a dozen family offices regarding acquisition of Worley's Young's interests. Indeed, the Kilroys ultimately received three verbal or written indications of interest in the Young's shares, including one from Bulloch who orally offered $100 million for Worley and Smith's shares combined, (tr. 426:17-427:11), and who later submitted a written LOI to purchase the shares for between $80 million to $100 million. (Tr. 108; Ex. 313.) And third, while it is true that solicitation of third party offers was made more difficult by Underwood's disinterest in considering them, Worley was well aware of the Stockholders' Agreement's restrictions on the sale of shares outside of Young's when she hired the Kilroys. She therefore cannot now accuse the Kilroys of failing to perform on the MAS Agreement when part of their difficulties in performing can be attributed to factors about which Worley was aware when she contracted with them in the first place.

Worley also points to the fact that the Kilroys were not involved in the ultimate sale of Worley's shares. Nowhere does the agreement state that the Kilroys were required to actually consummate the sale of Worley's shares, however. Instead, the agreement enumerates various other obligations, each of which the Kilroys satisfied.

In addition, the fact that the Kilroys were considering terminating the MAS Agreement does not somehow show that the Kilroys failed to perform their obligations under the Agreement. In fact, it is undisputed that the Kilroys "remained willing to help [Worley]," even as they considered terminating their relationship. (Tr. 249:7-17; 250:11-18; 430:6-19; 646:12-17.)

Moreover, the MAS Agreement was never actually terminated by either party. (*See* Ex. 1, ¶8 [requiring written notice for termination to be effective].) Thus, at the time of Young's purchase of Worley's shares, the MAS Agreement was still in full force and effect. Indeed, even if the MAS Agreement had, in fact, been terminated in writing, the provisions in the Agreement relating to payment of fees, including success fees, would have "survived any such termination." (*Id.*) Worley's and BRG's arguments to the contrary are a red herring.

The evidence is sufficient to show that the Kilroys performed their obligations under the MAS Agreement.[7] The question therefore turns to whether Worley breached that Agreement, which, she undeniably did when she failed to pay the Kilroys the 5% success fee set forth in the Agreement at paragraph 3.[8] Indeed, it is undisputed that Worley has not paid this fee. The Kilroys, therefore, have also proven their damages. As such, unless Worley's affirmative defenses hold any weight, which they do not, *see, infra*, the Kilroys have successfully proven their breach of contract claim.

Worley suggests, as an affirmative defense, that the MAS Agreement should be rescinded, but in order to be entitled to rescission, Worley would need to show that the Kilroys materially breached the MAS Agreement. (*See Pennel v. Pond Union School Dist.* (1973) 29 Cal.App.3d 832, 838 ["A party to a contract may rescind if there is a material breach by the other party."].) Worley has not met her burden.

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[7] Although Worley had previously dropped her affirmative claims against the Kilroys, she now asserts that, by their aforementioned actions, they breached their fiduciary duty to her. Not only has this claim against the Kilroys not been properly plead, it has also not been proven by any credible evidence or citation to persuasive or applicable caselaw.

[8] Worley contends that "[t]here was absolutely no evidence presented at the hearing that [Worley] willfully departed from the terms of the MAS Agreement as she understood them." (Worley Post-Arb. Br., p.34.) But whether Worley "willfully" departed from the terms of the MAS Agreement is of no import to the Kilroys' breach of contract claim. The mere fact that she breached the clear and explicit terms of the Agreement is what is determinative.

Worley also suggests that, per California Civil Code section 3399, she is entitled to reform the MAS Agreement because she believed and intended that there would be a cumulative cap on all of the success fees that she would be required to pay pursuant to both the MAS Agreement and the BRG First Amendment. Worley's position is belied by the fact that, pursuant to paragraph 15 of the MAS Agreement, Worley "represent[ed] and warrant[ed] that there are no other brokers, representatives or other persons that have an interest in any compensation due to MAS from the Transaction contemplated herein. Likewise, MAS shall have no interest in any compensation due BRG." (Ex. 1, ¶15.) By the plain terms of the MAS Agreement, therefore, the Kilroys' and BRG's potential entitlement to success fees were completely unrelated.

