IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CIVIL DIVISION

CASE NO.:

MICHAEL FISTEN, an individual,

Petitioner,

vs.

JULIE BROWN, an individual,

Respondent.
_____ /

PETITION/MOTION TO VACATE ARBITRATION AWARD PURSUANT TO SECTION 682.13, FLORIDA STATUTES

COMES NOW the Petitioner, MICHAEL FISTEN ("FISTEN"), by and through undersigned counsel, and files this his Petition/Motion to Vacate Arbitration Award ("Motion") entered on March 18, 2022 against him and in favor of the Respondent, JULIE BROWN ("BROWN"), and states:

SUMMARY OF PETITION/MOTION

Pursuant to Section 682.13, Florida Statutes, a party to an arbitration proceeding may challenge an adverse award within ninety (90) days after they receive notice of the award (albeit the grounds upon which the award can be vacated are limited), by filing a motion to vacate the award. In this case, on December 30, 2021, the Arbitrator, DAVID LICHTER ("Arbitrator") served the parties with a document entitled, "INTERIM AWARD." A copy of that document is attached hereto as Exhibit "A." Although it is clear that this was **not** a "final" award, the Arbitrator, inexplicably,

at page ***32*** of the 35-page document, inserted a heading entitled, "FINAL AWARD."

That last, short section of the Award addressed several matters that had already been fully adjudicated by that date, however, it is clear from the entire "INTERIM AWARD" that there were still issues needing to be resolved by the Arbitrator, most significantly, the determination of attorney's fees for both the litigation proper, and specially as a sanction for alleged discovery misconduct by FISTEN. Therefore, by any reasonable standard – and most importantly, by Florida law – the "INTERIM AWARD" was in fact, an ***interim*** (non-final) award. The "FINAL AWARD" was not served on the parties by the Arbitrator until March 18, 2022 (and specifically "incorporates" the "INTERIM AWARD"). See copy of "FINAL AWARD," attached hereto as Exhibit "B." Accordingly, the 90-day period within which FISTEN ***should*** be able to file a Motion to Vacate does not expire until ***June 16, 2022.***

However – the "INTERIM AWARD" has that troublesome (although legally null and void) reference to it being a "FINAL AWARD," at least in part (a true contradiction in terms.)[1] The 90-day period, ***as calculated from the date of the "INTERIM AWARD***," expires ***today***, March 30, 2022. And therein lies the problem: the 90-day period, by statute, is ***jurisdictional***.

Accordingly, to protect his right to challenge the Arbitration Award entered against him, and to preclude any possible jurisdictional argument being raised by BROWN, FISTEN, through counsel, has chosen to do the following:

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[1] *See* ***Air Conditioning Equipment, Inc. v. Rogers***, 551 So.2d 554, 556 (Fla, 4th DCA 1989) and authorities cited therein ("Arbitration awards should not be confirmed in piecemeal fashion...An arbitration 'award', although not defined in the code, should resolve and determine all matters that have been submitted.") (*Internal citation omitted*).

1. FISTEN'S Petition/Motion to Vacate the Arbitration Award is being filed in the Circuit Court today, March 30, 2022.

2. At the appropriate time, FISTEN will file and serve an Amended Petition/Motion to Vacate Arbitration Award, in which he will fully present all of his grounds to vacate that award, with appropriate citations to the record.[2]

JURISDICTIONAL STATEMENT

1. This is an action seeking to vacate an Arbitration Award entered against FISTEN and in favor of BROWN.

2. Although not a prerequisite for this type of proceeding, the damages suffered by FISTEN exceed Thirty Thousand Dollars ($30,000.00), not inclusive of court costs and attorney's fees.

3. FISTEN is an individual who resides in Broward County, Florida, and who is otherwise *sui juris*.

4. BROWN is an individual who, upon information and belief, resides in Miami-Dade County, Florida, and who is otherwise *sui juris*.

5. The agreement entered into by the parties ("Agreement") was entered into in Miami-Dade County, Florida, and was to be substantially performed in Miami-Dade County, Florida.

6. The various breaches of the Agreement by BROWN occurred primarily in Miami-Dade County, Florida.

7. All of the significant events upon which this Petition/Motion is based occurred in

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[2] There is a transcript of the entire five-day arbitration proceeding, however, due to the time constraints identified above, FISTEN has not yet been able to access, and examine, those transcripts. Further, it is his intention, upon the filing of an Amended Petition/Motion to Vacate, to file for record these transcripts.

Miami-Dade County, Florida.

8. All conditions precedent to the filing of this action have been satisfied or otherwise waived.

9. Accordingly, both jurisdiction and venue are properly within this Court.

STATEMENT OF FACTS

10. FISTEN adopts the sections of the "INTERIM AWARD" entitled, "OVERVIEW OF THE DISPUTE," "BRIEF FACTUAL BACKGROUND," "PERTINENT PROCEDURAL BACKGROUND," "THE OPERATIVE PLEADINGS," and "THE AGREEMENT, as his recitation of the facts upon which this Motion is based. See "INTERIM AWARD" at pages 3-10. The entire "INTERIM AWARD," attached hereto as Exhibit "A" to the Motion, is hereby incorporated herein by reference.

SUMMARY OF ARBITRATION AWARD[3]

11. FISTEN'S claims, Counts I through V of his Amended Statement of Claim, were denied in their entirety.

12. BROWN'S Counterclaim for breach of contract was granted.

13. BROWN'S Counterclaim for Reduction in FISTEN's compensation was denied in its entirety.

14. BROWN'S Counterclaim for Misrepresentation was denied in its entirety.

15. Sanctions were awarded to BROWN and against FISTEN for (a) discovery violations

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[3] This summary includes decisions of the Arbitrator entered in his "FINAL AWARD" dated March 18, 2022, as well as those entered in his "INTERIM AWARD."

and (b) violation of the confidentiality provisions of paragraph 12 of the parties' Agreement. These sanctions took the form of an award of attorney's fees, which were liquidated by the Arbitrator in the amount of $58,570.50.

16. The AAA administrative fees totaling $19,400.00, and the Arbitrator's fees and expenses totaling $50,981.53, "shall be borne as incurred."

GROUNDS TO VACATE THE AWARD

17. That there was evident partiality by the arbitrator, although he had been appointed as a neutral arbitrator. Section 682.13(1)(b)(1), Fla. Stat.

18. That there was misconduct by the arbitrator prejudicing the rights of FISTEN, a party to the proceeding. Section 682.13(1)(b)(3), Fla. Stat.

19. That the arbitrator refused to hear evidence material to the controversy. Section 682.13(3)(c), Fla. Stat.

20. That the arbitrator conducted the hearing contrary to section 682.06. Section 682.13(3)(c)1, Fla. Stat.

PRAYER FOR RELIEF

WHEREFORE, Petitioner MICHAEL FISTEN seeks the following relief:

A. The entry of a Final Order VACATING the Final Award entered on March 18, 2022.

B. The entry of an award of compensatory damages in FISTEN'S favor;

C. The entry of an award of reasonable attorney's fees and taxable costs in FISTEN'S favor; and

D. Such other relief as the Court may deem just and proper.

DATED: March 30, 2022.

Respectfully submitted,

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MICHAEL FISTEN

EXHIBIT “A”

AMERICAN ARBITRATION ASSOCIATION

MICHAEL FISTEN, CASE NO: 01-20-0015-8776

Claimant/Counter-Respondent,

vs.

JULIE K. BROWN,

Respondent/Counter-Claimant.
_____/

INTERIM AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with paragraph 11(b)(ii) of the Collaboration Agreement (the "Agreement") entered into between the above-named parties and dated May 17, 2019 by and between Julie K. Brown ("Brown" or "Respondent") and Michael Fisten ("Fisten" or "Claimant") having been duly sworn, and having duly heard the proofs and allegations of the parties, does hereby issue this INTERIM AWARD, as follows:

I. THE PARTIES

Claimant Michael Fisten served as an officer for Metro-Dade Police Department n/k/a Miami-Dade Police Department ("Metro-Dade") for approximately 30 years before he retired. He served in a number of capacities ranging from patrol, to General Investigations, Robbery, Homicide, Special Investigations, General Investigations Supervisor, Acting Platoon Commander and as part of the Joint Terrorism Task Force where he was a Special Operations Lieutenant. Mr. Fisten received a number of commendations during his career. For the last 12 years, he has

worked as a private investigator for a number of well-known law firms. Pertinent to this matter, he met attorney Brad Edwards at the Rothstein, Rosenfeldt & Adler firm, where he began to work with Mr. Edwards on some investigations involving now-deceased sex trafficker Jeffrey Epstein. His affiliation with Mr. Edwards continued for several years after Mr. Edwards formed his own law firm; Claimant worked with Mr. Edwards as an investigator primarily on cases related to Jeffrey Epstein. Fisten also formed an investigative firm, Blueline Investigations, with his former colleague (and boss) at Metro-Dade, Pat Roberts. Claimant was represented at the final hearing by Richard Wolfe, Esq. of Wolfe Law.

