SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

TOM MAHATHIRATH, an individual; TFM ADVISORS, INC., a California Corporation,

Plaintiffs,

v.

TRIPACIFIC CAPITAL ADVISORS, LLC, a Delaware Limited Liability Company; TRIPACIFIC MANAGERS, INC., a California Corporation; GEOFFREY FEARNS, and DOES 1 through 20, inclusive,

Defendants.

Case No. 30-2020-01170513-CU-BC-CJC

Assigned for All Purposes to:
Hon. Walter Schwarm
Dept. C32
W.S. 5-16-23

[~~PROPOSED~~] JUDGMENT

Action Filed: November 18, 2020

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. Purusant to the Stipulation of the parties, the Petition to Confirm the Final Arbitration Award issued on December 7, 2022 by the Hon. Rosalyn Chapman (Ret.) of Judicial Arbitration and Mediation Services (JAMS) in the matter of *TriPacific Capital Advisors, LLC, Claimant v. TFM Advisors, Inc. and Tom F. Mahathirath* (JAMS Case No. 1200057704) (the "Final Award") attached hereto as Exhibit "A" is GRANTED. The Final Arbitration Award is CONFIRMED in all respects, incorporated in full herein, is binding upon the parties hereto, and is made the Judgment of this Court as also set forth herein pursuant to Code of Civil Procedure Section 1287.4. Any objection

to the request or Petition for Correction by Plaintiffs and Respondents is deemed withdrawn.

2. In accordance with the Final Award:

(a) The Cross-Complaint filed by Tom F. Mahathirath and TFM Advisors Inc. is dismissed.

(b) Tom F. Mahathirath has no right, title or interest in any sums received or net profits earned by TriPacific Capital Advisors, LLC, after September 30, 2020; and Tom F. Mahathirath has no right to further commissions or bonuses beyond those previously paid.

(c) In satisfaction of the conversion claim, Tom F. Mahathirath shall return the Surface Pro 6 laptop and power cord to TriPacific Capital Advisors, LLC, no later than five (5) days from the date of this Final Award.

(d) TriPacific Capital Advisors, LLC shall recover fees and costs from Tom F. Mahathirath and TFM Advisors, Inc., jointly and severally, in the total amount of $49,434.80 (comprising $8,062.82 for filing fees copying costs, service of process fees and court appearance fees and $41,371.98 for deposition and hearing transcripts and deposition videos).

(e) TriPacific Capital Advisors, LLC, Geoffrey Fearns and TriPacific Managers Inc., jointly, shall recover from Tom F. Mahathirath and TFM Advisors, Inc., jointly and severally, the total amount of $1,521,045.62, comprised of:

i. costs or reasonable attorney fees in the total amount of $1,158,318.50;

ii. expert costs or expenses in the total amount of $117,800; and

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W.S. 5-16-23

iii. costs or JAMS fees and expenses in the total amount of $244,927.12.

3. The total amount due is $1,570,480.42, plus interest at the statutory amount of $430.27 per day from December 7, 2022 until the amounts are paid to TriPacific Capital Advisors, LLC, Geoffrey Fearns and TriPacific Managers Inc., in full.

4. Petitioners TriPacific Capital Advisors, LLC, Geoffrey Fearns and TriPacific Managers Inc., are the prevailing parties on the Petition to Confirm the Final Award per Code of Civil Procedure Section 1293.2 and Section 6 of the 2016 Employment Agreement. Pursuant to the Stipulation TriPacific Capital Advisors, LLC, Geoffrey Fearns and TriPacific Managers Inc., have agreed to waive their costs, including their reasonable attorneys' fees, for the costs and fees which were incurred since and not already included in the Final Award.

5. The Court retains jurisdiction of this action for further proceedings to enforce this Judgment and all of the provisions of the Final Award.

IT IS SO ORDERED.

Dated: May 16, 2023

Hon. Walter Schwarm
Judge of the Superior Court

Case No. 30-2020-01170513

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W.S. 5-16-23

Exhibit A

JAMS ARBITRATION
JAMS CASE NO. 1200057704

TRIPACIFIC CAPITAL ADVISORS, LLC,	)	
	)	
Claimant,	)	
	)	
v.	)	
	)	
TFM ADVISORS, INC, a California corporation; and TOM F. MAHATHIRATH, an individual,	)	**FINAL AWARD**
	)	
Respondents.	)	
	)	
AND RELATED CROSS ACTION.	)	

Date of Final Award: **December 7, 2022**

Date of Partial Award: **September 6, 2022**

Date of Arbitration Hearing: **June 27 through June 30 and July 1, 2022**

Place of Arbitration Hearing: **Los Angeles, California, by Zoom video-conference**

Arbitrator.

Hon. Rosalyn M. Chapman (Ret.)
JAMS
Los Angeles Resolution Center
Gas Company Tower
555 West 5th Street 32nd Floor
Los Angeles, CA 90013
Tel: 213.253.9784 Fax: 213.620.0100
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Counsel.

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Respondents/CounterClaimants:
David W. Affeld, Esq.
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On December 7, 2020, JAMS appointed Hon. Rosalyn Chapman (Ret.) as Arbitrator after selection by the Parties, Claimant TriPacific Capital Advisors LLC ("TriPacific") and TFM Advisors, Inc. ("TFM") and Tom F. Mahathirath ("Mahathirath") (collectively, "Mahathirath/TFM").

An evidentiary hearing was held by videoconference (Zoom) before the Arbitrator on June 27 through June 30 and July 1, 2022. Daniel M. Livingston ("Livingston") and Jeffrey K. Brown, partners with the law firm Payne & Fears LLP, appeared on behalf of Claimant TriPacific and Geoffrey Fearns ("Fearns") and TriPacific Managers, Inc. ("TMI") (collectively with TriPacific, "Cross-Respondents"), and David W. Affeld and Brian R. England, partners with the law firm Affeld Grivakes LLP, appeared on behalf of Mahathirath/TFM. On June 20, 2022, the Parties filed pre-hearing briefs.

On August 5, 2022, the Parties concurrently filed post-hearing briefs and on August 18, 2022, the Parties concurrently filed post-hearing replies.

On October 5, 2022, after issuance of the Partial Award, the Parties filed a Stipulation that the Arbitrator accepted, agreeing that on September 23, 2022, Mahathirath/TFM satisfied the award of $110,090 plus interest by paying $132,677 to TriPacific. The Parties also agreed that Mahathirath/TFM, separately and jointly, shall pay Cross-Respondents $49,434.80 for various fees and costs and that amount should be added to the Final Award.

On October 13, 2022, Cross-Respondents filed memorandum supporting attorney fees and costs and for additional relief and the supporting declaration of Livingston with exhibits. On November 3, 2022, Cross-Respondents filed the supplemental declaration of Livingston, pursuant to the Arbitrator's request. On November 11, 2022, Mahathirath/TFM filed an opposing memorandum and the opposing declaration of Brian R. England with exhibits. On December 1, Cross-Respondents filed a reply.

I. Agreement to Arbitrate.

On or about January 14, 2016, TriPacific (referred to as "Company") and Mahathirath (referred to as "you") signed a Revised Compensation Agreement (the "2016 Agreement") that requires final and binding arbitration:

> **6. Arbitration of Disputes.** You agree to submit all controversies, claims or disputes arising directly or indirectly out of or in connection with this letter or your employment with TriPacific to final and binding arbitration before JAMS in Orange County California.... The arbitrator shall have the authority to grant any relief authorized by law.... The parties agree that the arbitration shall be final and binding and any arbitration award shall be enforceable in any court having jurisdiction to enforce this arbitration agreement.
>
> **7. Acknowledgements/Representations**... This agreement shall be governed by and construed as a whole according to its fair meaning and not strictly for or against either of the parties. This letter sets forth the entire agreement between the parties with respect to the matters set forth herein and supersedes all prior agreements, discussions and understanding relating to the subject matter hereof, and may not be amended, modified, superseded or cancelled except by a written instrument executed by both parties. There have been no additional oral or written representations or agreements. Except as expressly modified and amended herein, the terms of the Original Employment Letter shall remain unchanged and in full force and effect. In the event of any action or legal proceeding to enforce this agreement or resolve any dispute hereunder, the prevailing party shall be entitled to recover its costs incurred in connection with such action or proceeding, including reasonable attorney's fees as well as expert costs and expenses. In executing this letter, the parties acknowledge that no promises or representations have been made except

as expressly stated herein and that they have not relied upon any statement or representation other than those contained herein. Each side has had the opportunity to consult with their own attorney prior to executing this agreement and been given adequate time to carefully read and consider it, and knowingly and freely executes this document.

II. Procedural Background.

A. Pleadings.

On October 21, 2020, TriPacific filed a Demand for Arbitration against Mahathirath/TFM alleging breach of contracts and conversion. TriPacific seeks: (1) to recover $345,079.00, plus statutory interest at 10%, and personal property; and (2) a declaratory judgment that: (i) Mahathirath/TFM "have no right, title or interest in any sums received or Net Profits earned by TriPacific after September 30, 2020, and [(ii)] no rights to further commissions … beyond those previously paid."