Worley also contends that the MAS Agreement should be reformed under *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 381, because the 5% success fee set forth in the Agreement is unreasonable. There was nothing unreasonable about this fee, however; it was the result of a bargained for arms-length transaction. Further, while it is true that (1) "there would only be a small number of potential investors to whom the Kilroys could pitch the company, opposed to a broad auction in which they [were] marketing the company to 50 or 100 or 200 potential investors," that (2) "the Kilroys anticipated resolution of the project . . . in six to twelve months," and that (3) "the anticipated transaction size was large," all of these facts were known to the parties, including Worley, when they entered into the MAS Agreement. Thus, there is no basis for finding the Agreement unreasonable and worthy of reform at this time.

Similarly, BRG contends that the MAS Agreement should be rescinded under the doctrine of "frustration of purpose" because "the essential purpose of the MAS Agreement

was frustrated" by "Underwood's complete shutdown of any possibility of any third-party purchase or investment in Young's", among other things. But the factors that BRG cited in its brief that it contends were "not reasonably foreseeable supervening event[s] totally or nearly totally destroy[ing] the value of counterperformance" were, actually, reasonably foreseeable. (*See* BRG Post-Arb. Br., pp.11-12 [quoting *Fed. Leasing Consultants, Inc. v. Mitchell Lipsett Co.* (1978) 85 Cal.App.3d 44, 47-48].) As noted, *supra*, the Kilroys and Worley were well aware of the potential difficulties in selling to third parties; thus Underwood's resistance to such a sale would have not been a surprise to anyone.

Moreover, while BRG and Worley contend that the primary purpose of the MAS Agreement was to have the Kilroys tap into the wealth of "family offices", the evidence showed that the primary purpose of the Agreement was actually to increase the offering price for Worley's shares. (Tr. 471:7-472:8; 145:14-20; 350:14-352:4; 489:11-20; 561:11-562:6..) No frustration of this purpose was shown at the hearing.

Finally, Worley maintains that to the extent the Kilroys are entitled to recovery, they "can easily be compensated by an order requiring Sheeler to turn over to the investment bankers he brought in and whose fee share agreement he negotiated any amount they are due from the funds he wrongfully obtained from [Worley]." (Worley Post-Arb. Br., p.34.) Worley's argument fails to account for the fact that there is absolutely no contract between the Kilroys and BRG or Sheeler directly. Thus, neither Sheeler nor BRG are obligated to pay the Kilroys anything.

The Kilroys have proven their breach of contract claim against Worley. Worley is therefore liable to them for the entirety of the 5% success fee set forth in their Agreement,

totaling $2,995,000. The Arbitrator has considered but declines to award prejudgment interest in this award.

The Arbitrator has also considered the Kilroys' request for attorneys' fees. The Arbitrator declines to issue such an award and finds there is no prevailing party. Pursuant to paragraph 15 of the MAS Agreement, the prevailing party in an arbitration "shall be entitled to an award of its reasonable attorneys' fees and expenses." (Ex. 1, ¶14.) However, JAMS Comprehensive Arbitration Rules and Procedures provide that: "The Award may allocate attorneys' fees..." Emphasis Added. Rule 24(g) As the court noted in *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 374-75, "[t]he choice of remedy . . . may at times call on any decision maker's flexibility, creativity and sense of fairness. In private arbitrations, the parties have bargained for the relatively free exercise of those faculties. Arbitrators . . . may base their decision upon broad principles of justice and equity." (*Id.* at 374-75.)

Here, the Kilroys have undeniably already received the value of the benefit of their efforts. They received the benefit of the enhanced value of Smith's stock via Smith's success fee payment, and via this Award, they are receiving the benefit of the enhanced value of Worley's stock via her success fee payment. While it is true that the Kilroys contributed to Smith and Worley's ultimate success in increasing their stocks' value, it is also true that Worley's transaction with Young's for a greater purchase price would not have occurred but for her initiative to push for litigation. Worley's efforts and intentions, therefore, also greatly enhanced her and Smith's stock value. If the Kilroys were to be further compensated via an award of attorneys' fees for their efforts, the undersigned would be undermining Worley's contributions to this successful transaction, and she would be

unfairly and inequitably providing excess benefit to the Kilroys who have already been adequately compensated.