Respondent Julie Brown is a career journalist and the recipient of several awards over her career. She joined the *Miami Herald* in 2005 and served as a reporter. In 2016, she began to investigate and work on a story about Jeffrey Epstein. This wide-ranging investigation involved dozens of interviews with attorneys (including Brad Edwards), some of Epstein's victims and other people, review of public records and FOIA requests, all of which resulted in the three-part series *Perversion of Justice.* The series, which was released via the *Miami Herald* online in November 2018, received international attention. Brown asserts that the series also helped lead to the arrest of Jeffrey Epstein on July 6, 2019[1] and there is some evidence that the series may have ultimately contributed to the July 12, 2019 resignation of then-United States Secretary of Labor and former United States Attorney for the Southern District of Florida, Alex Acosta, in connection with that

[1] Attorney Brad Edwards testified that the series indirectly lead to Epstein's arrest.

office's prosecution of Jeffrey Epstein. Respondent was represented at the final hearing by Steven Perez and Albert Alvarez of Peretz Chesal Herrmann.

II. OVERVIEW OF THE DISPUTE

Claimant brings a five-count Amended Statement of Claim ("ASOC") against Respondent.[2] The thrust of the ASOC is that Brown breached the Agreement by failing to pay Claimant 50% of the $700,000 second book advance that Respondent received from the publisher for her non-fiction book about Jeffrey Epstein, which work was the subject of the Agreement. Fisten contends that Brown improperly anticipatorily breached the Agreement by terminating it via a letter from her counsel on October 16, 2020 (the "Letter").

In the Letter, Ms. Brown notified Mr. Fisten of the Agreement's termination based on alleged failures by Claimant to provide information and materials to Respondent, instead providing them to others and failing to provide Ms. Brown with certain materials claimed to be in Mr. Fisten's exclusive possession. That Letter also advised that Respondent was not going to pay Claimant any additional monies based on his alleged "non-participation in both the project and your incurable breach of the Collaboration Agreement." *Id.*[3] Claimant asserts that he fully performed all of his obligations under the Agreement, and that paragraph 11(b) of the contract is illusory,

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[2] Claimant dropped Count VI for Quantum Meruit/Unjust Enrichment prior to the final hearing after the filing of Respondent's Motion for Summary Judgment as to this Count.

[3] Although Fisten contends that the Letter "did not describe the breach in detail," Fisten Post-Trial Memo at 13, the undersigned finds the description sufficient.

as it purportedly gives Respondent the right to unilaterally reduce Fisten's compensation as she sees fit. After an exchange of emails between counsel following the Letter, this arbitration followed.

For her part, Brown has raised the affirmative defense of Claimant's alleged prior breach of the Agreement, which she contends excused any subsequent performance by her. Respondent also asserts Fisten's "unclean hands" by virtue of certain alleged misrepresentations he made and his participation in the Netflix series *Filthy Rich* concerning Jeffrey Epstein, which he purportedly concealed from Brown. Respondent also brings a Counterclaim against Claimant for Breach of Contract, based on Fisten's alleged failure to provide "exclusive material" to Brown as allegedly promised; by violating the Agreement's "exclusivity" provision by participating in the Netflix program, and by violating the Agreement's confidentiality provisions by disclosing the terms of the Agreement to the media.

III. BRIEF FACTUAL BACKGROUND

After meeting one another on a limited basis prior to 2019, in February of that year, Claimant and Respondent met face-to-face to discuss their respective work involving Jeffrey Epstein. Fisten was thinking about writing a book regarding Epstein (he had previously authored some potential book proposals in 2011 and 2015) and Brown told Claimant that she was beginning to work on her own book proposal with her agents. This meeting culminated in an oral agreement to work together, which ultimately resulted in the execution of the Agreement in May 2019. In the

interim, Fisten sent his book proposals to Brown, and they began to collaborate in the ensuing months.[4]

Following the execution of the Agreement, Brown's agents ultimately negotiated a publishing contract with Harper Collins, which was signed in September 2019. That same month, the publisher paid Respondent her initial advance, which she split with Claimant 50/50, in accordance with the terms of the Agreement. For his part, Fisten received $150,000 in connection with the initial book advance.

Between May 2019 and July 2020, the parties exchanged a substantial series of texts, emails, photos, documents and other materials. The nature and extent of Claimant's submissions to Respondent and their utility in connection with the Agreement and the work that was ultimately published are at the heart of this dispute. On October 16, 2020, Brown's counsel sent the Letter to Fisten notifying him of his allegedly incurable breach, terminating the Agreement and informing Claimant that Respondent was not going to pay Fisten any more money.[5] This

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[4] Claimant asserts that he sent his book proposals to Respondent because he was under the impression she had never written a book proposal (or a book) before and required his as a "go by," i.e., something to reference in connection with the preparation of her proposal. Brown's unrebutted testimony, however, was that she had previously written a book proposal involving the locally notorious Ben Novack entitled "The Novack Murders," which was submitted to the publisher Simon & Schuster and was ultimately made into a Lifetime movie. She also testified that she had the assistance of colleagues, such as author and award-winning *Miami Herald* journalist Carl Hiaasen, who sent her sample book proposals. Fisten's suggestion that Respondent, a long-time journalist who previously authored at least one book proposal, needed Fisten's assistance in preparing her proposal -- when Fisten provided no concrete evidence that he had ever successfully submitted one before -- is not as credible as Brown's version of events.

[5] Significantly, despite telling Fisten that he has "done literally nothing since you signed the Collaboration Agreement," the Letter went on to state that although Brown has an "absolute

arbitration followed. Brown ultimately received another $700,000, which she did not share with Claimant, and her book regarding Epstein, *Perversion of Justice,* was published in 2021.

IV. PERTINENT PROCEDURAL BACKGROUND[6]

The original Statement of Claim was filed with the AAA on December 1, 2020. Respondent filed her Answering Statement and Counterclaim on January 29, 2021. On April 6, 2021, Brown filed a Motion for Partial Judgment alleging that Fisten materially breached the Agreement by disclosing its financial terms to the media. Respondent sought as a remedy a declaration from the Arbitrator that Fisten's breached excused Brown from any additional payments under the Agreement. After briefing and oral argument, on May 13, 2021, the Tribunal issued its Order Granting in Part Respondent's Motion for Partial Judgment.

The Arbitrator found that following Brown's termination of the Agreement, Claimant hired a public relations firm to distribute a press release. That release, issued the day the arbitration was filed, invited the press to a media briefing at Fisten's counsel's offices, and the release attached slightly and sloppily redacted versions of the Statement of Claim and the Agreement. That same day, the *Miami Herald* ran a story about the arbitration, including quotes from the Statement of

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right to demand repayment of the share of the advance previously paid to you . . . she has decided (against my advice) not to do so for now." *Id.*

[6] This section is not meant to summarize every motion filed or every order issued, just those pertinent to the Interim Award.

Claim and mentioning certain financial terms from the Agreement. The following month, the *Miami New Times* published an extensive article which contained quotes from the termination letter, referred to the Statement of Claim, published the contents of certain emails exchanged between Claimant and Respondent and contained a number of quotes from Fisten which were the result of an interview to which Claimant submitted. The undersigned held that the disclosures in both articles were "a willful, blatant and carefully orchestrated public blast which plainly and materially breached the terms of Paragraph 12" of the Collaboration Agreement. *Id.* at 8. The Tribunal decided to carry with this arbitration the appropriate remedy.

