

FACT-CHECKED VERSION

AMERICAN ARBITRATION ASSOCIATION --- COMMERCIAL ARBITRATION TRIBUNAL

WONDERWORK, INC., f/k/a Surgery For the Poor, Inc., Claimant,

V. Case No. 13-20-1300-06

HELP ME SEE, INC.,

PARTIAL FINAL ARBITRATION AWARD

Important Background Information

All you need to know about this arbitration is that it started out as a simple contract dispute that could've been settled for \$600,000 in 2012.

Instead of settling for \$600,000, HelpMeSee spent \$12.5 million and 7 years. That's what it cost to bankrupt WonderWork and force it out of business. (Charities paid for all of these legal fees.)

After Charles Wang, Brian Mullaney's former friend and Mullaney's co-founder of Smile Train, heard about this dispute, he persuaded HMS to fire their lawyers and hire his lawyers. Wang provided HMS with thousands of pages of internal Smile Train documents and witnesses.

HelpMeSee is run by the 85th richest family in the world. They gave Wang's lawyers an unlimited budget. 4 of Wang's lawyers with hourly rates of \$1,450, \$885, \$790 and \$600 usually attended every hearing at a cost of about \$30,000 a day. WonderWork could barely afford one lawyer at \$400/hr.

Wang's lawyers did their best to bankrupt WW by turning a scheduled 3-day arbitration into a 3.5-year "show trial" with 200,000 pages of documents and 294 hours of testimony. Wang's lawyers fabricated a long list of "counterclaims." (HMS's original lawyers alleged no counter-claims.) They rehearsed and coached a long list of "witnesses" who knew nothing about the dispute. They were all paid directly or in-directly by Wang to disparage Mullaney and WonderWork.

The nearly 80-year old arbitrator, who had no judicial experience, allowed Wang's lawyers to do whatever they wanted which helped his fees soar from a typical fee of \$10,000 to nearly \$300,000. It became a kangaroo court with no due process, rampant perjury and a revenue-driven arbitrator who allowed *every* question and *every* witness regardless of relevance. (Including an allegation from 1989.)

90+% of this report was cut and pasted from Wang's lawyers' submissions. It contains 248 so-called "facts" that are demonstrably false, misleading and/or taken out of context. It makes generalized statements of so-called facts without any citations to the record which included 1,000+ exhibits and 11,000+ pages of testimony. The failure to support the findings with record citations makes it impossible to verify the correctness of the findings. And this award reflects extreme bias, as it ignored all of the rebuttal proof WW submitted that contradicted the so-called findings made in the award.

287 false and misleading facts and statements in this report are highlighted in yellow with accompanying footnotes below.

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f/k/a Surgery for the Poor, Inc.

Claimant,
vs.
13-20-1300-0650

Case No.:

HELP ME SEE, INC.,

Respondent.

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PARTIAL FINAL ARBITRATION AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Arbitration Agreement between the parties, dated August 31, 2011, and having been duly sworn and having heard the proofs and allegations of the parties, do hereby issue the following Partial Final Arbitration Award.

I FACTS¹

A. The Parties

1. Claimant WonderWork, Inc., f/k/a Surgery for the Poor, Inc.¹ describes itself as an “umbrella charity”² that provides services to various charitable brands³, each of which is focused on a different medical issue, including blindness, burns, clubfoot, hydrocephalus and hole in the heart.⁴ WonderWork was co-founded in 2010 by Brian Mullaney (“Mullaney”) and Charles Wang (“Wang”).⁵ WonderWork is represented herein by Joseph A. Vogel, Kaplan Kravet & Vogel P.C., 630 3rd Avenue, 5th Floor, New York, N.Y. 10012.

¹ FALSE. 287 of these “facts” are demonstrably false.

² FALSE. WonderWork is not an “umbrella charity” and never was.

³ FALSE. WonderWork provided no services to any “charitable brands.”

⁴ FALSE. WonderWork never focused on hydrocephalus or hole in the heart.

⁵ FALSE. Charles Wang did not co-found WonderWork.

2. Respondent HelpMeSee, Inc. (“Respondent” or “HelpMeSee”) is a 501(c)(3) charity co-founded by Jim and Al Ueltschi (“Ueltschis”).⁶ Its mission is to eliminate

¹ The names “S4TP” and “WonderWork” are used interchangeably in this Award.

⁶ CONTEXT. Al Ueltschi had a net worth of \$2.9 billion and almost \$200 million in his charitable foundation; according to Forbes, the Ueltschi family is the 86th richest family in the world. His son Jim Ueltschi viewed WonderWork as competition and demanded WonderWork “exit the blindness business” whenever settlement was discussed. During the arbitration, HMS managers working for Ueltschi in India met with WonderWork partners and offered them grants and bribes to stop working with WonderWork, telling them WonderWork would soon be forced out of business.

cataract blindness worldwide by training thousands of surgical specialists using high-fidelity simulation and courseware adapted from Jim and Al Ueltschi's unique experience with aviation pilot training. Since its inception, Jim Ueltschi has served as HelpMeSee's Chairman and Treasurer, and Mohan Thazhathu ("Thazhathu") has been HelpMeSee's President and CEO. HelpMeSee is represented herein by Vincent A. Sama, Catherine B. Schumacher, Peta Gordon and Jennifer Wieboldt, **Kaye Scholer**

LLP, 230 West 55th Street, New York, N.Y. 10019.⁷

B. Inception of Mullaney/ Wang Relationship

3. Wang, who was the Chairman of Computer Associates, Inc. ("Computer Associates"), met Mullaney in the early 1990s when Mullaney made a presentation to Computer Associates on behalf of the advertising agency, J. Walter Thompson Company. Mullaney shortly thereafter left J. Walter Thompson to start Schell/Mullaney Advertising ("Schell/Mullaney"). Subsequently, Mullaney requested and received Wang's permission for Mullaney to make a presentation to Computer Associates on behalf of Schell/Mullaney. This led to Schell/Mullaney's serving as Computer Associates' advertising agency from the early 1990s until 2000.

C. Operation Smile

4. During the 1990's, Mullaney was involved with Operation Smile, a cleft palate charity. At Mullaney's behest, Wang also became interested in Operation Smile and **ultimately donated more than \$10 million to the charity.⁸**

5. In the late 1990s, Mullaney told Wang that Bill and Kathy Magee, the heads

⁷ FALSE. Kaye Scholer, Charles Wang's law firm, has sued Brian Mullaney and WonderWork multiple times and has been paid \$20+ million charities for all of its lawsuits.

⁸ FALSE. Wang never gave \$10 million to Op Smile. NY Times, 11/24/1999.

of Operation Smile, were “crooks” who were using Operation Smile as a “candy store.”

⁹Wang responded that regardless of such accusations, he believed there was a more

⁹ Mullaney never said this.
(001-888-363-6363)
(13-20-1300-0650)

effective way to deliver cleft surgeries than pursuant to the Operation Smile model, and he explained a concept of training local surgeons in developing countries to provide cleft surgeries to children directly, thus avoiding any need for such countries to rely on foreign doctors.¹⁰ Wang told Mullaney that he would provide the initial funding for a charity employing this model.¹¹

D. Start of Smile Train

6. Mullaney and Wang thereafter formed their new charity (Smile Train) based on the model envisioned by Wang.¹² In participating in Smile Train as he did, Wang relied on the assurance that Mullaney was working to extricate him from Operation Smile¹³ and that Mullaney was going to use Wang's \$10 million donation to Operation Smile as seed money for Smile Train.¹⁴ At a later time, Wang learned that: (i) Mullaney had actually been asked to leave Operation Smile after he had seriously disparaged the organization in a number of different ways,¹⁵ including the attempted overthrow of the Operation Smile Board;¹⁶ and (ii) \$5 million of the \$10 million Wang

¹⁰ FALSE. Wang did not come up with the idea of empowering local surgeons instead of sending volunteers on missions – he had no experience with delivering cleft surgeries in developing countries. The idea arose when Mullaney met a man who owned a steam locomotive and wanted to use his train to host fundraisers for Operation Smile. Mullaney didn't like that idea but it led to the idea of using a train to deliver surgeries and training in developing countries. After developing the idea with his team, Mullaney brought it to Wang for funding because Wang was the highest paid CEO in America for 4 years straight and also had just received a \$700 million "bonus" for which he was getting a lot of negative publicity.

¹¹ FALSE. Wang never provided "initial funding" for Smile Train. In fact, he didn't provide any funding for years. Walter Haefner provided all of Smile Train's initial funding with a \$35 million grant paid over 5 years.

¹² FALSE. Mullaney came up with the new "model" and brought it to Wang for funding.

¹³ FALSE. Mullaney never "extricated" Wang from Op Smile. Both Wang and Mullaney quit at the same time and then started Smile Train.

¹⁴ FALSE. Wang never gave \$10 million to Op Smile.

¹⁵ FALSE. Mullaney did not disparage Op Smile and was never asked to leave. Mullaney resigned after being ordered to by Wang who was also a director after two children died needlessly on Op Smile mission to China in 1998. (NY Times, Nov. 1999)

¹⁶ FALSE. The arbitrator was confused, there never was an "attempted overthrow" of Op Smile

had contributed to Operation Smile had simply disappeared.¹⁷

7. After Wang and Mullaney established Smile Train: (i) Mullaney hired Smile Train's first president; (ii) Mullaney served on Smile Train's Board; and (iii)

Wang was Smile Train's Chairman.¹⁸ As Chairman, Wang provided Smile Train with strategic direction,¹⁹ and he and Mullaney worked together closely to create a common vision for the charity.²⁰

8. In addition to his initial donation of seed money,²¹ Wang personally contributed

\$50 million in stock to Smile Train²², which later turned out to be worth \$35 million.

Wang also generally matched the donations raised at Smile Train fundraisers²³ and

board..

¹⁷ FALSE. No money "disappeared." Op Smile's FY99 990 states clearly that it gave Smile Train all money raised for ST Project. ("On Wednesday, December 23, 1998, Operation Smile contributed to the Smile Train assets in the amount of \$4,690,735, representing its net assets in its Smile Train account at that date.")

¹⁸ FALSE. Ann Ziff was Smile Train's first Chairman – not Wang. In 2001, Wang made himself Chairman for Life and he retained that title for 17 years until his death in 2018. After firing multiple executive directors, Wang made his secretary Smile Train CEO and Vice Chairman of the board.

¹⁹ FALSE. Wang did not provide "strategic direction" nor was he involved with day to day management of Smile Train. He attended three, 2-hour ST board meetings a year.

²⁰ FALSE. Smile Train President, Mullaney ran the charity with the help of his management team. Wang visited ST offices 3 times a year for 2-hour board meetings. Never attended a single management meeting.

²¹ FALSE. Wang did not donate any "seed money" – Walter Haefner provided all of it.

²² FALSE. Wang and his business partner Walter Haefner each pledged to give \$35 million to Smile Train. Haefner gave \$50 million. Wang gave \$27 million.

²³ FALSE. Smile Train didn't have any fundraisers. Wang never matched any donations except small donations related to his hockey team, the New York Islanders.

solicited friends and business partners to be Smile Train donors. As part of this effort, Wang personally brought on board many of Smile Train's largest donors, including: (i) Walter Haefner, one of Smile Train's top donors and Wang's Computer Associates' partner in Europe; and (ii) Chuck Dolan, who owned Cablevision and currently owns the Knicks, the Rangers and Radio City Music Hall. In addition, Wang procured donations or attendance at fundraisers from persons such as Maurice Greenberg,²⁴ Colin Powell, President George W. Bush, the Pasuccis, Walter Cronkite and Christie Brinkley.

9. Mullaney was unhappy with Smile Train's first president and soon hired another whom he also came to dislike.²⁵ Soon after he sold his advertising agency to a third party, Mullaney approached Wang about the possibility of his taking over as Smile Train's President.²⁶ Wang agreed and in 2001, Mullaney assumed the role of President at Smile Train.

E. Smile Train Direct Mail

10. In or about 2002, Wang and Mullaney decided that Smile Train needed to implement a fundraising strategy.²⁷ They turned to a direct mail marketing (or DMM) campaign²⁸ because: (i) direct mail donors would provide repeated contributions

²⁴ FALSE. Smile Train didn't have fundraisers. Mullaney recruited Hank Greenberg, not Wang. Mullaney wrote to Greenberg in 1997 after he went to a White House dinner honoring Chia President Jiang Zemin. He responded. Mullaney met with Greenberg's Starr Foundation which gave ST almost \$20 million. Greenberg still keeps in touch with Mullaney today.

²⁵ FALSE. Wang and the Smile Train board were unhappy with both CEOs. ST Board member Don Murphy - not Mullaney - fired first CEO, Don Mooers and 2nd CEO Baxter Urist.

²⁶ FALSE. Mullaney sold his ad agency in 1996. Five years later Wang asked Mullaney to serve as interim President of Smile Train in 2001 for one year.

²⁷ FALSE. Right away, in 2001, after taking over Smile Train, Mullaney learned Smile Train was running out of money and needed to fundraise.

²⁸ FALSE. ST began with advertising not direct mail. Mullaney wrote all the ads which were bought at 90% off list price. Later, after a large direct mail company saw the print ads, they

over time, thus permitting Smile Train to amortize the numbers over a five year period, rather than focus on a single early mailing, which would inevitably lose money;²⁹ and (ii) Wang had provided sufficient capital to cover the early losses that would be incurred in a direct mail campaign.³⁰ Over time, the campaign was wildly successful and by 2009, Smile Train had raised \$91 million in donations and amassed a substantial surplus³¹

approached ST and offered to do a direct mail test.

²⁹ FALSE. The arbitrator has no idea what he is talking about here: he is confused.

³⁰ FALSE. Wang didn't give any money till after Smile Train began direct mail. Haefner funded all of Smile Train for the first few years.

³¹ FALSE. At this time, Smile Train raised \$500+ million – not \$90 million. And the surplus of unused donations was around \$100 million by 2009.

F. Mullaney's New Concept and Threat to Leave Smile Train

11. In 2008, Mullaney told Wang he wanted to convert Smile Train into a charity that would contribute services not just to cleft, but also to a number of sub-charities which would be dedicated to surgeries other than cleft.³² On hearing this, Wang was concerned, among other things, with the notion that if a charity solicits funds for one cause, like clefts, how could it then use those funds on a different cause?

³³This back and forth ultimately ended with Mullaney tendering his resignation from Smile Train in order to pursue his new idea.³⁴

12. Two weeks after resigning, Mullaney changed his mind and announced that he wanted to return to Smile Train, provided Wang would agree to his being paid \$1 million per year.³⁵ Wang thought it was in Smile Train's interest to keep Mullaney and, thus, agreed to the demand. Actually, Mullaney was paid substantially more than \$1 million in this period because Mullaney also performed separately compensated work for a number of Wang's other businesses.

G. Mullaney's Blindness Agenda

³² FALSE. Mullaney was concerned about ST's growing \$135 million dollar surplus of unused donations and the opportunity they presented. Mullaney pressed to expand ST's mission beyond clefts and significantly increase the number of surgeries ST provided every year. This idea was discussed as early as 2006 as ST began to accumulate a surplus of tens of millions of dollars in unused donations.

³³ FALSE. This issue was discussed with Smile Train lawyer who said it would be fine to expand the mission of Smile Train as long as donors were made aware of this. They recommended the language be changed in Smile Train appeals to say donations would be used to help a child with a cleft *or other serious medical problem*. This was done.

³⁴ FALSE. Mullaney briefly considered leaving Smile Train for personal reasons. But when Mullaney heard Wang was going to take over Smile Train, move it to his offices on Long Island and put his daughter Kimberly in charge of it, Mullaney changed his mind about leaving. He feared Wang would use the charity as his private PR company and spend all the money in China where his business interests were. Mullaney never resigned and never left Smile Train.

³⁵ FALSE. Mullaney never demanded \$1 million a year. To the contrary, Mullaney refused to accept almost \$400,000 in compensation and would go for months without taking any pay.

13. After returning to Smile Train in 2008, Mullaney (unbeknownst to Wang) continued to pursue his plan to expand Smile Train's causes beyond cleft.³⁶ As part of this effort, Mullaney instructed Smile Train employees to research pediatric blindness and to explore the marketing materials and fundraising strategies utilized by other charities that were addressing blindness. Mullaney and his staff also created a d/b/a called HMS, Inc. (HelpMeSee) and initiated newspaper ads to test interest in his blindness concept.

³⁶ FALSE. For years the board discussed expanding Smile Train's mission was the surplus of unused donations grew from \$10 million to \$25 million to \$50 million to \$75 million and then \$100 million in 2009 and \$135 million in 2010. In Sept., 2009 Mullaney was given permission to test blindness fundraising.

14. Orbis was a blindness treatment and prevention charity which was co-founded by Al Ueltschi and was famous for the Flying Eye Hospital. As part of Smile Train's secret work in pediatric blindness,³⁷ Mullaney and Priscilla Ma (a Smile Train employee) ("Ma") met with Mohan Thazhatu ("Thazhatu"), the Chief Operating Officer of Orbis, in October 2009. In that meeting, Mullaney informed Thazhatu that Smile Train was looking to broaden its mission to include blindness, and he invited Orbis to submit a funding proposal.

15. In December 2009, Thazhatu asked Mullaney to meet with Orbis' then-treasurer and board member, Jim Ueltschi, who was the son of Flight Safety International, Inc.'s. billionaire founder Al Ueltschi. Jim Ueltschi was greatly impressed by Mullaney's presentation, and Mullaney thereafter began to offer marketing advice to Orbis.³⁸

H. Freakonomics

16. Freakonomics is an economic consulting group which was led by Steven Levitt ("Levitt")³⁹ and provided Smile Train with analytics on its direct mail campaigns. In early 2010, Mullaney told Wang of a purported analysis by Levitt to the effect that the median age of those with cleft was declining⁴⁰ and that there would

³⁷ FALSE. There was nothing secret about this as the ST board had discussed this for year and gave permission for Mullaney to explore.

³⁸ FALSE. Ueltschi and Mohan asked for Mullaney's help and he spent many months giving them and staff free advice and support regarding Orbis fundraising programs which were under-performing.

³⁹ FALSE. Freakonomics is a book – not "an economic consulting group." Steve Levitt has signed a declaration that states references to him and his firm in this document are misleading and/or completely false.

⁴⁰ MISLEADING. It wasn't a "purported" analysis it was very accurate as time has shown. Smile Train had 500,000 digital patient charts which Levitt and his team reviewed and they showed that the median age of ST patients around the world was dropping. It dropped by 50% in both China and India. Wang refused to believe this because he worried it would lead to a reduction in payments

soon be only 400,000 clefts left in the world, thus putting Smile Train essentially out of business.⁴¹ When Wang reacted with shock and extreme skepticism, Mullaney responded by saying that if the 400,000 number bothered Wang that much, he would change the number to reflect 2.4 million remaining clefts in the time frame referenced by Levitt.⁴² Mullaney's striking flexibility with the facts concerning the

to China where his business interests were. When this was presented to him, Wang pounded the table and said Levitt was a moron and none of this was true. Since then, the median age has continued to drop significantly and the number of ST cleft surgeries in China has also dropped. Wang compensated for this by tripling the amount ST contributes per surgery in China to around \$900 which increase Smile train spending in China by tens of millions of dollars. In India, which does twice as many surgeries as China, ST partner hospitals receive \$300 or less per surgery. This \$600 premium to hospitals in China arbitrarily increased the amount of ST money going to China by \$12 million per year.

⁴¹ FALSE. Mullaney never said there would only be 400,000 clefts in the world. His presentation was quite clear that there would always be new babies born with clefts in China and around the world. At that time, approximately 200,000 new babies with clefts were being born every year. Mullaney was explaining that as the backlog of unrepaired clefts was being addressed, the total number of cleft surgeries would decrease as the median age of patients drops. Mullaney never said ST was "going out of business" as there would always be a need to help those who couldn't afford cleft surgery which as Smile Train's mission. Mullaney's point was that cleft surgeries had peaked, and they would soon begin declining – all of this happened. The significant drop in median age explained why cleft surgeries at Smile Train had stopped growing and leveled off at around 120,000 and have declined significantly since 2010 to around 105,000 a year now. In 2017, Smile Train's website says it performs one cleft surgery every 5 minutes which comes out to 105,000 cleft surgeries a year. A 12% decline. Mullaney warned that unless it expanded the mission, the surplus of unused donations would grow even faster and create problems as ST donors expected their donations to be spent, not be part of a secret endowment. Mullaney argued it was unethical to deceive donors this way and ST had a moral obligation to either expand the mission and spend the donations or stop raising money it didn't need and might not ever spend. Today, ST's surplus of unused donations is around \$325 million. Everything in Mullaney's presentation – which is available today - turned out to be true. Wang just didn't want to hear it – or let Mullaney expand Smile Train's mission – because he feared it would reduce the amount of Smile Train money going into China.

⁴² FALSE. This allegation is not supported by any documents or witnesses.

number of remaining clefts planted a seed of mistrust in Wang with respect to Mullaney.⁴³ That seed grew continuously from that point forward.

17. At Smile Train's February 9, 2010 Board meeting, Mullaney presented the median age theory, which he said predicted elimination of the backlog of clefts in China and India in five years.⁴⁴ On that basis, Mullaney proposed that Smile Train devote its substantial surplus of funds⁴⁵ to surgically treatable diseases other than

⁴³ FALSE. This is nonsense. Wang had liked and trusted Mullaney for 23 years. But now he was very worried about Mullaney making changes that might reduce payments to China where Wang had always said Smile Train needs to spend a lot because that was where his "business interests are." Wang needed to find excuses to discredit and dismiss Mullaney. Immediately after ousting Mullaney, Wang changed the ST Board financial reporting so it was impossible to see how much ST money was going into China. China was grouped with many other countries into SouthEast Asia. This would make it hard to notice when Wang tripled the amount per surgery ST partners in China received over their Indian neighbors. And the Smile Train China Country Manager was told to stop reporting to her manager and to start reporting to Wang and him alone. Then her pay was nearly tripled from \$180,000 a year to nearly \$500,000 making her the highest paid Smile Train employee in the world. Making \$500,000 a year in China is like making \$2 million a year in the U.S. She was not paid like other Smile Train China employees through Smile Train China payroll, she had her pay wired to a special bank account in the U.S. eve though she lives and works in China. Many believed Wang had an inappropriate relationship with Wang.