II. *Worley's Claims Against the Kilroys*

As noted, *supra*, Worley asserted three counterclaims against the Kilroys for breach of contract, breach of the covenant of good faith and fair dealing, and seeking declaratory relief that the MAS Agreement is unconscionable. For all of the reasons discussed in the aforementioned section of this Interim Award, Worley's claims are rejected.

Specifically, with regard to Worley's unconscionability claim, Worley has failed to meet her burden of proving that she had inferior bargaining power or that the contract was "overly harsh," "unduly oppressive," "unreasonably favorable," or that it "was so one-sided as to shock the conscience." (*See Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 911.) As the evidence made clear, Worley was represented by counsel who reviewed, commented upon and negotiated the Kilroys' engagement. And while Worley may not now, in retrospect, like the bargain into which she ultimately entered, the unconscionability doctrine is not concerned with "a simple old-fashioned bad bargain." (*Id.*) And even if it were, Worley's and the Kilroys' bargain was not actually "bad." Despite Worley's assertions to the contrary, (*see* Worley Counterclaims, ¶ 102), the MAS Agreement does not provide the Kilroys with unlimited discretion as to what financial advice and assistance they will provide to Worley, and paragraphs 9 and 12 of the MAS Agreement, Schedule II of the Indemnification Agreement and Schedule III of the Form of Release and Covenant Not to Sue are not so one-sided to render them unconscionable.

Unconscionability does not provide Worley with an adequate defense; she is not entitled to the declaratory relief that she seeks.

III. *Worley's Claims Against BRG and Sheeler*

When Worley impleaded BRG and Sheeler in these proceedings, she asserted four counterclaims against them: fraud, negligent misrepresentation, rescission and declaratory relief. According to Worley, Sheeler wrongfully induced her to (1) sign the Second Amendment; and (2) pay directly to him the August 16 invoice issued pursuant to the Second Amendment. Worley also maintains that BRG's and Sheeler's fraud "ran much deeper," citing other instances of alleged fraud throughout her brief. (Worley Post-Arb. Br., p.35.) While each of these allegations has been considered by the undersigned in reaching her decision, her analysis herein focuses on Worley's first two allegations and the evidence relating to them as those are the most relevant to the instant dispute.

A. Fraud/ Negligent Misrepresentation

To prevail on a fraud claim, a complainant must show: (1) misrepresentation (false representation, concealment, or nondisclosure) of a material fact; (2) knowledge of falsity or lack of reasonable ground for belief in the truth of the representation (scienter); (3) intent to induce reliance; (4) actual and justifiable reliance by plaintiff; and (5) resulting damage. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974.) To prevail on a claim for negligent misrepresentation, a complainant must show: (1) the misrepresentation of a past or existing material fact; (2) without reasonable ground for believing it to be true; (3) with intent to induce another's reliance on the fact misrepresented; (4) justifiable reliance on the misrepresentation; and (5) resulting

damage." (*Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Cambridge Integrated Servs. Grp., Inc.* (2009) 171 Cal.App.4th 35, 50.)

1. *Execution of the Second Amendment*

Worley contends that Sheeler, with the assistance of BRG's General Counsel Marvin Tenenbaum, prepared the Second Amendment to the BRG Agreement to ensure that Sheeler would be paid a 5% success fee on any amount that Worley accepted for her interest without advising Worley that the Second Amendment would materially change Sheeler's compensation and the total amount of success fees payable to consultants. Specifically, Worley points to the fact that the Second Amendment did away with the $36,389.22 per share minimum threshold price for any recovery by Sheeler from the First Amendment, and instead permitted Sheeler to obtain 5% of any amount paid for Worley's stock with no minimum threshold for success. She further notes that the Second Amendment eliminated the 5% cap on total fees. Worley asks the Arbitrator to infer from these changes that Sheeler must have sought to hide them from her because the changes would serve to benefit him to Worley's detriment.