Fisten submitted his ASOC on August 5, 2021 and three days later, the Arbitrator largely granted Brown's Motion Compel Production of certain discovery. Respondent thereafter moved for sanctions based on Claimant's failure to comply with the Order granting Respondent's Motion to Compel. On September 19, 2021, the Tribunal directed Fisten to produce certain materials in a particular manner in connection with Brown's Motion for Sanctions and decided to defer ruling on the question of sanctions, until such time as the undersigned disposed of this matter. Based on Claimant's additional failure to comply with the order compelling discovery and the Order on the Motion for Sanctions, on October 20, 2021, the Tribunal entered an Order Drawing Adverse Inference as to the Existence of Certain Documents and again noted that the Arbitrator would continue to defer any sanctions until the final hearing (or thereafter).

On October 22, 2021, the Tribunal granted Brown's request to exclude Claimant's agent Michael Abate as a witness, based on Fisten's "willful failure to comply with an order of the Tribunal," Order Excluding Michael Abate as a Witness at 3, given Claimant's failure to produce his agent for deposition despite repeated requests. In short, Fisten's conduct since the filing of the Statement of Claim has been marked by a material breach of the Agreement's confidentiality provisions, repeated discovery violations resulting in the imposition of sanctions, the drawing of an adverse inference founded on *other* discovery violations and a series of troubling occurrences during discovery.[7] Based on the foregoing, the Arbitrator deems it appropriate to award sanctions for the foregoing discovery violations and for Claimant's willful and material breach of the Agreement's Confidentiality provisions set forth in paragraph 12. Such sanctions are addressed *infra*.

The matter proceeded to final hearing on October 26-29, 2021. The parties submitted their post-hearing briefs and related materials on December 6-7, 2021 and the matter was declared closed as of December 7, 2021. The parties agreed reopen the hearing following the Tribunal's decision to issue an Interim Award pending the parties' decision on attorney's fees, as discussed below.

V. The Operative Pleadings

The ASOC now contains five counts: Declaratory Relief (Count I); Accounting (Count II); Breach of Fiduciary Duty (Count III); Breach of Contract (Count IV); and

[7] These include, for example, claims that certain emails from Radicalmedia were the only emails available, when additional emails were thereafter "just found."

Recission and Injunction (Count V). Despite the number of claims, Fisten's Trial Memorandum,[8] Post-Trial Memorandum the evidence and argument before this Tribunal almost exclusively focused on his claim for Breach of Contract (whether committed by way of anticipatory breach or actual breach of the Agreement). That is the claim that the Arbitrator will primarily examine.[9] Claimant's breach of contract claim seeks $350,000, which he asserts he is owed based on Brown's failure to pay Fisten the balance of his half of the Net Proceeds (defined in the Agreement) paid by the publisher to Respondent under the publishing agreement.

For her part, Respondent has brought her own breach of contract claim (Count I), based on Fisten's alleged failure to provide the "exclusive material" he allegedly promised; his violation of the Agreement's exclusivity provision by participating in a Netflix program, and by violating the Agreement's confidentiality provisions by disclosing the terms of the Agreement to the media. For those alleged breaches,

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[8] Fisten's Trial Memorandum also briefed the issue of the implied covenant of good faith and fair dealing, *id.* at 7-8, but Claimant brought no such claim in this arbitration and it will not be considered.

[9] Count I for Declaratory Relief was based on the factual allegation that Claimant "authored many passages in, and the Work is based *predominantly* upon his proprietary information and work product". *Id.* at ¶ 26 (emphasis added). Fisten did not brief or argue this issue and it could be said to be abandoned. Additionally, and as discussed *infra*, Fisten's own evidence revealed that his work product contributed at most to a *de minimus* portion of the book. Count II (Accounting) was not mentioned at all in the briefing and at trial and can be deemed abandoned. In any event, the relief it seeks is duplicative of Count IV (Breach of Contract). Claimant presented no evidence, offered no legal authority and made no arguments to support Count III's allegation that Brown owed a fiduciary duty to Fisten, and that claim can be deemed abandoned or denied for lack of evidence. Count V (Rescission and Injunction) was not briefed or argued, and can be deemed to be abandoned. That Count is also duplicative to the extent it is based on Count IV, *see* ASOC at ¶ 41 (seeking rescission based on Brown's breach of contract), and in part on the fallacious claim that Fisten is a "Co-owner of the copyright in the Work," something the Agreement explicitly refutes. *See id.* at ¶ 10 ("Brown owns and will own copyright and all other rights in the Work.").

Brown seeks the $150,000 previously paid to Fisten. Following the filing of Claimant's ASOC, Brown also brought claims for Reduction of Fisten's Compensation (Count II), wherein she seeks to recover the $150,000 paid to Claimant under Paragraph 11(b) of the Agreement and for Misrepresentations (Count III), which is essentially a claim for fraudulent inducement into the Agreement.

VI. The Agreement

The parties undertook certain responsibilities under the Agreement, which included, among other things, Fisten providing certain information and materials to Brown and making himself available to Respondent for interviews, and Brown completing her manuscript and endeavoring to secure publication of the completed work. Paragraph 4 of the Agreement set forth the terms of Fisten's "financial participation" in consideration for the services he was to render. The Agreement contains a termination clause, which provides, in pertinent part, that "either party may terminate this Agreement if the other party materially breaches any of the terms or conditions of this Agreement and such material breach is not cured within thirty (30) days after receipt of written notice." It also provides that notwithstanding anything to the contrary in the Agreement, Fisten is entitled to receive payment if Brown contracts with a publisher, unless Brown determines that such payment should be reduced in light of Claimant's contributions to the book. If the parties cannot agree on the reduction, they are to arbitrate their dispute.

VII. Analysis of Pertinent Issues

A. Anticipatory Breach and Breach of Contract

Fisten argues that the Letter announcing that Brown had no intent to pay Claimant any additional monies amounted to an anticipatory breach of the Agreement. He contends that this anticipatory breach relieved him of any subsequent obligations to perform, including the disclosures made to the media in December 2020 and January 2021, which disclosures were the subject of the Tribunal's Order dated May 13, 2021.[10] Going hand-in-hand with that contention is Claimant's assertion that he fulfilled all of his duties set forth in paragraph 2(a) of the Agreement. Fisten Post-Trial Memorandum ("Fisten PTM") at 6-7; *see also* Fisten's testimony at the final hearing (I "fully, completely and materially complied with all my responsibilities.").

As Fisten correctly argues in both his pre and post-hearing briefing, "a breach of contract 'by anticipatory repudiation allows the *nonbreaching* party to terminate his own performance and bring litigation for damages." *Southeastern Integrated Medical, P.L. v. North Florida Women's Physicians, P.A.*, 50 So.3d 21, 22 (Fla. 1st DCA 2010) (emphasis added). In this instance, the undisputed repudiation or, more properly phrased, termination, was by Brown, not Fisten. As a result, Claimant notes that "[w]hen anticipatory breach is asserted as a defense, the proponent is attempting to establish that his own performance under the contract was excused *and that he is*

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10 Claimant's anticipatory breach argument is discussed *infra*. His contention that Respondent's alleged anticipatory breach obviated his confidentiality obligations under the Agreement is belied by its explicit terms: "The provisions of this Paragraph 12 will survive the termination of this Agreement *for any reason*." *Id.* (emphasis added).

not in default." *Ryan v. Landsource Holding Co.*, 127 So.3d 764, 767-68 (Fla. 2nd DCA 2013) (emphasis added) ("The non-defaulting party is relieved of its obligations under the contract."). Stated another way, to establish a right to damages for Respondent's alleged anticipatory breach, Claimant "must establish [his] ability to perform at the time of the breach." *Id.* at 768. As Fisten has repeatedly maintained throughout the arbitration, he "in fact had fully performed all his material obligations under the Agreement." Fisten Trial Memo a 4.[11] *See also* Response to Motion for Partial Judgment at ¶ 6 (at the time of the termination letter, "Fisten had already completed his obligations under the terms of the Collaboration Agreement.").