⁴⁴ FALSE. Mullaney's presentation doesn't say this at all. What Mullaney said was that there would be a gradual elimination of the *backlog* of clefts in China and India and 9 years later, this has come true. Smile Train's cleft surgeries have declined from 125,000 a year to 105,000 a year. G.S Memorial in India, Smile Train's busiest cleft hospital in the world, saw its surgeries decline from a high of 3,800 per year to 1,500 a year now. As Mullaney predicted, babies with clefts are still being born in China and India at the same rate. Smile Train continues to be needed. But the median age of children Smile Train operates on in China and India was cut in half due to the more than half a million surgeries ST has provided, the improving economy, increased awareness of the availability of surgery and efforts by the governments of both China and India. This led to a reduction in the number of ST surgeries and *it would have led to a reduction in the amount of ST payments going to China if Wang hadn't triple the contribution per surgery for China to \$900.*

⁴⁵ FALSE. Mullaney never wanted to displace cleft spending or focus. He simply requested an extremely modest budget of \$5 million (out of the \$135 million (3%) surplus of unused donations) that Smile Train had gathering dust in the bank.

cleft, including cataract blindness (“Cataract Initiative”). The Board’s response was to direct that Mullaney cease all work on anything other than cleft although the Board did say it would investigate Mullaney’s proposal before reconvening.⁴⁶

I. Internal Investigation

18. Mullaney’s conduct in early 2010 aroused suspicions in the Smile Train Board and, accordingly, the Board asked Smile Train’s Audit Committee to conduct an internal investigation of whether Smile Train Management had been withholding material information from the Board.⁴⁷ In the course of this investigation, it was learned that while Mullaney attributed the purportedly objective median age theory to Levitt, it was actually no more than a self-serving effort on the part of Mullaney to justify expanding Smile Train’s mission.⁴⁸ To buy Freakonomics’ cooperation, for

⁴⁶ FALSE. No one told Mullaney to cease anything and there was never any board-approved “investigation.” Mullaney and his team continued to work on developing this concept of expanding ST’s mission and putting unused donations to good use. Later, Wang initiated his own sham “board investigation” without any discussion, knowledge or approval of the ST Board.

⁴⁷ FALSE. Smile Train directors never discussed nor approved any “investigation.” Smile Train “Audit Committee” consisted of one person, Bob Bell, a 35-year employee of Charles Wang, who, presumably at Wang’s direction began his own, unauthorized investigation without any knowledge, discussion or approval of ST directors. Mullaney heard about this when his employees called him in India saying Bob Bell showed up at Smile Train offices without notice asking for access to “all files.” He told the staff he was conducting a “board investigation” but what it really was a fishing expedition to find dirt on Mullaney. Immediately after receiving this call Mullaney called fellow board members Rob Smits and Mark Atkinson who knew nothing about any “board investigation” and agreed that this was not authorized by the ST board. When Mullaney called Don Murphy, Murphy knew Wang was doing this and thought it was “okay.” At a previous board meeting, Wang told Mullaney that he controlled Murphy’s vote. This was when Mullaney realized Wang was taking over Smile Train.

⁴⁸ FALSE. Levitt has signed a sworn declaration that this is not true. And the board presentation explicitly shows that this was not true. The median age theory was Mullaney’s theory and it has been proven correct in the 9 years since it was presented. Mullaney was worried about the ethical and legal questions of raising donations ST didn’t need and might never spend. Mullaney felt uncomfortable signing fundraising letters that he believed were misleading donors into thinking that Smile Train

example, Mullaney had unilaterally doubled Freakonomics' monthly retainer to \$30,000, effective February 1, 2010.⁴⁹ And when Wang ultimately spoke to Levitt, Levitt explained that Mullaney never asked Freakonomics to predict the cleft trend objectively but, rather, to furnish data that might help justify Mullaney's argument that cleft would soon be eliminated.⁵⁰

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urgently needed money for surgeries. Since then Smile Train's surplus of unused donations has more than doubled, to around \$325 million, just as Mullaney predicted as Smile Train cleft surgeries peaked around 125,000 a year and since then have declined to around 100,000 a year.

⁴⁹ FALSE. Levitt's firm received a previously promised -and well-earned - raise after they helped ST recoup millions of dollars of donations tied to GiftAid in the UK. The raise had nothing to do with this. Levitt has signed a declaration that confirms this.

⁵⁰ FALSE. Mullaney never argued "cleft would be eliminated." He said the *backlog* of unrepaired clefts in China and India was being eliminated - and it has been. Levitt never "furnished data" - ST provided data to Levitt and his team which analyzed it and discovered the clear correlation between the median age of patients and the size of the backlog of clefts. This has only been made more clear over the following 9 years. The arbitrator never looked at any of these materials and he is just cutting and pasting bogus, patently false statements from Wang's lawyers intended to discredit Mullaney.

⁵¹ FALSE. Smile Train provided patient data to Levitt's team and they turned the data into a few simple maps that showed conclusively that the backlogs of clefts in China and India were shrinking as the median age of ST patients was sinking. In the nine years since, Mullaney's theory has been validated and these allegations have been proven false.

19. Mullaney and Smile Train's staff attempted to conceal facts from the Board in additional ways. For example, when the Board requested a copy of the Freakonomics report concerning the median age theory, Smile Train Senior Management claimed that one did not exist. Subsequently, however, Smile Train Senior Management admitted that it had deceived the Board and that a report in fact existed.⁵²

20. In the aftermath of the back and forth at Smile Train about the median age theory, it became clear that the theory had no substance. Smile Train's cleft surgeries have increased every year since 2010⁵³, and Smile Train recently provided 60,000 surgeries in the first half of the year, which was the highest half-year total on record.⁵⁴

J. Mullaney Emails

21. In March 2010, Mullaney learned of the investigation of Smile Train Management that had been directed by the Board in early 2010.⁵⁵ On March 25, 2010, Mullaney sent an email to Bob Bell ("Bell"), who was heading the investigation,

⁵² FALSE. No "Freakonomics Report" was ever created or concealed by Mullaney or anyone at Smile Train. This fabrication came from Wang, his team and his lawyers.

⁵³ FALSE. Smile Train's cleft surgeries have decreased - not increased. ST website in January, 2017 claims ST provides one cleft surgery every five minutes. This comes out to 105,000 surgeries a year. A 12.5% decline since 2010.

⁵⁴ FALSE.

⁵⁵ FALSE. No investigation was "directed by the Board in early 2010." This "investigation" was initiated by Wang without any knowledge, discussion or approval of the ST Board. After Mullaney left on a 3-week trip to visit partner hospitals in India, Wang's personal accountant Bob Bell asked ST managers if he could go through "all the books" as part of a "board investigation." Mullaney called independent board directors, Mark Atkinson and Rob Smits who confirmed no one had ever discussed or approved a "board investigation." This was a fishing expedition to find disparaging information on Mullaney and get rid of him.

wherein Mullaney instructed Bell to do nothing related to the investigation unless Mullaney was present.⁵⁶ Mullaney then went on in the email to attack Wang, asserting that he had a “personal agenda;” that he was “not acting in the best interest of Smile Train or the children;” that he had “exploded in rage in front of two of our employees, smashed the conference table with his fist. . . . screamed at the top of his lungs;” that he had made “many self-serving statements that are not only false and inaccurate but mean-spirited and libelous;” and that he had admitted to Mullaney that he did not “‘give a fuck’ about helping children in any other country.”⁵⁷ China is

⁵⁶ FALSE. Mullaney’s team was very upset when Bob Bell showed up unannounced asking to go through all the ST files without any authorization or approval of the ST Board. Mullaney asked Bell to wait till he returned from his trip to India.

⁵⁷ TRUE. Wang was beginning his takeover of the charity and Mullaney was very concerned. Mullaney voiced all of his concerns and fears most of which came true. Wang’s business interests were his top concern not the welfare of Smile Train and the ensuing 9 years validates everything Mullaney wrote and said.

where his businesses are and he needs Smile Train to help him ‘make money.’” The next day, Mullaney followed up with another email to Bell which was similarly abusive of both Wang and Bell.

22. Bell felt obliged to share Mullaney’s emails with Wang and did so. After reading them, Wang asked Mullaney to meet with him on April 19, 2010 at the offices of NeuLion, a public company where Wang served on the Board. At the meeting, Wang reluctantly agreed to let Mullaney remain at Smile Train provided Mullaney agreed to fulfill the following three conditions: 1. sign a written apology letter, making it clear that Mullaney’s emails to Bell were wrong and untrue; 2. support the addition of two Smile Train Board members appointed by Wang; and 3. regain the trust of Wang and the Board before Labor Day. Mullaney agreed and on the same day, he signed an apology letter drafted by Roy Reichbach (“Reichbach”), NeuLion’s General Counsel.⁵⁸ While Mullaney signed the letter in the presence of Reichbach, he initially testified under oath in this arbitration that he did not sign the apology.⁵⁹

23. At Smile Train’s April 20, 2010 Board meeting, the directors voted Reichbach and Art McCarthy (formerly with KPMG) onto the Board and unanimously

⁵⁸ FALSE. Mullaney was presented with a letter written by Wang’s personal lawyer and told if he did not sign it he would be destroyed. The letter was filled with false statements and facts. Wang told Mullaney that if he didn’t sign what was essentially a POW confession he and his family would be “thrown out in the street.” It was clear that Wang’s lawyer was worried about legal issues Wang might face for his conduct at Smile Train and he wanted Mullaney to sign a letter denying he knew of any illegal conduct by Wang. Most people who don’t do illegal conduct don’t need to get people to sign letters saying they didn’t see them doing illegal things.

⁵⁹ Wang left Mullaney alone in the room with the letter and a pen. Mullaney did not sign the letter. He believes Wang and or Reichbach forged his signature without his knowledge or permission just as they had to a fake resignation letter Smile Train sent to thousands of Smile Train donors. Immediately after leaving this meeting, Mullaney called his lawyer at Jones Day and told him Wang tried to force him to sign the letter.

voted to postpone indefinitely any consideration of expanding Smile Train's mission.⁶⁰

K. Events at Orbis

24. As Mullaney knew, Orbis was interested in blindness. Three days after he met with Wang and signed the apology letter, Mullaney made a marketing presentation to ORBIS in which he described ORBIS' marketing team as "absolutely pathetic" and "totally clueless" and "dumb, dumb, dumb." ⁶¹During the meeting, he

⁶⁰ Wang added two more employees to the ST Board in June because his first Board Coup attempt in April had failed when Don Murphy refused to vote to oust Mullaney. After telling Wang he would help him get rid of Mullaney, Murphy received a call from Ann Ziff, former Chairman of Smile Train pressuring him not to and explaining what a disaster it would be if Wang got control of Smile Train. It worked - Murphy told Wang he was not going along with the plan. So Wang added two more employees to give him the votes he needed to get rid of Mullaney. At this board meeting, independent board director Mark Atkinson half-joked that it was beginning to look like working for Wang was a requirement to be on the Smile Train Board. Wang would later throw Atkinson (and Mullaney) off of the ST Board.

⁶¹ FALSE. Mullaney never made any presentation to Orbis. He was asked to meet with Orbis' marketing team and give senior management feedback which he did. Jim Ueltschi agreed with Mullaney's assessment.

advised Jim Ueltschi that ORBIS should consult with Target MarkeTeam (“TMT”) on direct mail and that Mullaney himself would create a letter or two for ORBIS related to blindness. Finally, Mullaney also told Jim Ueltschi that: (i) Smile Train would not be expanding into other areas and, thus, ORBIS could not collaborate with Smile Train on blindness; and (ii) things might not work out for him at Smile Train and he might therefore have “lots of extra time” to help ORBIS.

25. At the end of April 2010, the ORBIS Board decided to spin-off the Cataract Initiative and reassigned Thazhatu to lead this project as a separate entity. Jim Ueltschi and Thazhatu were not encouraged by this and began to consider embarking on a separate, independent blindness effort.⁶² In this regard, they sought Mullaney’s advice and help because they thought their situation was analogous to when Mullaney had left Operation Smile and formed Smile Train. In response, Mullaney explained that he was planning to take on 2-3 major charities as clients and help them achieve the same success as Smile Train. He stated he would “probably commit to 2-3 clients within 30 days or so” and that “one has already signed on.” In response, Jim Ueltschi told Mullaney to “[h]old a spot” for him.⁶³

26. In July 2010, Mullaney offered to sell Ueltschi the name “Help Me See” along with its logo for \$1, and Ueltschi gladly accepted.

27. On July 28, 2010, the ORBIS Board voted to discontinue its support of the Cataract Initiative. And on August 23, 2010, Al Ueltschi sent a letter announcing the

⁶² FALSE. Ueltschi told Mullaney that he and Thazhathu were thrown out of Orbis. Orbis sued Ueltschi for non-payment of a grant. (New York Post, Feb. 23, 2013)

⁶³ FALSE. Ueltschi and Thazhathu both falsely and continually portrayed Mullaney’s new charity as a fundraising company that wanted “clients” when in fact it was and is a charity.

creation of HelpMeSee, a new organization independent of ORBIS that would pursue the mission of alleviating blindness.

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⁶⁴ CONTEXT. In this letter Al Ueltschi thanks Brian Mullaney for all of the pro bono help he gave to Orbis and the Ueltschis for more than a year.

L. Mullaney's Termination by Smile Train

28. At the September 21, 2010 Smile Train Board meeting, the Audit Committee reported the result of its internal investigation.⁶⁵ Among other things, the Committee found that: (i) Mullaney had misled the Board with respect to the median age theory, which was concocted for the sole purpose of promoting Mullaney's personal agenda⁶⁶; (ii) Mullaney had quietly pursued and spent money on areas other than cleft, and this continued even after the Board found out about it and told him to stop;⁶⁷ (iii) the lack of a Freakonomics report on the median age theory was troubling and suspect since Freakonomics created reports on almost everything it did for Smile Train;⁶⁸ and (iv) Mullaney had manipulated Smile Train's books and records in various ways designed to further his own personal agenda.⁶⁹

29. At the conclusion of the Audit Committee's presentation, the Smile Train

⁶⁵ FALSE. There was no Audit "Committee." This "internal investigation" was a fishing expedition conducted by one man, Bob Bell, working presumably for his boss of 35 years, Wang, without knowledge, permission or approval of the Smile Train board.

⁶⁶ FALSE. In the 9 years since this meeting Mullaney's theory has proven true. ST clefts peaked around 125,000 surgeries per year and then began declining, now around 105,000 a year. And just as Mullaney predicted, ST's surplus of unused donations has risen significantly. It has more than doubled since Mullaney left and now is more than \$300,000,000 and growing. Mullaney's "agenda" was to stop misleading donors by accumulating unused donations that donors thought were being used to provide surgeries and to put hundreds of millions of dollars in unused donations to good use by expanding Smile Train's mission.

⁶⁷ FALSE. See Paragraph K24 above where it states that right after the board meeting "Mullaney also told Jim Ueltschi that: (i) Smile Train would not be expanding into other areas and, thus, ORBIS could not collaborate with Smile Train on blindness." This contradicts the claim that Mullaney "continued secretly" to "work on blindness." Just as Wang demanded, Mullaney and his team sent out 1,000+ letters to partners explaining there would be no expansion of ST's mission.

⁶⁸ FALSE. There was no report and Steve Levitt has signed a declaration that confirms representations of him and his firm's work are false and extremely misleading.

⁶⁹ FALSE. Mullaney's only agenda was to help as many children as possible.

Board discussed Mullaney's resignation, which no one opposed.⁷⁰ Ultimately, the Board agreed to offer Mullaney an opportunity to discretely resign and receive a generous separation package which would be paid over time to ensure his cooperation.⁷¹ On October 14, 2010, Mullaney voluntarily entered into a separation agreement with Smile Train.⁷² Provided Mullaney abided by the terms of the separation, he was to receive close to \$2 million in pay⁷³ and a \$500,000 grant to start a new charity.⁷⁴ Also, despite having been fired, Mullaney was to remain on the Smile Train Board until June 2012.⁷⁵

30. After Mullaney's separation, Smile Train's Audit committee ultimately turned its investigation of management over to the accounting firm, Grant Thornton. Grant Thornton uncovered numerous additional transgressions and concluded that

⁷⁰ FALSE. All of ST's independent directors opposed what Wang and his employees were doing, (the majority of directors were employees of Wang) and fought for Mullaney for three hours. Once it was obvious Wang and his four employees had the votes to get rid of Mullaney, the focus switched to creating a fair severance package so that Mullaney would not sue.

⁷¹ FALSE. "Discrete"? Without Mullaney's knowledge or approval, ST put his signature on a resignation letter and sent it to tens of thousands of ST donors. Mullaney never received a penny of severance nor any explanation as to why. And they did not honor any other aspects of the severance package at all.

⁷² FALSE. It was not "voluntary," but under severe duress. Mullaney was told that if he didn't sign this agreement he and his family would be "thrown out in the street." His lawyer, Sally Blinken, was not allowed to be present.

⁷³ FALSE. Millions? Mullaney never received a penny of severance.

⁷⁴ FALSE. \$500,000? Mullaney never received a penny of this grant. He did start a new charity and asked for this grant many times. ST never provided it nor explained why.

⁷⁵ FALSE. Mullaney's term ran till 2013 – not June, 2012. But ST broke this promise too in June 2012, when Mullaney and Atkinson were both forced off of the ST board after they each called for an outside investigation of Wang and his employees.

Mullaney had expenses amounting to \$335,000 that were not appropriate in that they were either unsubstantiated or were personal to Mullaney and without business purpose or both.⁷⁶ Grant Thornton also found that Mullaney had deferred substantial amounts of salary which would not then be included on his W-2 forms. As a result, Mullaney's W-2s had to be amended and reissued to reflect \$1.13 million of additional income.⁷⁷

M. Mullaney's Relationship with Smile Train, 2010/2011

(i) Mullaney's Book About Smile Train

31. On November 2, 2010, shortly after Mullaney executed the Separation Agreement, the Smile Train Board learned that Mullaney had entered a publishing contract with Hyperion Publishing ("Hyperion") with respect to a book about Smile Train titled "One Smile at a Time."⁷⁸ Months later, the Board received the contract and learned that: (i) Mullaney was named the author of the book;⁷⁹ (ii) the contract entitled Mullaney to a \$150,000 advance plus royalties;⁸⁰ and (iii) the contract

⁷⁶ FALSE. This "investigation" by Grant Thornton was a complete sham. Mullaney was not informed he was being "investigated" nor given any opportunity to hear the allegations or defend himself. All of Mullaney's expenses had been approved by Bob Bell, the Chair of the Smile Train Audit Committee and Wang's personal accountant for 35 years. Since Mullaney was forced out, Wang launched many "investigations" of Mullaney -- without any knowledge or participating of Mullaney for the sole purpose of disparaging and harming him.

⁷⁷ FALSE. Wang's lawyers passed around W-2s at the arbitration but Mullaney never received one and likely they were never filed with the IRS. This was a stunt to influence the arbitrator and it worked. Mullaney never was given nor did he ever receive any deferred compensation. He did refuse almost \$400,000 of compensation as a "donation" to Smile Train. Further evidence that this was a sham is the fact that Smile Train never re-stated its 990s which it would have been required to if any of these allegations were true. The IRS has never contacted Mullaney about this.

⁷⁸ FALSE. Smile Train discussed and approved this book project in spring of 2009. Board presentations and minutes clearly prove this.

⁷⁹ FALSE. The board already knew all about this.

⁸⁰ MISLEADING. Mullaney had promised to donate 100% of his proceeds to Smile

obligated Smile Train to purchase 25,000 copies of the book.⁸¹ On learning this, Reichbach (Smile Train's General Counsel)⁸² directed Mullaney to "refrain from doing anything further on this until such time as Board approval has been granted" and to furnish the galleys of the book to the Smile Train Board forthwith. Mullaney refused.⁸³

32. In January 2010, Mullaney assigned his contractual rights to the book to Smile Train in order to avoid paying taxes on the advance payments.⁸⁴ Shortly after Reichbach told Mullaney to stand down and to furnish galleys to the Smile Train Board, however, Mullaney secretly reassigned the rights to the book back to himself.⁸⁵

Train which he did. Mullaney's literary agent and co-author received significant portions of this advance. Mullaney attempted to give Smile Train the remainder, the first check he received. Smile Train returned the check to Mullaney saying he had to pay taxes on it and then give remaining funds to Smile Train. Mullaney revised contract so Smile Train could receive his proceeds directly from publisher without taxes being deducted to approximately double what the charity would receive.

⁸¹ MISLEADING. This was not an "obligation" but a benefit to be able to purchase up to 25,000 books at cost: just \$4-\$6 per book, which Smile Train would be able to use for fundraising mailings that would raise millions of dollars.

⁸² FALSE. Reichbach was not Smile Train's General Counsel – he was Wang's personal lawyer and one of his longtime employees.

⁸³ FALSE. Months earlier, galleys of the book were sent to board members inviting comments and offering to make changes. No feedback was ever given.

⁸⁴ FALSE. Mullaney had given his first check to Smile Train as he promised all net proceeds would go to Smile Train. Smile Train CFO returned the check and said it could not deposit a check made out to Mullaney. Mullaney changed the contract so that Smile Train would receive all of Mullaney's share directly and tax free.

⁸⁵ FALSE. When Mullaney learned that Wang was trying to kill the book for his own personal reasons, he asked the publisher to revert back to the original contract to protect the book, his co-author and the publisher all of whom had worked on the book for years and put a lot of time, effort and money into it.

33. At the February 8, 2011 Smile Train Board meeting, it was reported that Mullaney would not submit the book for Board approval,⁸⁶ and the Board accordingly directed that the book deal be terminated.⁸⁷

34. On June 7, 2011, Mullaney wrote to the Smile Train Board, claiming that Smile Train had agreed to purchase 25,000 copies of the book and imploring Smile Train to pay Hyperion \$120,000 for the copies. At the end of the email, Mullaney directed the Board to “stop interfering with [his] personal contract.” Suffice it to say that the Board did not authorize payment.⁸⁸ At or about the same time, the Board learned that Hyperion was about to publish the book. As a result, Smile Train entered a monetary settlement with Hyperion in which Smile Train paid Hyperion the costs it had expended in exchange for not publishing the book.⁸⁹

35. Over a year later, Mullaney self-published the book and sent it to

⁸⁶ FALSE. Galleys of the book had been sent to several members of the Smile Train Board asking for comments and feedback. No one responded.

