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3 **IN THE MATTER OF THE ARBITRATION OF**  
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5 6 Claimant(s), 7 8 vs. 9 10 11 12 13 Respondent(s). 14	OIA ARBITRATION NO.: 11015  Neutral Arb.: Hon. Lise A. Pearlman Claimant Party Arb.: Quinton Cutlip, Esq. Resp. Party Arb.: Richard Conti, Esq.  AMENDED DECISION OF ARBITRATION PANEL RE: SANCTIONS AWARD (FOR FEES AND EXPENSES INCURRED TO DATE)  AND ORDER RE ADDITIONAL HEARING DATES
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16 Pursuant to Claimant's motion, the arbitration panel has previously ordered The  
17 Kaiser Respondents to pay Claimant all reasonably incurred past and future reasonable  
18 attorney fees, expert fees, and expenses that would not have been incurred but for the  
19 discovery abuses found by the panel in its DECISION RE MOTION FOR PROTETIVE  
20 ORDER AND MOTION TO STRIKE ANSWER dated January 22, 2014. Claimant's  
21 counsel thereafter submitted a statement of costs and fees and supporting  
22 documentation. Respondent's counsel objected to certain claimed costs and fees and  
23 conceded others.  
24

25 At the panel's request, Counsel met and conferred and agreed to the following  
26 fees and costs:

- 27
- 28 • Item 3 invoice for services and transcript

1			\$10,408.33
2	• Items 6, 7 & 13	Attorney's fees of	\$24,900.00
3	• Item 8	Fees for	\$2,162.50
4	• Item 9	Court reporter fees	\$7,317.00
5	• Items 11 & 12	Fees for claimant party arbitrator Quinton Cutlip	
6			\$11,742.25
7	• Item 14	Fees for	<u>\$3,000.00</u>
8			\$59,530.08
9			
10			

11 Left for resolution by the panel were Claimant's items 1, 2, 4, 5, and 10. On May 9,  
12 2014 the panel held a teleconference and decided the remaining contested matters as  
13 follows:  
14

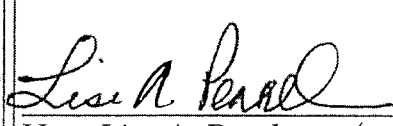
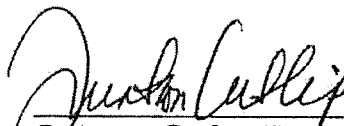

15	1. Six hours of	time at \$300 per hour	\$1,800.00
16	2. Ten hours of	time at 300 per hour	\$3,000.00
17	4. Four hours of	ime at \$300 per hour	\$1,200.00
18	5. 25% of	invoice	\$5,294.81
19	10. Food and Lodging		<u>\$1,832.17</u>
20			\$13,126.98
21			

22 In addition, Respondents agree that it is appropriate for the panel to award  
23 \$577.50 to Claimant for additional fees incurred to Mr. Cutlip (1.65 hours at \$350 per  
24 hour) \$577.50

25	Total sanctions awarded pursuant to Claimant's Statement of Costs and Fees		
26	associated with Respondents' Discovery misconduct		\$73,234.56
27			
28			

1 This order pertains solely to past fees and expenses submitted to date by  
2 CLAIMANT for payment by RESPONDENTS and is without prejudice to the  
3 submission of additional fees and expenses reasonably incurred as authorized by the  
4 panel for additional discovery and hearing preparation necessitated by the discovery  
5 abuses found by the panel in its prior order.  
6


7  
8 Dated: May 14, 2014  
9

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11     
12 Hon. Lise A. Pearlman (ret.) Quinton Cutlip, Esq. Richard Conti, Esq.  
13 Neutral Arbitrator Claimant's Party Arb. Respondent's Party Arb.  
14

15 ORDER Re Additional Hearing Dates: Pursuant to stipulation the following additional  
16 hearing dates are ordered following the July 14-16 dates already on calendar: September  
17 29, 30, and Oct. 1, 2014 from 10 a.m. to 5 p.m. at the Alameda County Law Library, 125  
18 12<sup>th</sup> St. Oakland, CA.  
19

20  
21 NOTHING IN THIS ARBITRATION DECISION PROHIBITS OR RESTRICTS THE  
22 ENROLLEE FROM DISCUSSING OR REPORTING THE UNDERLYING FACTS, RESULTS, TERMS  
23 AND CONDITIONS OF THIS DECISION (OR SETTLEMENT AGREEMENT) TO THE  
24 DEPARTMENT OF MANAGED HEALTH CARE.  
25

26  
27 Dated: May 14, 2014

28  
By   
Hon. Lisa A. Pearlman, (Ret.)  
Neutral Arbitrator

IN THE MATTER OF THE ARBITRATION OF

Claimant  
vs.  
and DOES 1-60  
Respondents.

Arbitration No. 11015

Neutral Arbitrator: Hon. Lise Pearlman  
Claimant Party Arb.: , Esq.  
Resp. Party Arb.: , Esq.