Claimant's claim of full performance stands in direct contrast to Respondent's argument that Fisten breached the Agreement in several material ways. First, Brown asserts that Claimant breached paragraph 2(a) of the Agreement, which required Fisten to "diligently complete any research reasonably necessary to complete the manuscript for the Work." *Id.* Second, Respondent contends that Fisten did not give "personal interviews and other information and materials obtained by Fisten relating to the subject-matter of the Work exclusively to Brown" as the contract required (other than as may have been approved by Brown),[12] but instead granted

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[11] As this Arbitrator has held at least twice previously, this moots Claimant's argument that "Brown never gave Fisten an opportunity to cure." Fisten Trial Memo at 4. *See* Order Granting in Part Respondent's Motion for Partial Judgment at 6 (May 13, 2021); Order Denying Fisten's Motion for Summary Judgment at 3 n.1 (Sept. 29, 2021).

[12] Although Respondent correctly contends that Claimant's media blitz in December 2020 and January 2021 materially breached the Agreement – as this Tribunal found previously -- that breach occurred long after Brown terminated the agreement and could not have supplied a reason for the termination.

interviews and disseminated materials to third parties, including the media. Third, Respondent asserted that Claimant violated the "Warranties and Representations" paragraph of the Agreement which in pertinent part required Fisten to warrant that he had "no other contractual commitments of any kind which will or might materially conflict or interfere with the performance of Fisten's obligations hereunder. . . . " *Id.* at ¶ 8.[13] The contrapuntal arguments made by the parties merit an analysis of one of the matter's central issues: what was the nature of Claimant's performance under the Agreement?

(i) The "Tasks" Allegedly Assigned and Completed

In response to certain discovery requests, Claimant created a list entitled "Contact with Julie Brown 2019-2020," which list was offered at the final hearing as Demonstrative Exhibit No. 1 ("Demo #1") and, according to Fisten, were the tasks he performed in connection with his work under the Agreement. Claimant modified this chart into a List of Tasks, submitted as Exhibit A to Fisten's Post-Trial Memo (the "New List"). Although the number of tasks set forth in Demo #1 totaled 211, *id.* at 20, only 166 remained in the New List. This 21% reduction in the amount of tasks following the final hearing provides evidence that the list in Demo #1 itself was

[13] Brown argued that Fisten violated this paragraph in a variety of ways via his participation in the Scott Israel for Broward Sheriff campaign. While the evidence adduced at the final hearing showed that Claimant spent some time on the campaign, the Agreement did not require him to work full time, and Respondent offered insufficient proof that the time Fisten did spend on the campaign materially interfered with his duties under the Agreement. This contention merits no further discussion and is rejected.

considerably inflated, and a comparison of the two documents confirms that.[14] Stated another way, Fisten has effectively conceded that 45 "tasks" that he contended were "Tasks Assigned by Julie Brown," Demo #1 at 1, and that "All tasks were completed," *id.*, were either: a) not tasks; or b) not completed. This undermines Fisten's claim for anticipatory breach as well as his credibility.

The List of Tasks also has, for the first time, a new column entitled "Supporting Evidence."[15] This column is problematic for several reasons. First, it references exhibits that Claimant decided not to put into evidence as Respondent accepted Fisten's proffer of summaries as sufficient.[16] Second, its late inclusion takes away an opportunity for Brown to respond. Third, even assuming they are properly examined,

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[14] By way of example only, Demo #1's listing for February 14, 2019 contains the same task twice, "Julie asked me for an investigative report I did on Aline Weber," and another very closely related task on that same date seeking contact information for the same person. Another task previously identified by Fisten in Demo #1 for March 13, 2019 said: "Julie called me to check flight tracker to see if Epstein's plane was in WPB." Brown's Response to Fisten's "Contact with Julie Brown 2019-2020," Brown Ex. 145 (the "Rebuttal Report" or "RR"), described this as a "false task," *id.* at 4, stating the reasons why, and that task disappeared from the New List. The same is true of the task listed for July 3, 2019, where Claimant claims the following as a "task": "I told Julie we should meet once a week and go over what has to be done on the book, never materialized." That is clearly not a "task" assigned by Julie and it disappeared from the New List following the filing of the RR (which described it as a "non-Task") and the final hearing. The same is true for Fisten's July 7, 2019 "task," "Julie couldn't talk to me told me she was on TV," which disappeared after the final hearing. There are numerous others discussed and supported with backup emails in the RR. The New List also contains duplicate or nearly identical entries. *Compare id.* at #84, *second* #96 (there are two entries marked #96). The RR describes these duplicate tasks as at best incomplete. *See id.* at 30, 35.

[15] Such additional evidence may have been requested by the Tribunal at the final hearing.

[16] MR. WOLFE: I'm not going to put all the exhibits into evidence. We don't have a record. He's [Fisten] summarized everything in the charts, so I don't see any reason to go ahead and do that.

Tr. Hrg. (Oct. 26, 2021) at 93:22-25.

a review of some tasks cited in the New List and then compared to Fisten's Exhibit List (submitted October 14, 2021) or even the flash drive with Fisten's exhibits provided to the Arbitrator brings into serious doubt the reliability of the New List or the Exhibit List itself.[17] That is, a review of the New List, the Rebuttal Report and the exhibits reveals that numerous items that Claimant labeled as "tasks" were not tasks assigned by Respondent to Claimant, but were, among other things:

- items that *Fisten* sent *to Brown*;
- items Respondent sent to Claimant (and others on a number of occasions) for informational purposes only, such as articles;
- matters unrelated to the book at issue in this arbitration; or
- items for which Claimant provided no backup or insufficient backup.

A few examples will suffice. Claimant's description for May 2, 2019 from Demo #1 as a "task" was "Advised Julie to watch the View Dershowitz will be on." That is hardly a task Brown assigned to Fisten. Following the submission of the Rebuttal Report, that description morphed in the New List to Respondent supposedly asking Fisten to watch the television show for any useful material; the underlying text on the subject, however, says no such thing:

> Fisten: "Hope you had a good vacation. Heard Dershowitz is going to be on the View live today about his connection to Epstein.
>
> Brown: It's not live on west coast. I can't watch it until later."

Brown Ex. 100 at 12.

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[17] As discussed piecemeal below, the list of exhibits on the latest Fisten Exhibit List does not match up with the exhibits cited in the New List, at least by number and description.

Another example is Fisten's task for November 21, 2019, which he describes as "Julie asked Fisten to review a book called EPSTEIN: DEAD MEN TELL NO TALES Spies Lies & Blackmail. She wanted my opinion and to see if there was anything that we could play off of for our book." Fisten's exhibit supporting this is supposedly #482, which on his Exhibit List bears only the title "June 2019 phone calls," which is not even the same month this exchange occurred.[18] Brown's Exhibit #174, from the date in question, is an email *from Fisten to Brown* asking her whether she was interested in speaking to the author or utilizing "any of the exclusive elements in the book," whatever that means. *Id.*

A third example is the alleged task for December 12, 2019, which is described in Demo #1 as "Julie asked me to help Emily with obtaining several photos;" in the New List, Claimant added the phrase "which were going to be used in the book." *Id.* Fisten cites Exhibit #468, which is titled on Fisten's Exhibit List "6-1-20 Julie and Emily win award 10000," which adds nothing to the discussion.[19] Brown's exhibit #175, on the other hand, is an email from Emily Michot, who worked at *The Miami Herald* with Julie Brown. This email simply asked Claimant whether Blue Line Investigations, Fisten's company, should get certain photo credits and did not involve any request for Claimant's assistance.

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[18] The same exhibit from the flash drive in the Tribunal's possession is simply a list of phone numbers called in October and November, which is utterly unhelpful.

[19] Exhibit #468 on the flash drive is a 101-page document containing text messages between the parties. It is not the Tribunal's job to sort through each page to try to find some support for Claimant's citation.

Demo #1 lists for April 13, 2020 two separately delineated tasks: "I provided Julie with a witness named Lynn Forester de Rothschild, and never heard back from her on that," and "Julie asked for and I provided her with a report on Lynn Rothschild." These two tasks collapse into one in the New List, now described as "Fisten advised Julie that he knew of a potential witness named Lynn Forester de Rothschild and that she should talk to her." Claimant reports that "Julie advised Fisten to forward to her everything he had on this potential witness." To support this "task," Fisten cites Ex. #441, which on his Exhibit List is a "3-17-20 Sentencing Transcript," which has nothing to do with this alleged task. More to the point is Brown Ex. #45, which is in fact merely a forwarding email from Claimant to Respondent which itself forwards an email *from 2009* from Brad Edwards to Fisten asking Claimant to see if he might locate this person.[20] There is no advice from Fisten to Brown in the email regarding this witness, as claimed, nor is there any response from Brown, as Claimant asserts.