⁸⁷ FALSE. It was too late to terminate the book deal as it was being sold, pre-sales. In addition, the board had approved the book in 2009 – this was Wang acting unilaterally to kill the book without the entire board’s knowledge or permission. Months later, Reichbach told Mullaney he could go ahead with the book as long as he included a disclaimer in the front that it was his book and not an official ST book. Mullaney agreed to this but Reichbach reneged on this offer.

⁸⁸ FALSE. The board had approved this benefit, to purchase books to mail major donors in fundraising appeals at significant discounts. Mullaney was making no money from these purchases. It was a personal contract – publishers make contracts with authors, not organizations. When Smile Train did not honor this contract that had been signed 2 years earlier with the full knowledge and approval of the Smile Train Board, Mullaney sent a personal check for \$120,000 to the publisher, who had spent years and a lot of money developing the book, to protect the publisher. The book was already being sold online.

⁸⁹ FALSE. Without the knowledge and/or approval of the Smile Train board, two ST directors threatened to sue the publisher if it did not cancel the book. They later sweetened the pot with a bribe of \$150,000 of Smile Train money to get them to kill the book.

between 1,200 and 1,400 of Smile Train's largest donors.⁹⁰ In the afterward, Mullaney told the donors about WonderWork and provided his contact information. When Smile Train's donors alerted Smile Train of this, Smile Train brought an action against Mullaney in the United States District Court for the Southern District of New York for copyright infringement and misappropriation of trade secrets, specifically Smile Train's donor list.⁹¹ During the proceeding, the court ordered Mullaney to turn over two lists, at least one of which was the Smile Train donor list.⁹² Ultimately, the case settled, and Mullaney assigned whatever interest he had in the copyright of the book to Smile Train.

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⁹⁰ FALSE. These were not Smile Train's "largest donors", they were donors Mullaney had a personal relationship with after running Smile Train for 10+ years. Mullaney was ousted by Wang suddenly and was not allowed to say goodbye to anyone. Without Mullaney's knowledge or permission, Wang and his employees sent a fake resignation letter written with Mullaney's forged signature to thousands of Smile Train donors. Mullaney did not "self-publish" anything. He printed rough drafts of the book and then sent them with personal thank you letters to some of the major donors who helped him during his 10 year tenure as ST President. In his letter, Mullaney encouraged donors to keep supporting Smile Train. Hundreds of thousands of dollars including one \$100,000 check was sent to Smile Train as a result of Mullaney's mailing.

⁹¹ CONTEXT. This was the first of many purely personal and vindictive lawsuits Wang's lawyers would file against Mullaney and his charity in NY State Court, Federal Court, and The High Court of Justice in London, England and Federal Bankruptcy Court. Including this arbitration, more than \$25 million from two charities, Smile Train and HelpMeSee, has been spent on these personal and vindictive lawsuits against Mullaney and his charity WonderWork. Wang did not pay any of his lawyers' fees.

⁹² FALSE AND MISLEADING. The case was settled without any finding of any wrongdoing. Many Smile Train employees and directors (including Wang) had various Smile Train donor lists on their computers as Mullaney did. Mullaney never used any ST donor list to solicit anyone.

⁹³ MISLEADING. This Federal Court litigation would likely cost \$2-3 million in defense costs to litigate the case, so Mullaney elected instead to settle it, which he did.

(ii) **Proposed Merger Between Smile Train and Operation Smile**

36. In December 2010, it was suggested that Smile Train and Operation Smile could discuss a collaboration now that Mullaney was no longer with Smile Train. At first, Operation Smile was reluctant to meet because its people were concerned that Mullaney was still involved with Smile Train. Nonetheless, discussions did ensue.⁹⁴

37. The negotiations progressed to a point where the Smile Train Board approved the proposed merger at a meeting held on February 14, 2011.⁹⁵ There were concerns raised about confidentiality at the meeting, however, since information about the proposed merger had been leaked to the press. When Reichbach polled the Board to see if any Board members had disclosed confidential information to the press, everyone said “no,” except for Mullaney who had “no comment” and stated that he would “not be responding to that question because [Reichbach had] not

⁹⁴ FALSE AND MISLEADING. Without any advance knowledge or approval of The Smile Train Board, Wang spent months negotiating a secret merger with Op Smile, a charity that was one tenth the size of Smile Train. The main goal of the merger was to move ST assets from New York to Virginia where there would be little to no government oversight. When a proponent of the merger was asked why ST would move \$135 million from NYC to a tiny charity with virtually no assets in Virginia Wang’s personal lawyer said, “To escape the New York regulatory scheme.”

⁹⁵ FALSE AND MISLEADING. All independent Smile Train directors voted against this merger. All Smile Train directors who worked for Wang (4) and Wang voted for the merger as it would give Wang personal control of more than \$150 million of Smile Train donations. Immediately after the vote, Wang personally fired 5 women, virtually the entire senior management team that had created Smile Train and worked there for 11+ years. Wang’s lawyers told these women that they would receive no severance unless they signed a gag order that prohibited them from discussing the takeover of Smile Train, and/or anything about Wang. And also, none of them would be allowed to work or volunteer for any organization that was in any way connected to Mullaney. Most of them refused to sign and received nothing and went to work with Mullaney. When Hana Fuchs sued Smile Train for severance, Smile Train counter-sued her and accused her of helping Mullaney steal from Smile Train “for years.”

responded to” his questions.

38. ⁹⁶On February 23, 2011, New York Times reporter Stephanie Strom (“Strom”), who had a longstanding relationship with Mullaney, published an article titled “Opposition Arises to Charities Merger.” In the article, Strom referenced confidential documents, including the merger agreement and draft board minutes, and stated that her source of information was a Board member who opposed the merger, i.e., Smits, Mullaney or Atkinson. Atkinson and Smits both testified that they provided no documents to Strom. ⁹⁷

39. In a follow-up article on March 6, 2011, Strom again cited confidential Smile Train information, including a spreadsheet with information about 12,000 Smile Train donors and a letter Smile Train purportedly intended to send to its donors.

⁹⁶ FALSE AND MISLEADING. Mullaney did not leak this information to the New York Times. Wang and his lawyers continually accused Mullaney leaking this information even after another director admitted giving the information to the New York Times.

⁹⁷ FALSE. Mullaney did not leak this information to the New York Times. Wang and his lawyers continually accused Mullaney leaking this information even though another director already admitted giving the information to the New York Times.

Strom also stated in the article that: “[m]embers of the Smile Train Board who voted against the merger have filed a complaint with the New York Attorney General’s Office.”

40. At the March 7, 2011 Smile Train Board meeting, Reichbach again polled the Board members as to whether they had leaked confidential Smile Train information to Strom. All present answered “no,” except for Mullaney who said: “If you want to interrogate me, speak to my lawyer. I am saving all of my comments for the Attorney General’s Office.”

41. Following the above-described events, Smile Train cancelled the merger with Operation Smile.⁹⁸ From the opening of the Operation Smile negotiations until the end, Mullaney concealed the extent of his involvement from the Ueltschis and Thazhatu, maintaining instead in communications with them that: “he did not want to waste time on the Smile Train Circus” and was staying out of the merger debacle.⁹⁹

N. Mullaney’s Negotiations with the Ueltschis

42. After leaving Smile Train in September 2010,¹⁰⁰ Mullaney focused on

⁹⁸ FALSE AND MISLEADING. The “above-described events” are not why the merger was cancelled. Thousands of donors signed an online petition protesting the merger. You can see their comments at <http://www.thepetitionsite.com/1/savesmiletrain/>. The New York Times ran very critical articles criticizing the merger (<http://www.nytimes.com/2011/02/24/business/24smile.html>) including a quote from a former Chief of The Charities Bureau that was very concerned about the merger because it would allow Wang to run Smile Train like a “fiefdom.” After independent Smile Train board members asked the New York State Attorney General to investigate Wang and the merger and it became apparent the NY State AG was going to get involved, Wang decided to cancel the merger. He blamed Mullaney.

⁹⁹ FALSE. Mullaney kept Ueltschi and Mohan updated on everything that was happening. Mullaney did not sign the letter all other independent directors of Smile Train sent to the NY AG and he never commented publicly on the merger.

¹⁰⁰ FALSE. Mullaney did not leave Smile Train in September, 2010. He agreed to resign in October, 2010 and remained President of Smile Train through June 2011.

creating a new charity, which he ultimately named S4TP. His plan was to form an “umbrella” 501(c)(3) organization that would provide fundraising services to five charity “brands,” namely burns, blindness, club foot, hole-in-the-heart, and hydrocephalus.¹⁰¹ The idea was that S4TP would act as the brands’ “invisible fundraising arm” and, in return, would receive fees from the brands.¹⁰² To get all this off the ground, Mullaney would need at least \$25 million of capital.¹⁰³

43. Mullaney approached Jim Ueltschi,¹⁰⁴ among others, as part of his effort to raise capital for his new charity. He did so without telling Ueltschi that he had been asked

¹⁰¹ FALSE. Mullaney never planned to form an “umbrella” organization - this was a disparaging term introduced by Wang’s lawyers (including “charity brands”). His plan did not include providing “fundraising services” to five charity brands” either. This is a grossly false and misleading representation of WonderWork business plan concocted by HMS lawyers to support their false allegation that WW was just a marketing agency and not a charity. WonderWork was a IRS approved 501c charity that helped provide more than 260,000 surgeries in 43+ developing countries thanks to the support of 250,000 donors.

¹⁰² FALSE. This was not the idea at all. These false and misleading statement was one of hundreds that were cut and pasted from Wang’s lawyers’ submissions. HMS was the only organization to ever pay WW any “fees” and HMS was not a “brand.” This shows how Wang’s lawyers effective brainwashed the arbitrator.

¹⁰³ FALSE. Mullaney launched WonderWork with less than \$200,000 in capital.

¹⁰⁴ FALSE. Ueltschi approached Mullaney and asked for his help with Orbis. Mullaney worked for free for more than a year helping Ueltschi. Ueltschi then offered Mullaney the position to be a co-founder of HMS. Then he offered Mullaney the job of Chief Marketing Officer of HMS. Mullaney declined all of these job offers.

to leave Smile Train following an internal investigation.¹⁰⁵ Rather, on September 27, 2010 (a week after he had been fired)¹⁰⁶ he wrote Ueltschi to the effect that he was thinking of leaving Smile Train because of Smile Train's reluctance to expand into new areas. It was not until January 2011 that Jim Ueltschi and Thazhathu learned of Mullaney's departure from Smile Train although, even then, Mullaney told them that he left voluntarily following a disagreement with Wang over the direction of the charity.¹⁰⁷

44. Initially, Mullaney asked the Ueltschis to underwrite the entire \$25 million investment in all five S4TP brands.¹⁰⁸ The Ueltschis, however, declined because they wished to be involved only in blindness. After making various other proposals throughout 2010 and 2011 which were not acceptable to the Ueltschis, Mullaney ultimately focused on the concept of offering HelpMeSee a turnkey solution whereby he would raise all the funds for HelpMeSee.¹⁰⁹ As part of his undertaking,

¹⁰⁵ FALSE. Ueltschi knew everything about Mullaney's departure from Smile Train. Ueltschi even offered to hire and his team of 5 senior managers that were also forced out by Wang on February 14, 2011. That's why Ueltschi insisted there be a clause about Wang in the agreement.

¹⁰⁶ FALSE. Mullaney was not fired in September, 2010. He resigned in October, 2010 and as part of his package would remain Smile Train CEO until June, 2011.

¹⁰⁷ FALSE. Ueltschi and Mohan knew everything that was happening between Mullaney and Ueltschi as emails confirm. Mullaney met with Ueltschi at Teeterboro Airport in late 2010 and presented his business plan for his new charity. Mullaney and Ueltschi discussed in detail his departure from Smile Train.

¹⁰⁸ FALSE. Mullaney never asked Ueltschis for \$25 million. Mullaney was trying to find major donors to give \$5 million each for each of the 5 causes – not "brands": blindness, club foot, burns, hole in the heart, water on the brain. Ueltschi's cared about blindness so Mullaney and Ueltschi discussed a \$5 million donation. But over more than a year of haggling, Ueltschi and Mohan kept reducing the size of their support from a \$5 million donation to a \$5 million loan to a \$167,000 a month services agreement to build a direct mail program for HMS.

¹⁰⁹ FALSE. The agreement doesn't say anywhere that WonderWork would raise "all funds" for HMS. Wang's lawyers said this and the arbitrator cut and pasted virtually everything Wang's lawyers submitted. Under services to be provided it states direct

Mullaney even promised that he would solicit Smile Train's major donors exclusively for HelpMeSee.¹¹⁰ As Mullaney wrote to Thazhatu at the time: his "agreement with Smile Train is that he cannot solicit major Smile Train donors for S4TP but there is no restriction on [his] soliciting major Smile Train donors for *other* charities. HelpMeSee will be the only charity that Mullaney does this for."¹¹¹

45. At the time of his negotiation with the Ueltschis and Thazhatu, Mullaney told them he had raised \$10 million for his club foot and burns brands and that the likes of Goldman Sachs, the Gates Foundation, the Pascucci Family Foundation, Bloomberg and Stanley Druckenmiller had expressed interest in becoming brand sponsors¹¹². None of this, however, ever materialized. And adding to Mullaney's

mail, advertising, online giving, website, collateral, foundation and corporation fundraising. There was never any mention of major donor solicitations or "all funds."

¹¹⁰ FALSE. OUT OF CONTEXT. During more than a year of haggling over the contract, there were many versions. When Ueltschi said he would donate \$5 million it was contemplated that Mullaney might become a director of HelpMeSee and might solicit ST donors exclusively. Subsequently, as the haggling continued, the degree of Ueltschi's support decreased substantially along with it, Mullaney's participation in HMS. In the end, Ueltschi would not donate a penny to WonderWork and Mullaney would not become a director of HelpMeSee. The final agreement was just a \$167,00 a month services contract - which obligated Mullaney to pay back HelpMeSee millions of dollars of its fees years later - and no board seat so there was no exclusive right or imposed obligation to solicit Smile Train donors on either S4TP or Mullaney.

¹¹¹ FALSE. Wang's lawyers made this assertion but it is completely false. No where in the contract does it say this.

¹¹² FALSE. The word "sponsors" is another term cut and pasted from Wang's lawyers submissions. Mullaney was soliciting major donors, Founding Donors - not sponsors. Some of these had committed to being Founding Donors - not "brand sponsors."

financial problems¹¹³ was the fact that Smile Train was withholding separation payments from Mullaney because of Mullaney's perceived breaches of his separation agreement with Smile Train.¹¹⁴ While this lack of money forced Mullaney to underwrite the day to day cost of running S4TP out of his own pocket, it was clear he could not continue to do this for long.¹¹⁵

46. Desperately in need of money and with no commitments materializing, Mullaney outlined a new idea in the Spring of 2011 that seemed to work for both HelpMeSee and Mullaney.¹¹⁶ In exchange for a \$2 million per year fixed fee, S4TP would focus on HelpMeSee's fundraising exclusively for a period. This would enable Mullaney to establish a track record with HelpMeSee that he could use at a later time to convince other donors to provide seed funds for the other "brands."¹¹⁷

47. HelpMeSee asked Mullaney to submit realistic estimates of projected fundraising in connection with his proposal. While Mullaney purported to do this, the Ueltschis and Thazhatu considered the estimates to be extremely high if not totally unrealistic. At Thazhatu's request, Mullaney modified his projections downward, and the parties then consulted Ron Bell (TMT's CFO) ("Bell") as to what he would project

¹¹³ FALSE. Mullaney never had any "financial problems."

¹¹⁴ FALSE. Never, at any during negotiations with Ueltschi and Mohan did Smile Train give Mullaney any notice that he was in breach of anything. ST never explained why they did not fulfill any of the commitments in Mullaney's separation package.

¹¹⁵ FALSE. Total fiction. At the time, it cost very little for Mullaney to underwrite the day to day cost of running S4TP for almost a year. Mullaney had rented 2 cubes from another charity called Bridgespan on 33rd street. He had no employees but himself and he was taking no pay. This was a story Wang's lawyer concocted.

¹¹⁶ FALSE. Mullaney already had commitments for millions of dollars in start-up donations at this point from several Founding Donors.

¹¹⁷ FALSE. This "brand theory" was concocted by HMS and Wang's lawyers. Mullaney never asked anyone for "seed funds" for "brands." All start-up fundraising was for S4TP, a charity.

for HelpMeSee.¹¹⁸ Bell's estimates were decidedly more pessimistic than Mullaney's projections which Mullaney had already revised downward. Ultimately, Mullaney and Bell presented HelpMeSee with further modified projections. While these were more ambitious than Bell's initial estimates, the Ueltscis and Thazhatu nonetheless relied on assurances from Mullaney and accepted the projections as an ambitious compromise with which they could live.

¹¹⁸ FALSE. It was Mullaney who had worked for many years with Ron Bell asked him to collaborate on the projections for a HMS direct mail program.

48. At or about the time of the projections, Mullaney and HelpMeSee agreed that TMT, Smile Train's long time DMM provider, would have the primary role in managing HelpMeSee's direct mail.¹¹⁹ This was necessary for the reason, among others, that S4TP did not have the necessary license to send DMM on behalf of another charity.¹²⁰ Thus, before HelpMeSee executed an agreement with S4TP, it entered a separate vendor agreement with TMT whereby TMT would create and run HelpMeSee's DMM program in exchange for a fee of \$12,500 per month.¹²¹ It was understood by all concerned at the time that if HelpMeSee and S4TP ultimately entered an agreement, S4TP would oversee TMT and the other vendors HelpMeSee needed for the fundraising program designed by S4TP.¹²²

Evolution of the Agreement Between HelpMeSee and S4TP

(i) Ancillary Revenue

49. HelpMeSee was extremely concerned about the size of Mullaney's proposed \$2 million annual fee, particularly when coupled with the other vendor costs needed for Mullaney's fundraising.¹²³ Mullaney, however, assured HelpMeSee about the

¹¹⁹ FALSE. S4TP, not TMT, was hired by HMS for managing HMS's direct mail which is why S4TP managed not just TMT but all the other direct mail vendors such as the list company, the caging company, the donor database company, etc. TMT did not manage any of these other DM vendors for HMS.

¹²⁰ FALSE AND MISLEADING. You don't need a license to "send direct mail on behalf of another charity" you just need to register in each state. S4TP could have but didn't need to for what it was doing.

¹²¹ FALSE AND MISLEADING. HMS hired TMT first because they were in a hurry to get started – not because S4TP didn't have a "license."

¹²² FALSE. This completely contradicts first sentence in this paragraph.

¹²³ FALSE. HMS and Mullaney had spent more than a year negotiating this contract with Scadden Aarps lawyers as their counsel. If they were concerned they wouldn't have signed it. The \$2 million annual fee was more than fair and reasonable because it saved HMS millions of dollars in salaries, benefits, office space, etc. that HMS would have had to spend on staff to do all the things S4TP was doing. They outsourced

economic viability of his plan and explained that HelpMeSee was undercounting revenue for various reasons, including the fact that the DMM estimates omitted revenue from Smile Train donors, which would almost surely exceed \$1 million. As a result, the parties incorporated what they called “Ancillary Revenue” of \$1,110,000 into the performance targets in the Agreement they were negotiating. Mullaney explained at the time that the Ancillary Revenue number was just a base and that he fully expected much more than that in contributions to HelpMeSee from Smile Train donors.¹²⁴

almost all of their fundraising to S4TP for much less than it would have cost to do it in-house. In addition, during the first year S4TP helped HMS raise almost \$5 million, acquire approximately 74,000 new donors and S4TP donated almost \$800,000 in cash and grants back to HMS. This amount represents half of all the fees HMS ever paid S4TP. In addition, Mullaney personally donated \$25,000 to HMS.

¹²⁴ CONTEXT. More did come in – without any contractual obligation to do so, S4TP gave HMS almost \$800,000 in cash and grants.

50. On July 28, 2011, the parties exchanged the first draft Agreement. In the draft, the performance targets that Thazhathu and Mullaney had spent months developing, including Ancillary Revenue, were attached as Annex A. On August 4, 2011, Mullaney's attorney, Greg Lam ("Lam"), circulated a restructured version of the agreement that, among other things, omitted the Annex A performance targets. HelpMeSee objected strenuously, explaining that the targets set forth in Annex A were the "basis of our willingness to join with S4TP." Over Lam's objection, Mullaney agreed to revert to the original July 27 draft, including the Annex A performance targets.¹²⁵ Those performance targets were incorporated unchanged into the parties' final agreement.

(ii) Protection Against Retribution by Wang

51. By late August 2011, the parties were ready to sign the Agreement. At the time, Mullaney already appeared to be busy soliciting major donors for HelpMeSee, including Wyc Grousbeck ("Grousbeck"), father of a blind child, owner of the Boston Celtics, and a major supporter of blindness charities, including Massachusetts Eye and Ear and the Perkins School for the Blind.¹²⁶ HelpMeSee was greatly encouraged at the time by Mullaney's professed solicitation of major donors for HelpMeSee and accepted Mullaney's representation that he would "not be working on Surgery for the Poor for at least the first six months."¹²⁷

¹²⁵ CONTEXT. Lam, a very experienced non-profit lawyer believed the agreement was poorly drafted and unfair to both HMS and S4TP. He advised both parties not to sign it. HMS lawyer was in France and from Skadden Arps and had little to no non-profit experience. HMS told Mullaney to take it or leave it.

¹²⁶ FALSE. Mullaney didn't meet Wyc Grousbeck until 2012.

¹²⁷ FALSE. Agreement doesn't say this. It says HMS would be S4TP's "only client" - the agreement didn't prohibit S4TP from continuing to raise start-up funds for itself as it had been doing since Nov. 2010 and HMS was fully aware of this. Mullaney was not

52. A few days before the Agreement was to be signed, however, Bell (TMT) told Thazhatu that Ma (Smile Train's Executive Director) had informed him that Smile Train would cease doing business with TMT if TMT had a direct relationship with Mullaney or his new charity. Given the fact that the parties had planned to replicate

working on "the solicitation of major donors for HMS" before signing the agreement and he never said he was. When Mullaney gave HMS large cash donations and grants totaling almost \$800,000 he told HMS explicitly that this money came from WW Founding Donors. HMS happily cashed the checks and never complained that S4TP had Founding Donors. It was only much later during the arbitration that HMS came up with this claim that "other clients" no longer meant all the other charities that wanted S4TP to work for them (Mercy Ships, Amnesty International, CURE, Autism Speaks) but it also meant S4TP itself, as if S4TP could be its own client. This preposterous claim came from Wang's lawyers.

