

JAMS CASE REFERENCE NO. 5220002918

Cherny, Andrei,

Claimant(s),

v.

Aspiration Partners, Inc.,

Respondent(s).

FINAL AWARD

On December 21, 2023 the arbitrator issued a ruling (“Ruling”) on a motion brought by Aspiration against Cherny pursuant to Rule 18. The arbitrator granted Aspiration’s motion for summary disposition of Cherny’s claim for attorneys’ fees and costs in excess of \$10,000. Put differently, the arbitrator ruled that Cherny is not entitled to attorneys’ fees incurred in connection with the enforcement of his rights under the Agreement, including those incurred in connection with the filing and prosecution of this arbitration. The **Ruling** is attached hereto as **Exhibit 1**.

After the issuance of the Ruling, the parties resolved all the remaining claims in the Demand (“Other Claims”). For the reasons set forth in the Ruling and based on the parties’ agreement as to the Other Claims, the arbitrator now makes the following Award:

1. Cherny is **not entitled to an award of attorneys' fees incurred in connection with the enforcement of rights under the Agreement**, including those incurred in connection with the filing and prosecution of this arbitration. This part of the Award is based on the reasoning set forth in the Ruling which is incorporated herein.
2. Cherny **is entitled to payment of the sum of \$172,064.28** comprised of the amounts set forth in **Exhibit 2** hereto. That same document is also attached to the Ruling as an exhibit. This part of the Award is based upon the parties' agreement as to the Other Claims.

Dated: February 9, 2024



Hon. Glenda Sanders (Ret.)

EXHIBIT 1

Cherny, Andrei,

Claimant(s),

v.

Aspiration Partners, Inc.,

Respondent(s).

Ruling and Order on Rule 18 Motion Regarding Attorneys' Fees Issue

The Demand

In his Demand, claimant (Cherny) seeks an Award in his favor and against Respondent Aspiration Partners, INC. (Aspiration) for an Order that:

1. Aspiration pay Cherny \$25,000 per month consulting fees under section 2 of the Separation Agreement for the period October 12, 2022 through the present;
2. Aspiration provide Cherny with immediate access to his aspiration issued computer and email account;
3. Aspiration pay Cherny \$10,000 to reimburse Cherny for legal fees incurred in connection with the negotiation and execution of the Separation Agreement;
4. Aspiration provide Cherny and his eligible dependents with continuing health insurance coverage;
5. Aspiration confirm in writing that Cherny's stock option awards remain valid and outstanding;
6. Aspiration pay Cherny pre-and post-award interest. The parties now agree on the amount of pre-award interest owed as of December 15, 2023. (See email correspondence of December 15, 2023 between counsel and **Exhibit A hereto** containing a spreadsheet in which the pre-award interest is set forth);

7. Aspiration pay Cherny all costs and attorneys' fees incurred in seeking enforcement of his rights under the Separation Agreement, including all costs and attorneys' fees for bringing the arbitration;
8. The arbitrator declare Aspiration is obligated to reimburse Cherny for certain arbitration filing fee costs. The parties have now agreed that the amount owed for such costs is \$50. (See December 15, 2023 email correspondence, and Exhibit A hereto.)

After the filing of the Demand the parties resolved most of the claims in the Demand except the claim that is the subject matter of this motion. There is also still a dispute concerning the question whether certain computers in Cherny's possession should be returned to Aspiration. Those computers are identified in the December 15, 2023 email correspondence between the parties as (1) MacBook Pro 13-inch| SN: C02CW4UKML7J, and (2) MacBook Pro 13-inch|SN: C02T3MTRHF1P.

The Rule 18 Motion and Governing Law

Pursuant to Rule 18 of the JAMS Employment Arbitration Rules and with the authorization of the Arbitrator (Report and Scheduling Order No. 2), Aspiration moved for Summary Disposition of Cherny's claim for attorneys' fees and costs in excess of \$10,000. Demand paras. 26 through 28.

Attorneys' Fees Provisions in the Separation Agreement and the Releases

The Separation Agreement (Agreement) contains 2 provisions regarding the recovery of attorneys' fees. First, under **Section 20**, the Agreement provides: "The Company agrees that it shall reimburse Executive for up to \$10,000 in attorneys' fees actually incurred in connection with the negotiation and execution of this Agreement, subject to Executive's delivery to the Company of documentation evidencing such fees within 60 days of the Effective Date." The parties agree that this \$10,000 has not yet been paid and that Cherny has submitted adequate documentation of the expenditure. Aspiration has agreed to pay \$10,000 in attorneys' fees for the negotiation and execution of the Separation Agreement.