Moreover, Fisten's listed task on Demo #1 for May 20, 2020 was "Julie asked for and I provided her with a chart of Epstein victims." The New List – with a nearly identical description – cites inapplicable Exhibits #454 (5-7-20 re David Kelmanson [whatever that means]) and #85 (Brad Edwards Affidavit). But Brown's Exhibit #139 actually dated from May 20, 2020, is an email from Claimant to Respondent entitled "Chart of Girls" which simply states "Well I see that Brad found the chart I made up and told he didn't know where it was . . ." This email merely attaches a picture of

[20] Brown's Ex. #45 does match Ex. #441 on the flash drive.

attorney Brad Edwards pointing to the top of a cut-off (in the photo) poster board with three pictures and a number of unidentifiable post-it notes.[21]

Based on a review of the foregoing and the testimony considered from the arbitration, it is clear that Claimant's description of many "tasks" is simply not supported by the evidence. A review of other "tasks" from Fisten's charts reveals that many were not completed, were only partially completed, or did not include tasks that Respondent actually assigned to Claimant.

There were other tasks that Fisten either did not do or did not complete. By way of example only,[22] Claimant's New List for March 2, 2019 contains a task entitled "Julie verbally asked Fisten to find out who the New York victims were." The description under the "completed task" column states "[s]ources were called, research was conducted and the information was sent to Julie via Text."[23] The Rebuttal Report cites a text from Fisten to Brown from the same date, March 2, 2019; the text mentions no victim names from New York and one possible name from LA introduced by the phrase "we *think* one [victim] is," (emphasis added) with no further

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[21] Exhibit #454 on the flash drive matches Brown's #139; Exhibit #85 on the flash drive appears to be a list of three cases from 2009 when Fisten was working for the now-defunct Rothstein, Rosenfeldt & Adler firm. Both of these exhibits are equally useless for purposes of supporting this alleged "task".

[22] There are numerous other examples, but their length and explication would convert this Interim Award into an even lengthier document.

[23] The supporting Exhibit is identified as #468, but that exhibit on Fisten's Exhibit List is entitled 6-10-20 - Julie and Emily win award 1000," which does not support that entry. Instead, #468 from the flash drive in the Arbitrator's possession is the 101-page text document.

information (Brown Ex. 100 at 5). Fisten's description of his action as a "completed task" is simply wrong.

Interestingly, Demo #1 mentions an exchange of text messages between the parties on March 31, 2019. The Rebuttal Report cites the text (Brown 100 at 8) in which Respondent asks Claimant: "Did you ever track down the Rebecca and Michael people who Dersh claimed told him Virginia was lying?" The RR notes that Fisten failed to respond to this task, which it lists as not performed. In response, Claimant simply *deletes* the text from the New List.

In a similar vein, Demo #1 lists a task that says, "Julie asked me to review an article about Tom Girardi and Sheriff Ric Bradshaw and discuss with her." The RR stated that Claimant never responded to this request and the task was incomplete. *Id.* at 19. Once again, in the New List, this "task" simply disappears.

Likewise, for January 27, 2020, Demo #1 lists the following task: "Julie sent me an email stating she was still looking for the depositions of Michael Reiter, Joe Recarey, Virginia's, Shawna's, Tatum's. I told her Brad has them all and I would talk to him." After the RR noted that Claimant did not follow up on the task, inform Respondent that any portion was unrealistic and that Brown received two of the depositions from another source, *id.* at 41, this task simply disappears from the New List. When asked about this request and these depositions by his counsel at the final hearing, Claimant stated "Brad was not going to release any of those depositions and I had none of those in my possession." Tr. Hrg. (Oct. 26, 2021) at 62:7-18. If that was the case, why didn't he inform Respondent? If that was the case, how could Fisten

possibly list this as a "completed task" in Demo #1? These examples (among others) demonstrate that Fisten is apparently moving the proverbial goal posts by jettisoning prior tasks he claimed to complete but did not, so that he can attempt to claim compliance in the New List. The Tribunal rejects such improper massaging of the task list. Fisten's claim, therefore, that "[t]here were only four things that Brown asked for and Fisten did not do" Fisten Post-Trial Memo at 8, is simply wrong,[24] and is another blemish on Claimant's credibility.

(ii) The Interviews

Another major point of contention in the final hearing was the nature and extent of interviews Fisten provided to third parties. Paragraph 2(a) of the Agreement provides that Fisten "agrees to give his story, personal interviews and other information and materials obtained by Fisten relating to the subject-matter of the Work *exclusively* to Brown . . . ." (emphasis added). The Letter informed Claimant that he had breached the duties set forth above by having provided "information and materials to others (including without limitation Netflix)." Fisten contends that his interview for the Netflix Documentary[25] about Jeffrey Epstein entitled *Filthy Rich* (aired in May 2020) and his subsequent surveillance of Epstein's home "completely occurred **before** the Collaboration Agreement was signed on May 17, 2019." Fisten Post-Trial Memo at 9 (emphases in the original). A portion of the interview, however, depicts Claimant watching coverage of the July 12, 2019 resignation of U.S. Secretary

[24] Claimant himself acknowledged on January 28, 2020 that he needed to "step it up" on the joint project. Brown Ex. 59 (email from Fisten to Brown (Jan. 28, 2020).

[25] This documentary was produced by Radicalmedia.

of Labor and former Epstein prosecutor Alex Acosta (as then-U.S. Attorney for the Southern District of Florida) following Jeffrey Epstein's arrest.

To support his contention, Claimant asserts his interview regarding Acosta was actually footage from a CNN interview that Brown approved and that his pre-Agreement timetable is correct because "he was wearing the same shirt and was in the same Hotel Room as the CNN interview." Fisten Trial Memo at 10 n.4 and accompanying text; Tr. Hrg (Oct. 26, 2021) at 76:6-9. The Tribunal notes from watching the video that in the segment, however, the press conference surrounding the Acosta resignation is played on a laptop in real time in front of Claimant while he is being interviewed. During the interview, and commenting on the Acosta resignation, Fisten states "now I know why he resigned **today**," meaning July 12, 2019, nearly two months *after* he signed the Agreement forbidding such interviews.

Moreover, the statement that he was "wearing the same shirt and was in the same hotel room as the CNN interview" is demonstrably false. The Arbitrator has reviewed and compared both videos (Brown Exs. 146 and 149). In them, the backgrounds are clearly different: one room has a blank wall, the other has a window covered by a shade; Fisten is seated behind a desk in one and without a desk in the other; one segment shows the interviewer, the other does not. The shirts are also visibly different; one has an elbow-length sleeve with a button, the other does not. Notably, in an affidavit filed as late as September 7, 2021 in this case, Claimant sets forth (among other things) the topics that were covered in the CNN interview; the discussion of Acosta's resignation is not among them. Brown Ex. 107 at 7. The

Tribunal therefore finds that at least a portion of the interview that appears in the Netflix documentary was done after the Agreement was signed, which is a breach of the Agreement.

There is additional evidence that Fisten violated Paragraph 2(a) of the Agreement by appearing in a ReelzTV documentary entitled *The Prince and the Pedophile,* in which he appears a number of times.[26] There is no dispute that this interview occurred during the term of the Agreement; the only issue is whether Respondent consented to Claimant's participation. Fisten had turned down an interview with the BBC in August 2019 (Brown Ex. 100 at 38), but claimed that Brown had consented to a *different* interview. Claimant provided no evidence of this consent, and posits, without any evidence, that the BBC somehow sold or gave his interview to ReelzTV and then used the material without consulting or informing Fisten. The text that Claimant sends to Respondent when the documentary was aired is also suspect:

> Was Scrolling through channels to find something to watch and saw that on Reelztv was a special [about] Jeffrey Epstein and prince Andrew in the info portion it says what it's about and has my name on it. I watch it, it's a documentary can they do that without telling me?