Smile Train's fundraising success by using the same vendors as Smile Train, including TMT, this development was of great concern to Jim Ueltschi. In addition, Jim Ueltschi feared that Smile Train might object when Mullaney solicited major Smile Train donors on HelpMeSee's behalf. This was an acute concern since such solicitations were to be a key source of revenue for HelpMeSee under its upcoming agreement with Mullaney.

53. To alleviate Jim Ueltschi's angst over possible disruption from Wang, the parties added Section 5.3(a)(ii) to their Agreement. That Section provided HelpMeSee with a new ground to terminate for cause if "any fact, circumstance or event arises that is related to or involves Mr. Charles Wang, Smile Train and/or his or their Representatives that impairs or that, in the Company's good faith discretion, could impair the ability of the Manager (or any of the Manager Personnel) from devoting its (or their) full time . . . obligations under this Agreement (including, publication of potentially adverse publicity involving the Manager and/or any Manager Personnel or the commencement of any proceeding or action)."

54. When he negotiated his Agreement with HelpMeSee, Mullaney repeatedly assured HelpMeSee that it should have "no worries" about Wang, that he was "not taking any chances," that he had been "exceptionally careful to abide by [his Separation Agreement] and [would] continue to do so," and that he was "not breaching [the Separation Agreement] in any way." Unbeknownst to the Ueltschis and Thazhatu, however, all of this was false. In fact, Mullaney had breached his Separation Agreement with Smile Train in multiple, serious respects, including:

misappropriating and misusing Smile Train property, including its donor list;¹²⁸

¹²⁸ FALSE. This was part of the Federal lawsuit Wang's lawyers filed – and they gave HMS all of their documents even though both sides agreed to keep all of it confidential. These were bogus accusations that were withdrawn without any admission of guilt.

providing Smile Train's confidential information to the New York Times¹²⁹ and others; repeatedly denigrating Smile Train and its management to its donors¹³⁰; creating and using a highly misleading "smiletrain2.org" email address;¹³¹ and attempting to assign to himself the ownership of the book, "One Smile at a Time" when the book in fact belonged to Smile Train.¹³²

O. The Agreement

55. HelpMeSee and S4TP executed their Agreement on August 31, 2011. In addition to the provisions already discussed, the following sections are particularly pertinent to this arbitration:

- **Section 5.1:** The Agreement became effective on September 1, 2011 and was to continue in operation until September 1, 2016 unless it was terminated in accordance with Sections 5.2 or 5.3, or the term was extended pursuant to an agreement of the parties.
- **Section 2.1:** The Manager (S4TP) was to provide Services to HelpMeSee, as defined in Annex C of the Agreement. Annex C provided, among other things, that the Manager would "create a grant application program substantially similar to that designed for Smile Train by Brian Mullaney during his tenure as chief executive officer of Smile Train, together with any improvements made to such grant application program, which program will provide mailings, grant reports and grant renewal applications to corporations and foundations."
- **Section 2.8:** "As of the effective date of this Agreement and for the six (6) month period thereafter, the Company shall be the Manager's only client." This was later extended by the parties to 9 months.

¹²⁹ FALSE. Another false allegation – another ST director admitted to giving this information to The New York Times.

¹³⁰ FALSE.

¹³¹ CONTEXT. Mullaney was forced to create and use a secondary SmileTrain2.org email because his primary Smile Train email had been hacked and Wang's personal employees were reading ST employees emails.

¹³² FALSE. The book allegations were also false and all of them withdrawn without any. Finding or admission of guilt. Wang's lawyers would often use their previous bogus lawsuits against Mullaney to smear him in future legal actions without disclosing that they were the ones who brought the previous lawsuit.

- **Section 7.3(b):** “The Manager agrees to devote its best efforts to the performance of its obligations under this Agreement. In furtherance of the foregoing, the Manager agrees to actively and diligently solicit donations, including by soliciting former Smile Train donors.¹³³ The Manager further acknowledges and agrees that the Manager’s voluntary or involuntary failure to comply with any of the covenants set forth in this Agreement shall constitute a material breach.”

¹³³ FALSE AND MISLEADING. HMS had fought to have the word “all” included in this statement ie: Manager agrees to actively and diligently solicit donations, including by soliciting ALL former Smile Train donors. But it was deleted because it was clear that Mullaney had never agreed to solicit every Smile Train donor he knew. Not to mention the fact that it also says “former Smile Train donors” and it was impossible to know if a donor was former or not.

- **Section 2.3:** “The Manager shall ensure that the Services are provided at a level, and at standards of quality, diligence and care, consistent with the level and standards that were customary during Brian Mullaney’s tenure as chief executive officer of Smile Train during 2010; provided that such level and standards are sufficient to achieve or surpass the Performance Targets.”
- **Section 3.1(b):** HelpMeSee was to pay the Manager \$2 million per year in monthly installments of \$166,666.66.
- **Section 2.7:** “The Manager shall not . . . provide advisory, direct mail, marketing-related or any other services to any other Person¹³⁴ whose corporate or charitable purpose, as applicable, relates to vision or eyesight without the prior written consent of the company [HelpMeSee].”
- **Section 7.5:** “The Manager acknowledges and agrees that during the first thirteen (13) months of the Term, the Company shall satisfy the payment to the Manager of the Management Fee Installments and the Costs by drawing the applicable amounts from a line of credit. The Company’s satisfaction of one Management Fee Installment plus the Costs shall not exceed two million one hundred thousand dollars (\$2,100,000) (the ‘Cap’). The Manager further acknowledges and agrees that the Company’s written approval shall be required prior to incurring any obligations in excess of the Cap and that the Company shall be entitled to offset the payment of subsequent Management Fee Installments and/or reimbursement of Costs by the amounts incurred by the Manager in excess of the Cap (including amounts incurred following Company approval.) . . .”
- **Section 3.3(a), (b):** “The Manager shall maintain complete, accurate and appropriate books, records and accounts relating to the performance of the Services contemplated hereunder. . . . Such books, records and accounts shall be maintained at the Manager’s offices in New York, New York and shall be accessible for inspection and copying by the Company, its Affiliates and any of its or their Representatives at any time during normal business hours.”
- **Section 5.3:** “At the option of the Company, in its sole discretion, and at any time during the Term, this Agreement shall terminate upon thirty (30) day’s written notice of termination from the Board to the Manager, without prejudice to any other rights or remedies which may be available to the Parties, if: (i) the Manager shall commit a material breach of any provision of this Agreement, which such material breach continues uncured for a period of thirty (30) days after written notice of such breach (. . . if the Manager does not commence and diligently

¹³⁴ TRUE. This clearly states that S4TP could not provide services for other clients but HMS argued that this meant it couldn’t “provide services” for itself, raise money for itself which was absurd because they would have gone bankrupt if they stopped raising money for itself.

continue substantive actions to cure such breach during the thirty (30)- day period); . . . (iii) the Manager shall commit any act of fraud, misappropriation of funds, or embezzlement or shall be grossly negligent in the performance of its duties under this Agreement.”

- **Section 5.3(c):** “. . . at the option of the Company and at any time after the initial twelve (12) months of the Term, this Agreement shall terminate upon six (6) months’ written notice of termination from the Board to the Manager, without prejudice to any other rights or remedies which may be available to the Parties.”

- **Section 9.4:** “This Agreement contains the entire agreement and understanding among the parties with respect to the subject matter hereof, and supersedes all prior and contemporaneous agreements, understandings, inducements and conditions, express or implied, oral or written, of any nature whatsoever with respect to the subject matter hereof.

- **Section 9.6:** “THIS AGREEMENT AND THE RIGHTS AND OBLIGATIONS OF THE PARTIES UNDER THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAW OF THE STATE OF NEW YORK.”

- **Section 9.13(c):** In the event a dispute cannot be resolved by mediation, it “shall be referred to and finally resolved by arbitration under the Commercial Arbitration Rules of Arbitration of the AAA . . .”

P. Immediate Aftermath of S4TP/HelpMeSeeAgreement

56. The day after execution of the HelpMeSee/S4TP Agreement

(“Agreement”), S4TP presented its launch plan at a meeting at HelpMeSee’s offices

(“Launch Plan”).¹³⁵In the Launch Plan, S4TP stated that it would arrange meetings

with over twenty of Smile Train’s top donors,¹³⁶ write letters to more than 500 of

¹³⁵ FALSE AND MISLEADING. This “Launch Plan” was clearly labelled DRAFT and it was for discussion purposes only. It was never finalized.

¹³⁶ FALSE. This was a DRAFT version of the plan. Mullaney tried to arrange meetings with ST donors such as Starr Foundation and Bloomberg Foundation who did not want to meet with Ueltschi. Mullaney did arrange some meetings with major ST donors such as the O’Brien’s who were HMS’s largest donors and they sent in an additional \$10,000 after having dinner with Mullaney.

Smile Train's major donors¹³⁷, and pitch current Smile Train celebrities,¹³⁸ among other things.

57. Following the Launch Plan meeting, S4TP and HelpMeSee participated in regular calls in which S4TP updated HelpMeSee on its alleged progress with the Launch Plan, including its headway with major donors.¹³⁹ During the September 9,

¹³⁷ Mullaney sent direct mail letters on HMS letterhead to tens of thousands of Smile Train donors, many of whom were major donors, (\$1,000+) who were on rental lists and many responded with donations to HMS including HMS's largest donor, The Luke O'Brien Foundation which sent in \$10,000. After Mullaney took them out for a thank you dinner and they sent in another \$15,000 donation to HelpMeSee shortly thereafter.

¹³⁸ Mullaney was in the process of getting permission from Smile Train celebrities to endorse HMS when HMS posted ST celebrity names, photos online without permission.

¹³⁹ FALSE. Soliciting major donors was not included in the "services to be provided" part of the agreement between S4TP and HMS.

2011 call, for example, Mullaney reported that “major donor solicitations are underway. One meeting has already been set up with a billionaire next week. Brian reported that S4TP is working to contact another prospective major donor in Switzerland.”¹⁴⁰

58. When Thazhatu followed up on September 20 to see if Jim Ueltschi would be needed at any of Mullaney’s upcoming meetings, Mullaney responded that: “Nothing is going to happen next week but in the works. I had a very good meeting with a billionaire last week in D.C. that I am optimistic about. I also have contacted the billionaire in Switzerland who gave Smile Train \$50 million and he is recommending that his foundation consider a grant.”¹⁴¹

59. Mullaney later told Thazhatu that he did not want Jim Ueltschi attending major donor meetings because in his “opinion people won’t give money to billionaires” like Ueltschi.¹⁴² He also said he did not want Thazathu participating in such meetings because Thazhatu had a funny name.¹⁴³ Completely unbeknownst to Ueltschi and Thazhatu, Mullaney was excluding them from his major meetings¹⁴⁴ to

¹⁴⁰ FALSE. Mullaney never said this.

¹⁴¹ FALSE. Taken out of context. References were for start-up fundraising for S4TP.

¹⁴² FALSE. Mullaney did not bring Jim Ueltschi to meetings because his father, Al Ueltschi had a net worth of \$2.9 billion and Jim’s family was the 86th richest family in the world. (Forbes.) Mullaney explained it’s impossible to get donors to give money to billionaires. The Ueltschi family had a charitable foundation with \$200 million.

¹⁴³ FALSE. Mullaney didn’t bring Mohan to meetings because in his opinion, Mohan was not very warm or personable. A HMS donor who met Mohan complained to Mullaney about Mohan. Later on, when Mohan replaced Mullaney as a signer of HMS direct mail letters, Mullaney did raise some concerns that signing letters with the name “Mohan Thazhatu” may turn off some donors. Afterwards, Mohan stopped using the Mohan and started calling himself Jacob Thazhathu.

¹⁴⁴ FALSE. During the 10 months S4TP was working for HMS, Mullaney had approximately six meetings to solicit start-up donations for S4TP. During this same time, S4TP helped HMS acquire about 74,000 new donors while acquiring approximately 90 new Founding Donors for itself, some of whom had committed to

keep them from learning that in fact, he was soliciting major donors for contributions to his own charity (S4TP) and (contrary to all representations) was not seeking anything on HelpMeSee's behalf at the meetings.¹⁴⁵

Q. Ron Bell's Temporary Departure

60. On October 3, 2010, Ron Bell (TMT) resigned his direct mail roll at HelpMeSee. This was at Smile Train's request because Smile Train did not want any of its vendors offering services to an entity that had any kind of connection with Mullaney.¹⁴⁶ On hearing this, Mullaney told HelpMeSee that he would find a

helping before the agreement was signed.

¹⁴⁵ FALSE. Mullaney did not solicit for HMS during the few major donor meetings he had as these were longtime ST donors, some of whom had already made commitments to becoming Founding Donors of S4TP.

¹⁴⁶ FALSE. Smile Train threatened to fire TMT - and other S4TP vendors - if they continued to work with S4TP. This was part of Wang's successful 9-year campaign to destroy S4TP and WonderWork and Mullaney.

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replacement and reassured Jim Ueltschi and Thazhatu that major donor solicitation was going well (“I had a very good meeting with a billionaire two weeks ago in D.C. (Conway) And hope to hear from him today. I reached out to Smile Train’s largest donor (Haefner), \$50 million, and he has invited me to come to Switzerland to pitch to their foundation in November or December.”)¹⁴⁷

61. Mullaney also sent a scathing email about Bell’s resignation to Ma (Smile Train’s Executive Director), excoriating her for her “active participation in these sordid events.” He then threatened: “How will you feel when this is on the front page of the New York Times? Aren’t you worried that one day you will be held responsible for your actions.”

R. Additional Representations by Mullaney

62. In November 2011, Mullaney updated HelpMeSee on his trip to Houston to meet with “6 couples, former Smile Train major donors, impressed with presentation and appear to all be on board.” Mullaney further reported that he was still “working on finalizing a deal” with the D.C. donor (Conway),¹⁴⁸ would be going to California to meet with “wealthy ST donors, plus celebs,” would meet with the Haefner Family Foundation¹⁴⁹ on November 21-23, and would be reaching out to Patrick Soon-Shoing (“Soon-Shoing”), who had been suggested by Ueltschi as a potential donor. S4TP subsequently sent Soon-Shoing three different solicitation

¹⁴⁷ FALSE. Taken out of context, references to start-up fundraising for S4TP. Mullaney was very open with Ueltschi and Mohan about his fundraising for S4TP and when he sent a large \$239,000 donation to HelpMeSee, Mullaney’s letter said that these monies come from founding donors of S4TP. HelpMeSee cashed the checks without complaint – only when Wang’s lawyers got involved did they start to say that S4TP wasn’t allowed to raise their own start-up money.

¹⁴⁸ FALSE. Conway has signed an affidavit that refutes HMS’s claims.

¹⁴⁹ FALSE. Haefner has signed a legal letter refuting HMS’s claims.

letters on behalf of S4TP (notHelpMeSee).¹⁵⁰

63. In soliciting major donors for S4TP after entering the contract with HelpMeSee, Mullaney often, if not always emphasized S4TP's purported work in blindness as a basis for procuring a donation to S4TP.¹⁵¹ In fact, however, S4TP was

¹⁵⁰ FALSE. Mullaney wrote to Soon-Shiong at the suggestion of and on behalf of HMS.

¹⁵¹ FALSE. In soliciting start-up donations from major donors for S4TP, Mullaney showed the S4TP business plan only which included 5 causes: clubfoot, burns, blindness, hole in the heart and water on the brain. This business plan was created almost a year before S4TP signed an agreement with HMS.

just a fundraiser¹⁵² and was in no way involved in blindness surgeries¹⁵³—that work was all being done by HelpMeSee.¹⁵⁴ Thus, Mullaney secretly represented that S4TP was doing the blindness surgeries¹⁵⁵ as a means of procuring donations for S4TP when in fact, that work was all being done by HelpMeSee¹⁵⁶ for whom Mullaney was supposed to be (but was not) raising money.¹⁵⁷ As one of many examples of this,

Mullaney wrote to Grousbeck (owner of the Boston Celtics and father of a blind son) on December 1, 2011 as follows:

We are starting with blindness and hope to provide cataract surgeries to tens of millions of children and adults in developing countries. Part of our plan involves a surgical simulator that will allow us to create an eye surgeon (who knows one procedure) in six months versus 8 years. I think we can raise billions of dollars for this cause. And we have a business plan that is outrageously ambitious, but in my opinion very doable. Bill Gates liked it and he is no slouch.¹⁵⁸

64. Mullaney, of course, had nothing to do with the “surgical simulator”

¹⁵² FALSE. S4TP, which became WonderWork, was a 501c3, a charity, with a mission to help provide free surgeries for poor children and adults. In 2016, the year this report was written, WonderWork provided (92,000) more than twice as many cataract surgeries a year as HMS did that year. (45,000.)

¹⁵³ FALSE. S4TP was raising millions of dollars for blindness surgeries for HMS, donated almost \$800,000 in cash and grants to HMS to perform blindness surgeries and had mailed 11+ million letters raising awareness and donations for blindness.

¹⁵⁴ FALSE. “that work was all being done by HMS” is false. The “work” was being done by partner hospitals and NGOS of HMS - they did the actual surgeries.

¹⁵⁵ FALSE. The only thing Mullaney showed prospective S4TP Founding Donors was the S4TP business plan. Mullaney never showed any “work” of HMS or anyone else.

¹⁵⁶ FALSE. HMS owned no hospitals, provided no surgical teams, found no patients, provided no surgeries directly. Sending checks was all the “work” HMS did.

¹⁵⁷ FALSE. Mullaney and S4TP raised almost \$5 million for HelpMeSee. In addition, without any obligation to do so, S4TP gave HelpMeSee almost \$800,000 in cash and grants for blindness surgeries. Mullaney personally gave HMS \$25,000.

¹⁵⁸ FALSE. This clearly is talking about the future – future tense - “hope to provide” and about a “plan”, a business plan that hopes to help “tens of millions” in the future, not taking credit for work HMS was doing. The simulator that HMS claims S4TP took credit for did not exist in 2011 nor does it exist today in 2019. It too was part of the plan. Grousbeck never donated a dollar to anyone.

which he referenced in his letter to Grousbeck.¹⁵⁹ To the contrary, that was the brainchild and longtime dream of the Ueltschis.¹⁶⁰ As stated, the Grousbeck letter was just one of many examples of Mullaney's falsely attributing a blindness program to S4TP as a means of raising funds for S4TP.¹⁶¹ As another example, when Lisa Strain and Carl Kokich made a \$1 million donation to S4TP on December 9, 2011, Mullaney thanked them stating:

so far, you are in the company of just 25 others, but believe it or not, we have already begun delivering life changing surgeries. I am attaching a photo of a young girl who we helped just a few weeks ago. She was blind when she showed up Christmas Eve at one of our partner hospitals. A few days later she left with her vision restored and a big smile on her face.¹⁶²

¹⁵⁹ FALSE. Mullaney actually and his team were raising millions of dollars for HelpMeSee so that they could develop their simulator.

¹⁶⁰ FALSE. Simulator was supposed to be delivered in 2013. It is now 2019 and still is not completed. Wang's lawyers are complaining about Mullaney taking credit for something that didn't exist – and perhaps never will.

¹⁶¹ FALSE. Mullaney never attributed a blindness program to S4TP – all he ever showed or mailed was the S4TP business plan.

¹⁶² FALSE. This is not a solicitation but a thank you letter. Lisa and Clark Kokich were longtime, major donors to Smile Train who traveled to India to see ST programs and Africa to see WW program. Mullaney met with Clark Kokich in November, 2010, almost a year before the HMS agreement was signed. That is when Clark and Lisa committed to becoming Founding Donors of S4TP. Clark has signed an affidavit and a declaration attesting to the fact that their donation was for S4TP, not HMS.

S. The Timing of Contributions

65. S4TP argues that Mullaney received oral commitments from the Haefner Foundation, Conway,¹⁶³ the Egberts and the Sanders Foundation in 2010 before the HelpMeSee/S4TP Agreement was signed and that the contributions from those sources were therefore not covered by the Agreement. The evidence of record, however, is that Mullaney was unable to finalize deals with or procure any money from any of these sources until after the Agreement with HelpMeSee was signed.¹⁶⁴

More particularly:

A. Mullaney met with the Haefner Foundation in 2010 and while he was well- received, he could procure no specifics on amount or timing of a contribution. In November 2011, after S4TP had begun working with HelpMeSee, Mullaney made a second presentation to the Foundation which resulted in a \$5 million donation to S4TP, not HelpMeSee.¹⁶⁵

B. Mullaney met with Smile Train donor Conway in 2010 and claims that Conway orally committed to a \$5 million contribution to S4TP. But none of this worked out. In November 2011, after S4TP began working with HelpMeSee, Mullaney met again with Conway and ultimately, Conway made a single donation of \$1 million to S4TP on May 7, 2012, months into S4TP's relationship with HelpMeSee.¹⁶⁶

¹⁶³ FALSE. This is true – Mullaney did have commitments. But he could not accept donations because it took him almost a year to get IRS approval. Conway and Haefner have given written statements stating this is true.

¹⁶⁴ FALSE. This is fiction – had nothing to do with HMS. S4TP applied for IRS approval in Nov. 2010 but for various reasons did not receive it until Sept., 2011 – almost a year later. Immediately after receiving IRS approval, S4TP started accepting donations.

¹⁶⁵ FALSE. Haefner has given a written statement that this is not true.

¹⁶⁶ FALSE. Conway has given an affidavit attesting that this is not true.

C. In mid-November 2011, after S4TP began working with HelpMeSee, Mullaney visited the Egberts and eight of their friends in Houston. On January 3, 2012, the Egberts made their first donation to S4TP in the amount of \$10,000.