The second attorneys' fee provision is contained in **Section 9 (d)** of the Agreement. That

section controls recovery of attorneys' fees incurred in the arbitration. It provides that:

“[t]he fees of the arbitrator and all other costs ... unique to arbitration shall be paid by the Company initially, but if Executive initiates a claim subject to arbitration, Executive shall pay any filing fee up to the amount that Executive would be required to pay if Executive initiated such claim in the Court. Each party *shall be solely responsible for paying its own further costs for the arbitration, including, but not limited to, its own attorneys' Fees....*[.] The arbitrator may award fees and costs (including attorneys' fees) to the prevailing party *where authorized by applicable law.*” Emphasis added.

Two Releases are attached to the Agreement. One Release is signed by Cherny and the other by Nate Redmond, Chair of the Board, on behalf of Aspiration. There is no dispute as to the authenticity of the Agreement or the Releases. Each of the Releases contains paragraphs describing the claims being released, the claims not being released, and a paragraph entitled “No Action.” (Para 5 in Cherny's Release and paragraph 4 in Aspiration's Release). The “No Action” provision is substantively identical in each of the Releases. It provides that:

“The [signatory, i.e. Cherny or Aspiration] agrees that if the signatory hereafter commences any suit arising out of, based upon, or relating to *any of the claims released hereunder*, then the [signatory] agrees to pay to Releasees, and each of them, in addition to any other damages caused to Releasees thereby, all attorneys' fees incurred by Releasees in defending or otherwise responding to said suit or Claim.” (Emphasis added.)

To rule on the issue presented, the arbitrator must interpret the Agreement read together with the Releases. Section 12 of the Separation Agreement provides that the Agreement “shall be construed under the laws of the State of California. Sections 7 and 8 of the Cherny and Aspiration Releases respectively also provide for the application of California law.

Under California law the mutual intention of the parties at the time the contract is formed governs interpretation (Civ. Code, section 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract (*Id.*, section 1639.) The clear and explicit meaning of the written provisions must be judicially interpreted in their ordinary and popular sense unless they are used by the parties in a technical manner or are given a special meaning by the parties (*Id.*, Sections 1644 and 1638.) Thus, if the meaning a layperson would ascribe to contractual

language is not ambiguous, the layperson's meaning must be applied. *Santisas v. Goodin* (1998) 17 Cal.4th 599, 608. Civil Code section 1638 also provides: "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

The language of the attorneys' fees provisions in paragraph 9 of the Separation Agreement is clear and explicit and does not involve an absurdity. Cherny is entitled to reimbursement for \$10,000 for the "negotiation and execution" of the Separation Agreement (Agreement, para. 20) but he is "*solely* responsible for paying" his own attorneys' fees "for the arbitration." (Agreement, para. 9 (d).) The Separation Agreement does not go on to contain a "prevailing party fees" clause -- a clause which must be "specifically" included and one which is frequently negotiated and made part of an agreement. Civ. Code 1717.

Under Civil Code section 1717 (a) "[i]n any action on a contract, where the contract *specifically* provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded... then the party who is determined to be the party prevailing on the contract, shall be entitled to reasonable attorney's fees...[.]" No such clause was negotiated and incorporated into the Separation Agreement. If it had been, then Civil Code section 1717 (a) would apply, and the last sentence of paragraph 9 (d) would come into play because that sentence provides that a prevailing party may be awarded fees and costs "where authorized by applicable law". Attorneys' fees may be authorized by law under a statute or by contract under Civil Code 1717 where that contract specifically provides that the prevailing party shall be entitled to an award of attorney's fees. There is no statute providing for attorneys' fees here and the parties did not agree that the prevailing party would be entitled to an attorneys' fees award in an action arising out of a breach of the Separation Agreement. Civil Code 1717 merely stands for the proposition that *if* the contract provides that a party is entitled to attorneys' fees under a contract, then all contracting parties must be afforded the same right even if the provision was afforded to only one party. Here there is no provision in the Agreement for *any* party to receive a prevailing party attorneys' fee award. And there is no statute authorizing an award of attorneys' fees to the prevailing party here. In short, an attorneys' fees award for fees incurred in

connection with the arbitration is not “authorized by applicable law” and so section 9 (d) does not come into play.

The arbitrator notes that Cherny acknowledged in paragraph 20 of the Agreement that he was represented by, or had the opportunity to be represented by, independent counsel of his own choice in connection with the negotiation and execution of the Agreement. Cherny correctly notes that he has been forced to incur attorneys’ fees to seek relief that Aspiration now concedes he is entitled to. He argues that he should not have been required to incur attorneys’ fees to enforce his now admitted rights. Mr. Cherny could, however, have negotiated a prevailing party attorneys’ fees clause. He did not. And the arbitrator has no power to award fees based upon the equities. When Courts of Appeal consider equity in analyzing Civil Code section 1717, it is always in the context of ensuring that if one party to a contract is entitled to prevailing party fees, then all parties to that contract must be entitled to them. There is no general equitable power pursuant to which the arbitrator can award attorneys’ fees.