On or about November 30, 2020, Mahathirath/TFM filed a civil action against TriPacific, Fearns, and TMI in Orange County Superior Court, case no. 30-2020-01170513-CU-BC-CJC, alleging breach of contract, failure to pay wages, and related claims and seeking an order of attachment ("state court action"). In response, TriPacific and Fearns filed a petition to compel arbitration and Mahathirath/TFM filed a motion to stay arbitration. On May 25, 2021, the Orange County Superior Court granted the petition to compel arbitration, denied as moot Mahathirath/TFM's motion to stay arbitration, and denied Mahathirath/TFM's application for a writ of attachment.

Mahathirath/TFM did not file a Response or Answer to the Demand. Thus, a general denial was entered on their behalf, pursuant to Rule 9(e) of the JAMS Comprehensive Arbitration Rules & Procedures.

On August 11, 2021, Mahathirath/TFM filed a Cross-Complaint against Cross-Respondents, as indicated, that raises eight causes of action: (1) breach of fiduciary duty against Cross-Respondents; (2) breach of written contract against TriPacific; (3) breach of implied covenant of good faith and fair dealing against TriPacific; (4) failure to pay earned wages against TriPacific; (5) waiting time penalties under Labor Code § 203 against TriPacific; (6) equitable accounting against Cross-Respondents; (7) constructive trust against Cross-Respondents; and (8) declaratory judgment against TriPacific. Mahathirath/TFM seek compensatory damages of not less than $8.9 million, punitive damages, waiting time penalties under Labor Code § 203, attorney fees and costs, interest, imposition of a constructive trust, a declaration that TriPacific's demand that Mahathirath/TFM return wages previously earned and paid by TriPacific violates Labor Code § 221, and other just and proper relief.

On August 24, 2021, Cross-Respondents filed a Response to the Cross-Complaint, generally denying all allegations and claims and that Mahathirath/TFM have been harmed, and raised several affirmative defenses. On May 5, 2022, Cross-Respondents filed a First Amended Response to Cross-Complaint, generally denying all allegations and claims and that Mahathirath/TFM have been harmed, and raised numerous affirmative defenses, including: (4) no breaches of contract, violation of law, or other obligation; (6) unclean hands and Civil Code § 3517; (7) bad faith and breach of duty of loyalty under Labor Code §§ 2860, 2861 and 2863; (10) material breach of written contracts, including breach of loyalty and theft of property; (16) no privity of contract between Mahathirath/TFM and Cross-Respondents other than TriPacific; and (18) statutes of limitations. Cross-Respondents pray Mahathirath/TFM recover nothing and bear all arbitration costs, including reasonable attorney fees and experts' expenses and costs incurred by Cross-Respondents, and that Cross-Respondents be awarded other just relief in law or equity, including all payments due with interest.

B. Arbitral Proceedings.

On November 4, 2020, Mahathirath/TFM submitted a letter to JAMS objecting to the arbitrability of TriPacific's claims. On January 6, 2021, the Arbitrator and the Parties held a preliminary conference. At the preliminary conference, the Parties advised the Arbitrator of the state court action and Mahathirath/TFM requested that the Arbitrator stay the arbitration pending the outcome of the cross-motions before the Superior Court. On March 23, 2021, the Arbitrator stayed the arbitration pending the Superior Court's ruling on the motion to compel arbitration.

After the Superior Court granted the motion to compel arbitration, the Arbitrator and the Parties held a case management conference on June 4, 2021, following which the Arbitrator issued Preliminary Order No. 2 setting deadlines for discovery, motions for summary adjudication, and the arbitration hearing. At the case management conference, the Parties agreed that the JAMS Comprehensive Arbitration Rules & Procedures ("JAMS Rules") would apply to the arbitration instead of the JAMS Employment Arbitration Rules & Procedures.

C. Motion for Summary Adjudication.

On May 17, 2022, the Arbitrator granted Cross-Respondents' motions for summary adjudication on the first cause of action for breach of fiduciary duty and seventh cause of action for constructive trust and dismissed those claims. The Arbitrator denied Cross-Respondents' motions for summary adjudication on the other claims in the Cross-Complaint. The Arbitrator's rationale for dismissing the breach of fiduciary cause of action is set forth in Part V.A.1 below.

III. Arbitration Hearing.

A. Witnesses.

The following witnesses testified under oath by videoconference:

- Geoffrey Sterling Fearns

- Blake Evan Pickett
- Julie Susan Hansen
- Tom Fornbouavanh Mahathirath
- Robert Alan Taylor
- David Eugene Nolte

B. Documents.

The following documents were admitted into evidence at the evidentiary hearing: Exhibits 1-93, 94 (Cay Hayne deposition),[1] 95 (Jason Kliewer deposition), 96 (Brett Whitehead deposition), 97 (Gloria Gil deposition), 98-100, 105-115, 117-139, 150, 153-155, and 200-402.

IV. Findings of Fact.[2]

TriPacific is a Delaware limited liability company specializing in the management of institutional capital for the construction and development of residential real estate in the United States. It is a registered investment advisor with the Securities and Exchange Commission. TriPacific solicits investments and uses the capital to finance real estate developments. Over the years, TriPacific had a portfolio of investments in California, Arizona, New York and Georgia. Some residential investment projects run from groundbreaking to the final sale of all homes in a tract.

TriPacific is a wholly owned subsidiary of TMI, which is an S-corporation founded by Fearns in 2007 to hold the membership interests in TriPacific. Fearns is the President of TriPacific and TMI is owned by a Fearns' family trust. Fearns has a law degree and M.B.A. from Stanford University. After graduating law school, Fearns practiced law for a couple of years and then became involved in overseeing real estate development projects. From 1986 to 1994, Fearns was the President of Baldwin Company, a single family residential home developer. From 1994 to 2005, Fearns was employed by Lowe Enterprises ("Lowe"), a multi-faceted real estate company. In 2005, Fearns formed TriPacific and bought part of Lowe's real estate portfolio, including the

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[1] At the arbitration hearing, the Arbitrator overruled TriPacific's objections to portions of Cay Hayne's deposition designated by Respondents/Cross-Complainants, based on JAMS Rule 22:

> Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence....

JAMS Rule 22(d).

[2] The Arbitrator, having considered all documentary and testimonial evidence admitted at the evidentiary hearing, having applied the appropriate burdens of proof and weighed the evidence, and having observed demeanor and made credibility determinations, makes the factual findings set forth herein.

assignment of Lowe's contract with the Los Angeles County Employee Retirement Association ("LACERA"). At the time, the LACERA contract required TriPacific to be exclusive to LACERA; however, that provision ended in 2010.

Over the years, TriPacific invested $300 million on behalf of LACERA. LACERA's last investment through TriPacific was made in 2006. While investing funds for LACERA, Fearns met and worked with Gloria Gil ("Gil"), who later left LACERA to work for the Regents of the University of California ("UC Regents") as the head of its real estate investment division. To date, TriPacific has had only two investor-clients: LACERA and UC Regents.

On July 26, 2013, TriPacific entered into a contract with UC Regents to provide investment advice and to manage certain real estate investments.[3] Under the contract, TriPacific focused solely on single family housing. UC Regents had guidelines TriPacific was required to follow, generally requiring development projects to return equity within four years from the date of investment, limiting the size of the projects depending upon the location, and requiring an investment rate of return ("IRR") in excess of 15%. Under the contract with UC Regents, TriPacific had the potential to earn four types of fees: (1) a one-time equity asset management fee of $550,000 to be paid quarterly during the first year; (2) an incentive fee based on hurdles or goalposts and the IRR; (3) a 2% project management fee based on gross revenues; and (4) a financing fee in the event TriPacific arranged for third-party financing.

Project management fees were intended to pay for services TriPacific provided UC Regents by overseeing capital flow, making sure materials were delivered, ensuring construction was ongoing and meeting legal requirements and standards, the pricing of units, monitoring the sale of units, and the like. At all times, it was TriPacific's and UC Regents' custom and practice or course of conduct under their contract for TriPacific to request 1% project fee payments monthly based on the sale of units in each project and to defer requesting payment of the remaining 1% project management fee until the whole project was closed. TriPacific's course of conduct under the contract was similar to its practice or conduct under its contract with LACERA. UC Regents intended for TriPacific to follow this practice or course of conduct to ensure TriPacific's continued management or oversight of the projects until the very end, so that the builder, insurer and others continued to meet all obligations and liabilities.[4] Deferral of the payment of the final 1% project management fee also benefitted TriPacific by increasing the IRR on the projects.

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[3] The agreement between TriPacific and UC Regents actually consists of two agreements: an Operating Agreement and a Real Estate Advisory and Asset Management Agreement that incorporates and attaches a Statement of Work ("SOW") and addenda that sets forth guidelines, builder criteria, and the fee schedule that lists the types of fees TriPacific could recover and how TriPacific could request payment of fees (other than an Interim Incentive Fee, Holdback Amount).

[4] Even after all the units in a development project are sold, homeowners may bring legal claims against the developer (and others) for breach of contract or warranty.