Worley failed to introduce any persuasive evidence of such intent by Sheeler at the arbitration hearing, however. The Arbitrator, therefore, will not make Worley's suggested inference. The Arbitrator also rejects Worley's attempt to draw an inference from the fact that Sheeler presented her with the Second Amendment when she was purportedly between counsel. Even if this were true (and there is evidence that Worley actually had access to legal advice during this period) that is insufficient to conclude that Sheeler was engaged in any intentional misrepresentation. The Arbitrator also rejects Worley's argument that Sheeler created the "perfect storm" by convincing Worley to break from her

brother, by presenting the draft Second Amendment via e-mail directly to Worley for her signature rather than to her attorney, and by doing all this while Worley was incapacitated.

Worley testified at the hearing that she was told that the only difference between the First Amendment and the Second Amendment was that her brother was omitted from the Second Amendment. (Tr. 691:22-296:3.) She also testified that she was told that the only purported justification for the Second Amendment was that she and her brother had split ways and that BRG needed an amendment to reflect this bifurcation. Ample credible evidence was introduced, however, that directly contradicts Worley's assertions and supports Sheeler's representation that the Second Amendment was necessary because he (and BRG) were going to be providing new and different services to Worley. Worley was heading toward litigation at her own insistence at break neck speed. (*See, e.g.*, Tr. 836:23-838:3; Uy Depo. 64:19-65:1). Both Worley and Uy confirmed that Worley was in a rush to implement her new litigation plan because she wanted to sue Underwood by Thanksgiving to "ruin" his holiday and his end of year. (Tr. 836:23- 837:23.) Sheeler sought an amendment to the agreement to accommodate Worley's shift in focus away from valuation and toward litigation and to provide her with professional services in pursuit of her lawsuit against her uncle.

Evidence of Sheeler's intent can be found in an e-mail that he sent to Worley on November 7, approximately one week before Worley was presented with the draft Second Amendment language. In that e-mail, Sheeler talks about the need to "modify [his] engagement" because "the scope of [Sheeler's] work has changed." (*See* Ex. 163.) A change in the "scope" of Sheeler's work would necessarily mean more than the omission of Smith from the equation. And when Sheeler sent Worley the draft language of the Second

Amendment on November 16, 2015, he again noted in writing that the nature of the BRG retention had changed. (*See* Ex. 123.) There is no documentation that Sheeler ever suggested that these changes were merely the result of needing to omit Worley's brother from the agreement.

This is consistent with Worley's testimony that, around this same time, because Young's was no longer negotiating, she no longer needed Sheeler's negotiating services. (Worley Depo. I 339:8-18.) Instead, she explained, now that the tides had shifted, she wished to proceed to litigation. (Tr. 930:10-13; Worley Depo. II 66:17-67:13.) In fact, Worley testified that she, Uy and Sheeler had worked out a game plan and once the Second Amendment was signed, they would proceed to get a "big gun" litigator on board, plan to sue her uncle and take the dispute to the next level. (*See* Tr. 892:6-19.) Sheeler recommended Adam Streisand at Sheppard Mullin for the role and Worley began conversations with him in November, 2015. (Tr. 824:11-827:15.)

Sheeler also further emphasized that Worley should review the draft with anyone she wanted, which belies Worley's fraud claim. (*Id.* ["I encourage you to discuss the modifications with Rod and Lisa or whomever you wish."].) Worley forwarded this e-mail and amendment draft to Uy for his review. (Ex. 264.) She did not, however, seek assistance or advice from anyone else, testifying that she "didn't feel the need to" talk to anyone but Uy. (Tr. 860:4-14.)

Uy reviewed the draft Second Amendment language with Worley and even made changes to it. On November 21, Uy traveled from Torrance to Worley's home in Newport Beach as he had often done to accommodate her. Together they reviewed the draft Second Amendment. (Uy Depo. 63:21-64:11.) Uy went over the draft with Worley and reminded

her that he was not an attorney and suggested that she have an attorney review the draft before signing. (Uy Depo. 67:19-68:17.) Uy's and Worley's review of the draft Second Amendment included consideration of the revised BRG success fee and the fact that it was separate and distinct from any obligation that might arise under the Kilroys' agreement. (Uy Depo. 70:9-71:1.) Uy credibly testified that Worley well understood this distinction. (Uy Depo. 71:7-10.)