D. In late March 2012, Mullaney travelled to meet Robert Sanders (“Sanders”). Following his lunch with Sanders, Mullaney reported to HelpMeSee that he “[m]et with big Smile Train donor today for lunch, not a major gift person but maybe \$25K or \$50 K.” The Sanders Dickinson Foundation did not donate until May 2, 2012 when it gave \$50,000 to S4TP.¹⁶⁷

T. The \$239,550 “Donation”

66. In late 2011, HelpMeSee had no knowledge of S4TP’s subterfuge, but did know that S4TP’s performance was falling far short of expectations.¹⁶⁸ More particularly, DMM responses were lower than anticipated;¹⁶⁹ HelpMeSee’s banner ads “erroneously” linked to the S4TP website instead of HMS’s website;¹⁷⁰ the redesign of the HelpMeSee website was a mess;¹⁷¹ and Mullaney had failed to bring in Ancillary Revenue,¹⁷² including major donors.¹⁷³

¹⁶⁷ FALSE. Sanders, a longtime Smile train donor, gave this start-up donation to S4TP.

¹⁶⁸ FALSE. S4TP was doing a good job for HMS raising almost \$5,000,000 and acquiring approximately 74,000 new donors for HMS. S4TP was on track to meet its yearly targets.

¹⁶⁹ FALSE. S4TP was meeting its DMM targets.

¹⁷⁰ MISLEADING. The vendor in charge of banner ads made this mistake which was quickly corrected.

¹⁷¹ FALSE. The website was well-designed and its giving metrics were as good as Smile Train.

¹⁷² FALSE. Ancillary revenue was coming in and would have hit its annual target if HMS hadn’t terminated the contract with S4TP. This was just three months into a 5-year agreement and HMS was complaining about everything. If S4TP was allowed to complete the year it would have met its Ancillary Revenue targets.

¹⁷³ FALSE. Mullaney had acquired HMS’s biggest donor, The Luke O’Brien Foundation, one of Smile Train’s largest donors and other Smile Train donors who recognized Mullaney’s name on the direct mail appeals.

67. In light of the negative results, Jim Ueltschi and Thazhatu began to complain with increasing force¹⁷⁴. On January 31, 2012, S4TP presented HelpMeSee with a “donation” of \$239,550, which it claimed came from “friends and supporters” and was earmarked for surgeries.¹⁷⁵ HelpMeSee was baffled; it did not understand how S4TP could have money when it was exclusively working for HelpMeSee;¹⁷⁶ nor did it see any basis for S4TP’s attempting to restrict HelpMeSee’s ability to use Ancillary Revenue as it saw fit.¹⁷⁷ Little did HelpMeSee know at the time that S4TP had received a \$5 million pledge from the Walter Haefner Foundation on December

¹⁷⁴ FALSE. Ueltschi and Mohan Thazhathu started complaining one week after the agreement was signed.

¹⁷⁵ FALSE. S4TP didn’t “claim” it was “earmarked for surgery.” S4TP explained this came from start-up donation that came from S4TP donors. from their donors. At the time, HMS was not providing many cataract surgeries, far fewer than they were telling their donors, and when S4TP asked why HMS said they didn’t have any money to pay for cataract surgeries. So, without any contractual obligation to do so, S4TP decided to help HMS and it a large donation of \$239,550 to help HMS increase their cataract surgeries. The letter that accompanied the donation clearly said it was money from S4TP donors. Altogether, S4TP donated almost \$800,000 in cash and grants to HMS - which would have paid for virtually 90% of the surgeries HMS did during this period.

¹⁷⁶ FALSE. HMS was well aware S4TP was raising start-up funds before and after the agreement was signed - S4TP told them this and included it in the letter with the \$239,550 donation. HMS was not “baffled” at all – in fact, Ueltschi called Mullaney and asked for the names and addresses of the S4TP donors which Mullaney politely declined to give him. HMS was well aware that S4TP could not have paid all its bills with just the fees from HMS. HMS cashed the \$239,550 check right away. They never complained. HMS cashed every donation check S4TP sent them with letters that stated the donation was from S4TP’s donors. HMS never challenged S4TP’s right under the agreement to continue to solicit its own start-up fundraising until after the arbitration had commenced and HMS’s attorneys asserted counter claims.

¹⁷⁷ FALSE. S4TP restricted its \$239,500 donation to HMS to ensure it went to cataract surgeries which HMS was not doing enough of. Instead, HMS was spending most of its money on a surgical simulator. S4TP felt this was not fair to donors who were led to believe their donations were going to surgeries not a surgical simulator which Ueltschi had discussed producing and then commercializing. Before signing the agreement Mullaney got Ueltschi to promise that all funds raised from direct mail produced by S4TP be used for surgeries. Mullaney and S4TP had doubts that they fulfilled their promise on this.

1, 2011,¹⁷⁸ which was paid on January 19, 2012, and an additional \$1,419,050 from other Smile Train supporters based on pitches Mullaney had made about S4TP's purported blindness work.¹⁷⁹ Mullaney then decided, on a completely arbitrary basis, to allot

¹⁷⁸ FALSE. Haefner has submitted a written statement confirming that his donation was intended for S4TP.

¹⁷⁹ FALSE. The only thing Mullaney showed S4TP prospects was a S4TP business plan. WonderWorks HelpMeSee (13-20-1300-0650)

HelpMeSee \$239,550 (or 3.73%) of the total raised. Mullaney paid that amount out of S4TP's unrestricted funds and then **tried to restrict HelpMeSee's use of the money to surgeries so that he could report to S4TP's donors and prospects that S4TP had funded surgeries.**¹⁸⁰

U. More Mullaney Activities

68. After HelpMeSee received a \$10,000 check from the Luke O'Brien Foundation in November 2012, making it HelpMeSee's largest donor after the Ueltschis,¹⁸¹ Mullaney took the O'Briens out to dinner. Although Thazhatu asked for the O'Briens' contact information,¹⁸² and both Thazhatu and Jim Ueltschi's daughter tried to attend that dinner,¹⁸³ Mullaney blocked all of this. Following Mullaney's meal with the O'Briens, they became S4TP donors.¹⁸⁴

¹⁸⁰ FALSE. S4TP didn't *try* to restrict the donation it *did* restrict the donation. But HMS didn't honor the restriction. S4TP noticed that the check seemed to have been deposited into Ueltschi's personal bank account. HMS refused to honor the restriction. The donation from S4TP was intended to help HMS increase the number of cataract surgeries it was doing. HMS claimed it didn't have any money for surgeries. HMS raised almost \$10 million in 2012 but spent only around 10% of that on surgeries. Meanwhile HMS direct mail was focused 100% on surgeries and all HMS donors thought their money was going towards surgeries. Mullaney personally donated \$25,000 to HMS. S4TP had helped HMS raise millions of dollars. It was a 100% correct statement that S4TP had helped in many ways to fund many of the surgeries that HMS was providing. That's why S4TP agreed to this contract – to help HMS provide a significant amount of cataract surgeries.

¹⁸¹ CLARIFICATION. This is a good example of a major Smile Train major donor becoming a HMS donors just as Mullaney promised in spite of HMS claims that this didn't happen.

¹⁸² FALSE. Thazhatu already had O'Brien's information - HMS received the donation and all the donor information.

¹⁸³ FALSE. As request by Mohan and Ueltschi, Mullaney invited Ueltschi's daughter to attend the dinner but she declined because she was pregnant. Mullaney also invited Mohan but he did not want to drive all the way from Long Island for a dinner in Connecticut so Mullaney went with his wife.

¹⁸⁴ FALSE. After the dinner, the O'Brien's sent an additional \$15,000 donation to HMS. The O'Brien's have signed a sworn statement that this is totally false and that Mullaney never mentioned S4TP never mind solicited the Obrien's for S4TP.

69. Mullaney testified that when he had a conversation with a HelpMeSee donor named Kaplan, he did not tell her anything about S4TP because “she was a HelpMeSee donor [a]nd I never told HelpMeSee donors about anything else.” In fact, however, in the thank you letter Mullaney sent on behalf of HelpMeSee, he enclosed a copy of S4TP’s “business plan.”¹⁸⁵

70. Mullaney even pocketed donations that S4TP received from donors who expressly requested that the funds be spent on blindness or HelpMeSee¹⁸⁶. On February 7, 2010, for example, Betty Riess (“Reiss”) sent S4TP a \$600 donation that she asked be used for its blindness program.¹⁸⁷ Due to a series of surrounding occurrences, Riess thereafter became concerned that S4TP had not given her donation to HelpMeSee, as requested. On December 12, 2012, Mullaney wrote to her and assured her that her donation was “included in a very large grant [S4TP] gave to

¹⁸⁵ FALSE. The Kaplans were major Smile Train donors who received a mailing with the S4TP business plan from S4TP asking them if they would like to be Founding Donors of S4TP. At the time this was sent, neither Mullaney nor S4TP were aware that the Kaplans were HMS donors and this is another example of a major Smile Train donor becoming a HMS donor just as Mullaney had promised.

¹⁸⁶ FALSE. All donations for HMS were sent to HMS directly – they were never sent to S4TP. A special PO BOX for HMS donations was set up just for this. S4TP donors responding with founding donor donations from a mailing including the S4TP business plan intended their donations to support all of S4TP’s causes including club foot, burns, hole in the heart, water on the brain AND blindness

¹⁸⁷ FALSE. Betty Reiss was a S4TP donor and a major donor Smile Train. She too responded to a S4TP mailing – not a HMS mailing - with a donation to S4TP in February, 2012 and she did request it be used for blindness surgeries. Betty’s S4TP donation was part of a \$150,000 grant for surgeries S4TP gave to HMS in May, 2012. Betty also responded to a HMS mailing – another Smile Train donor who recognized Mullaney’s name and became a HMS major donor as Mullaney promised.

HelpMeSee.” This was not true. Even if S4TP’s transfer of \$239,550 could somehow be considered a “grant,”¹⁸⁸ the fact would remain that the “grant” pre-dated Riess’ donation.¹⁸⁹

71. When testifying on the subject of Riess, Mullaney said she “was the only one”¹⁹⁰ who made a donation to S4TP that was expressly restricted to blindness. This, too, was not true. In a supplemental document production by S4TP during the hearings, it was revealed that Joseph O’Donnell also made a donation to S4TP which was expressly restricted to blindness. As with Ms. Riess, however, S4TP never turned that donation over to HelpMeSee.¹⁹¹

V. Smile Train Meeting with HelpMeSee

72. On February 17, 2012, Ma (Executive Director of Smile Train) contacted Thazhatu to express concern that HelpMeSee’s DMM pieces were similar to Smile Train’s and were causing donor confusion. Thazhatu raised Ma’s concerns with Mullaney, who told Thazhatu to ignore her.¹⁹² Thazhatu, however, disagreed with Mullaney’s recommendation and met with Ma a few days later to assure her that

¹⁸⁸ FALSE. It was explicitly given as a S4TP grant – the fact that HMS ignored donor intent and deposited this money in an Ueltschi bank account doesn’t change that. The minute HMS accepted the grant and deposited the check it obligated HMS to honor the donors’ wishes which was for the money to be used for surgeries. HMS did not do this.

¹⁸⁹ FALSE. The Reiss \$600 donation was paid to HMS as part of the \$150,000 grant for surgeries made to HMS in May, 2012. The \$239,550 donation for surgeries that S4TP made to HMS in January, 2012 was a separate prior grant for surgeries.

¹⁹⁰ MISLEADING. Mullaney corrected his testimony on re-direct examination to include Joseph O’Donnell donation of \$5,000 as the second S4TP donor who requested that his donation be used for S4TP’s blindness work. This donation was forwarded to HMS as part of the \$150,000 grant for surgeries that S4TP made to HMS in May, 2012.

¹⁹¹ FALSE. Both donations were part of the \$150,000 grant for surgeries made by S4TP to HMS in May, 2012.

¹⁹² FALSE. At HMS’s request, Mullaney showed the letter to S4TP’s lawyer; his opinion that the letter’s claims as being without merit, was then shared with HMS. This was another example of harassment by Charles Wang and his lawyers.

HelpMeSee would rectify any problems with its DMM campaign.¹⁹³ During the meeting, Ma told Thazhatu that certain of the S4TP employees had pending legal issues with Smile Train. She also told Thazhatu that names of 25,000 donors had been stolen from Smile Train and that 12,000 of the donors had been contacted. This was the first that HelpMeSee had learned of this even though Section 5.3(b) of the HelpMeSee/S4TP Agreement required S4TP to give prompt notice of any events involving Smile Train that might impair S4TP from performing its obligations.

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¹⁹³ DUPLICITOUS. Mohan met with Priscilla Ma secretly and did not tell Mullaney. This was the beginning of the secret HMS - SMILE TRAIN alliance that would ultimately force S4TP out of business.

¹⁹⁴ FALSE. This is revisionist history. There were no lawsuits between former ST employees and ST at the time. Neither Mullaney or anyone else at S4TP had anything to do with stealing a ST donor list or using a donor list. S4TP had no obligation to report any of these events. They had nothing to do with S4TP's ability to service HMS.

W. The Cap Dispute

73. In mid-February 2012, S4TP sent HelpMeSee an “Update and Roll-Out Plan,” which extended the Year 1 projections through year-end 2012. This had the effect of revising the performance targets in Annex A of the parties’ Agreement downward.¹⁹⁵ When Thazhatu questioned Mullaney about this, Mullaney attacked Thazhatu, falsely accusing him of manipulating the performance targets in Annex A, which had remained unchanged from the July 27, 2011 draft Agreement until it was signed on August 31, 2011.¹⁹⁶ When this was pointed out, Mullaney retaliated by repeatedly disparaging and maligning Thazhatu, calling him (among other things) “thuggish,” “crazy,” and a “bureaucratic tyrant.”¹⁹⁷

74. HelpMeSee rejected Mullaney’s revised plan and expressed concern that S4TP’s projected performance would dip below the targets set forth in Annex A. In response, S4TP designed what Mullaney termed an “aggressive” DMM plan to get the fundraising program “back on track.”¹⁹⁸ Mullaney cautioned, however, that this ambitious plan might result in S4TP’s exceeding the expense cap set forth in the HelpMeSee/S4TP Agreement. Mullaney fully understood that under that Agreement,

¹⁹⁵ FALSE. Performance targets were never changed. They were fixed.

¹⁹⁶ FALSE. Sometime after TMT produced its DM forecasts, someone removed the trial period of 3-4 months when TMT would be testing different direct mail packages in order to find a CONTROL package. It is easy to see it is in TMT’s forecast and then missing from the final contract.

¹⁹⁷ FALSE. Mullaney never said these things. False and uncorroborated accusations by Mohan.

¹⁹⁸ FALSE. HMS requested a more aggressive mail program so Mullaney responded to their request with higher investment and faster results. Initial results from original plan were behind schedule - precisely the amount of the Trial Period - which had someone been deleted from the TMT direct mail forecast but still excellent for a start-up program. HMS made the decision to invest additional money to send larger mailings to increase donations and acquire donors as a faster pace.

S4TP would not get paid if it exceeded the expense cap, even if the unauthorized expenses were not the result of negligence on the part of S4TP (see pg. 22, supra).¹⁹⁹

75. On March 12, 2012, HelpMeSee agreed to adopt Mullaney's new, aggressive plan on a month-to-month basis and to table the decision as to whether to approve exceeding the spending cap until HelpMeSee could assess performance under the revised plan²⁰⁰. At HelpMeSee's March 20, 2012 Board meeting, Mullaney explained that "[b]y August 2012, expenses will reach \$2.7 million. A decision will have to be

¹⁹⁹ FALSE. HMS wrote the contract to put a ceiling on their spending. S4TP respected that and made sure the budget did not exceed S4TP's ceiling. But in asking for a more aggressive plan, with higher spending, S4TP was intentionally exceeding the spending limit which would trigger the suspension of payments to S4TP. There never was any "negligence" of any kind. DM vendor Ron Bell told Mullaney and S4TP that Mohan had a plan to get S4TP to exceed the cap so then he would not have to pay them.

²⁰⁰ MISLEADING. It wasn't Mullaney's "new, aggressive plan" it was HMS's new plan which they explicitly requested. Mullaney warned HMS that it was impossible to increase mailings without higher spending which in turn would exceed the cap. HMS understood this and said go ahead. It was very clear that HMS's intent was to get S4TP to exceed the cap and then use it as an excuse not to pay S4TP its monthly fee. Around this time, when Mullaney tried to make peace with Mohan, he told him that "we are stuck with each other until September" so we should do our best to get along. This was because the five year contract could not be terminated before one year. Mohan responded, "Not if I can find a breach!" This was the beginning of Mohan and Ueltschi desperate attempts to find a way to get out of the contract without paying the mandated six months severance.

made in July 2012” as to whether to exceed the cap, but that by that time “[r]esults will be available from April, May and June.”

76. Despite the decision to defer consideration of approving expenses in excess of the cap, Mullaney immediately began pressuring Thazhatu to agree to exceed the cap and to revise the Agreement to waive any forfeiture of Mullaney’s fee which would otherwise arise from exceeding the cap. Thazhatu refused.²⁰¹

77. Ultimately, S4TP gave HelpMeSee a Catch-22 choice—it either had to agree to exceed the expense cap or, failing that, S4TP would stop HelpMeSee’s DMM program.²⁰² As a result, HelpMeSee was forced to delay its June mailing. Mullaney even tried to pressure Bell (TMT), who had returned to assist on HelpMeSee’s DMM campaign despite Smile Train’s express wish that he not be a vendor to any entity in which Mullaney was involved. As Mullaney wrote to Bell at the time:

If we [S4TP and HelpMeSee] do part ways, which is not what I want, I would expect/hope that you would stick with us [S4TP] . . . I hope that you see a bright future with us, and a very rocky, uncertain and risky future with them with a lot less revenue.²⁰³

78. On May 15, 2015, HelpMeSee and S4TP reached a compromise on the expense cap, the basic terms of which were as follows: (i) the June DMM mailing would go forward; (ii) S4TP would provide HelpMeSee a fee rebate of \$150,000 in

²⁰¹ FALSE. Mullaney was explaining that it was unfair to penalize S4TP for exceeding the cap if it was caused by HMS ordering S4TP to do mailings that would exceed the budget cap. Mullaney was just following the rules that HMS specifically included in the contract. Mullaney said S4TP could not exceed the cap without the explicit permission of HMS per the contract.

²⁰² FALSE. The choice was to keep spending within the cap that HMS had insisted on when negotiating the agreement or give S4TP permission to exceed it. Mohan refused to make a decision and could not be found which is why the mailing was delayed.

²⁰³ TRUE. S4TP and HMS did part ways and HMS fired TMT.

exchange for permission to exceed the Agreement's spending cap;²⁰⁴ and (iii) the parties would renegotiate the Agreement in August. While Mullaney told the Board that the \$150,000 was a fee rebate, he subsequently tried to recharacterize it as a grant and thus count it towards S4TP's Ancillary Revenue target.

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²⁰⁴ FALSE. The agreement was that S4TP would give HMS another grant of \$150,000 - not a "fee rebate" - to use for cataract surgeries and in return HMS would continue working with S4TP the remaining 3 months of the contract. S4TP sent the check with a letter that explicitly explained this was a grant to be used for cataract surgeries. Once again, HMS cashed the check but did not honor its commitment to use the \$150,000 for surgeries. Nor did it honor its promise to continue working with S4TP through the mandated first year of the contract and pay S4TP for July and August. Without notice of termination or any explanation, HMS gradually took away all of S4TP's responsibilities and assignments and stopped all payments. Much latter it concocted these stories and claims when they began working with Wang's lawyers.

²⁰⁵ FALSE. Both the email and check that was sent that day clearly state the \$150,000 was a grant for surgeries. Once again, HMS did not honor the donor's intent. If HMS wanted a "fee rebate" they should have tried to negotiate that but they did not. They accepted the grant without a word, cashed the check, and then later, came up with this story of a "fee rebate." They were very dishonest.

X. S4TP's \$400,000 "Grant" to HelpMeSee

79. On June 14, 2012, S4TP wrote to HelpMeSee to inform it that "next week we begin testing direct mail for our other causes, clubfoot, burns, water on the brain and hole in the heart. Even though our contract allowed us to begin work on other causes last March, we waited until June to make sure HelpMeSee was on solid footing." In addition, S4TP stated that it would be changing its name to "WonderWork" and would provide HelpMeSee with a \$400,000 "grant" restricted to surgeries, payable in two installments of \$100,000 on August 15 and October 15, 2012, with a final installment of \$200,000 on December 15, 2012.²⁰⁶

80. HelpMeSee responded to S4TP on June 29, 2012, explaining that: (i) the \$400,000 donation was Ancillary Revenue, which by definition was unrestricted,²⁰⁷ and (ii) with the \$100,000 paid on August 15, S4TP would still have a \$760,450 shortfall in Ancillary Revenue on August 31, 2012. S4TP never paid any of the \$400,000 grant, but acknowledges that it owes that amount.

Y. Mercy Ships

81. In the Spring of 2012, HelpMeSee discovered that Mercy Ships, one of HelpMeSee's partner charities, was also having issues with S4TP. Kerry Peterson (Mercy Ships' Vice President of Marketing,) ("Peterson") explained that Mercy Ships had agreed to Mullaney's boarding its floating hospital ship, the Africa Mercy, to

²⁰⁶ CONTEXT. S4TP was under no contractual obligation to provide these large grants to HMS but did it out of goodwill to help HMS increase its surgeries.

²⁰⁷ FALSE. There was no "definition" of Ancillary Donations being "unrestricted." This is a total fabrication. Donors decide if/ how they want their grants restricted – not grantees. HMS kept doing this, accepting donations, cashing checks and ignoring the restrictions that came with the donations. HMS clearly did not want to spend money on surgeries and perhaps wanted to be free to deposit donation in Ueltschi bank accounts which S4TP had evidence of happened at least once with \$239,500.

capture videos and photos for HelpMeSee but that Mullaney was refusing to sign a Memorandum of Understanding (“MOU”) that would restrict the use of such videos and photos to HelpMeSee and Mercy Ships exclusively.²⁰⁸ Instead, Mullaney was offering Mercy Ships a \$10,000 “grant” in exchange for unrestricted rights to the

208 FALSE. There was no issue – Mullaney agreed to sign the MOU.
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videos and photos.²⁰⁹Peterson testified that “this is where” Mercy Ships realized that Mullaney was “raising money for himself”²¹⁰and that this made the MOU essential because “we need to put a provision together to make sure that our photos are not used to build his charity.”