UC Regents and TriPacific entered into joint ventures (LLCs) for the development and management of the projects, with UC Regents owning 99% of the joint venture and TriPacific owning 1% of the joint venture. Generally, TriPacific prepared monthly fee requests to UC Regents for payment of the initial 1% project management fees, listing all projects, the number of units sold and unsold, and the fee amounts requested. TriPacific also prepared quarterly reports based on the monthly reports and met annually with Gil and her staff to discuss each UC Regents' project, its status, performance, sales of units, and an overview of the locality's market.

Mahathirath and his family immigrated from Laos when he was quite young. Mahathirath obtained a bachelor's degree from Georgia State University. After college, Mahathirath worked for several companies as a financial analyst, investment manager, and fund advisor, gaining expertise in analyzing and structuring real estate investments on behalf of various pension plans and others. Mahathirath worked for TriPacific for seven years, from September 30, 2013 to September 30, 2020.

When TriPacific hired Mahathirath in September 2013, Mahathirath signed an engagement letter that offered employment as TriPacific's Vice President – Investment Manager ("2013 Agreement"). Mahathirath was recruited "to lead the investment team on [TriPacific's] new fund with UC Regents" by placing the fund with investors and to expand TriPacific's "business and client base." Mahathirath reported directly to Fearns. Mahathirath was hired as an at-will employee.[5] Mahathirath received a starting salary of $150,000, potential bonuses, group medical and dental insurance benefits, group life insurance and long term disability benefits, paid time off, eligibility to participate in a 401(k) plan, relocation expenses up to $25,000, an additional $10,000 moving allowance, and a loan up to $75,000 to assist in purchasing a home in Orange County.[6]

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[5] The 2013 Agreement states:

> **At-Will Nature of Employment**
> You understand and agree that nay employment relationship you enter into with the Company[,] its successors or assigns is of an "at will" nature. This means that you are free to end your employment with the Company at any time, with or without cause and with or without advance notice. It also means that the Company may terminate your employment at any time, without or without case and with or without advance notice, and that the Company may modify any aspect, term or condition of your employment (e.g., job duties, title, compensation, hours, benefits, job location, policies and practices – except for the "at will" nature of the employment relationship) at any time, with or without cause and with or without notice. You understand and agree that the "at will" nature of your employment with the Company cannot be modified except by a written agreement signed by the President of the Company.

[6] The following are key provisions in the 2013 Agreement:

> **Bonus Salary/Bonus Compensation through 2014**

Mahathirath was an outstanding Investment Manager who successfully placed UC Regents' $150 million investments and worked closely with Gil. By mid-2015, however, Mahathirath told Fearns he was resigning to establish his own investment fund. Mahathirath understood that by resigning, he would be "walking away" from any bonus not yet been paid to him. After considering his options, Mahathirath changed his mind about resigning and over the

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> Your starting base compensation will be paid at the rate of $150,000 annually, however, you will also be eligible to receive an Achievement Bonus for 2013 and 2014 of up to of [sic] 50% of your annual base salary (i.e., $75,000/year, prorated for 2013), based upon the satisfactory achievement of certain investment goals that we will mutually establish. *All bonus awards, including your Achievement Bonus, are fully discretionary.* However, as we discussed you will be permitted to draw up to 50% of your potential annual Achievement Bonus ratably each month with your salary through 2014, bringing your effective base compensation to $187,500/year. Your base compensation will be reviewed at the end of each calendar year beginning in 2014. Paychecks are distributed on the 15th and the last day of each month.
>
> **Bonus Compensation - Post-2014**
> After 2014, your bonus compensation will be tied to fee income generated by the projects/investments you originate, as well as to the Company's overall profitability as set forth below. As you know, *we recently finalized an arrangement with UC Regents for a new housing fund which provides for both Management Fees on a project-by-project basis*, as well as incentive fees if the housing program portfolio as a whole exceeds certain performance hurdles. *I anticipate you participating in these fees as follows*:
>
> • Management Fees – You will be eligible to receive Ten Percent (10%) of the Management Fees generated by the *investments/projects you originate.* As we discussed, our current deal with UC Regents calls for TriPacific to receive Management Fees of up to 2% of all investment Gross Revenues collected.
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> • Profit Participation – Ten Percent … of the Company's GAAP Net profits are set aside as a bonus pool for senior managers (typically those at the officer level). The Company's net profits are significantly influenced by portfolio performance and the consequent receipt of incentive fees, and hence the majority of this profit pool is typically allocable to investment originators. As we discussed, at this juncture you are the only individual employed in this capacity by TriPacific (albeit as additional capital is raised the Company will likely need to hire additional investment personnel in order for the funds to be prudently deployed). Although *participation in this pool is fully discretionary*, it will be based heavily upon the performance of your investments and their contribution to the firm's bottom line.
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> **Bonus/Participation Payments.**
> Bonus/participation awards are typically paid 50% on or before December 31 of the calendar year in which they are awarded, with the balance paid on or before March 31 of the following year. *You must be employed at the time any bonus or other payments are made in order to be eligible to receive them. All bonus/participation awards and the timing of their payment are at the Company's discretion* and subject to change.

(emphasis added).

next few months, he and Fearns negotiated a new compensation agreement. At all times, Mahathirath understood that TriPacific's custom and practice or course of conduct with UC Regents was to defer requesting payment of the final 1% project management fees until each project was closed.

On January 14, 2016, Mahathirath signed the 2016 Agreement, which increased his compensation and responsibilities. And for estate planning purposes, Mahathirath executed an assignment of his bonus compensation from TriPacific to his own company called TFM, which was owned by Mahathirath and his wife. The 2016 Agreement changed Mahathirath's title to Executive Vice-President, increased Mahathirath's responsibilities to include overseeing Paul Manning ("Manning"), a long-term Vic-President and manager who was responsible for underwriting, and Blake Pickett ("Pickett"), another long-term Vic-President and manager who was responsible for operations, and changed his salary and bonus compensation.[7] Mahathirath's annual salary was increased to $250,000, he was provided a guaranteed $50,000 draw, and he would receive potential bonuses based on TriPacific's net profits.[8] Additionally, TriPacific forgave

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[7] The 2016 Agreement provides:

> **1. Recitals.** In 2015, TriPacific fully invested its initial investment tranche with UC Regents. This first tranche ("Tranche 1") was comprised of approximately $79M of equity committed as of September 1, 2015 across 9 separate projects. Additional funding has been granted by UC Regents, and *in recognition of your efforts to place the funds in Tranche 1 and your ongoing performance to solicit additional investment opportunities and capital*, we have mutually agreed to adjust your compensation and title as set forth below.
>
> **2. Position and Duties.** You have been promoted to Executive Vice-President of the Company, and your duties will include the *solicitation and origination of new capital and new investments/business opportunities, as well as general oversight of investment operations and project management*. You will report to the President, who may alter or otherwise modify the terms, conditions and responsibilities of your position from time-to-time as he deems appropriate.

(emphasis added).

[8] The 2016 Agreement contains the following key provisions:

> **3. Base Salary.** Your base compensation has been established at $250,000 annually beginning January 1, 2016, however, you shall be permitted to draw an additional $50,000 ratably over the year along with your salary, bringing your effective base compensation to $300,000/year. This additional $50,000 draw shall however, be considered an advance against the bonus compensation set forth below.
>
> **4. Bonus Compensation.** Pursuant to the terms of your original employment letter dated September 3, 2013 (**"the Original Letter,"** incorporated here by reference), you will continue to receive Ten Percent (10%) of the Management Fees generated by the investments/projects you originated in Tranche 1, and be eligible for a discretionary bonus tied to the Company's profitability. For all new investments funded after Tranche 1 however (**"New Investments"**), your Bonus compensation *shall* instead be equal to Fifty Percent (50%) of the Net Profits attributable to

a loan that assisted Mahathirath in buying a house. Lastly, the 2016 Agreement contains the certain Acknowledgements /Representations quoted in Part I above.

In the first quarter of 2017, TriPacific received a final $4 million payment from LACERA. TriPacific did not pay Mahathirath a bonus based on the LACERA payment. Rather, TriPacific paid bonuses to: Manning, Pickett and Julie Hansen, who was (and is) TriPacific's Controller. These Vice-Presidents and managers actively managed LACERA's investments before 2017. Although Mahathirath gave some limited "advice" to Manning and Pickett about LACERA projects, his managerial work was negligible.