Uy also made handwritten changes to the draft Second Amendment, lowering the success fee payment for a deal under $125 million from 7% to 5% and adding "ordinary" to expenses that would be covered. (Ex. 165; Uy Depo. 73:17-22.) Uy and Worley reviewed this draft and discussed the changes. (Tr. 933:12-934:18 [when asked whether she and Uy discussed changes and modifications that Worley wanted to make to the draft Second Amendment sent by Sheeler, Worley responded "Yes." .) Uy explained that the success fee reduction to 5% was a fee that would go to BRG if an offer were accepted. (Uy Depo. 73:24-74:10.) Worley understood that based on the amendment, BRG would get no more than a 5% success fee. (Uy Depo. 75:24-76:5.) The proposed changes were typed into the draft and sent back to Uy by Sheeler's wife/assistant – Kelly Passmore – on December 1, 2015. (Ex. 219.)

Uy brought the revised draft to Worley's home on December 2, 2015 to have her sign. (Tr. 699:24-700:1; 938:9-13.) By this point, Uy and Worley had, by Worley's own admission, discussed the amended agreement at least "two times for sure" since receiving the first draft on November 16. (Tr. 861:11-14.) Uy spent most of the day on December 2 with Worley and "read the agreement again in front of her." (Uy Depo. 77:17-78:11; Tr. 858:21-859:1.) When they reached paragraph 5 on the second page of the draft, they made

a further change, crossing out a $500,000 termination fee to BRG and reducing it to $250,000. (Ex. 662.) Uy testified that at all times on that day Worley understood what he was discussing with her and expressed herself clearly and lucidly. (Uy Depo. 83:7-12.) Uy's wife sent the signed agreement to Passmore the next day. (Ex. 662.) At the hearing, Worley was unable to present any credible evidence to counter Uy's persuasive testimony that outlined her review of the Second Amendment with him and her understanding of its contents.

Worley claims that on December 2, 2015, she and Uy were on speakerphone with Sheeler who allegedly assured her that the 5% cap on combined professional fees was still in place (Tr. 701:8-18),[9] but there is not a single piece of contemporaneous evidence to support this contention. For one, Sheeler introduced unrebutted phone bills showing no calls with Worley or Uy on or around the time of the execution of the Second Amendment. (Ex. 699.) Further, documents show that Sheeler was on a business trip that week (*see* Ex. 714), and it was Sara Sheeler as Kelly Passmore who was communicating with Uy regarding the execution of the amendment. (*See, e.g.*, Exs. 263, 219.) The record further reveals that Sheeler sent no e-mails regarding the Second Amendment after November 17. (*See* Ex. 658.) There is no reference to the alleged 5% cap on all "combined fees" on the face of the Second Amendment or in any other contemporaneous document. (*See* Ex. 2.) Uy never testified that he and Worley discussed there being a combined 5% cap that would include both Sheeler's and Kilroy's fees.

[9] This testimony is notably inconsistent with Worley's prior contention that Sheeler "approached" her when trying to pressure her into signing the Second Amendment. When asked at the hearing what she meant by "approached," Worley explained that she "interpreted that as physical, did he come to me physically." (Tr. 974:21-975:8.) Thus, not only does this testimony raise inconsistencies in Worley's story, it also renders her story less plausible since Sheeler was away on a business trip during the relevant time frame. (*See* Ex. 714.)

Based on the above, Worley has failed to meet her burden to prove her fraud and her negligent misrepresentation causes of action with regard to her execution of the Second Amendment.

2. *Payment of Invoice*

Worley contends that Sheeler committed fraud in issuing her and receiving payment on the August 16, 2016 invoice and that BRG is liable for Sheeler's conduct because it ratified Sheeler's actions.