82. Mercy Ships forwarded to Thazhatu a copy of Mullaney’s correspondence including an email in which Mullaney had told Mercy Ships:

We are doing quite a bit of work in blindness right now and Glen Strauss who is working with us is operating on 30-40 children who were all born blind. It should be quite an interesting experience. I will send you a quick report upon return.²¹¹

83. Thazhatu made the following comment when he passed Mullaney’s correspondence on to Jim Ueltschi:

Sorry, my blood is boiling when I read this chain of emails from Brian to Mercy Ships. Thankfully, Mercy Ships and us have a stronger relationship and they have dealt with Brian appropriately. Please see the very first e-mail Brian sent to Mercy Ships CEO, Don Stephens, as if Glenn Strauss is working for S4TP without even acknowledging HelpMeSee. It is nauseating to read Brian gloating on the S4TP grant to HelpMeSee for

²⁰⁹ FALSE. Mercy Ships complained that S4TP was not a “donor” so Mullaney offered them a grant in response. Mullaney had already given Mercy Ships more than \$1 million when he was running Smile Train. Mullaney didn’t ask for unrestricted use of anything, just that all charities involved share the photos and videos. The \$10,000 grant was for surgeries, it was not an improper payment as implied by this Award. Wang’s lawyers were always changing good deeds into something nefarious - a donation to HMS became a “fee rebate”, here a \$10,000 grant became a “bribe.”

²¹⁰ FALSE. Over the past 20 years Mullaney has helped raise more than \$1 billion for various charities and has never raised any “money for himself.” Despite hundreds of allegations from Wang’s lawyers, there never was finding or substantiation that Mullaney personally misappropriated any funds for himself. The Agreement did not prohibit S4TP from continuing its efforts to raise and receive start-up donations once the Agreement became effective.

²¹¹ FALSE. This email is taken out of context and extremely misleading. It is from Mullaney to Don Stephens, Founder of Mercy Ships, a charity which Mullaney had given more than \$1 million in grants when he ran Smile Train. Stephens had been asking for Mullaney’s help for years with fundraising. In addition to being HMS Chief Medical Officer, Glen Strauss was a long-time Mercy Ships surgeon –who was performing the surgeries on the ship. S4TP went on this trip at the invitation of HMS and to obtain stories and photos to use in HMS direct mail program.

\$239k.²¹²

84. Mercy Ships refused S4TP's grant offer and insisted that S4TP sign the MOU, which S4TP did. Mullaney then reached out to HelpMeSee to see if they would fund the trip,²¹³ claiming that he had been "ambushed with a take-it-or-leave-it MOU." Thazhatu refused, at which point Mullaney offered Mercy Ships a grant of \$25,000, which Mercy Ships declined. Peterson viewed this grant as "a bribe," like "a carrot being stuck out there that, you know, we would get the 25,000 and then that would... open the door to using our photos."²¹⁴

²¹² TRUE. It was clear that Mohan hated Mullaney at this point and was desperate to find a way to terminate the contract without paying the six months severance.

²¹³ FALSE. The HMS- S4TP agreement specifically says HMS was to pay for all international travel S4TP undertook for HMS. HMS refused to pay.

²¹⁴ FALSE. Mullaney was responding to Mercy Ships' complaints that S4TP was not a "donor" and he was trying to do a nice thing for a charity that had always struggled to raise money. For years Founder Don Stehens' begged Mullaney for fundraising help and advice. Ironically, for the previous year, Mullaney had met with and worked with pro bono a Mercy Ships VP trying to help them launch a direct mail program.

85. In late June 2012, Bell sent HelpMeSee a copy of a letter he had received from S4TP in connection with S4TP's change of name from S4TP to WonderWork. In the letter, S4TP/WonderWork stated that: "for our first ten months, we have focused exclusively on blindness and the miracle surgery that can give a blind child or adult their eyesight back in as little as 15 minutes and for as little as \$300." This

S4TP/WonderWork mailing featured Mercy Ships photos which Mullaney had procured on his Africa Mercy trip after signing the MOU which precluded him from using Mercy Ships photos in this manner.²¹⁵ On receipt of this mailing, HelpMeSee did the following: (i) it asked Mullaney for a copy of all name change letters and a list of the people to whom they had been sent; and (ii) it alerted Mercy Ships that Mullaney had breached the MOU.²¹⁶

²¹⁵ FALSE. The MOU states explicitly that the photos could only be used in conjunction with raising money for HMS. Two of these photos were used in a thank you letter – that acknowledged HMS as a blindness partner of S4TP – that was sent to donors whose start-donations to S4TP were the source of close to \$800,000 in cash and grants that S4TP donated to HMS. Once Peterson spoke with Mullaney and learned that S4TP was one of HMS's largest donors, he said it was okay for S4TP to use the photos. In fact, Mullaney told Peterson he had a photo of woman who was severely burned and he asked Peterson if S4TP could use for their burns fundraising and Peterson said sure. Peterson changed his mind and demeanor completely after HMS spoke with him. At the time, HMS was desperately searching for a "breach" that would allow it to terminate their contract with S4TP without paying severance. HMS pounced on this minor problem with Mercy Ships and tried to turn it into a major "breach." Peterson who was receiving monetary support from HMS did what HMS told him to do. He went from amicable to outraged in about 60 seconds. As an example of how well rehearsed and coached Peterson was for his testimony, he told the arbitrator that Mullaney was such a despicable and unethical person, that if his boss hired Mullaney, he would resign at once rather than work with Mullaney. At the time Peterson made these remarks, he had only spoken to Mullaney twice on the phone for 5 minutes each time, and he had never met him in person until the morning of his testimony. How could he know Mullaney was so "despicable and unethical?" Clearly, he was coached.

²¹⁶ MISLEADING. HMS asked for Mercy Ships' help and cooperation in escalating this issue and requested that mercy Ships send a cease and desist letter to S4TP.

86. Upon learning of S4TP's name change mailing,²¹⁷ Mercy Ships confronted Mullaney, who tried to avoid the issue by claiming that he "just checked" and "we didn't use any Togo photos in any of our WonderWork brochures."²¹⁸ When that failed, Mullaney said that the photos had not been used to raise money for WonderWork²¹⁹ and that he had been seeking funds for HelpMeSee "indirectly" under the WonderWork name.²²⁰ Then, on July 2, 2012, Mullaney reached out to Jim Ueltschi, admitting that S4TP "mailed a few personal letters to thank donors who have given us money and included a one page flier that used the one girl we helped in Togo."²²¹

87. On July 3, 2012, Mullaney and a "very angry" Jim Ueltschi spoke. Following the call, Mullaney reached out to Peterson, falsely claiming that S4TP "did not raise any money for WonderWork with these photos"²²² and also stating that he would "not use these photos again for WonderWork or HelpMeSee unless [Mercy Ships] gives

²¹⁷ FALSE. HMS was the first organization to be told of S4TP's name change.

²¹⁸ FALSE. S4TP never used any Mercy Ship photos in a fundraising brochure. They were used in a thank you letter to a small group of S4TP donors.

²¹⁹ FALSE. They were used in a thank you letter to S4TP Founding Donors thanking them for their founding donor donations – these funds were the source for the almost \$800,000 in cash and grants that S4TP donated to HMS – the letter was not a solicitation for additional donations.

²²⁰ FALSE. Mullaney never said this. This is a complete fabrication that HMS and Wang's lawyers concocted. S4TP never "seeking funds for HMS "indirectly" under the WonderWork name.

²²¹ FALSE. This is not an accurate representation of the call which Ueltschi tape recorded illegally (Ueltschis was in Florida, Mullaney was in New York) without Mullaney's knowledge or approval. This is illegal in Florida. It shows the intent of Ueltschi and Mohan to somehow find a way to terminate the contract without paying six months severance.

²²² FALSE. Two photos were used in a donor thank you letter, not a fundraising letter.

[S4TP] permission.” Following this conversation, Mullaney emailed Jim Ueltschi that “everything was fine” with Peterson “once he learned that we were NOT raising any money for WonderWork with these photos and once he learned that we are raising money for you.” HelpMeSee forwarded Mullaney’s email to Peterson, who had a different take on their conversation. Peterson explained that Mullaney:

did call me and said that he would be done with HelpMeSee in six months and would like to contact me then about helping Mercy Ships. He made it sound like he didn’t want to work with you guys anymore and Jim went off on him. I don’t think I have ever met anyone as disconnected as he is. As far as everything being fine, I guess the fact that I didn’t yell at him last night gave him a sense of security.

88. On July 16, 2012, Mercy Ships sent S4TP a cease and desist letter.²²³

Mullaney responded that Mercy Ships “didn’t need to send that nasty cease and desist letter” and “confirm[ed] again that [WonderWork] will not use that content again without your knowledge and permission.” In fact, S4TP thereafter breached the MOU on multiple occasions.²²⁴ And while WonderWork kept “explaining” that it was passing money on to HelpMeSee,²²⁵ the fact is that as of this time, S4TP had received approximately \$8 million in donations, but had passed along only \$239,550 to HelpMeSee.

²²⁶AA. Termination

89. HelpMeSee repeatedly asked Mullaney for information regarding the

²²³ MISLEADING. HMS asked Mercy Ships to send a cease and desist so HMS could use it to claim a breach and not have to pay S4TP any severance.

²²⁴ MISLEADING. Two photos were accidentally included with 60+ other photos in a year-end S4TP mailing. Mullaney acknowledged and apologized for this.

²²⁵ FALSE. WonderWork never did and never said it was “passing money on to HelpMeSee”. Nor did WW ever raise money for HMS “indirectly” as HMS and Wang’s lawyers claimed.

²²⁶ FALSE. S4TP never raised money to “pass along” to HMS. This is a bogus theory concocted by HMS and Wang’s lawyers.

name change letter, including a copy of the letter and a list of people to whom it had been sent. After its multiple requests for documents went unmet,²²⁷ HelpMeSee informed S4TP on July 18, 2012 that it would be terminating the Agreement, stating:

²²⁷ FALSE. Mullaney provided HMS with a great deal of documents and information responding to their questions. But HMS kept asking for S4TP's donor list which is what they really wanted. This of course was confidential and S4TP could not share it with HMS. Especially at this point where it was clear HMS was just looking for any way to terminate the contract and without paying severance. No one trusted HelpMeSee.

Your refusal to make your business records available for inspection makes it impossible to verify your compliance with our agreement which we determine to be in material breach. Under the circumstances, it is [in both] our interests to conclude our agreement as soon as possible. I sincerely hope that this transition can be accomplished smoothly.

BB. This Arbitration

90. On March 21, 2013, WonderWork commenced this arbitration against HelpMeSee, seeking \$1,333,333.28 in damages under Section 5.3(c) of the Agreement based on its assertion that HelpMeSee terminated the Agreement without cause. HelpMeSee counterclaimed for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, fraudulent inducement, copyright infringement, and an accounting, and sought damages, both compensatory and punitive, as well as an injunction, costs, and attorneys' fees. Arbitration hearings commenced on March 4, 2014.²²⁸ While the parties originally scheduled 14 hearing days, the arbitration quickly ballooned and was completed after 49 hearing days.²²⁹

²²⁸ FALSE AND MISLEADING. HMS's original lawyers never had any counter-claims. These arose after Wang convinced HMS to fire their lawyers and hire Wang's lawyers who fabricated a long list of false and outrageous counter-claims and a preposterous story of S4TP not being allowed to raise start-up funds for itself and of S4TP "passing along" donations it raised "in-directly" for HMS.

²²⁹ FALSE AND MISLEADING. The arbitration "ballooned" because Wang's lawyers were given a blank check, a virtual unlimited budget to bankrupt S4TP by making this arbitration as long and as expensive as possible. It is false and misleading to say this rose from 14 hearing days to 49 hearing days because with the original HMS lawyers it was scheduled for 2-3 hearing days and a few months. Once Wang's lawyers got involved they increased the 2-3 day hearing to 14 hearing days, and then Wang's lawyers did everything they could with the help of a very grateful arbitrator to make it last as long as they could. The average civil arbitration in America lasts seven months, this arbitration lasted 45 months, three and a half years as HMS did everything it could to bankrupt S4TP. Saying it was "completed after 49 hearing days" is very deceptive. Instead of settling this simple contract dispute for \$600,000 as S4TP offered, Wang's lawyers were paid \$12.5 million. The Ueltschi family who controlled HMS is the 86th richest family in the world according to Forbes Magazine but they didn't pay any of this \$12.5 million of legal fees directly. HelpMeSee paid all these legal fees with charitable contributions that were supposed to go to surgeries. They spent \$12.5

II DISCUSSION OF CLAIMS

A. HelpMeSee's Claim for Breach of Contract

91. The Agreement provides that S4TP “desires to create, manage and monitor various fundraising and marketing programs” for HelpMeSee. S4TP’s specific promise to solicit Smile Train donors is memorialized in Section 7.3(b), where S4TP warrants it would “devote its best efforts to the performance of its obligations under the Agreement,” including “by soliciting former Smile Train donors.”²³⁰ S4TP further agreed that its “voluntary or involuntary failure” to do this would “constitute a

million instead of \$600,000 which was offered at the beginning as a settlement. Jim Ueltschi made is very clear that his goal was to use the arbitration to force WonderWork, a fellow blindness charity HMS viewed as competition out of business. The arbitrator whose fees were tied directly to the length of arbitration was grateful for one of the longest arbitration in U.S. history, (the average arbitration lasts 7 months, this arbitration lasted 45 months.) was very grateful to see his compensation soar to almost \$300,000. (The average arbitrator in New York makes only \$90,000 a year.) The nearly 80-year old arbitrator who had no judicial experience whatsoever helped extend the arbitration as much as he possibly could by allowing any and all questions and any and all testimony including one allegation from 1989. That was 22 years before the HMS S4TP contract was signed. In addition to providing HMS with his lawyers, he also provided hundreds of pages of documents and witnesses who knew nothing about the contract dispute but would happily disparage Mullaney and WonderWork.

²³⁰ MISLEADING. Both HMS and S4TP agreed to delete the word “all” in front of donors in this clause in the agreement because HMS understood S4TP was already soliciting and would continue to solicit Smile Train major donors. No to mention the fact that the clause is inoperable because it is almost impossible to determine whether some is a “former” Smile Train donor or not. How was STP or Mullaney supposed to know this?

material breach” of the Agreement. (*Ibid.*) The parties also articulated a clear, objective standard of performance: S4TP would ensure that its “[s]ervices were provided at a level, and at standards of quality, diligence and care, consistent with the level and standards that were customary during Brian Mullaney’s tenure as CEO of Smile Train during 2010, provided that such level and standards are sufficient to achieve or surpass the Performance Targets” set forth in Annex A. (*Id.*, Sec. 2.3). Pursuant to Annex A, S4TP agreed to raise \$1.11 million in Ancillary Revenue, which consisted of revenue raised via “fundraising initiatives other than the DMM Campaign that the Manager projects will generate additional revenue,” including funds raised from former Smile Train donors.

92. Thus, the Agreement is clear and unambiguous—S4TP undertook to use its best efforts to solicit Smile Train’s donors for HelpMeSee and agreed to implement standards that would permit it to meet the performance targets set forth in Annex A.

231232 In fact, S4TP did neither; it did not solicit Smile Train major donors for HelpMeSee,²³³ and it fell far short of all the performance targets in the exhaustively negotiated Annex A.²³⁴ Instead, S4TP used its access to HelpMeSee to convince

²³¹ FALSE AND MISLEADING. The obligation was to solicit “*former* Smile Train donors” not “Smile Train’s donors” as stated here. It is not clear and unambiguous.

²³² FALSE AND MISLEADING. The primary focus of the agreement was to build a direct mail program that acquired NEW donors – not just former Smile Train donors. S4TP did this. Of the approximately 74,000 new donors S4TP helped HMS acquire, thousands of them were former Smile Train donors including HMS’s largest donor.

²³³ FALSE. This report just acknowledged 3 major Smile Train donors who also became HMS major donors: Luke O’Brien Foundation, Betty Reiss and Joe Cartolano. HMS’s biggest donor was The Luke O’Brien Foundation, a major Smile Train donor. Plus it is estimated thousands of other donors among the approximately 74,000 donors S4TP helped HMS acquire were also Smile Train donors.

²³⁴ FALSE. S4TP was on track to meet all targets and would have if HMS hadn’t terminated the Agreement several months before the year-end. S4TP raised more than \$600,000 towards Ancillary Revenue and would have reached 100% of the goal if

donors, including Smile Train's major donors, to contribute to S4TP.

93. More particularly, S4TP regularly sent letters and other updates to its list of Smile Train's major donors²³⁵ in which it discussed S4TP's purported work for blindness, without revealing that it was actually HelpMeSee which was working on blindness²³⁶ and that S4TP was just collecting a fee to be HelpMeSee's marketer.²³⁷

Similarly, while Mullaney led HelpMeSee to believe that he was travelling to meet with his various contacts, including many of Smile Train's major donors, to raise

hadn't begun efforts to terminate the contract 3 months before the first year expired. S4TP was never given the opportunity to reach its goals. In addition to Ancillary Revenue, S4TP raised almost \$5 million for HMS through the HMS direct mail program which helped HMS acquire approximately 74,000 new donors with residual value of approximately \$4 - \$6 million.

²³⁵ FALSE. S4TP did not "regularly mail" to or even possess a "list of Smile Train's major donors". regularly send letters and other updates to these donors.

²³⁶ FALSE. S4TP's Founding Donors were solicited with a S4TP business plan – and it contained no information, materials, photos or work of HMS. S4TP was working on blindness in many aspects.

²³⁷ FALSE. S4TP was and is a charity, not a marketer "collecting a fee." S4TP is a 501c3 registered charity whose business plan included providing cataract surgeries. S4TP and HMS are both charities that provide financial support to partner hospitals and NGOs who provide cataract surgeries. Neither HMS nor S4TP actually provide the surgeries directly. It is absurd to allege that S4TP was not "working on blindness" during this time. S4TP's 6 employees were mailing 11 million letters to raise money for HMS which acquired approximately 74,000 donors for HMS. S4TP helped HMS raise around \$5 million dollars for cataract surgeries. S4TP donated (without any contractual obligation to do so) an additional amount close to \$800,000 in cash and grants to HMS so HMS could increase the number of surgeries it was doing. In 2016, S4TP, now WonderWork, provided TWICE as many surgeries as HMS.

money for HelpMeSee, Mullaney testified that he never presented HelpMeSee in a single major donor meeting.²³⁸ Likewise, while Mullaney regularly updated HelpMeSee about his various meetings with new major donors, such as Grousbeck²³⁹ (who had a singular focus on blindness), Mullaney admitted that he never told Grousbeck about HelpMeSee and was never intending to fundraise for HelpMeSee²⁴⁰. Instead, Mullaney boasted to Grousbeck of S4TP's simulator and Bill Gates' support when, in fact, it was HelpMeSee that had created the simulator and obtained Gates' support. Stated simply, therefore, Mullaney was acting through S4TP to take HelpMeSee's money, while exploiting HelpMeSee to raise money to pursue his own personal interests.²⁴¹

(i) S4TP's Response

²³⁸ FALSE AND MISLEADING. Mullaney never used HMS or HMS business plans or HMS "work" to solicit any S4TP Founding Donors. And he never used S4TP materials to solicit HMS donors. Mullaney only met face to face with two major donors for HMS, including Kevin and Jeanine O'Brien over dinner to thank them. Afterwards, the O'Briens sent in another \$15,000 donation to HelpMeSee. During the entire 10 months S4TP was working for HMS, while it was acquiring approximately 74,000 donors for HMS, Mullaney only met with 6-9 major Smile Train donors – that's less than one a month. Three of them had committed to being a Founding Donor of S4TP long before the HMS agreement was signed. They each signed affidavits and/or legal letters that state they intended their donations to go to WonderWork not HelpMeSee. HMS was well aware that S4TP was raising start-up funds before and during the HMS agreement. Mullaney openly talked about his meetings and his progress with raising start-up money for S4TP. And without any obligation to do so, S4TP gave HMS almost \$800,000 in cash and grants as donations so it could help HMS increase the number of cataract surgeries it was doing. S4TP told HMS these donations came from S4TP donors. HMS cashed all their checks. HMS never questioned S4TP's right to raise start-up donations. Ueltschi even called up Mullaney after receiving the first donation of \$239,550 from S4TP and asked for a list of S4TP's donors so he could write and thank them.

²³⁹ FALSE. Grousbeck was not a "new major donor" - he never gave S4TP or HMS any money nor was he ever a major donor of Smile Train.

²⁴⁰ FALSE. Mullaney never said this.

²⁴¹ FALSE. The simulator didn't exist then – and it doesn't exist today, in 2019. Mullaney never raised any money for "his own personal interests."

94. S4TP attempts to counter the foregoing facts by claiming that its role was limited to creating and managing HelpMeSee's DMM program and that specific solicitation of major donors was outside the purview of "Services" promised under the Agreement.²⁴² Thus, Mullaney argues that when the Agreement refers to "Smile Train donors," it contemplates Smile Train donors who by chance received HelpMeSee's promotional material in the mail through use of a mailing list rented from a third party.²⁴³ Mullaney's position that he had no obligation to personally solicit major Smile Train donors²⁴⁴ beyond the sending of such mass mailings²⁴⁵ contorts the plain meaning of the Agreement and runs counter to Mullaney's steady stream of representations²⁴⁶ to HelpMeSee that, in fact, he was meeting with named Smile Train donors to solicit major contributions for HelpMeSee. Further,

²⁴² FALSE. The HMS – S4TP agreement outlines in great detail all of the services to be provided by S4TP and no where does it mention soliciting major donors for HMS. In addition, the agreement specifically states that Mullaney was not allowed to represent HMS without HMS's express permission.

²⁴³ FALSE. Direct mail was one way S4TP would acquire many new donors including lots of Smile Train donors. Rented lists of names contained many of Smile Train's 2+ million donors and many responded – including the O'Briens, HMS's biggest donor - because they recognized Mullaney as co-founder and former President of Smile Train. Of the 75,000 new donors S4TP helped HMS acquire, hundreds if not thousands were Smile Train donors though not "former Smile Train donors" as the agreement requires. But S4TP also was helping HMS acquire new donors through its website which was attracting tens of thousands of visitors, through mailings to thousands of foundations, and targeted mailings to prospective major donors of which Mullaney had mailed hundreds and of course through introductions to major Smile Train donors who had an interest in blindness. It was a five year contract and HMS wanted to exit before the first six months were up.