After signing the 2016 Agreement, Mahathirath became increasingly worried about the lack of a severance package if he were to leave TriPacific and started pressuring Fearns to make him a partner in TriPacific. In June of 2018, Mahathirath arranged for a special client appreciation

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those investments (the **"Profit Share Percentage"** or **"Profits Interest"**), calculated as set forth below.

a. Net Profits. The term **"Net Profits"** shall mean the Company's GAAP net income before taxes but after all Expenses, which shall include, without limitation, deductions for all salaries, bonuses, overhead, rent, administrative costs, capital charges, financial costs, operating losses and all other payments, costs and expenses incurred by the Company or made in respect to the operation of TriPacific. The foregoing shall also include the amount of any costs, gains or losses incurred or attributable to any co-investment made by the Company.

b. Net Profits Calculation – New Investments. Because your Bonus compensation differs between Tranche 1 investments and New Investments, the Company Controller shall, so long as any Tranche 1 investment remains outstanding, prepare a New Profits calculation specifically attributable to New Investments which shall be used to determine your Profits Interest. This calculation shall consist of the gross revenues generated by the New Investments less: (i) all costs attributable specifically to such investments; and (ii) an allocation of all other Company Expenses (e.g., salaries, overhead, etc.) which shall be apportioned between Tranche 1 and the New Investments as determined by the Controller based generally upon the ratio of gross revenues generated by each portfolio. In addition, an adjustment will be made to the Net Profits calculation in order to account for the difference in our respective salaries.

5. Other Compensation.

a. 2014 Bonus Advance. In 2014, an additional $50,000 bonus payment was made to you as an advance against future bonus compensation. We have agreed that this sum will now be considered a part of your total compensation for 2014 and not an advance to be deducted from future bonus awards.

b. Home Loan. As part of your relocation package, the Company provided you with a loan to acquire your current residence. The balance due on this loan as of 12/31/15 was $212,500. We have agreed that 50% of this debt ($106,250) would be forgiven at the end of 2015, with the remaining balance forgiven as of 12/31/16 provided you remain employed by the Company as of that date.

and networking weekend in Napa. Before the weekend event, Mahathirath met privately with Gil at UC Regents' offices to discuss his desire to become a partner in TriPacific and to inquire about being considered for a new "emerging manager" program that UC Regents implemented to increase diversity. Gil advised Mahathirath that he was not qualified to participate in the emerging manager program and he needed a large company with a solid history of success to be selected; however, TriPacific was probably too small. Nevertheless, at the Napa event, Mahathirath spoke with Fearns about the emerging manager program; but Fearns was not receptive, viewing Mahathirath's enthusiasm as an attempt to become 51% owner of TriPacific.

After the Napa event, Mahathirath urged Gil to contact Fearns about making him a partner in TriPacific and also about TriPacific participating in the emerging manager program. At Mahathirath's urging, Gil telephoned Fearns twice to discuss why Mahathirath was not a partner. In a conversation, Gil told Fearns that Mahathirath had asked her to contact him about the partnership. Fearns viewed Mahathirath's conduct as unprofessional and warned him to never again contact an investor about TriPacific's private business.

Once he settled into Orange County, it appears that Mahathirath overextended himself financially. Under the 2016 Agreement, he requested and received regular, monthly advances on expected bonuses, which continued throughout his employment. In order to increase his bonuses, in 2019, Mahathirath misrepresented to Fearns that the builder of the Port Imperial project was going to buy out TriPacific's interest in a couple of months and asked Fearns to request immediate payment from UC Regents of the deferred final 1% project management fee although the project was not yet closed.[9] Fearns acquiesced to Mahathirath's request and Mahathirath received a $1 million bonus, as a result. However, Port Imperial's builder did not buy-out TriPacific's interest and the project did not close until 2022.

In May 2020, UC Regents formally advised Fearns it would no longer place new real estate investments through separate account managers, such as TriPacific, although investments already in progress would be completed. TriPacific's last new project with UC Regents was in the fourth quarter of 2019. As of the date of the arbitration hearing, there were three projects (in Scottsdale and Atlanta) that remained open. These projects are expected to close in late 2023 -- at a loss. Based on the loss projections, UC Regents authorized payment to TriPacific of $1.5 million as an offset. The open projects in the UC Regents' portfolio are being managed or overseen by Fearns, Manning and Pickett. To date, TriPacific has not found any new sources of investment funding.

Starting in March of 2020, Mahathirath worked from home due to COVID-19. Mahathirath was complying with public health mandates and protecting his son from infection. On August 21,

[9] The Port Imperial project was a $75 million mid-rise condominium project in New Jersey that Mahathirath had put together over a lengthy period of time a couple of years earlier.

2020, TriPacific advised Mahathirath that he had been overpaid, based on his advances and TriPacific's projected net revenues. On September 30, 2020, TriPacific terminated Mahathirath's employment. At the time, TriPacific had overpaid Mahathirath $110,090 under the 2016 Agreement. The main reason TriPacific terminated Mahathirath was because TriPacific no longer could make investments for UC Regents, which significantly reduced Mahathirath's role. In addition, however, Fearns opined that Mahathirath was not working with Pickett and Manning in fulfilling his obligation to manage UC Regents' projects.

While he was employed by TriPacific, Mahathirath received salary in the amount of $1.55 million and bonuses totaling $6.63 million, as follows: $9,375 in 2013; $175,000 in 2014; $243,340 in 2015; $550,600 in 2016; $791,651 in 2017; $2.12 million in 2018; $1.6 million in 2019; and $1.13 million in 2020. In addition to salary and bonuses, Mahathirath received a monthly car allowance and a loan to help him buy a house in Orange County.

When Mahathirath learned that UC Regents were no longer making new investments, he began to look for capital to start his own investment firm. Mahathirath did not manage UC Regents' projects. In his search for capital, Mahathirath used TriPacific's information (on the Surface Pro 6 laptop that TriPacific had purchased for him) and also shared TriPacific's documents with others. Mahathirath has refused to return the Surface Pro 6 to TriPacific despite several demands that he return it.

Mahathirath views himself as a self-made man who is exempt from complying with the usual workplace and societal norms, as shown *inter alia* by his actions urging Gil to contact Fearns about a partnership, his misrepresentation regarding the status of the Port Imperial project, his refusal to return TriPacific's laptop, and his unwillingness to meet his discovery obligations as a litigant. Mahathirath's testimony has limited credibility.

V. DISCUSSION.[10]

A. Mahathirath/TFM's Cross-Complaint.

1. Breach of Fiduciary Duty (First Cause of Action).

a. Legal Standards.

"The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) the breach of the duty; and (3) damage proximately cause by that breach." *IIG Wireless, Inc. v. Yi* (2018) 22 Cal. App. 5th 630, 646 (internal quotation marks and citation omitted); *Hasso v. Hapke* (2014) 227 Cal. App. 4th 107, 140. "The breach of fiduciary duty claim can be based upon either negligence or fraud, depending on the circumstances." *Tribeca*

[10] The Arbitrator has considered the Parties' arguments and authorities in making the determinations and reaching the conclusions in the Discussion even if the arguments and authorities are not referenced.

Companies, LLC v. First Am. Title Insur. Co. (2015) 239 Cal. App. 4th 1088, 114 (citation omitted).

A fiduciary relationship is "any relationship between two parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party." *Wolf v. Sup. Ct.* (2003) 107 Cal. App. 4th 25, 29. "There are two kinds of fiduciary duties --- those imposed by the law and those undertaken by agreement." *GAB Bus. Servs., Inc. v. Lindsey & Newsom Claim Servs., Inc.* (2000) 83 Cal. App. 4th 414, 416, *disapproved on other grounds in Reeves v. Hanlon* (2004) 33 Cal. 4th 1140 (citations omitted)).

"In general, employment-type relationships are not fiduciary relations." *O'Byrne v. Santa Monica-UCLA Med. Ctr.* (2001) 94 Cal. App. 4th 797, 811-812 (citation omitted). "In the absence of a fiduciary relationship, there can be no breach of fiduciary duty as a matter of law. Summary judgment thus was properly granted as to plaintiff's cause of action for breach of fiduciary duty." *Id.* at 812 (citation omitted).

b. Analysis.

Cross-Respondents have shown there was no fiduciary relationship between Mahathirath and TriPacific; only an employment relationship. TFM was merely an assignee; not even an employee. In fact, TFM/Mahathirath have not presented any evidence establishing grounds for a fiduciary relationship and rely solely on allegations in the Cross-Complaint to respond. *See, e.g., Soderstedt v. CBIZ Southern Cal., LLC* (2011) 197 Cal. App. 4th 133, 154-155 ("[P]leadings are allegations, not evidence, and do not suffice to satisfy a party's evidentiary burden." (citation omitted). Accordingly, the Arbitrator granted TriPacific's motion for summary adjudication on the first cause of action for breach of fiduciary duty and, prior to the arbitration hearing, dismissed the breach of fiduciary duty claims by Mahathirath and TFM, separately.

2. Breach of Contract Claim (Second Cause of Action).

a. Legal Standards.

The elements to establish a breach of contract claim are: (1) the existence of a contract; (2) plaintiff's performance or excuse for non-performance; (3) defendant's breach; and (4) damages to plaintiff. *Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal. App. 4th 437, 447. Generally, a breach of contract exists "only when it is 'of so material and substantial a nature that [it] affect[s] the very essence of the contract and serve[s] to defeat the object of the parties.... [The breach must constitute] a total failure in the performance of the contract.'" *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 586 (9th Cir. 1993) (brackets in original; citation omitted). "Normally the question of whether a breach of an obligation is a material breach, ... is a question of fact. However, if reasonable minds cannot differ on the issue of materiality, the issue may be resolved as a matter of law." *Brown v. Grimes* (2011) 192 Cal. App. 4th 265, 277-278 (citations omitted).