Even if Worley had shown that Sheeler misrepresented to her that he had the option to collect and disburse funds on behalf of his employer, BRG, Worley has failed to show (or even assert) that she was damaged by such misrepresentation. (*See, e.g.*, Worley Depo II at 146:19-24 [when asked "how is it that you're paying Dr. Sheeler as opposed to paying BRG has had any negative impact on you?", Worley testified, "[t]hat hasn't because those two in my mind are one and the same, so I don't know how that has hurt me."].) Indeed, the only possible damage to Worley would be if she were found liable to BRG directly for payment of the invoice. But as will be discussed in more detail, *infra*, BRG's claims again Worley are without merit.

Having failed to show that she suffered any damages by Sheeler's purportedly wrongful acts with regard to the invoice, Worley's fraud claim pertaining to this invoice fails.[10]

B. Rescission

Under California law, a contract may be rescinded if the consent of the party rescinding was obtained through fraud, or if the consideration for the obligation of the

[10] In light of this conclusion, the undersigned need not address whether BRG could also be liable to Worley for its ratification of the acts of its agent or under the doctrine of respondeat superior.

rescinding party becomes entirely void from any cause. (Cal. Civ. Code §1689.) Worley has failed to prove her fraud claim. This claim, therefore, cannot form the legal basis for rescinding her contract.

Worley also contends that the Second Amendment should be rescinded because she lacked capacity to understand the Amendment's terms and because the Amendment was the product of undue influence. (*See* Cal. Civ. Code §1689(b)(1).) There was no evidence introduced at the arbitration hearing showing that Worley was pressured into signing the Second Amendment, however. Indeed, Worley testified that she "always had a choice" about whether or not to continue with Sheeler and BRG. (Tr. 890:16-891:18.) Further, no evidence was introduced showing that Sheeler was "taking a grossly oppressive and unfair advantage of [Worley's] necessities or distress." (*See* Cal. Civ. Code §1575.) And there was no evidence showing that Worley's "will was overborne" or that she was "induced to do or forbear to do an act which [she] would not do, or would do, if left to act freely." (*See Keithley v. Civil Serv. Bd. Of the City of Oakland* (1970) 11 Cal.App.3d 443, 451.)

With regard to Worley's lack of capacity assertion, no evidence was introduced, aside from Worley's own self-serving conclusory statements, showing that she lacked mental or cognitive capacity at the time of signing the Second Amendment. There are no medical records or corroborating testimony to show that she had any mental or physical medical conditions that would have impaired her ability to understand exactly what she was agreeing to. Her claim of lack of capacity, therefore, cannot form the basis for her rescission claim.

C. Declaratory Relief

Worley seeks declaratory judgment that the Second Amendment is invalid and unenforceable based on her allegations of fraud and negligent misrepresentation. For the reasons set forth, *supra*, Worley's request is denied.

D. Hourly Fees

As discussed, *supra*, Sheeler invoiced Worley for, and Worley paid, $451,950 in hourly charges for work done by Sheeler pursuant to the Second Amendment to the Engagement Agreement. (*See* Ex. 35 ["In accordance with the Second Amendment to Engagement Agreement dtd December 1, 2015, please find our request for payment below for services rendered in this matter . . ."].) Neither Sheeler nor BRG were entitled to this payment, however. Hourly fees are only considered in the text of the Second Amendment to the extent that the Amendment and Engagement Agreement are "terminate[d] prior to the end of the Term, or if the Term expires and is not extended." (Ex. 123, ¶5.) Otherwise, the only payments authorized under the Second Amendment are success fees and expenses. (*See* Ex. 123.) As Tenenbaum testified, if BRG was going to charge an hourly fee, that fact would typically be stated in the BRG agreement alongside the hourly rate to be charged. (Tenenbaum at 1428:15-19; *see, e.g.*, Ex. 62 [Valuation Agreement – explicitly setting forth Sheeler's $600 hourly rate].) Hourly fees were never listed, except under the limited circumstances that are undeniably not at issue here. Worley is therefore entitled to reimbursement of the $451,950 in hourly fees that she paid to Sheeler.

BRG contends that liability to re-pay these fees to Worley is Sheeler's and Sheeler's alone. The undersigned agrees. It is undisputed that Sheeler, not BRG, received the entirety

of this payment. There is therefore no legal or factual reason to impose liability on BRG. The liability is solely Sheeler's.