Id. at 95. Having sat for the interview, Claimant's professed ignorance rings hollow, especially in light of the deception surrounding the Netflix

[26] Although Claimant states that the only interview that is mentioned in the [Letter] is Netflix," Fisten Trial Memo at 12, what the Letter actually states is that Fisten has "provided such information and materials to others (including *without limitation* Netflix) in blatant disregard of your exclusive obligation to Ms. Brown." (emphasis added). To the extent Claimant is arguing some sort of waiver, that is rejected, and the "without limitation" language is sufficient to encompass the ReelzTV interview.

documentary. Based on the foregoing, it is clear that Fisten breached the terms of the Agreement which required him to give his interviews "exclusively to Brown," and Fisten's assertions in his Post-Trial Memo that he "fulfilled all of this duties in paragraph 2(a) of the Collaboration Agreement," *id.* at 7, is simply wrong.

B. Paragraph 11(b) and the Reduction in Compensation

Another hotly contested point in these proceedings is Respondent's refusal to pay to Claimant any monies other than the $150,000 from the initial $300,000 advance the publisher paid to Brown. It was this refusal that ultimately prompted this arbitration. Fisten argues that he is entitled to the money, having fully performed. We have already concluded above that Claimant did not fully perform under the Agreement.

At issue here, however, is Paragraph 11(b) of the Agreement, which provides in pertinent part that:

> Fisten will nevertheless be entitled to receive the payments set forth in Paragraph 4 (a) and (b) above [50% of all net proceeds the publisher pays] unless Brown determines that the aforesaid compensation to Fisten should be reduced in light of the nature of Fisten's contribution to the final manuscript of the Work.

The language of this portion of 11(b) therefore raises two questions: 1) what was the nature of Fisten's contribution to the final manuscript; and 2) does the clause giving Respondent the discretion to reduce Claimant's compensation render the promise to pay illusory?

(i) Fisten's Contribution to the Book

Brown submitted discovery directed towards Fisten's contributions to the work. Claimant reviewed the final manuscript during the course of this arbitration and created "Fisten Book Exhibits 1-22" in which he identified 22 places in the work where Respondent purportedly used materials/information that he supplied. Assuming *arguendo* Claimant in fact supplied to Brown all of the information he claims, the sum total of Fisten's contribution can be summarized as follows:

Words of Text in Book	Number of words encompassed by the information Claimant identifies that he supplied	Percentage
136,345	5,880	4.3

Respondent prepared a detail rebuttal document (Brown Ex. 17), which was also attached to a prior motion for summary judgment. That document examines each of Fisten's claimed submissions for the book section-by-section, citing sources, and indicates that (i) Brown obtained much, if not all of the material from other sources prior to the time Claimant claims to have furnished them for the manuscript; (ii) Respondent did not use the materials Fisten provided; (iii) Claimant failed to provide the source materials or details needed; (iv) Fisten cites to the wrong person; and/or (v) the matters Claimant cites were from publicly-available sources. Additionally, when asked at the final hearing about what he did in relation to what appeared in the book, Fisten acknowledged that if the information he purportedly gave Brown "wasn't used in the book, I don't know if that information I gave her led

to something that she used in the book." Tr. Hrg. (Oct. 27, 2021) at 236: 8-10. Hence, it would be mere speculation to conclude that Fisten contributed anything to the book that is not patently obvious. The fact the Claimant "didn't read the entire book," *id.* at 224:1, at the center of this dispute to try and bolster his assertions is telling.[27] Based on the foregoing, the Tribunal finds that the "nature of Fisten's contribution to the final manuscript of the Work," Agreement at 11(b), was negligible at best.

(ii) Respondent's Ability to Reduce the Amount of Compensation

Claimant argues that the Agreement is unenforceable "because it purports to grant Brown the ability to arbitrarily reduce Fisten's compensation based upon her retrospective evaluation of his contribution. If Brown can change the focus of the book and not pay Fisten his agreed compensation, then paragraph 11(b) . . . is illusory. . . . " Fisten Post-Trial Memo at 14. *See also id.* at 16 (Brown's unilaterally changing the focus of the book is a breach of the contract).[28] Claimant cites *Pan-Am Tobacco Corp. v. Dept. of Corrections* 471 So.2d 4 (Fla. 1984), for the general proposition that "[w]here one party retains to itself the option of fulfilling or declining to fulfill its

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[27] Claimant's failure to read Respondent's *Perversion of Justice* series at the time of publication and particularly when he met Brown regarding the Agreement, Tr. Hrg. (Oct. 27, 2021) at 4:4-9, is quite curious, as it would certainly have informed him, at least in part, of some of the information Respondent had at her disposal when they met, and what new information he might be able to provide. This makes his comment that he did not think it would be helpful to know what information Brown had to prepare the series, *id.* at 4:18-21 quite perplexing.

[28] Claimant's "focus-of-the-book" argument is unavailing in light of the Agreement's language, which explicitly gives Respondent "sole editorial control over the proposal and Work and shall be responsible for the scope, concept, style, organization and language therein." *Id.* at ¶ 2. Additionally, it appears that the change of focus was the result of editorial suggestions from Brown's publisher, not Brown. *See, e.g.,* Brown Exs. 155, 157.

obligations under the contract, there is no valid contract and neither side may be bound." *Id.* at 5.[29] Mindful that contractual language should be interpreted in accordance with its plain meaning and that a "contract should not be interpreted so as to render its operation inequitable as to either party," *Comwel Dev. Corp. v. City of Deerfield Beach,* 382 So.2d 716, 718 (Fla. 4th DCA 1980), the Arbitrator finds that the Agreement's language does not place sole discretion to fulfill or decline to do so in Brown's hands.

The entire relevant section from paragraph 11(b) states:

> Fisten will nevertheless be entitled to receive the payments set forth in Paragraph 4 (a) and (b) above unless Brown determines that the aforesaid compensation to Fisten should be reduced in light of the nature of Fisten's contribution to the final manuscript of the Work. In such event, *Brown will so notify Fisten in writing* and the parties will thereupon negotiate such reduction in good faith . . . . If the parties are unable to reach an agreement with respect to the foregoing sentence . . . *then such dispute will be settled by arbitration.*

Id. (emphases added). In this instance, while Brown notified Fisten in writing of the termination, the Letter did not leave any room for negotiation. However, the termination was not the end of the narrative, as the Agreement provides that if the parties cannot reach agreement on the reduction, the dispute "will be settled by arbitration." In other words, once Respondent made the reduction, she was by no means the final arbiter of the reduction; that decision was left to the Tribunal.

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[29] The facts of this case are otherwise distinguishable, as *Pan-Am* involved questions of state sovereign immunity and the ability of a department to cancel a contract. Additionally, the department at issue canceled the contract "specifying no deficiencies in Pan-Am's performance and giving no time within which to correct any deficiencies." In this instance, Respondent specified a number of Claimant's deficiencies and the lack of an opportunity to cure has been previously discussed and rejected by this Tribunal.

Florida courts agree that agreements "wherein one party reserves the right to cancel at his pleasure cannot create a contract." *Lauren, Inc. v. Marc & Melfa, Inc.,* 446 So.2d 1138, 1139 (Fla. 3d DCA 1984) (citation omitted). However,

> *Since the courts . . . do not favor arbitrary cancellation clauses, the tendency is to interpret even a slight restriction on the exercise of the right of cancellation as constituting such legal detriment as will satisfy the requirement of sufficient consideration*; for example, where the reservation of right to cancel is for cause, or by written notice . . . or is based on some other objective standard.
>
> *A promise to buy conditioned upon the buyer's 'satisfaction' as to the goods agreed to be sold is not illusory since the buyer is at liberty to reject the goods only if he is in fact dissatisfied.*

Id. (emphases in italics in the original; underline emphasis added) (citations omitted). *See also Wright & Seaton, Inc. v. Prescott,* 420 So.2d 623, 626 -27 (4th DCA 1982) (cited by Fisten) (obligation to provide written notice of termination is sufficient consideration to support the promise of the other party).

In this instance, Respondent provided written notice, as required, and the Agreement provided that Claimant was entitled to receive payment unless Brown *determined* Fisten's contribution was insufficient. Respondent made that determination which -- at least in retrospect and based on the evidence -- was entirely reasonable. That "determination" appears to the undersigned to be at least as high a standard (and likely higher) and arguably required more effort than the "satisfaction" standard which the Court approved in *Lauren.* Additionally, and as noted above, Brown's determination was explicitly subject to review by an arbitrator.