"The interpretation of a written instrument, even though it involves what might properly be called questions of fact, is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect." *Parsons v. Bristol Dev. Co.*(1965) 62 Cal. 2d 861, 865 (citations omitted). "The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties." *Bank of the West v. Sup. Ct.* (1992) 2 Cal. 4th 1254, 1264; *see also* Cal. Civ. Code § 1636 (Arbitrator has a duty to interpret a contract "as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."); *id.* § 1642 ("Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."); *id.* § 1643 ("A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.").

The rules of contract interpretation "require us to look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it." *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal. 4th 1, 18; *see also* Cal. Civ. Code § 1638 ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."). In other words, the parties' "intent is to be inferred, if possible, solely from the written provisions of the contract. ([Cal. Civ. Code] § 1639.) The clear and explicit meaning of these provisions, interpreted in their ordinary and popular sense unless used by the parties in a technical sense or a special meaning is given to them by usage, controls judicial interpretation." *Waller*, 11 Cal. 4th at 18 (internal quotation marks and citation omitted); *see also* Cal. Code Civ. § 1641 ("The whole of the contract is to be taken together so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."); *Hewlett-Packard Co. v. Oracle Corp.* (2021) 65 Cal. App. 5th 506, 531 ("To interpret a contract, we look to its language ([Cal. Civ. Code] § 1638) and ascertain the intent of the parties, if possible, based solely on the contract's written provisions (§ 1639). In so doing, we apply the 'clear and explict' meaning of these provisions, interpreted in their 'ordinary and popular sense'...." (citation omitted)).

In addition to the words used in the agreement, to establish the parties' mutual intent, courts also consider "extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent acts and conduct of the parties." *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1999) 68 Cal. App. 4th 445, 474 (citations omitted); *see also Woodbine v. Van Horn* (1946) 29 Cal. 2d 95, 104 (The "construction given the contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the courts."); *Kennecott Corp. v. Union Oil Co. of Calif.* (1987) 196 Cal. App. 3d 1179, 1189 ("The conduct of the parties after execution of the contract and before any controversy has arisen as to its effect affords the most reliable evidence of the parties' intentions." (citations omitted)).

"[T]he trial court may properly admit[] evidence extrinsic to the written instrument to determine the circumstances under which the parties contract and the purpose of the contract." *Parsons*, 62 Cal. 2d at 864-865. The trial court engages in a three-step process: "First, it provisionally receives any proffered extrinsic evidence that is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. If, in light of the extrinsic evidence, the language is reasonably susceptible to the interpretation urged, the extrinsic evidence is then admitted to aid the court in its role in interpreting the contract." *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal. App. 4th 1107, 1126 (*Wolf II*); *Brown v. Goldstein* (2019) 34 Cal. App. 5th 418, 432-433.[11] "Accordingly, rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties. Such evidence includes testimony as to the circumstances surrounding the making of the agreement ... including the object, nature and subject of the writing ... so that the court can place itself in the same situation in which the parties found themselves at the time of contracting." *Pacific Gas & Elec. Co. v. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal. 2d 33, 40 (footnote and citations omitted).[12] Even if the contract is not ambiguous on its face, extrinsic evidence may be allowed to ascertain the intent of the parties at the time the contract was executed. *City of Hope Nat'l Med. Ctr. v. Genentech, Inc.* (2008) 43 Cal. 4th 375, 395.[13]

As to employment agreements, "[i]ncentive compensation, such as bonuses and profit-sharing plans, also constitute wages." *Schachter v. Citigroup, Inc.* (2009) 47 Cal. 4th 610, 618 (internal quotation marks and citations omitted); *see also Neisendorf v. Levi Strauss & Co.* (2006) 143 Cal. App. 4th 509, 522-523 ("[O]nce a bonus has been promised as part of the compensation for service, and the employee fulfills all the agreed-to conditions, the promised bonus is considered wages that must be paid. Consequently, defining bonuses as wages protects an employee's expectation of promised remuneration and prevents the employer from arguing that the promised bonus was an unenforceable gift or gratuity." (citing *DiGiacinto v. Ameriko-Omserv Corp.* (1997) 59 Cal. App. 4th 629, 635 (other citation omitted)). "Eligibility to receive incentive compensation

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[11] "Although the parol evidence rule results in the exclusion of evidence, it is not a rule of evidence but one of substantive law." *Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass'n* (2013) 55 Cal. 4th 1169, 1174 (citation omitted).

[12] "If, however, there is a conflict in the extrinsic evidence, the factual conflict is to be resolved by the jury." *Wolf II*, 162 Cal. App. 4th at 1127.

[13] This is true even if the agreement is an integrated agreement. *See, e.g., Bert G. Gianelli Dist. Co. v. Beck & Co.* (1985) 172 Cal. App. 3d 1020, 1037 n. 4, *disapproved on other grounds by Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal. 4th 384, 389 ("If a writing is deemed integrated, extrinsic evidence is admissible ... if it is relevant to prove a meaning to which the language is reasonably susceptible." (citations omitted)).

is properly determined by the … plans' specific terms and general contract principles." *Schachter*, 47 Cal. 4th. at 621 (internal quotation marks and citation omitted).

b. Analysis.

Considering the circumstances surrounding the making of the 2013 Agreement and 2016 Agreement, including the Parties' extrinsic evidence regarding intent and their course of conduct under the agreements, the Arbitrator concludes that the Parties' mutual intentions when entering into the agreements support TriPacific's interpretations of the agreements.[14] The following conclusions flow inexorably from the Findings of Fact: TriPacific did not materially breach either the 2013 Agreement or the 2016 Agreement.

The purposes of the 2013 Agreement and 2016 Agreement were to provide the terms and conditions governing TriPacific's initial employment of Mahathirath and continued employment of Mahathirath, respectively. As to the 2013 Agreement, the Parties dispute whether they intended for Mahathirath to have a right to a bonus on the LACERA payment under the Bonus Compensation – Post-2014 Profit Participation provision. On the one hand, Mahathirath contends he is eligible for a 10% bonus on the final $4 million LACERA payment because the intention behind the Profit Participation provision was to enshrine the "company sweep" principle in order to bridge the financial span between his new salary and bonuses (which he would not receive immediately) and his old salary and benefits. On the other hand, TriPacific contends the Profit Participation provision is fully discretionary and, in any event, was intended to apply solely to managers who originated or managed LACERA projects, as Mahathirath fully understood.

The Arbitrator concludes that the Profit Participation provision is clear and unambiguous and was not intended to afford Mahathirath a bonus on the final LACERA payment. Mahathirath's testimony simply is not credible. His testimony is not supported by any documentary evidence (correspondence or emails); his testimony conflicts significantly with Fearns' testimony, who drafted the provision; and, more importantly, the circumstances existing at the time he entered into the agreement undermine Mahathirath's testimony. When Mahathirath joined TriPacific in 2013, TriPacific employed several long-term Vice-Presidents who managed LACERA's projects and were eligible for bonuses related to payments on those projects. The Profit Participation provision in the 2013 Agreement was not intended to replace those managers with Mahathirath vis-à-vis bonuses stemming from LACERA's projects. And Mahathirath's testimony that he actively

[14] Paragraph 7 of the 2016 Agreement provides that the "agreement shall be construed as a whole according to its fair meaning and not strictly construed for or against either of the parties…. Each side has had the opportunity to consult with their own attorney prior to executing this agreement and been given adequate time to carefully read and consider it, and knowingly and freely executes this document." This provision conflicts with the standard California rule of contract interpretation that ambiguities in contracts are to be construed against the drafter, i.e., TriPacific. *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal. 5th 233, 248. Nevertheless, because the Arbitrator has not found any ambiguities in the 2016 Agreement, she has not applied this provision.

managed some LACERA projects, thus entitling him to a bonus, is without merit since his management efforts were negligible. Further, Mahathirath's conduct from April 2017 until his termination conflicts with his interpretation of the Project Participation provision. Although Mahathirath did not receive a bonus based on the final LACERA payment in 2017, he undoubtedly was aware of the payment to TriPacific and, nevertheless, did not contest TriPacific's failure to pay him a bonus based on the $4 million payment. For these reasons, Mahathirath is not entitled to any bonus based on the $ 4 million LACERA payment to TriPacific in 2017.

As to the 2016 Agreement, the Parties dispute whether Mahathirath has: (i) earned bonuses that TriPacific did not pay relating to UC Regents' projects, and (ii) substantially earned bonuses that TriPacific did not pay him. Initially, the Arbitrator concludes that Mahathirath's right to a bonus under the 2016 Agreement is not discretionary. Rather, Paragraph 4, the Bonus Compensation provision in the 2016 Agreement, states that Mahathirath's bonus compensation "shall … be equal to Fifty Percent … of the Net Profits attributable to those investments…." The use of the word "shall" eliminates any discretion.