E. Attorneys' Fees and Costs

Pursuant to the Standard Commercial Terms that were attached to the parties' Consulting Agreement, which remained in effect when that Agreement was amended both the first and second time,[11] the prevailing party in this arbitration is entitled to reasonable attorneys' fees and costs. (*See* Ex. 63 ["[t]he prevailing party shall be entitled to reasonable attorneys' fees and costs incurred in enforcing this engagement agreement through arbitration or otherwise . . ."].) Worley has not prevailed on her primary causes of action. She is, therefore, not the prevailing party in this matter, and as such, is not entitled to recover her attorneys' fees.

F. Punitive Damages

In her Counterclaims against BRG and Sheeler, Worley seeks punitive damages. The Standard Commercial Terms that were attached to the parties' Consulting Agreement clearly prohibits the recovery of such damages, however. (Ex. 63 ["The parties shall not be liable to each other for any consequential, incidental, special or punitive damages . . . ."].) Worley's request for punitive damages is therefore denied.

IV. *BRG's Claims Against Worley*

BRG asserts three counterclaims against Worley: (1) breach of contract; (2) breach of the duty of good faith and fair dealing; and (3) attorneys' fees. The first two claims are based upon the fact that Worley did not pay BRG the success fee that she owed under the

[11] *See* Ex. 19, ¶2, First Amendment to the Consulting Agreement – "In all other respects the terms of the Engagement Agreement shall remain in full force and effect"; Ex. 123, ¶6, Second Amendment to the Consulting Agreement – "Except as otherwise amended herein, the terms of the Engagement Agreement, as previously amend[ed], shall remain in full force and effect among BRG and Smith Worley."

Second Amendment, having paid Sheeler directly. The last claim is based on the fee-shifting provision in the BRG Consulting Agreement.

A. Breach of Contract

As noted, *supra*, in California, to succeed on a breach of contract claim, BRG must prove (1) the existence of a contract; (2) their performance or excuse for nonperformance on the contract; (3) Worley's breach of the contract; and (4) resulting damages. (*Oasis W. Realty, supra*, 51 Cal.4th at 821.) Here, it is undisputed that in every iteration of Worley's engagement letters with BRG, the agreements provided for payment to be made by check or by wire to BRG. (Exs. 62 at 5; 63 at 4; 19 at ¶2; 2 at ¶6.)

That said, Worley credibly testified that she always saw Sheeler and BRG as one and the same, that she believed that Sheeler had the authority on behalf of BRG to enter into all four agreements with her, and that she believed that Sheeler had the authority to collect any funds payable thereunder. (Tr. 914:7-915:1.) Further, on August 23, 2016, Sheeler informed Worley and her attorney that he had the option, on behalf of BRG, "to collect and disburse funds." (Ex. 199.)Worley had no reason to believe that Sheeler, as a Managing Director at BRG, was collecting these funds for any other reason than to collect them on behalf of BRG. Thus, while the contracts may have stated that Worley was to pay BRG directly by check or by wire, Worley substantially performed on the contract when she paid the required sums to Sheeler, who she believed to be acting on behalf of BRG. BRG's breach of contract claim against Worley therefore fails.

BRG asks the Arbitrator to infer that Worley paid Sheeler rather than BRG intentionally in breach of the contract's terms, pointing to the fact that Worley and Sheeler had become close friends throughout 2016, as did Worley and Sheeler's wife. These facts,

while true, do not justify such an inference. No credible evidence was introduced at the arbitration hearing demonstrating that, by paying Sheeler, Worley intended to deprive BRG of receiving payment. She believed she was paying obligations owed to BRG through Sheeler.

B. Breach of the Duty of Good Faith and Fair Dealing

The duty of good faith and fair dealing "requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement." (*Egan v. Mut. Of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 818.) Any allegations of breach of the implied covenant must go beyond the statement of mere contract breach in order to be actionable. (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 352.)

Here, BRG has failed to allege that Worley did anything beyond what it alleges she did under its breach of contract claim. BRG's good faith and fair dealing claim therefore fails.