²⁴⁴ FALSE. This is not included in the list of services to be provided in the agreement and was never discussed or agreed to by Mullaney. Again, here it says "Smile Train donors" whereas the contract states specifically "former Smile Train donors."

²⁴⁵ FALSE. S4TP wrote, printed and mailed 11 million letters for HMS and from these mailings HMS acquired 75,000 new donors.

²⁴⁶ FALSE. Mullaney was very honest and open with Ueltschi and Mohan. Mullaney even had a meeting with Mohan about his need to hire someone to solicit major donors because Mullaney could not do that.

Mullaney's contention that his sole function related to HelpMeSee's DMM program

²⁴⁷is belied by the fact that S4TP was not even HelpMeSee's actual DMM provider.²⁴⁸

Instead, at Mullaney's

²⁴⁷ FALSE. Direct mail was not the "sole function" for which S4TP was hired, although it was the primary function. The list of services to be provided includes: build and manage a website, produce high quality collateral, produce thousands of high quality photos of HMS programs, create PowerPoints and presentations, build a grant program that would solicit corporations and foundation and create an advertising campaign. S4TP did all of this and overall it was a very successful program.

²⁴⁸ FALSE. S4TP was hired to manage the HMS direct mail program – not to be a DMM "provider" – whatever that is.

request, HelpMeSee retained TMT to run its DMM program because S4TP lacked the requisite license to send DMM.²⁴⁹ And while Mullaney did supervise TMT's DMM efforts, it makes no sense that HelpMeSee would have paid S4TP \$166,667 per month to supervise the party who was handling the DMM program and doing the "on the ground work" and was receiving only \$12,500 per month for its considerable efforts.²⁵⁰ Rather, HelpMeSee paid S4TP \$166,667 per month because it expected that S4TP would be soliciting major Smile Train donors and would be procuring substantial contributions from them for HelpMeSee.²⁵¹

* * * *

²⁴⁹ FALSE. HMS hired S4TP not to be a "direct mail vendor" but to manage ALL the vendors HMS needed to build a major fundraising program including direct mail vendor, list company, donor database vendor, caging company, website vendor, PR firm, ad agency, etc. S4TP didn't need a license to manage a direct mail vendor such as TMT, which it did.

²⁵⁰ FALSE. HMS was represented by Scadden Arps and negotiated its agreement with S4TP for almost a year. The contract made "a lot of sense" because it saved HMS the trouble of hiring a full staff and the millions of dollars it would have cost HMS in payroll, training, office, healthcare expenses. HMS hired S4TP not to be a "direct mail vendor" like TMT, but to manage ALL the vendors HMS needed to build a major fundraising program including direct mail vendor, list company, donor database vendor, caging company, website vendor, PR firm, ad agency, etc. Finally, TMT didn't just make \$12,500 per month, it made substantial commissions on the printing and production of HMS direct mail. S4TP's compensation was fair and reasonable in light of all the work they were doing for HMS. Upon signing the agreement, to service the HMS account, S4TP signed a million-dollar, multi-year lease and it hired a staff of 8 employees to handle not only all of the fundraising but accounting, marketing, programs as well. S4TP's payroll was well over a million dollars. It would have cost HMS much more to have hired the same people to do this in-house and the results would not have been as good. S4TP raised almost \$5 million and helped acquire approximately 74,000 new donors which had a net value of at least \$4 - \$6 million during the first year alone. Since firing S4TP, HSM brought its direct mail program in-house and the direct mail results have plummeted.

²⁵¹ FALSE. Again, the contract specifically states services to be provided and soliciting major donors is not on that list. In addition, this states S4TP was supposed to be soliciting "major Smile Train donors" when the agreement specifically states "former major Smile Train donors." The fact is, S4TP raised a lot of money for HMS and S4TP did give almost \$800,000 in cash and grants to HMS from S4TP's own funds in addition to the almost \$5 million S4TP helped HMS raise through direct mail.

95. For the reasons stated, the Arbitrator finds that S4TP was in substantial breach of its Agreement with HelpMeSee.²

B. HelpMeSee's Claim for Breach of Fiduciary Duty

96. "A fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.' Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions." EBC L, Inc. v.

² HelpMeSee asserts that S4TP's breaches also violated Section 2.8 of the Agreement, which provides that: "as of [August 31, 2011] and for the six (6) month period thereafter, [HMS] shall be the Manager's only client." S4TP argues in response that it did not violate Section

2.8 since: (i) that section only restricted S4TP's activities on behalf of "clients;" (ii) HelpMeSee's complaint is that S4TP was raising money for itself; and (iii) S4TP's raising money for itself could not have been on behalf of a client since S4TP could not possibly have been its own client.

Even if S4TP is technically correct about not being its own client, the fact remains that the spirit and import of the entire Agreement, including Section 2.8, was that S4TP would be working exclusively for HelpMeSee, which S4TP did not do. This exclusivity accords with Mullaney's repeated statements that he was "working 24/7 for HelpMeSee during this exclusive period."

²⁵² THIS FOOTNOTE ABOVE BY THE ARBITRATOR – confirms that S4TP's interpretation of the Agreement's "only client" restriction is correct ("technically correct" according to the Arbitrator), but then the Award misinterprets Section 2.8 by imposing an "exclusivity" requirement that exists nowhere in the Agreement, neither in Section 2.8 or anywhere else. This was a post-agreement interpretation that contradicted the express language of the Agreement and one which HMS repeatedly espoused at the arbitration, without any support whatsoever, yet became an interpretation upon which the Arbitrator based his finding of liability in the Award.

“Put differently, a fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other. Ascertaining the existence of a fiduciary relationship ‘inevitably requires a fact-specific inquiry.’” *Roni LLC v. Afra*, 18 N.Y.3d 846,848, 963 N.E.2d 123, 939 N.Y.S.2d 746 (2011).

Where fundraising counsel provide advice to a not-for-profit client on all aspects of their fundraising campaigns, have superior expertise, and have fostered a relationship of trust and confidence, they are fiduciaries of their clients with all of the duties and responsibilities attendant to that role. Those duties and responsibilities include, without limitation, primary allegiance to the interests of their not-for-profit client; full disclosure to the client of all actual or potential conflicts of interest, including the financial or other relationships with affiliates, subcontractors, third-party vendors, outside commissioned sales representatives and their family members; and providing to the client thorough projections or estimates, in writing, of all material elements of the proposed fundraising campaigns, including projected revenues, costs, and all pertinent fee, rate and billing information.

²⁵³ FALSE. HMS approached and pursued Mullaney for more than a year before the agreement was signed. Ueltschi invited Mullaney to play golf and have dinner in Florida. Ueltschi tried to hire Mullaney at Orbis and then at HMS. Mullaney declined. Invited Mullaney to be employed by HMS as its full time fundraiser. Mullaney declined.

successful charity” and threatening that HelpMeSee would “not get very far” without his help and expertise. As a result of Mullaney’s aggressive sales tactics, HelpMeSee dedicated a massive portion of its initial start-up capital to a fundraising program conceived and implemented by S4TP.²⁵⁴ In doing so, HelpMeSee placed a heightened degree of faith and trust in S4TP and, in particular, Mullaney, whom it believed to be a fundraising superstar and genius.

99. Here, S4TP violated its fiduciary duties to HelpMeSee in repeated, multiple ways. Thus, for example, Mullaney represented time and again to HelpMeSee that he was fundraising from major Smile Train donors on HelpMeSee’s behalf²⁵⁵ when, in fact, he was fundraising from these major donors on S4TP’s behalf. Further, in the course of conducting such fundraising, S4TP and Mullaney took credit for the substantial blindness work of HelpMeSee²⁵⁶ when, in fact, S4TP and Mullaney had nothing to do with that work. Thus, S4TP falsely told its potential donors that it had

²⁵⁴ FALSE. HMS investment in direct mail was far from “massive.” Jim Ueltschi loaned HMS just \$5 million. (The Ueltschi family is the 86th richest family in the world with billions of dollars and hundreds of millions in charitable foundations.) For that \$5 million investment S4TP helped HMS raise almost \$5 million and acquire around 74,000 new donors worth between \$3 - \$5 million. The HMS direct mail campaign was a success.

²⁵⁵ FALSE. Mullaney never told HMS this “time and again.” He had only 6-9 meetings with S4TP Founding donors and prospects in 10 months. In contrast, he helped HMS acquire approximately 74,000 new donors.

²⁵⁶ FALSE. Mullaney and WonderWork never showed any work of HMS to solicit S4TP donors. The only thing ever presented to prospective S4TP donors was a S4TP business plan that was developed almost a year before the HMS agreement was signed. In addition, there was very little that was substantial about HMS’s “blindness work” in 2011 – 2012. HMS was doing very few surgeries and spending less than 10% of what it raised on surgeries. HMS was spending the vast majority of its money on its surgical simulator but there was nothing to show donors or prospects. No demo, no photos, no prototype. HMS told donors it would be done in 2013 but now it is 2019 and it is not completed – and may never be.

“started surgeries already” and that it had “helped restore the eyesight of almost 1,000 children and adults in Asia and Africa.” Further, when Mullaney spoke to HelpMeSee’s major donors,²⁵⁷ S4TP provided them with its business plan and encouraged them to donate to S4TP instead, which they did.²⁵⁸

* * * *

100. For the reasons stated, the Arbitrator finds that S4TP was in clear breach of a fiduciary duty to HelpMeSee.

C. The Audit Provision

101. HelpMeSee asserts a breach of Section 3.3 of the Agreement (the Audit Provision), which provides:

²⁵⁷ FALSE. Mullaney only ever met with two major HelpMeSee donors: Kevin and Jeanine O’Brien who initially gave \$10,000 to HMS – because they knew Mullaney from Smile Train. They gave another \$15,000 donation to HMS shortly after having dinner with Mullaney. And Ellen Zaroff who gave HMS \$5,000 after meeting Mullaney.

²⁵⁸ FALSE. S4TP solicited HMS donors with or without its business plan. The two HMS major donors that Mullaney met with have both signed sworn statements that Mullaney never solicited them for S4TP.

(a) The Manager shall maintain complete, accurate and appropriate books, records and accounts relating to the performance of the Services contemplated hereunder. . .

(b) Such books, records and accounts shall be maintained at the Manager's offices in New York and shall be accessible for inspection and copy[ing] by the Company . . . at any time during normal business hours. .

..

102. As a result of discovering the S4TP mailing using Mercy Ships' media (see

par. 85, supra), Jim Ueltschi requested that S4TP provide HelpMeSee with a list of people who received the Mercy Ships photos and copies of the creative used, as well as other details about the fundraising being conducted by S4TP. He requested many of those documents another eight times.²⁵⁹In response, S4TP refused to provide the list of people who received the Mercy Ships photos, and it produced only some of the creative and little else about S4TP's fundraising activities. Ultimately, HelpMeSee sent its auditor to S4TP's offices to inspect the requested books and records but, again, HelpMeSee was denied access to most of those documents.²⁶⁰This led directly to HelpMeSee's termination of the Agreement.²⁶¹

103. S4TP defends its refusal to produce the documents in question by contending it had no obligation to provide HelpMeSee with information about its "proprietary founding donors" or other requested information about its fundraising.

²⁵⁹ MISLEADING. Ueltschi was provided with copies of all of S4TP's creative as well as the S4TP DM mailing list information. Ueltschi was not entitled to S4TP's donor list which he kept asking for. Then Ueltschi sent in his accountant who demanded the password for S4TP's accounting system so he could "look around."

²⁶⁰ FALSE. The agreement allows inspection of financial records relating to the HMS business. S4TP provided 5,000 pages of this data. Ignoring the documents provided at the audit, the HMS auditor demanded a password to access all of S4TP's online financial records and founding donor information –information that was not required to be provided to HMS under the Agreement.

²⁶¹ FALSE. HMS claimed multiple bogus causes for termination.

But this ignores the facts that: (i) S4TP had agreed to work only on blindness in this time frame, and most of the records in issue should therefore have related to its work for HelpMeSee;²⁶² (ii) once S4TP informed HelpMeSee that it was fundraising for HelpMeSee through S4TP,²⁶³ HelpMeSee had every right to inspect S4TP's books and records related to fundraising in order to ensure that it was receiving the donations

²⁶² FALSE. S4TP gave HMS access to most of its records, thousands of documents.

²⁶³ FALSE. S4TP never "informed" HMS that it was "fundraising for HelpMeSee through S4TP" because it never was. This is a false allegation. All HMS donations were sent directly to HMS from the donors themselves.

as warranted; and (iii) since S4TP's Mercy Ships mailers referenced HelpMeSee's name and the partnership with HelpMeSee, HelpMeSee had every right under Section 3.3 to as much information as it wanted about the mailers. If, in fact, HelpMeSee had received at the time even a partial amount of the requested information, that would have accelerated its learning that **S4TP was retaining contributions from its "founding donors" and others for itself in violation of the Agreement.**²⁶⁴ Under these circumstances, there can be no question that the requested information related to "Services" performed by S4TP for HelpMeSee within the meaning of Section 3.3.

* * * *

104. For the reasons stated, S4TP violated Section 3.3 of the Agreement. While this was a material breach and warranted being included by HelpMeSee as a reason for termination, it does not give rise to an independent claim for damages other than the damages that are already being awarded herein.

D. Section 5.3(a) (Interference from Wang)

105. Section 5.3 of the Agreement provides in pertinent part:

(a) At the option of the Company, and its sole discretion, and at any time during the Term, this Agreement shall terminate upon thirty (30) days' written notice of termination from the Board to the Manager, without prejudice to any other rights or remedies which may be available to the Parties if:

* * *

(ii) any fact, circumstance or event arises that is related to or involves Mr. Charles Wang, Smile Train and/or his or their Representatives that impairs or that, in the Company's good faith discretion, could impair the ability of the Manager (or any of the

²⁶⁴ FALSE. The arbitrator here is saying that every nickel that S4TP raised for itself, all of its start-up donations, had to be passed along to HMS or S4TP would be in violation of the agreement. This is absurd. No where in the agreement does it say this. If this were true, and S4TP actually did this it would have gone out of business right away. How could S4TP survive if it couldn't raise money to cover its expenses? The fees from HMS didn't cover all of S4TP's costs.

Manager Personnel) from devoting its (or their) full time,

attention and/or abilities to the performance of its (or their) obligations under this Agreement (including publication of potentially adverse publicity involving the Manager and/or any Manager Personnel or the commencement of any proceeding or action).

* * *

(b) **If any of the events specified in Sections 5.3(a)(ii) . . . shall occur, the Manager shall give prompt written notice thereof to the Board.** (Emphasis added.)

106. During this arbitration, Mullaney claimed that Wang was waging a “war of terror” against him and S4TP that continues to this day, yet Mullaney never notified HelpMeSee about most of his protracted battles with Wang, each of which could have been a ground for termination under Section 5.3(a)(ii). Thus, for example, S4TP never informed HelpMeSee of:

- Wang’s claim that Mullaney owed him \$500,000 on an unpaid promissory note, or that Wang obtained summary judgment on that claim on November 15, 2011.²⁶⁵
- Mullaney’s unauthorized use of Smile Train’s proprietary donor information to fundraise for S4T as well as to denigrate Smile Train to its donors.²⁶⁶
- Receiving “letters before action” on April 4, 2012, regarding unauthorized payments from Smile Train UK to Mullaney which ultimately resulted in a lawsuit and significant adverse publicity.²⁶⁷

²⁶⁵ FALSE. This claim was hardly a “protracted battle with Wang.” It was a personal claim which Mullaney satisfied promptly following the Court’s ruling. It had no impact on S4TP or HMS or Smile Train.

²⁶⁶ FALSE. These allegations are false and unsubstantiated. S4TP never used the Smile Train donor list to solicit donations.

²⁶⁷ FALSE. Shortly after these letters were received there was a Smile Train Board meeting at which it was decided not to pursue this lawsuit. The actual lawsuit happened long AFTER the HMS S4TP agreement was terminated. So it had absolutely no bearing on HMS, ST or S4TP. There was no publicity in the United States and virtually none in the UK. Moreover, the UK court’s decision found there was no

- Mullaney's undercover, extensive support of the opposition to the Smile Train / Operation Smile merger (which Wang favored), all the while telling HelpMeSee that "he [Mullaney] did not want to waste

misconduct whatsoever and it also confirmed that Mullaney would have a claim over against Smile Train US for any salary he was required to return under UK law because of the technical defect in the manner that the allocation was applied.

time on the Smile Train Circus,” and that he was completely staying out of the merger debacle.²⁶⁸

* * * *

107. S4TP contends that failure to inform HelpMeSee of S4TP’s various issues with Smile Train and Wang was of no consequence because none of the issues impeded S4TP’s ability to provide Services under the Agreement. But that is for HelpMeSee (not S4TP) to decide, i.e., Section 5.3(a)(ii) provides that it is within HelpMeSee’s “good faith discretion” to decide whether such issues “could impair” the Manager’s ability to provide Services under the Agreement. Thus, S4TP clearly breached Section 5.3 of the Agreement on multiple occasions. While these were material breaches, HelpMeSee did not sufficiently prove damages resulting from the breaches and, hence, such damages are not included in this Award.

E. Section 2.7 (Exclusivity as to Blindness)

108. Pursuant to Section 2.7 of the Agreement, S4TP agreed that it “shall not . . . provide advisory, direct mail, marketing-related or any other services to any Person whose corporate or charitable purpose, as applicable, relates to vision or eyesight . . .” In fact, S4TP provided advisory services to two entities whose charitable purpose related to blindness—Massachusetts Eye and Ear and Perkins School for the Blind—

²⁶⁸ FALSE. This failed merger attempt occurred many months *before* the HMS – S4TP agreement was signed. Mullaney was a minor player. This matter has absolutely nothing to do with this arbitration and was fully disclosed to HMS before the Agreement was signed. Moreover, Mullaney had an absolute right and a duty, as a director of Smile Train, to vote against and oppose any merger that he believed was not in the best interests of the Smile Train donors.

and, with regard to Perkins, S4TP actually worked with TMT to send out test mail packages. While S4TP's work for these entities was technically a violation of the Agreement, S4TP's services were provided on a pro bono basis and, in any event, HelpMeSee has not sufficiently proven any damages arising from the work.²⁶⁹ Thus, the

²⁶⁹ FALSE. All of this pro bono work was done with the knowledge and approval of HMS that knew Mullaney was doing it to try and cultivate a relationship with Wyc Grousbeck who had personally asked Mullaney to help these organizations. Grousbeck was Chairman of Mass Eye and Ear and his son was blind and attended Perkins. Mullaney told HelpMeSee that he was going to try and help these two non-profits, without any compensation to himself, as a favor to Wyc Grousbeck, in his unsuccessful efforts to woo Grousbeck; HMS said it was okay with this strategy.

Arbitrator treats S4TP's services on behalf of these entities as a de minimis violation of the Agreement and awards no damages.

F. Section 7.2 (IP Rights of Others)

109. Section 7.2 of the Agreement provides that: "The Manager represents and warrants . . . that the performance of the Services and Work Product (and all portions thereof) will not infringe or otherwise violate the Intellectual Property of any Third Party." S4TP violated this provision when it designed a mailer for HelpMeSee similar to those used by Smile Train and when it breached the Mercy Ships MOU on at least three separate occasions (see pars. 85-88, supra). Again, however, HelpMeSee has not sufficiently proven damages resulting from these violations and, hence, no such damages are included in this Award.

G. Section 7.6(c). Donation at Termination

110. Section 7.6(c) of the Agreement provides:

The Manager shall donate two million dollars (\$2,000,000) to the Company on or before September 1, 2016. If the Manager is terminated under Section 5.3 or this Agreement is otherwise terminated prior to September 1, 2016, for any reason, the Manager shall only be responsible for a percentage of such donation, based on that period of the Term that shall have passed, calculated through the date of termination. For clarity, if, for example, this Agreement is terminated as of September 1, 2015, the Manager shall pay the Company four-fifths of the two million dollars, or one million six hundred thousand dollars (\$1,600,000).

111. Here, the prorated amount due under Section 7.6(c) at the time of termination on August 17, 2012 was \$386,849. S4TP has paid no portion of that amount to HelpMeSee and, hence, the \$386,849 is included in this Award as damages owing from S4TP to HelpMeSee.

H. The \$400,000 Grant

112. On June 14, 2012, S4TP sent HelpMeSee a letter in which it stated that it was “making a \$400,000 grant to HelpMeSee to be used for surgeries,” with \$100,000 payable on August 15 and October 15, 2012, and the final \$200,000 payable on December 15, 2012. This charitable grant is an enforceable obligation. See, e.g., Paul & Irene Bogoni Found. v. St. Bonaventure U, 78 A.D.3d 616, 617, 913 N.Y.S.2d 154 (1st Dep’t 2010) (“Under New York Law, charitable pledges are enforceable because they constitute an offer of a unilateral contract that—when accepted by the charity by incurring liability in reliance thereon—becomes a binding obligation.”)²⁷⁰In fact, S4TP conceded at the arbitration hearing that the \$400,000 was due and owing but that it had held payment in abeyance due to the disputes between the parties.²⁷¹

* * * *

For the reasons set forth, S4TP is directed to pay HelpMeSee the \$400,000 as part of the Award in this arbitration.

I. Conversion

113. A claim for conversion is established “when one who owns and has a right to possession . . . proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner.” Key Bank of N.Y. v. Grossi, 227 A.D.2d 841, 843, 642 N.Y.S.2d 403 (3d Dep’t 1996). Here, S4TP converted

²⁷⁰ FALSE. HMS rejected the conditions associated with this grant; thus, it was not legally enforceable - notwithstanding its legal non-enforceability; the Arbitrator directed that it be paid as part of the award.

²⁷¹ FALSE. S4TP said it would have paid the grant if HMS had kept its word and honored its contract with S4TP. Charities have the right to withdraw unaccepted grants when the grantee refuses to abide by the grantor’s stated conditions or when they lose confidence in a grantee as S4TP certainly did with HMS.