Nevertheless, Mahathirath has not shown that TriPacific materially breached the 2016 Agreement by failing to pay him earned bonuses or substantially earned bonuses. The circumstances surrounding the 2016 Agreement establish that when Mahathirath and TriPacific entered into the contract both parties mutually intended to incorporate into the agreement TriPacific's custom and practice of deferring requests for payment from UC Regents of the final 1% management fees until the whole development project was closed. In other words, the parties intended that Mahathirath would not immediately earn a bonus on the final 1% of the 2% management fees until the final 1% was requested at the close of the project. Mahathirath was well aware that TriPacific and UC Regents followed this course of conduct under their contract because it protected the UC Regents as the investor.[15] Moreover, TriPacific (Fearns) and UC Regents (Gil) were comfortable with this conduct because it was the customary practice followed by TriPacific and LACERA under their contract.

Although there was one exception to TriPacific following its usual practice prior to Mahathirath's termination, i.e., the Port Imperial project, the exception did not change the usual course of conduct between TriPacific and UC Regents. Rather, the exception was caused by Mahathirath's misrepresentation to Fearns that the Port Imperial project would close in the near future because the builder was going to buy out TriPacific, as set forth in the Findings of Fact.

Moreover, Mahathirath's own actions under the 2016 Agreement were in accordance with TriPacific's course of conduct. Prior to his termination, Mahathirath accepted bonuses based solely on the initial 1% project management fees and did not object to not receiving bonuses on

[15] The Arbitrator finds credible Gil's deposition testimony that UC Regents' intended for TriPacific to defer requesting payments of the final 1% management fees until projects closed.

the final 1% project management fees prior to the closure of the whole project (other than for the Port Imperial project, discussed above). It is true, of course, that TriPacific did not comply with all GAAP accounting principles in calculating Mahathirath's bonuses. And this is a breach of the 2016 Agreement. However, the breach was not a material breach; to the contrary, Mahathirath received larger bonuses than he would have received if TriPacific had followed all GAAP accounting principles.

Additionally, it is clear that the Parties intended that the 2016 Agreement would incorporate the following provision in the 2013 Agreement: "You must be employed at the time any bonus or other payments are made in order to be eligible to receive them." Thus, under the 2016 Agreement, Mahathirath has no entitlement or right to any bonus after being terminated. Mahathirath candidly acknowledged that he understood he was bound by the foregoing provision in his discussions with Gil. In fact, this provision, when viewed as the lack of a severance package, appears to have been the motivation for Mahathirath to seek a partnership with Fearns. And a reasonable inference may be drawn that this provision was the primary reason Mahathirath did not resign from TriPacific in 2020 although he wanted to form his own investment company.

Finally, it must be noted that at the time he was terminated, Mahathirath had not completed all his duties and responsibilities as TriPacific's employee. He was not searching for new investments for TriPacific; instead he was searching for funding for his own investment firm. And he was not managing UC Regents' projects in coordination with Manning and Pickett.

For all these reasons, Mahathirath has not shown that TriPacific materially breached the 2016 Agreement. Because Mahathirath has not shown that TriPacific materially breached either the 2013 Agreement or 2016 Agreement, Mahathirath cannot establish an essential element for a breach of contract claim and the claims for breach of contract are dismissed.[16] As such, Mahathirath is not entitled to an equitable accounting and declaratory relief and those requests are denied.

3. Breach of Implied Covenant of Good Faith and Fair Dealing (Third Cause of Action).

a. Legal Standards.

"In addition to the duties imposed on contracting parties by the express terms of their agreement, the law implies in every contract a covenant of good faith and fair dealing." *Fleet v. Bank of America N.A.* (2014) 229 Cal. App. 4th 1403, 1409 (internal quotation marks and citations

[16] There is no reason to address TriPacific's defenses that Mahathirath has unclean hands and breached the duty of loyalty owed an employer, in light of the conclusions that Mahathirath's breach of contract claim is without merit. *See, e.g., Mills v. Green* (1895) 159 U.S. 651, 653 ("The duty of this court, and of every other judicial tribunal, is … not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."); *Becerra v. McClatchy Co.* (2021) 69 Cal. App. 5th 913, 927 n.4 (holding mootness exists "when the occurrence of events renders it impossible for the … court to grant … any effective relief").

omitted). As such, the implied covenant of good faith and fair dealing is "a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract." *Racine & Laramie, Ltd., Inc. v. Calif. Dept. of Parks & Recs.* (1993) 11 Cal. App. 4th 1026, 1031-1032. "For this reason, it is well established that an implied covenant cannot create an obligation inconsistent with an express term in the agreement." *Nein v. HostPro, Inc.* (2009) 174 Cal. App. 4th 833, 852 (citations omitted).

"The implied covenant is designed to effectuate the intentions and reasonable expectations of the parties reflected by mutual promises within the contract." *Nein,* 174 Cal. App. 4th 833, 852 (internal quotation marks and citations omitted). "The precise nature and extent of the duty imposed by such an implied promise will depend on the contractual purposes." *Fleet*, 229 Cal. App. 4th at 1409 (internal quotation marks and citations omitted); *see also Guz v. Bechtel National, Inc.* (2000) 24 Cal. 4th 317, 353, n. 18 ("[T]he covenant prevents a party from acting in bad faith to frustrate the contract's actual benefits. Thus, for example, the covenant might be violated if termination of an at-will employee was a mere pretext to cheat the worker out of another contract benefit to which the employee was clearly entitled, such as compensation already earned.").

"[W]here a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing." *King v. U.S. Bank National Assn.* (2020) 53 Cal. App. 5th 675, 706-707 (internal quotation marks and citation omitted). In other words, "[t]he covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith." *Carma Developers (Calif.), Inc. v. Marathon Development Calif., Inc.* (1992) 2 Cal. 4th 342, 372 (citations omitted). "It is universally recognized that the conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract." *Id.* at 373 (citations omitted).

b. Analysis.

There is no evidence from which a reasonable inference may be drawn the TriPacific acted in bad faith by terminating Mahathirath's employment in order to avoid paying him earned bonuses. Mahathirath did not earn or substantially earn any bonuses that were not paid to him. First, as determined above regarding the breach of contract claim, TriPacific did not act in bad faith or abuse its discretion when it followed its usual custom and practice of deferring requests to UC Regents for payment of the final 1% management fees until the projects closed. Second, although TriPacific did not uniformly apply GAAP principles at all times, Mahathirath has not shown that this breach of the 2016 Agreement was a material breach that caused him financial harm. And third, Mahathirath was terminated because UC Regents were no longer using TriPacific to fund investments, thus decreasing Mahathirath's responsibilities, and Mahathirath did not

appear to be working smoothly with Manning and Pickett in continuing to perform his ongoing duties of overseeing or managing UC Regents' projects.

For these reasons, Mahathirath had not established the elements for breach of the implied covenant of good faith and fair dealing and the cause of action is dismissed. As such, Mahathirath is not entitled to an accounting and declaratory relief and those requests are denied.

4. Labor Code Violations (Fourth and Fifth Causes of Action).

a. Legal Standards.

"If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." Lab. Code § 201. "Section 203 penalties for willful delays in the payment of end-of-employment wages are commonly referred to as 'waiting time penalties.'" *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal. 5th 93, 106 (citation omitted). Labor Code §§ 201 and 203 are "to compel the immediate payment of earned wages upon a discharge. The prompt payment of an employee's wages is a fundamental public policy of this state." *Kao v. Holiday* (2017) 12 Cal. App. 5th 947, 962 (citations omitted).[17]

The statute of limitations for bringing wage and penalty claims under Labor Code §§ 201 and 203 is three years under Code of Civil Procedure § 338. *See, e.g., Pineda v. Bank of America, N.A.* (2010) 50 Cal. 4th 1389, 1396 ("[T]he Legislature intended to ensure that the statute of limitations on an action for section 203 penalties tracks the statute of limitations governing actions for unpaid final wages."). "The duty to pay wages attaches before the time of discharge and is owed at the time of discharge." *Naranjo*, 13 Cal. 5th at 115.

"Employers must provide itemized wage statements to employees containing specified information, including wages earned and hours worked. (Lab. Code, § 226, subd. (a).)" *Kao*, 12 Cal. App. 5th at 960. "The requirement is mandatory. An employer's failure to comply constitutes a statutory violation." *Id.* at 960-961 (internal quotation marks and citation omitted). "An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with wage statement requirements is entitled to specified damages, an award of costs and

[17] "A willful failure to pay wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages are due. However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203." 8 Cal. Code Regs. § 13520. "A 'good faith dispute' that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee...." Id., subd. (a). "[Section 13520] imposes an objective standard." *FEI Enterprises, Inc. v. Yoon* (2011) 194 Cal. App. 4th 790, 802 (footnote omitted). "The failure to pay is willful if the employer knows what [it] is doing [and] intends to do what [it] is doing, and does not require proof that the employer acted with a deliberate evil purpose to defraud work[ers] of wages which the employer knows to be due...." *Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal. App. 5th 859, 868 (internal quotation marks, citations and footnote omitted).

reasonable attorney fees. (Lab. Code, § 226, subd. (e).)." *Id.* at 960 (internal quotation marks omitted).

b. Analysis.