C. Attorneys' Fees

BRG has not prevailed on either of its two causes of action against Worley. It is therefore not the prevailing party in this dispute. As such, it is not entitled to attorneys' fees under the terms of the parties' Consulting Agreement, or the amendments thereto. (*See* Ex. 63.) Further, BRG has failed to set forth any persuasive argument as to why the Arbitrator should award it attorneys' fees in her discretion.

V. *BRG's Claims Against Sheeler*

BRG pleads two cross-claims against Sheeler: contribution and equitable indemnity. Neither cross-claim is based on any sort of agreement between BRG and Sheeler; they are based solely on California law.

It is undisputed that when BRG learned of Worley's payment of the success fee to Sheeler via her November 30, 2016 demand letter, Sheeler refused to turn over the $3.451 million he had collected from Worley. (*See* Ex. 140, p.3.) Instead, Sheeler deducted $90,000 from the total payment he received -- $45,000 that he paid to Uy, $35,000 that he paid to Worley, and $10,000 that he reimbursed to himself for his April loan to Worley – and then remitted 20% of the remaining $3,361,950, or $672,390 to BRG. (Exs. 698, 243.) Sheeler was then terminated on December 12, 2016. (Ex. 754.) As noted, *supra*, BRG's claim against Sheeler for payment of these fees is being heard in a separate arbitration.

If Worley had prevailed in this arbitration and obtained any award against BRG, BRG may have had the right to seek contribution from Sheeler and/or have been entitled to equitable indemnity. Worley has not been awarded anything against BRG. BRG's request for contribution and its request for equitable indemnity are therefore moot.

CONCLUSION

For all of the foregoing reasons the Arbitrator finds that:

The Kilroys have successfully proven their breach of contract claim. Worley is liable to the Kilroys for the entirety of the $2,995,000 success fee, with no prejudgment interest. The Kilroys are not entitled to recover their costs and attorneys' fees.

Worley has failed to prove any of her three counterclaims against the Kilroys for breach of contract, breach of the covenant of good faith and fair dealing and declaratory relief that the MAS Agreement is unconscionable. These claims, therefore, fail. Worley is also not entitled to recover her attorneys' fees.

Worley has failed to prove her four counterclaims against BRG and Sheeler for fraud, negligent misrepresentation, rescission, and declaratory relief. These counterclaims, therefore, fail.

Worley is AWARDED $451,950 for Worley's payment of Sheeler's hourly fees to which he was not entitled. No prejudgment interest is AWARDED.

BRG has failed to prove its counterclaims against Worley for breach of contract, breach of the duty of good faith and fair dealing, and for attorneys' fees. These claims, therefore, fail.

BRG's counter-claims against Sheeler for equitable indemnity and contribution for any damages, judgment or other awards recovered by Worley in her counterclaims herein are moot.

AWARD

Claimants, Kenneth Kilroy, Ross Kilroy and M&A Securities Group are awarded $2,995,000 against Respondent, Adrienne Smith Worley.

Counter-claimant, Adrienne Smith Worley is awarded $451,950 against Counter-respondent, Carl Lloyd Sheeler.

Counterclaims of Counter-respondent, Berkeley Research Group, LLC against Adrienne Smith Worley are DISMISSED.

Claims of Counter-claimant Adrienne Worley Smith against Counter-respondent Berkeley Research Group are DENIED.

This Award resolves all issues submitted for decision in this proceeding.

Each Party is responsible for their own fees and costs.

This Award is subject to confirmation by a court of competent jurisdiction.

IT IS SO ORDERED.

Dated: August 28, 2018

Hon. Rebecca J. Westerfield (Ret.)
Arbitrator

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Kilroy, Kenneth, et al. vs. Worley, Adrienne Smith
Reference No. 1210033774

I, Brian Palencia, not a party to the within action, hereby declare that on August 29, 2018, I served the attached Final Award on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at San Francisco, CALIFORNIA, addressed as follows:

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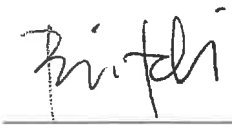
Parties Represented:
Carl Lloyd Sheeler

I declare under penalty of perjury the foregoing to be true and correct. Executed at San Francisco, CALIFORNIA on August 29, 2018.



Brian Palencia
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