Based on the foregoing, the Arbitrator does not find clause 11(b) to be illusory and unenforceable.

VIII. Credibility

During opening statements, Fisten's counsel stated that the final hearing would require the Arbitrator to judge the parties' credibility, because one of them was lying. *See also* Fisten's Post-Trial Memorandum at 9 ("Brown lied to this tribunal"); 11; 18 ("Fisten's Testimony is Far More Credible than Brown"). For her part, Respondent also repeatedly accused Claimant of misrepresentations and fraud. *See* Julie K. Brown's Post Hearing Brief at 1 ("Fisten committed a fraud on this Tribunal;" also referencing "Fisten's misrepresentations"); 11 ("cover up"); 14 ("efforts to conceal"); 20 ("Fisten lied at the final hearing."). Both parties put the other's credibility front-and-center in this arbitration, and this issue merits its own discussion. Neither party was without blemishes in this action,[30] but Claimant's credibility has been shredded by his own testimony and documents, his actions and the evidence adduced. In addition to the matters discussed above, some further examples are discussed below.

A. Les Wexner Materials

In his Affidavit in Support of his Motion for Partial Summary Judgment, Claimant swore that he "never had and therefore could not provide to Brown or anyone else . . . any story of Lex Wexner's relationship with Jeffrey Epstein, whether

[30] There were points in Respondent's testimony where she was successfully impeached on cross, some of her actions were less than laudatory (as testified to by Brad Edwards) and her memory was clearly not perfect, but Claimant's credibility was damaged far more substantially and in far more significant ways for purposes of this case.

told to me by members of Mr. Wexner's legal team or otherwise. . . ." *Id.* at ¶ 3. He also testified at the final hearing that he could not turn over any information that he obtained from the confidential meeting with Lex Wexner's lawyer and that he specifically told that to Julie [Brown]." Transcript of Hearing ("Tr. Hrg.") (Oct. 26, 2021) at 89:21-90:09. This testimony, however, stands in direct contrast with an email exchange he had with Brown where she inquired about the meeting with Wexner's lawyers and Fisten responded "I thought I gave you Wexner's lawyers meeting notes section." Brown Ex. 9 (Email from Fisten to Brown Feb. 21, 2020). Respondent asked for those materials on another two occasions (Brown Exs. 10 and 67) and apparently received no pushback from Claimant that he was prohibited from supplying the information.

B. Surveillance of Epstein's Home

As discussed above, Fisten contended in his post-hearing briefing that his surveillance of Epstein's home "completely occurred **before** the Collaboration Agreement was signed on May 17, 2019." Fisten Post-Trial memo at 9 (emphasis in the original). He also testified at trial that this was the case. *See, e.g.*, Tr. Hrg. (Oct. 26, 2021) at 281:16-17 (surveillance conducted week of April 5, 2019). However, his testimony was contradicted by his partner, Pat Roberts, who Claimant admitted was the person that actually did the surveillance. Tr. Hrg. (Oct. 26, 2021) at 54:8. Roberts testified (twice) that:

> A. [E]verything came to a screeching halt when he got arrested and there was no more money to be paid . . . .
> BY MR. PERETZ:

> Q. So you were working [doing surveillance] for the $10,000 up until the time Epstein was arrested; that's when it came to a screeching halt because he was no longer going to be subject to any surveillance?
> A. That's correct.
> Q. All right. And Epstein was arrested in July of 2019, correct?
> A. That's correct.

Tr. Hrg. (Oct. 26, 2021) at 20:11-22.[31]

C. Surveillance/Go-Pro Cameras

Fisten asserted that despite his company's entering into a "Consultant Agreement," with RadicalMedia, LLC for a flat fee of $10,000, that agreement was really for surveillance of Jeffrey Epstein's home, even though the agreement never mentions surveillance. In fact, the "project" for which Blue Line Investigations was retained[32] was defined as "the episodic audio visual series . . . ", Brown Ex. 23 at ¶ A, which hardly sounds like a surveillance gig. The Consultant Agreement also provides for Fisten to provide "third party archival materials (e.g., photographs, documents) . . . for potential incorporation into the project." *Id.* at A(1). Of note here is that in the credits to the Netflix documentary, Netflix thanks a number of people, including Fisten, for providing "archival resources", Brown Ex. 57, although Claimant insists he did not give them anything. A regular surveillance would not normally be the source of "archival materials."

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[31] Mr. Roberts attempted to back-track a bit, but then stated that the would "stay with what I said," and it (again) "came to a screeching halt as far as what we were doing because we never located him . . . and he got arrested." *Id.* at 21:14-22.

[32] Although Blue Line is officially the party to the Consultant Agreement, it was Claimant who was to provide the services thereunder.

Although Blue Line Investigations presumably has its own equipment for surveillance, and while portions of the Netflix documentary feature Claimant being interviewed in his car or driving, Fisten maintained that the GoPro cameras that Radicalmedia supplied were for long-distance surveillance of Epstein's home. Tr. Hrg. (Oct. 27, 56:7-58:4). Claimant also testified that Radicalmedia sent him three cameras, two for surveillance and an additional GoPro "in case one broke down." *Id.* at 58:8. But Claimant's testimony is belied by the emails and technical specifications Radicalmedia sent Fisten in connection with the three cameras.

The email referencing the shipping of the GoPro cameras asks one of the producers to check with the hotel's front desk "before you leave for *the shoot* . . ." Brown Ex. 104 (emphasis added). This sounds more like a documentary than a surveillance. Significantly, the specifications contained in Brown Ex. 105 provide a diagram and detailed directions on setting up all three cameras for interior car shots for filming "two people car scenes," or "single shots of you," "when you are solo in the car." It also mentions proper hand-placement on the steering wheel and advises against wearing sunglasses so "we can see your eyes." In short, the email and directions provided by Radicalmedia further damage Claimant's credibility. It also may explain why Fisten did not disclose this Consultant Agreement to Brown, which was executed after their verbal agreement but before the Agreement in question, as it would seem to run afoul of Sections 2(a) (Claimant to give interviews exclusively to Respondent) and 8(ii) (Fisten has no contractual commitments "of any kind which will *or might* materially conflict . . . with the performance of Fisten's obligations

hereunder . . . . ") (emphasis added). This failure to disclose certainly violates the spirit -- and indeed the letter -- of the Agreement.

Claimant's numerous credibility issues – only some of which are set forth above -- call into question the veracity of portions of his testimony[33] and the various documents he prepared in connection with this proceeding and further merit crediting Brown's testimony over his.

FINAL AWARD

In making his findings and this Final Award, the Arbitrator has carefully considered the documentary evidence, testimony, and the parties' arguments. Based upon the foregoing and for the reasons given, the Tribunal decides and awards as follows:

1. Claimant's claims for Declaratory Relief (Count I), Accounting for 50% of All Proceeds from the Work (Count II), Breach of Fiduciary Duty (Count III), Breach of Contract (Count IV) and Rescission and Injunction (Count V) are denied in their entirety as is Claimant's request for $350,000, plus interest and for costs of the arbitration;[34]

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[33] Claimant's testimony that he had no written or letter agreement with his agent, Tr. Hrg. (Oct. 21, 2021 at 18: 3-7), that his agent did not text, *id.* at 14:12-14, and that Fisten had no emails with his agent prior to April 2020 (despite having some thereafter), *id.* at 29:24-30:10 does not make sense, especially in light of his text to Brown on July 16, 2019 referring to what his agent *wrote* that morning. Brown Ex. 100 at 21.

[34] Respondent did not request an award of costs in this proceeding.