The Cross-Complaint alleges that TriPacific failed to pay Mahathirath all earned wages due in violation of Labor Code § 201 (fourth cause of action) and, thus, Mahathirath is entitled to waiting time penalties under Section 203 (fifth cause of action). The Parties agree that the Labor Code claims are derivative of the breach of contract claims. As discussed above, Mahathirath's breach of contract claims fail on the merits. Mahathirath has not shown that TriPacific materially breached either the 2013 Agreement (by failing to pay him earned wages, including a bonus based on the LACERA payment) or the 2016 Agreement (by failing to pay him all earned wages or substantially earned wages). In light of these conclusions, Mahathirath also has not established that TriPacific violated Labor Code § 201 by failing to pay him all earned wages due on termination or that he is entitled to waiting time penalties under Section 203. In light of these conclusions, TriPacific's statute of limitations defense is moot and need not be addressed. *See, e.g., Mills*, 159 U.S. at 653; *Becerra*, 69 Cal. App. 5th at 927 n.4.

Mahathirath/TFM's fourth and fifth cause of action for violation of Labor Code §§ 201 and 203 are dismissed. As such, Mahathirath is not entitled to an accounting and declaratory relief and those requests are denied.

5. Claims Against TMI and Fearns.

a. Legal Standards.

"Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations." *Sonora Diamond Corp. v. Sup. Ct.* (2000) 83 Cal. App. 4th 523, 538. Under California law, the business judgment rule immunizes directors of corporations from liability by statute and common law. *Coley v. Eskaton* (2020) 51 Cal. App. 5th 943, 952-953. "Deference under the business judgment rule is premised on the notion that corporate directors are best able to judge whether a particular transaction will further the company's best interest. But the premise is undermined when directors approve corporate transactions in which they have a material personal interest unrelated to the business's own interest." *Id.* (citation omitted).

However, "A corporate identity may be disregarded – the 'corporate veil' pierced – where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation." *Sonora Diamond Corp.*, 83 Cal. App. 4th at 538. "The alter ego doctrine arises when a plaintiff comes into court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff's interests. In certain circumstances the court will disregard the corporate entity and will hold the individual shareholders [or corporate officers] liable for actions of the corporation[.]" *Mesler v. Bragg Managem't Co.* (1985) 39 Cal.

3d 290, 300 (citation omitted). "It is well-settled that the alter ego doctrine is essentially an equitable one and for that reason is particularly within the province of the trial court." *Dow Jones Co., Inc. v. Avenel* (1984) 151 Cal. App. 3d 144, 147. "Alter ego is an extreme remedy, sparingly used." *Hasso v. Hapke* (2014) 227 Cal. App. 4th 107, 155.

b. Analysis.

Mahathirath/TFM initially sued Fearns and TMI on several causes of action. Only the claims for an equitable accounting and declaratory relief remain. In light of the dismissal of Mahathirath's claims for breach of contract, breach of implied covenant of good faith and fair dealing, and violations of the Labor Code, there are no grounds to support Mahathirath's claim for an equitable accounting and declaratory relief. There is no need to determine whether Mahathirath has met the evidentiary standard for establishing alter ego against Fearns and TMI because the issue is moot. *See, e.g., Mills*, 159 U.S. at 653; *Becerra*, 69 Cal. App. 5th at 927 n.4. The claims against Fearns and TMI are dismissed.

B. TriPacific's Demand.

1. Breach of Contract.

TriPacific has established that in 2020, Mahathirath was overpaid in the amount of $110,090, comparing his salary and advances against the earned bonuses, based on the Legal Standards and Analysis set forth in Part A.1 above. Although TriPacific has asked Mahathirath to pay back this amount, he has not done so. Additionally, TriPacific may be entitled to interest at the rate of 10% per annum, running from the date of termination on September 30, 2020, until paid in full. At the Arbitrator's request, the Parties reached an agreement that Mahathirath/TFM had satisfied the award of $110,900 plus interest by paying $132,677 to TriPacific. Additionally, the Parties also agreed that Mahathirath/TFM, separately and jointly, shall pay Cross-Respondents $49,434.80 for various fees and costs and that amount should be added to the Final Award.

2. Declaratory Relief.

a. Legal Standards.

"Declaratory relief actions are well-recognized in California law." *Snyder v. California Ins. Guarantee Ass'n* (2014) 229 Cal. App. 4th 1196, 1207. "A complaint for declaratory relief is legal sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudicated by the court." *Maguire v. Hibernia Savings & Loan Soc.* (1944) 23 Cal. 2d 719, 728 (citations omitted); *see also* Cal. Code Civ. Proc. § 1060 (A party to "a contract … may … bring an original action or cross-complaint … for a declaration of his or her rights and duties …, including determination of any question of construction or validity arising under the instrument or contract.…").

"The purpose of a declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation. Another purpose is to liquidate doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation. One test of the right to institute proceedings for declaratory judgment is the necessity of present adjudication as a guide for plaintiff's future conduct in order to preserve his legal rights." *Kendall v. Scripps Health* (2017) 16 Cal. App. 5th 553, 575-576 (cleaned up and citation omitted); *see also Monterey Coastkeeper v. Central Regional Water Quality Control Board* (2022) 76 Cal. App. 5th 1, 13 ("A party seeking declaratory relief must show a very significant possibility of future harm." (citation omitted).).

"[A]n actual controversy under the declaratory relief statute is one which admits of definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion upon a particular or hypothetical state of facts." *Monterey Coastkeeper*, 76 Cal. App. 5th at 13 (internal quotation marks and citations omitted). Stated somewhat differently, federal courts opine that "the appropriate standard for determining ripeness of private contract disputes is the traditional ripeness standard, namely, whether there is a substantial controversy, between parties having adverse legal interest, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Golden v. California Emergency Physicians Medical Group*, 872 F.3d 1083, 1086 (9th Cir. 2015) (internal quotation marks and citation omitted).

b. Analysis.

TriPacific seeks a declaratory judgment that: (i) Mahathirath/TFM "have no right, title or interest in any sums received or Net Profits earned by TriPacific after September 30, 2020, and [(ii)] no rights to further commissions … beyond those previously paid." Based on the Legal Standards and Analysis set forth above, grounds exist to grant TriPacific's request for a declaratory judgment setting forth the two declarations.

3. Conversion.

a. Legal Standards.

"Today, the tort of conversion is understood more generally as the wrongful exercise or dominion over personal property of another." *Voris v. Lampert* (2019) 7 Cal. 5th 1141, 1150 (internal quotation marks and citations omitted). "As it developed in California, the tort comprises three elements: (a) plaintiff's ownership or right to possession of the property, (b) defendant's disposition of property in a manner inconsistent with plaintiff's property rights, and (c) resulting damages." *Id.* "This formula does not contain any element of wrongful intent or motive because conversion in California is a strict liability tort." *Foster v. Sexton* (2021) 61 Cal. App. 5th 998, 1021 (citation omitted).

"A successful plaintiff in a conversion action is entitled to recover [t]he value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would have averted plus fair compensation for the time and money properly expended in pursuant of the property." *Voris*, 7 Cal. 5th at 1150 (citing Cal. Civ. Code § 3336; internal quotation marks and other citations omitted).[18]

b. Analysis.

TriPacific has established the elements for its conversion claim. It is undisputed that TriPacific paid for the Surface Pro 6 and the laptop was given to Mahathirath to use while performing his duties as TriPacific's employee. And it also is undisputed that under TriPacific's policies, which bind Mahathirath and other employees, Mahathirath was to return the laptop to TriPacific when he was terminated; but he did not, despite multiple demands. And finally, it is not disputed that the laptop contains TriPacific's proprietary information and TriPacific is damaged by Mahathirath's possession of the proprietary information.

TriPacific contends that the Arbitrator has authority to order Mahathirath to return the Surface Pro 6, which contains proprietary information, pursuant to Civil Code § 3380 and Code of Civil Procedure §§ 511.010-516.050. In the opposition to Cross-Respondents' motion for attorney fees and costs and other relief, Mahathirath now represents he "will return the physical computer and its power cord to TriPacific." Oppo. at 24:10. Mahathirath, noting that TriPacific's claims do not include trade secret theft or misappropriation and, in any event, TriPacific has a forensic copy of the Surface Pro (from discovery), further represents that "he has reset the laptop to factory setting, thereby deleting all of his personal information as well as any purported 'confidential and propriety' information that TriPacific complains of." Id. at 13-15.

The Arbitrator accepts Mahathirath's tardy agreement to return the Surface Pro to TriPacific and finds that returning the laptop in factory setting condition resolves the issue of damages for conversion. As noted, TriPacific has a forensic copy and should be able to restore

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[18] Civil Code section 3336 states:

> The detriment caused by the wrongful conversion of personal property is presumed to be:
>
> First – The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; and
>
> Second – A fair compensation for the time and money properly expended in pursuit of the property.

the Surface Pro's files, if it chooses. There is no authority to require Mahathirath to make any representations and certifications related to the proprietary information that was on the laptop.