Turning to the Releases, Claimant argues that the “No Action” provision in the Releases does contain an attorneys’ fees provision entitling the signatory to attorneys’ fees. He contends that this one-sided prevailing party attorneys’ fee provision must under Civil Code section 1717 be interpreted to apply to both parties. This is so because, as discussed above, under Civil Code 1717 if a contract provides for one party to be awarded prevailing party attorneys’ fees, all other parties must be afforded the same right. It is true, that each of the Releases has what is arguably a one-sided prevailing party fees provision but the provision is restricted to suits “arising out of, based upon, or relating to any of the Claims **released hereunder...**”[.] This arbitration does not, however, arise out of or relate to any of the “released claims” as described in paragraph 1 of each of the Releases. Instead, this arbitration arises out of *unreleased* claims, namely those based upon the enforceable terms of the Separation Agreement which logically have not been released.

Cherny has brought claims based on the Separation Agreement, asserting that Aspiration breached the post-October 12, 2022 contractual obligations. Cherny does not assert a claim released under the applicable Release. Neither has Aspiration brought any such claims. In other

words, the attorneys' fee provisions in the Releases do not apply here since no one is asserting a released claim. *See Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 708 (fee award "turns on the language of the contractual attorneys' fee provision, i.e., ... whether the type of claim is within the scope of the provision;" rejecting application of attorneys' fee clause since fraud and fiduciary duty claims did not seek "to enforce the terms" of the contract); *Gil v. Mansano* (2004) 121 Cal.App.4th 739, 741-45. The cases cited by Claimant including *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal. 5th 744 and *Carpenter & Zuckerman, LLP v. Cohen* (2011) 195 Cal. App. 4th 373 are not on point. They dealt with different circumstances than those at bar.

Pursuant to JAMS Rule 18 and California rules of contract interpretation, Aspiration's Motion for Summary Disposition of Cherny's claim for attorneys' fees in excess of \$10,000 is granted. Put differently, the arbitrator hereby rules and orders that Cherny is not entitled to attorneys' fees incurred in connection with the enforcement of his rights under the Agreement, including those incurred in connection with the filing and prosecution of this arbitration.

Because there are still certain issues outstanding that may require further adjudication, the Arbitrator will not enter any Award until those issues have been discussed at a further hearing hereby scheduled for **January 4, 2024 at 2:30 PM via Zoom.**

Dated: December 21, 2023

A handwritten signature in blue ink, appearing to read "G. Sanders", is written above a horizontal line.

Hon. Glenda Sanders(Ret.)

EXHIBIT A

	Amount	Interest Accrual Begin Date	Interest Accrual End Date	Number of Days	Daily Interest Accrued at 7%	Total Interest
Month 1 Consulting Fee	\$25,000.00	11/10/2022	6/6/2023	208	\$4.79	\$996.32
Month 2 Consulting Fee	\$25,000.00	12/10/2022	6/6/2023	178	\$4.79	\$852.62
Month 3 Consulting Fee	\$25,000.00	1/10/2023	6/6/2023	147	\$4.79	\$704.13
Month 4 Consulting Fee	\$25,000.00	2/10/2023	6/6/2023	116	\$4.79	\$555.64
Month 5 Consulting Fee	\$25,000.00	3/10/2023	6/6/2023	88	\$4.79	\$421.52
Month 6 Consulting Fee	\$25,000.00	4/10/2023	6/6/2023	57	\$4.79	\$273.03
Legal fees to negotiate separation agreement	\$10,000.00	11/17/2022	6/6/2023	201	\$1.92	\$385.92
Remaining arbitration filing fee	\$50.00					
2022 COBRA coverage	\$1,152.00					
2023 COBRA coverage	\$6,673.10					

TOTAL PAYMENTS: \$167,875.10

TOTAL INTEREST: \$4,189.18
INTEREST PLUS \$172,064.28
PAYMENTS:

EXHIBIT 2

	Amount	Interest Accrual Begin Date	Interest Accrual End Date	Number of Days	Daily Interest Accrued at 7%	Total Interest
Month 1 Consulting Fee	\$25,000.00	11/10/2022	6/6/2023	208	\$4.79	\$996.32
Month 2 Consulting Fee	\$25,000.00	12/10/2022	6/6/2023	178	\$4.79	\$852.62
Month 3 Consulting Fee	\$25,000.00	1/10/2023	6/6/2023	147	\$4.79	\$704.13
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