DECISION  
on LIABILITY and DAMAGES

A hearing on liability and damages in the above matter was duly noticed and heard at 1 p.m. on May 5, 2015 at the law offices of , 1999 Harrison St, Suite 2600, Oakland, CA 94612. Claimant was represented at the hearing by , Esq. of , Esq. All three arbitrators were present and the proceedings were recorded by a court reporter. Upon consideration of the arguments, the briefs and the record, the arbitrators hereby decide all issues presented:

1. By consent of claimant, Respondents and are hereby dismissed;
2. Insufficient evidence of malpractice having been presented and supported by expert testimony, a decision is rendered in favor of Respondents and finding no liability to claimant;
3. is liable to claimant for breach of the duty of good faith and fair dealing for the entire nineteen-month period of claimant's individual policy from November 1, 2007 through May 31, 2009 based on equitable tolling of the statute of limitations and conscious and deliberate acts by the Health Plan and/or its joint venturer during such period that unfairly frustrated the agreed

common purposes of claimant's health insurance policy and disappointed his reasonable expectations, depriving him of the benefits of the agreement for his health care coverage;

4. [redacted] is liable to claimant for both claims of malpractice addressed in paragraphs 5 and 6 below and as a joint venturer with [redacted] for breach of the duty of good faith and fair dealing addressed in paragraph 3;
5. Respondent [redacted] is liable to claimant for malpractice in failing to properly treat and oversee medical care for claimant's sleep disorder after December 20, 2007 that was ultimately addressed by MMA surgery by an outside provider;
6. Respondent [redacted] is liable to claimant for psychiatric malpractice in misdiagnosing claimant as bipolar without having reviewed claimant's prior relevant medical records;
7. Compensatory damages are awarded to claimant against [redacted] and [redacted] in the amount of \$552,806.66 as follows: \$400,000.00 for noneconomic damages and \$152,806.66 for economic damages. The economic damage award includes \$115,333.33 for lost wages, lost earning potential, and the cost of the MMA surgery, including four months of lost wages at \$160,000 per year when he was unemployed in early 2008 and his reasonable earning potential in excess of claimant's current earnings through the age of 65 had he become a teacher, which was supported by the testimony of claimant's expert and does not require certification as a specialist which claimant allowed to lapse. All other claims of lost earning potential are too speculative. The economic damage award also includes \$37,473.33 for attorneys' fees attributable to the cost of obtaining the benefit of the agreement for his health care coverage—estimated at 20% of the attorneys' fees incurred by Claimant in this arbitration other than in pursuit of the psychiatric malpractice claim. Claimant having failed to specify costs attributable to obtaining the benefit of the agreement, the arbitrators award none. Claimant having failed to prove fraud, malice or oppression, punitive damages are denied.
8. Claimant is awarded \$250,000 in noneconomic damages against respondents [redacted] M.D. and [redacted]. Since these noneconomic damages cover the same time period as the above referenced bad faith and sleep medicine medical malpractice, they are already part of the \$400,000.00 award in paragraph 7. This \$250,000.00 is not in addition to the \$400,000.00 in noneconomic damages.
9. Claimant is awarded \$250,000 in noneconomic damages against respondent [redacted] and [redacted]. This award is in addition to the noneconomic damages awarded in Paragraphs 7 and 8 above. The MICRA cap issue is distinguishable from cases such as *Yates v. Pollock*, 194 Cal. App. 3d. 195 (1987) and *Colburn v. United States*, 45 F.Supp. 2d.787 (1998) because the two claims are not from a single and indivisible

incident. Where, as here, there are two distinct claims for malpractice with different origins and duration requiring different experts and different theories of liability for the sleep apnea claim and the psychiatric claim, two MICRA caps apply to the two separate incidents. [Cf. analysis of similar MICRA statute in *Goldenberg v. Woodard C/W* 58151, 57232 (Nev. 2014) by the Nevada Supreme Court].

10. Damages:

- \$ 152,806.66 – Economic Damages
- \$ 400,000.00 – Non Economic Damages – Bad Faith plus Sleep Medicine Malpractice
- \$ 250,000.00 – Non Economic Damages – Psychiatric Malpractice
- \$ 802,806.66– Total Damages.

11. Claimant is entitled to additional discovery sanctions as follows: \$25,950.00 in attorneys' fees and \$10,031.43 in related costs for a total of \$35,981.43 in additional sanctions.
12. The total award to Claimant is \$838,788.09, including damages and additional sanctions.
13. As provided by the binding arbitration agreement pursuant to which this arbitration was conducted, Claimant is not entitled to recover fees and costs of pursuing malpractice claims against any respondents.
14. Claimant has failed to prove entitlement to an award of attorneys' fees on a private attorney general theory.

**Nothing in this arbitration decision prohibits or restricts the enrollee from discussing or reporting the underlying facts, results, terms and conditions of this decision to the Department of Managed Health Care.**

Dated: 8/1/15

[Signature]

Hon. Lise Pearlman (ret.)  
Neutral Arbitrator

Dated: 8/2/15

[Signature]

, Esq.

Claimant's Party Arbitrator

Dated: 8/3/15

[Signature]

, Esq.

Respondents' Party Arbitrator