2. Respondent's first defense as to Count V (Rescission and Injunction) is denied as moot because Claimant failed to pursue this claim;[35]

3. Respondent's first affirmative defense, prior breach of collaboration agreement, is denied as moot given the Tribunal's finding on Claimant's breach of contract claim; alternatively, the defense is sustained given Fisten's material breaches of the Agreement as set forth above;

4. Respondent's second affirmative defense of unclean hands is denied in its entirety;

5. Respondent's Counterclaim for breach of contract is granted;

6. Respondent's Counterclaim for Reduction of Fisten's Compensation is denied in its entirety and Respondent's request that Claimant be forced to return the $150,000 advance he received is denied, based on Brown paying the first installment to Fisten without complaint, her prior decision in the October 16, 2020 Letter to forego such compensation and based on whatever very limited contribution that Fisten *may* have made to the Work;

7. Respondent's Counterclaim for Misrepresentation is denied in its entirety; and

8. The parties shall each bear their own attorney's fees and costs.

9. With respect to the award of sanctions for discovery violations and the breach of paragraph 12's confidentiality provisions, Respondent shall be awarded

[35] Alternatively, the defense is sustained because Fisten failed to allege any basis or put on any evidence (such as fraud or mutual mistake) which might support this defense.

sanctions against Claimant equal to the amount of attorney's fees reasonably expended in the briefing and oral argument related to the entry of the August 8, 2021 Order on Respondent's Motion to Compel Production; the briefing and oral argument related to the Motion for Sanctions; the email leading up to the October 20, 2021 hearing following Claimant's failure to comply with the August 8, 2021 Order and attendance at the hearing; and the briefing and oral argument related to the entry of the Tribunal's Order Granting in Part Respondent's Motion for Partial Judgment. The parties are directed to confer within 14 days following the entry of this Interim Award (that is, no later than January 13, 2022), to see if they can reach agreement on the amount of such attorney's fees.

If the parties are unable to reach agreement on fees, Respondent may submit, within 14 days thereafter (that is, no later than January 27, 2022) a summary chart reflecting the identities of the attorneys working on the matter, their respective hourly rates, the number of hours each attorney expended and the fees sought for each of the foregoing matters. Brown shall also submit counsel's underlying time sheets reflecting such activity, but any attorney/client privileged material may be redacted. Fisten shall have 14 days thereafter (that is, until February 10, 2022), in which to submit any objections to the fees sought and the reasons for such objection. Respondent may file a reply within seven days thereafter, or no later than February 17, 2022. No affidavits as to the reasonableness or lack thereof of the fees sought need be filed. Following receipt of the foregoing briefing, the undersigned will make an award for the appropriate amount of attorney's fees and will issue a final award.

10. This award is in full settlement of all claims and defenses submitted to this arbitration. All claims, defenses, and any other issues raised by the parties not expressly granted are hereby denied.

I, as the Arbitrator for this proceeding, do hereby affirm upon my oath as Arbitrator, that I the individual described in and who executed this instrument, which is THE INTERIM AWARD.

SO ORDERED this 30th day of December, 2021.

David Lichter, Arbitrator
Cc: Counsel of Record
Angela Romero Valdeon, Manager, ADR Services

EXHIBIT “B”

AMERICAN ARBITRATION ASSOCIATION

MICHAEL FISTEN, CASE NO: 01-20-0015-8776

Claimant/Counter-Respondent,

vs.

JULIE K. BROWN,

Respondent/Counter-Claimant.
_____/

FINAL AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with paragraph 11(b)(ii) of the Collaboration Agreement (the "Agreement") entered into between the above-named parties and dated May 17, 2019 by and between Julie K. Brown ("Brown" or "Respondent") and Michael Fisten ("Fisten" or "Claimant") having been duly sworn, and having duly heard the proofs and allegations of the parties, and having previously rendered an Interim Award dated December 30, 2021, does hereby issue this FINAL AWARD, as follows:

The Arbitrator incorporates by reference the Interim Award dated December 30, 2021, as part of this Final Award. The Interim Award reserved jurisdiction to award sanctions for discovery violations and the breach of paragraph 12's confidentiality provision.

Procedural History Since Rendering of Interim Award on December 30, 2021

The Tribunal issued an Interim Award on December 30, 2021, along with an award of sanctions (in the form of attorney's fees) for discovery violations and breach

of paragraph 12's confidentiality provisions as further discussed *infra*. The parties were directed to confer to see if they could reach agreement on the fees and, failing such agreement, Respondent was directed to submit a summary chart of the attorneys working on the case, their respective hourly rates, the number of hours expended and the fees sought. The parties were not able to agree and, on January 18, 2022, Brown filed her Submission in Support of the Amount of Fee Award (the "Submission"). On February 15, 2022, the Arbitrator requested Respondent to provide a further explanation of work done in connection with certain tasks set forth in the Submission.

On January 15, 2022, Claimant Michael Fisten, acting in a pro se capacity – although seemingly still represented by counsel at that time – filed a Motion to Correct Arbitrator's Record, Subsequent Order Based Upon Error's (sic), and for Reconsideration Based Upon a Proper and Complete Record ("Motion to Correct."). On February 2, 2022, Respondent filed her Response to Fisten's pro se Notice of Withdrawal of Motion for Correction and Fisten's Motion for Extension of Time to Response (sic) to Brown's Motion Determine Amount of Fee Award. Neither AAA nor the undersigned had been served with whatever had been served on opposing counsel and, after AAA inquired, Claimant's new counsel, Andrew Kassier, Esq. sent a letter to AAA withdrawing Fisten's Motion to Correct. At the same time, Mr. Kassier asked for an extension of time to respond to Brown's fee request, which the Tribunal granted. Fisten's Objections to the Submission were served on February 15, 2022,

and Respondent filed her Reply in Support of Her Motion to Determine Amount of Fee Award (the "Reply") on February 22, 2022.

Attorney's Fees

The Arbitrator has carefully reviewed the Submission, Fisten's Objections to Brown's Submission (the "Objections") and Respondent's Reply in Support of the Submission. As Brown notes, in the Reply, Claimant did not object to any of the hourly rates in the Submission and objected to only $18,912.00 of Respondent's $58,570.00 fee request. Fisten's objections were set forth in a bullet-point type format.

A number of the objections to particular entries are characterized as "time entry excessive." What is required from Claimant, however, is a "detailed explanation or analysis of the improper billings," *Flexiteek Americas, Inc. v. Plasteak, Inc.*, 2016 WL 7497485 (S.D. Fla. Feb. 4, 2016), and Fisten has not met that standard. Fisten objects to other entries because they include "several discrete tasks. . . placed in one time entry" This, however, is not a valid objection. *See Williams v. R.W. Cannon, Inc.*, 657 F. Supp.2d 1302, 1312 (S.D. Fla. 2009) ("[T]he mere fact that an attorney has included more than one task in a single billing entry is not, in itself, evidence of block-billing."). Claimant raises a number of objections to allegedly duplicative work, but the Arbitrator is satisfied with Respondent's explanation of the entries in her Reply. Based on the foregoing, Fisten's Objections to Respondent's Submission are **overruled**, and the Arbitrator finds the fees submitted to be reasonable under the circumstances of this arbitration.

FINAL AWARD

In making his findings and this Final Award, the Arbitrator incorporates by referenced the Interim Award dated December 30, 2021 and further finds and awards as follows:

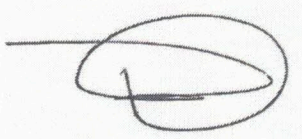
1. With respect to the award of sanctions for discovery violations and the breach of paragraph 12's confidentiality provisions, Respondent shall be awarded sanctions against Claimant equal to the amount of attorney's fees reasonably expended in the briefing and oral argument related to the entry of the August 8, 2021 Order on Respondent's Motion to Compel Production; the briefing and oral argument related to the Motion for Sanctions; the email leading up to the October 20, 2021 hearing following Claimant's failure to comply with the August 8, 2021 Order and attendance at the hearing; and the briefing and oral argument related to the entry of the Tribunal's Order Granting in Part Respondent's Motion for Partial Judgment. Those reasonable fees, as discussed above, are $58,570.50.

2. The AAA administrative fees totaling $19,400.00 shall be borne as incurred and the Arbitrator's fees and expenses totaling $50,981.53 shall be borne as incurred.

3. This award is in full settlement of all claims and defenses submitted to this arbitration. All claims, defenses, and any other issues raised by the parties not expressly granted are hereby denied.

I, as the Arbitrator for this proceeding, do hereby affirm upon my oath as Arbitrator, that I the individual described in and who executed this instrument, which is THE FINAL AWARD.

SO ORDERED this 18th day of March, 2022.



David Lichter, Arbitrator
Cc: Counsel of Record
Angela Romero Valdeon, Director of ADR Services