HelpMeSee's property when it diverted donors away from HelpMeSee and retained for itself funds which had been donated for blindness and had been earmarked for HelpMeSee. While these acts of conversion were material breaches of the Agreement, HelpMeSee proved no resulting damages in addition to those proved

elsewhere in connection with other breaches. Hence, no such additional damages are awarded here.²⁷²

J. Fraudulent Concealment

114. HelpMeSee asserts that S4TP fraudulently induced it to enter into the Agreement. If HelpMeSee prevailed on this claim, then the Agreement would be rescinded, and HelpMeSee would recover all payments it had made to S4TP pursuant to the Agreement. The bottom line would be that HelpMeSee would be placed in the position where it would have been if it had never entered the Agreement in the first place.

115. Here, rescission is an alternative to HelpMeSee's claim for damages which are comprised of the monies that HelpMeSee would have received if the Agreement had continued in effect without being breached by S4TP. Rescission and such a claim for damages are mutually exclusive since rescission is based on complete annulment of the Agreement whereas the damages are premised on monies and benefits that would have been realized under the Agreement if it had continued to exist and if there had been no breach.

116. While HelpMeSee asserts an alternative claim for rescission here, the claim becomes moot since HelpMeSee is being awarded substantial damages in this arbitration, representing monies HelpMeSee would have received under the Agreement if it had continued in effect without being breached. Accordingly, there is

²⁷² FALSE. S4TP diverted no donations from HMS. All of S4TP's founding donors were long-time friends and supporters of Mullaney and S4TP's staff; each intended their donation go to S4TP, not HMS. In fact, the four largest S4TP donors, who collectively gave \$7 million to S4TP, and whose donations HMS claimed were "diverted" have each signed affidavits and/or legal letters that dispute HMS's claims and confirm that they each intended their donation to go only to S4TP, not to HMS.

no need for this Award to further address HelpMeSee's claim for rescission.

K. S4TP's Claim for Unpaid Fees

117. S4TP contends that the Agreement was not effectively terminated until February 2013 and that it is accordingly owed its unpaid monthly fee of \$166,666.66 for each of the eight months from August 2012 through February 2013, for a total of \$1,333,333.28.³ S4TP premises this argument on Section 5.3 which provides that the Agreement can be terminated for convenience effective six months after the initial twelve months of the Agreement's existence, i.e., it can first be terminated for convenience in February 2013, which is eighteen months after the Agreement's effective date.

118. S4TP, on the other hand, asserts that the Agreement was terminated for cause long before February 2013. In support, HelpMeSee first points to a July 18, 2012 letter wherein Jim Ueltschi wrote to S4TP complaining about Mercy Ships and HelpMeSee's lack of access to S4TP documents, concluding:

Your refusal to make your business records available for inspection makes it impossible to verify your compliance with our agreement which we determine to be a material breach. Under the circumstances, it is in both our interests to conclude our agreement as soon as possible. I sincerely hope that this transition can be accomplished smoothly.

119. Then, on August 10, 2012, Thazhathu wrote to S4TP as follows: It has come to our attention that on 3 August 2012, Smile Train delivered to Surgery for the Poor / WonderWork a Cease and Desist Order for copyright infringement. Mercy Ships issued a similar order on 16 July 2012.

³ Section 5.4 of the Agreement provides in pertinent part: "... in the event of termination under Sections 5.2 or 5.3, the Manager shall be entitled to payment of any accrued, but unpaid Management Fee Installments and Costs incurred up to the date of termination."

These orders are in addition to the HelpMeSee notice to Surgery for the Poor / WonderWork dated 18 July 2012 requesting access to Surgery for the Poor / WonderWork books and records under Section 3.3, which was refused.

The action by Smile Train has been determined by the HelpMeSee Board of Directors to be another cause for termination under Section 5.3 (a) (ii) of the Surgery for the Poor / WonderWork contract with HelpMeSee.

Based on the foregoing, this serves as the formal notice of termination of the agreement between Surgery for the Poor / WonderWork and HelpMeSee, effective 17 August 2012.

120. S4TP makes the following arguments as to why the above-quoted notices of termination were of no effect:

FIRST, S4TP asserts that the July 18, 2012 notice was not sent to WonderWork's attorney, Doris Rieke ("Rieke") at Copilevitz and Canter, LLC, as required by Section 9.1(a) of the Agreement. This highly technical argument is in the nature of a "gotcha" which ignores the following facts: (i) S4TP had immediate, full knowledge at the time of HelpMeSee's July 18, 2012 notice of termination; (ii) Rieke did not even work at Copilevitz and Canter, LLC as of July 18, 2012; (iii) notification to Rieke was nowhere stated in the Agreement to be a condition of termination; (iv) a copy of the August 10, 2012 notice of termination was, in fact, sent to Rieke at Copilevitz and Canter, LLC; and (v) S4TP's position is flat out contrary to New York law. See Iskalo Elec. Tower LLC v. Stantec Consulting Servs., Inc., 79 A.D. 3d 1605, 1607, 916 N.Y.S.2d 373 (4th Dep't 2010) (upholding a termination notice sent to a company's corporate counsel instead of the chief executive officer); Suarez v. Ingalls, 282 A.D.2d 599, 600, 723 N.Y.S.2d 380 (2nd Dep't 2001) (upholding a termination notice

sent via regular mail instead of certified mail); Ives v. Mars Metal Corp., 196 N.Y.S.2d 247, 249, 196 N.Y.S.2d 247 (1959) (upholding a termination notice sent to the contractor's counsel but not directly to the contractor); U.S. Broad. Co. Corp. v. National Broad Co., Inc., 439 F. Supp. 8, 10 (D. Mass. 1977) (applying New York law) (where there is actual notice to terminate, "it is immaterial that [it was not mailed] to the exact address specified in the contract").

SECOND. WonderWork argues that the July 18, 2012 notice did not state that it would take effect in 30 days if the claimed breaches were not cured by that time, as provided in Section 5.3(a)(i) of the Agreement. But specific reference to this provision in the notice would have added nothing since S4TP nowhere alleges (nor could it) that it was unfamiliar at the time with the terms of Section 5.3(a)(i). Nor does S4TP mention that the July 18, 2012 notice stated it was to take effect "as soon as possible," which might well have turned out to be more than 30 days after the notice. Surely, Section 5.3(a)(i) does not preclude a terminating party from specifying as a courtesy that the termination will or might take effect later than 30 days from the notice, i.e., later than the minimum time requirement set forth in Section 5.3(a)(i). And finally, the August 10, 2012 notice expressly stated that it was "effective 17 August 2012," which was 30 days from the July 18, 2012 notice, as contemplated by Section 5.3(a)(i).⁴

THIRD. Claimant contends that the termination notices were of no effect because Respondent was without cause to terminate. More particularly, Claimant

⁴ S4TP argues that the effective date of the August 17, 2012 notice did not give it 30 days to cure the new and additional breaches set forth in the August 10, 2012 notice. This is not significant, however, since S4TP never cured (within 30 days or at any time) the breaches specified in the July 18, 2012 notice.

asserts that HelpMeSee—which is described as “a rival charity”—had no right to audit S4TP’s books and records. However, as set forth supra (pars. 101-04), HelpMeSee had every right to audit. S4TP also contends that it “cured” the breach of the Mercy Ships MOU when it apologized and represented to Mercy Ships that it would not make use of the photos again. One cannot “cure” misappropriation of one’s intellectual property, however, by promising not to do it again, particularly where, as here: (i) the promise was not fulfilled (see par. 88, supra); and (ii) the apology and promise was totally ill-received by Mercy Ships (see par. 87, supra).

* * * *

For the reasons set forth above, the Agreement was terminated effective August 17, 2012.

(i) Fees That Are Due and Owing to S4TP

121. Section 5.4(a) of the Agreement provides, in pertinent part:

... in the event of termination under Sections 5.2 or 5.3, the Manager shall be entitled to payment of any accrued, but unpaid Management Fee Installments and Costs incurred up to the date of termination.

122. Thus, according to Section 5.4(a)—even if S4TP committed a material, continuing breach permitting a termination for cause under Section 5.3(a)(i), S4TP nonetheless would have a valid claim for fees that were accrued and unpaid as the time of termination for cause. Here:

1. Section 3.1(b) of the Agreement provides that each of the monthly fee installments of \$166,666.66 is due “on the first business day of each month.”

2. The August 10, 2012 termination notice stated it was “effective 17 August 2012.”

3. As of the August 17, 2012 termination date, S4TP’s Management Fee Installments for July 2012 and August 2012 were accrued and unpaid and, thus, are due and owing to S4TP under Section 5.4(a) of the Agreement in a total amount of \$333,333.32.

L. Damages

123. Throughout the term of the Agreement, S4TP secretly competed against HelpMeSee²⁷³ and used HelpMeSee’s work and accomplishments²⁷⁴ to convince Mullaney’s contacts²⁷⁵ (most of whom he knew from Smile Train) to write large checks to S4TP. Further, Mullaney also covertly courted HelpMeSee’s few major donors in an effort to convince them to give to S4TP instead of to HelpMeSee.²⁷⁶ As a result, rather than donating to the organization that actually provided charitable

²⁷³ FALSE. S4TP helped HMS acquire approximately 74,000 new donors while it acquired approximately 90 Founding Donors for itself. The Agreement placed no restrictions on S4TP’s ability to continue to raise and receive start-up donations for itself during the Agreement term.

²⁷⁴ FALSE. S4TP never showed any HMS “work” or “accomplishments” - which at the time were minimal - to anybody. In 2011, HMS had been operational for only a few months and had not yet provided any cataract surgeries. In 2012, HMS helped provide very few cataract surgeries and spent only 10% of what it raised on surgeries. All of HMS’s direct mail to donors promised surgeries for patients but HMS was spending most of its donations on the development of a surgical simulator which wasn’t operational in 2012 and still isn’t today, in 2019.

²⁷⁵ FALSE. Mullaney’s “contacts” deny this ever happened and deny they were ever misled when they made their donations to S4TP.

²⁷⁶ FALSE. No S4TP donors were misled nor were any donations diverted from HMS. Mullaney only ever met with two major HMS donors, Kevin and Jeanine O’Brien who sent HMS an additional \$15,000 shortly after having dinner with Mullaney. And Ellen Zaroff who sent HMS \$5,000 after meeting with Brian. Both of these HMS donors have signed sworn statements that say this allegation is totally false.

services,²⁷⁷ donors were misled into giving it to S4TP²⁷⁸. It is this type of unconscionable conduct that the law seeks to remedy by ensuring that the damages are sufficient “not only to compensate for the wrongs but to prevent them.” Gomez v. Bicknell, 302 A.D.2d²⁷⁹

107, 113, 756 N.Y.S.2d 209 (2d Dep’t 2002). Accordingly, it is directed that:

a. S4TP is to pay HelpMeSee an amount equal to all the donations it received and kept during the term of the Agreement.²⁸⁰ This amounts to \$8,128,348.00.²⁸¹

b. Set off against the \$8,128,348 is the \$239,550.00 which S4TP paid to HelpMeSee on January 31, 2012. While S4TP called this payment a “donation” and while there might logically be no reason to deduct a

²⁷⁷ FALSE. The implication S4TP does not provide charitable services is outrageous. In 2016, S4TP helped provide almost 100,000 cataract surgeries – more than twice the number of cataract surgeries HMS provided that year. Altogether, S4TP has helped provide surgery for about 250,000 children and adults.

²⁷⁸ FALSE. It is bizarre to think that any donors can be “misled” into sending their donations to a different charity than they intended to help. This was so absurd that four of WonderWork’s largest donors hired their own lawyer and filed their own appeal with the New York State Supreme Court.

²⁷⁹ IMPROPER. Arbitration awards are not allowed to be penal as arbitrators do not have the authority to award punitive damages under New York law.

²⁸⁰ IMPROPER. In New York State, it is illegal to take donations away from one charity and give them to another without the permission of the donors or the Supreme Court of the State of New York. The arbitrator never heard from any of these donors.

²⁸¹ FALSE. Four donors who gave \$7 million to S4TP out of this \$8,128,348 have signed affidavits and/or legal letters that deny HMS’s claims and confirm that they each always intended their donation to go to S4TP, not to HMS. They also confirm they were never told about HMS or shown any work by HMS, and they object to their donations being taken from S4TP and given to HMS.

“donation” from damages, the deduction is nonetheless permitted because it strikes the Arbitrator as the right thing to do.⁵²⁸²

c. On June 14, 2012, S4TP undertook to make a \$400,000.00 grant to HelpMeSee. It never did so and acknowledged at the hearing in this arbitration that is an amount currently due and owing. Thus, S4TP is to pay the \$400,000.00 as part of damages here.

d. ²⁸³Pursuant to Section 7.6(c) of the Agreement, S4TP owes HelpMeSee an unpaid donation at termination in the amount of \$386,849.00. That, too is included as part of damages here.

d. HelpMeSee owes S4TP \$333,333.32 in fees that are due and owing under the Agreement. That amount is to be set off against the damages owed by S4TP to HelpMeSee.

iv. HelpMeSee seeks damages of \$3,862,226.85, which was raised by S4TP outside the term of the Agreement. That claim is set forth in a seven line paragraph and accompanying footnote in HelpMeSee’s Post-Hearing Memorandum of Law and is denied as not sufficiently developed.

v. HelpMeSee requests punitive damages in an amount of at least \$5 million.

That request is also denied since, in the Arbitrator’s view, the damages awarded are sufficient to recompense HelpMeSee and, also, to deter S4TP from future conduct

²⁸⁴such as that which is described in this Award. See

²⁸² FALSE. S4TP made an additional \$150,000 donation to S4TP that it expressly stated was a grant - not a “fee reduction” as the arbitrator claims.

²⁸³ FALSE. HMS refused this donation – now the arbitrator is awarding it. Shows the incredible bias demonstrated by this arbitrator.

²⁸⁴ IMPROPER. Arbitrators are not allowed to award punitive damages.

Gomez, supra, 302 A.D. at 113.

⁵ On the other hand, there is no deduction for the \$150,000 paid in resolution of the Cap Dispute since that amount was a fee reduction to which Mullaney agreed in resolution of a separate dispute (see pars. 73-78, supra).

285

285 FALSE. Mullaney never agreed to this.
(001) WonderWorks HelpMeSee
(13-20-1300-0650)

10!

* * * *

124. In sum, S4TP is to pay HelpMeSee \$8,128,348.00 plus \$400,000.00 plus \$386,849.00 less \$239,550.00 less \$333,332.32 for a total of \$8,342,314.68. Simple annual interest at the rate of 9% is to run on any unpaid portion of that amount from March 21, 2013 (the start of the arbitration) forward.

M. Discovery Obligations

125. From beginning to end, there were serious shortcomings in S4TP's production of documents in this arbitration. At the outset, S4TP asserted that its employees would pick and choose which documents to produce because it was not "IBM" and, as a result, S4TP refused to produce documents responsive to nine of Respondent's twenty document requests because it unilaterally decided that HelpMeSee's claims were "without merit." On August 18, 2013, this Arbitrator told S4TP that it was "putting the cart before the Horse" and ordered it to perform a thorough collection of requested documents, including electronic files.

126. S4TP's document productions that immediately followed this Arbitrator's August 18, 2013 Order continued to be palpably deficient, missing whole categories of responsive documents. As a result, HelpMeSee again wrote to the Arbitrator seeking relief and listing the types of documents it found to be missing from S4TP's production. This time, this Arbitrator directed S4TP's counsel to certify that there had been "a reasonably comprehensive search for documents responsive to Respondent's document requests" and that "based on that search, Claimant has produced all documents responsive to those requests."

127. After the hearings commenced on March 4, 2014, it repeatedly became apparent that S4TP's document production remained seriously flawed. This led to HelpMeSee's counsel writing five more letters seeking production of documents which were thereafter turned over in a trickle over the course of the next year. True, some of these documents were not called for by HelpMeSee's initial document requests, but many of them were. In the final analysis, this Arbitrator deems it likely that there were responsive documents which never were produced by S4TP in this arbitration.²⁸⁶

128. In December 13, 2013, and on numerous other occasions during the hearing, this Arbitrator made clear that any shortcomings in document production would be addressed at the time of an Award in this arbitration. This is the reason for the discussion of document production in this Section and in the following Section of this Award.

* * * *

129. While on the subject of S4TP's flawed production of documents, it is important to emphasize that while the Arbitrator does not know the reasons for the

²⁸⁶ FALSE. S4TP produced over 90,000 pages of documents in discovery, including hundreds that were never requested by HMS in its initial document request, but only during the course of the hearings. S4TP violated no discovery orders as none were ever issued. In fact, the arbitrator denied HMS' discovery motion, made in June 2014, stating on the record that he found no responsive documents were intentionally withheld from production by S4TP, and issued no subsequent orders. All of HMS' complaints about discovery were addressed in writing by S4TP and shown to be without merit. In most cases, the requested documents simply did not exist, or had already been provided. No ruling was ever made by the Arbitrator in response, until the Award issued which based its finding of non-compliance wholly on speculation and surmise finding it "likely" that responsive documents were never produced, without identifying what was being referred to.

shortcomings, he would be most surprised if they were attributable to any transgressions on the part of Joseph Vogel, S4TP's counsel. In fact, as best the Arbitrator could observe, Vogel followed the highest standard of ethics throughout this arbitration and represented his client with extreme competence and vigor in difficult circumstances, from beginning to end. The same is true of Vincent Sama, Catherine Schumacher, Peta Gordon and Jennifer Wieboldt, who represented

HelpMeSee with ultimate competence and dedication while adhering to the highest standards of ethics in this arbitration.

N. Costs and Attorneys' Fees

130. Both sides have requested an award of costs and attorneys' fees. They have asserted that claim throughout this proceeding and have never withdrawn it or sought to withdraw it. In such circumstances, the parties have injected the issue of costs and attorneys' fees into this proceeding and have conferred authority on this Arbitrator to make a determination in that regard, either in favor of Claimant or

Respondent. As the court stated in Matter of Goldberg v. Thelen Reid Brown Raysman & Steiner LLP, 52 A.D.3d 392, 860 N.Y.S.2d 93 (1st Dep't 2008):

As for the award of counsel fees to petitioner, it was respondents that first sought such fees in their counterclaim, and mutual demands for counsel fees in an arbitration proceeding constitute, in effect, an agreement to submit the issue to arbitration, with the resultant award being valid and enforceable

Accord: Bear Stearns & Co., Inc. v. Fulco, 21 Misc. 3d 823, 830, 939 N.Y.S.2d 790 (Sup. Ct., N.Y. Co. 2008) ("Since under the American rule attorneys' fees are not generally recoverable, the party seeking such fees bears the burden of demonstrating that the arbitrators have authority to award them. . . . The courts have found that this burden is met when the record shows that the parties have acquiesced in the awarding of attorneys' fees by their conduct during the arbitration, including by demanding attorneys' fees in their submissions.")

Spector v. Torenberg, 852 F. Supp. 201, 2010 (S.D.N.Y. 1994) ("In the instant case, petitioners agreed to the award of such fees by placing a request for "reasonable attorneys' fees" in their demand for arbitration. . . . Petitioners also acquiesced in the award of such fees by requesting attorney's fees in their post-hearing briefs. . . . Accordingly, the court finds that the arbitrators acted within their authority in awarding attorney's fees.")

131. In addition, HelpMeSee has requested that WonderWork pay HelpMeSee's costs and attorneys' fees as a sanction under Rule 58 of the American Arbitration Association's Commercial Arbitration Rules, which provides that "The arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator." WonderWork has opposed this application in a detailed presentation, and the Arbitrator is accordingly authorized to award costs and attorneys' fees on this ground as well.

132. The Arbitrator directs that WonderWork pay HelpMeSee's reasonable costs and attorneys' fees incurred in connection with this arbitration from the date of the Arbitration Demand forward. This directive is based on both of the grounds discussed above and results from the following findings:

1. HelpMeSee is clearly the prevailing party in this arbitration.
2. As described above, WonderWork/S4TP declined to comply with discovery orders from the beginning to the end of this arbitration, with the result that the conduct of the arbitration was decidedly less efficient and cost-effective than would otherwise have been the case.
3. Mullaney was not a credible witness.
4. While punitive damages are not being awarded here,²⁸⁷ the conduct of WonderWork/S4TP and Mullaney was nonetheless reprehensible.

²⁸⁷ FALSE. Arbitrator explicitly did award punitive damages which are not allowed.
(WonderWorks v. HelpMeSee)
(13-20-1300-0650)

III CONCLUSION

133. By way of summary and conclusion, the undersigned Arbitrator hereby enters this Partial, Final Award as follows:

A. Claimant is immediately to pay Respondent Eight Million, Three Hundred Forty Two Thousand, Three Hundred and Fourteen Dollars and Sixty Eight Cents (\$8,342,314.68). Simple annual interest is to run on any unpaid portion of that amount from March 21, 2013 forward.

B. All of Claimant's claims are denied and dismissed.

C. Respondent is entitled to recover from Claimant the reasonable costs and attorneys' fees which Respondent incurred in connection with this arbitration from the time of the Arbitration Demand (March 21, 2013) forward. Within three weeks of receiving this Partial Final Award, Respondents are to submit an affidavit, together with backup and supporting papers, setting forth such reasonable costs and expenses which they incurred. This affidavit is not to include arbitrator fees or administrative fees of the American Arbitration Association, which will be addressed elsewhere. Claimant is to serve any answering papers within six weeks of receipt of this Partial Final Award.

D. Except for amounts to be determined pursuant to Paragraph C above and except for amounts to be paid for arbitrator fees and administrative fees of the American Arbitration Association, this Partial Final Award is in full settlement of all claims and counterclaims submitted in this arbitration. To

the extent any such claim or counterclaim is not specifically mentioned herein, it is denied.

John H. Wilkinson
John H. Wilkinson

10/13/16
Dated

I, John H. Wilkinson, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Partial Final Arbitration Award.

4.1 li.
John H. Wilkinson

10/13/16
Dated

State of New York
County of New York

SS

On this 13th day of October 2016, before me personally came and appeared John Wilkinson, to me known and known to me to be the individual described herein and who executed the foregoing Partial Final Award and acknowledged to me that he executed the same.

[Signature]
Notary Public Dated 10-13-2016

NOTARY PUBLIC, State Of New York
Qualified In Weester county Comm1ssi0n Expires

HARRY A. FOTIADIS
Mo . 01F05007963

[Redacted] ej_CJ