VI. Prevailing Party.

"Unless authorized by either statute or agreement, attorney's fees ordinarily are not recoverable as costs." *Reynolds Metals Co. v. Alperson* (1979) 25 Cal. 3d 124, 127 (citations omitted). Here, Paragraph 15 of the 2016 Agreement contains the following "prevailing party" provision: "In the event of any action or legal proceeding to enforce this agreement or resolve any dispute hereunder, the prevailing party *shall* be entitled to recover its costs incurred in connection with such action or proceeding, including reasonable attorney's fees as well as expert costs and expenses." (emphasis added).

The Arbitrator determines that TriPacific is the prevailing party under the 2016 Agreement. *See, e.g., Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal. 5th 744, 754-755 ("[W]ords in a contract are to be understood in their usual sense." (internal quotation marks and citations omitted)). Where a contract provides that "the prevailing party shall be entitled to reasonable attorney fees and costs," the arbitrator may decline to find a prevailing party, but once the arbitrator finds that a party is the prevailing party, "the arbitrator [i]s compelled by the terms of the agreement to award [the prevailing party] reasonable attorney fees and costs." *DiMarco v. Chaney* (1995) 31 Cal. App. 4th 1809, 1815. The use of the word "shall" requires the Arbitrator to award TriPacific reasonable attorney fees and costs.

In addition to the 2016 Agreement, TriPacific also relies on Civil Code § 1717 to support its request for attorney fees and costs.[19] However, the Arbitrator concludes that TriPacific's reliance may be misplaced. *See, e.g., de la Carriere v. Greene* (2019) 39 Cal. App. 5th 270, 276 ("[U]nder Civil Code section 1717, there may be only one prevailing party entitled to attorney fees

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[19] Section 1717 states, in pertinent part:

> (a) In any *action* on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be prevailing on the contract, … shall be entitled to reasonable attorney's fees in addition to other costs.
>
> * * *
>
> (b) (1) The court … shall determine who is the prevailing party on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no prevailing party on the contract for purposes of this section.
>
> (2) Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section.

Cal. Civ. Code § 1717(b)(1), (2) (emphasis added).

on a given contract in a given *lawsuit*." (emphasis added, internal quotation marks and citations omitted)); *CDC Firefighters v. Maldonado* (2012) 200 Cal. App. 4th 158, 165-166 ("[T]he statute [Section 1717] does not define the term 'action." [¶] Code of Civil Procedure section 22 defines 'action' as a 'proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right.'"). Thus, the Arbitrator relies solely on the 2016 Agreement as the ground for awarding Cross-Respondents attorney fees.

As to wage and hour cases, Labor Code section 218.5 is a fee-shifting statute that authorizes attorney fees to a prevailing party; but if the prevailing party is not an employee, attorney fees may only be recovered if the employee brought the action in bad faith. Specifically, Labor Code Section 218.5 states:

> (a) In any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action. However, if the prevailing party in the court action is not an employee, attorney's fees and costs shall be awarded pursuant to this section only if the court finds that the employee brought the court action in bad faith....
>
> (b) This section does not apply to any cause of action for which attorney's fees are recoverable under Section 1194.

Lab. Code § 218.5.

In opposing Cross-Respondents' request for attorney fees and costs, Mahathirath/TFM rely extensively on Labor Code § 218. First, Mahathirath/TFM argue that Labor Code § 218.5(a) applies to preclude the award of any attorney fees to Cross-Respondents because the gist of Mahathirath/TFM's claims were for payment of wages; the wages claim was intertwined with – and cannot be separated from – Mahathirath's claims for breach of contract, breach of implied covenant of good faith and fair dealing, equitable claims and the like. Second, based on the Arbitrator's conclusion that the employer (TriPacific) is the prevailing party, Section 218.5(a) precludes awarding attorney fees and costs to the employer unless the action was brought in bad faith and, here, the action was not brought in bad faith. Mahathirath/TFM argue that the lack of bad faith is demonstrated by the Arbitrator's denial of most of Cross-Respondents' grounds for summary adjudication. Third, Mahathirath/TFM contend that TriPacific, as the moving party, has the burden to apportion its fees among the various claims, which it did not, and it is now too late to attempt to do so.

"Labor Code section 218.5 is a fee-shifting statute in actions for nonpayment of wages." *Dane-Elec Corp. USA v. Bodokh* (2019) 35 Cal. App. 5th 761, 771 (*Dane-Elec*). "Where there are

multiple claims alleged in a complaint, a party need not prevail on all of the claims in order to qualify as a 'prevailing' party under section 218.5, but may seek fees on *only* those claims to which section 218.5 applies." *Ramos v. Garcia* (2016) 248 Cal. App. 4th 778, 786 (citation omitted; emphasis added); *see also id.* ("In the application of section 218.5, subdivision (b), the term 'any action' refers to any cause of action, and attorney fees may be awarded and apportioned on one eligible claim under section 218.5, even if the case also involved a claim exclusively subject to section 1194." (citation omitted)). Here, the question is whether Labor Code section 218.5(a) bars Cross-Respondents from recovering attorney fees under the 2016 Agreement on claims other than the one claim for unpaid wages set forth in the fourth cause of action. The Arbitrator concludes that it does not.

Initially, the arbitration commenced when TriPacific filed a Demand against Mahathirath for breach of contract and conversion. It is undisputed that TriPacific prevailed on both of those claims. Recovery of attorney fees and costs as the prevailing party on those claims is not barred by Section 218.5(a). No reasonable argument can be made that Section 218.5(a), which may apply to an unpaid wages claim on a Cross-Complaint, can bar the recovery of attorney fees for a party who prevails under a contract provision on claims raised in a Demand.

Second, as to the Cross-Complaint, Section 218.5(a) applies only to wage claims brought by employees against employers and TFM is not an employee; it is an assignee. Although Mahathirath was TriPacific's employee, TFM was not; thus, Section 218.5 does not apply to TFM's claims against Cross-Respondents. Moreover, neither Fearns nor TMI were named as respondents in the Cross-Complaint's fourth cause of action for unpaid wages. Cross-Respondents Fearns and TMI were not Mahathirath's employer; only TriPacific was his employer. As such, Section 218.5 does not apply to preclude an award of attorney fees in favor of Cross-Respondents Fearns and TMI against TFM.

Third, considering the Legislative purpose behind Section 218.5(a), the circumstances of Mahathirath's employment with TriPacific and the evidence at the arbitration hearing (as recited in Parts IV and V above), the Arbitrator determines that Mahathirath brought the cause of action for unpaid wages against TriPacific in bad faith. *See, e.g., Dane-Elec*, 35 Cal. App. 5th at 773 (Section 218.5 "has the potential to become a one-way or unilateral fee-shifting provision if … the trial court finds a plaintiff did not bring *the wage claim* in bad faith." (internal quotation marks and citations omitted; emphasis added)). As determined herein, Mahathirath's claim for unpaid wages depended on several significant intentional misrepresentations he made to his employer, TriPacific. And Mahathirath's testimony had limited credibility. These determinations support the conclusion that Mahathirath brought the unpaid wages claim in bad faith.

Assuming arguendo the bad faith provision applies to the Cross-Complaint as a whole instead of applying only the unpaid wages claim, the Arbitrator further determines that

Mahathirath brought the Cross-Complaint in bad faith. As to the Cross-Complaint's first cause of action for breach of fiduciary duty, Mahathirath failed to defend the claim at summary adjudication. And, it goes without saying, the breach of fiduciary duty claim directly conflicted with Mahathirath's claim for unpaid wages. All claims remaining after summary adjudication were found to be without merit following the evidentiary hearing, which established that Mahathirath made several significant intentional misrepresentations to TriPacific and his testimony had limited credibility.

Under California law "joinder of causes of action should not dilute [a party's] right to attorney's fees. Attorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed." *Reynolds Metals Co.*, 25 Cal. 3d at 129-30; *see also Atkins v. Enterprise Rent-A-Car Co. of San Francisco* (2000) 79 Cal. App. 4th 1127, 1133 ("[T]he joinder of causes of action should not dilute the right to attorney fees. Such fees need not be apportioned when incurred for representation of an issue common to both causes of action for which fees are permitted and one for which they are not…."(citations omitted)); *Drouin v. Fleetwood Enters.* (1985) 163 Cal. App. 3d 486, 493 ("Attorneys fees need not be apportioned between distinct causes of action where plaintiff's various claims involve a common core of facts or are based on related legal theories."); *cf. Carver v Chevron U.S.A., Inc.* (2004) 119 Cal. App. 4th 498, 503 (holding that when a contractual right to attorney fees conflicts with a statutory prohibition, the court may award fees on the contractual provision but reduce a portion of the fees related exclusively to the unilateral fee-shifting statutory provision).

Lastly, considering the Legislative purpose behind Section 218.5, the circumstances of Mahathirath's employment with TriPacific and the evidence at the arbitration hearing (as recited in Parts IV and V above), the Arbitrator concludes that the claim for unpaid wages was not intertwined with the other claims in the Cross-Complaint -- or the claims raised by TriPacific in the Demand -- and there is no reason to preclude awarding Cross-Respondents attorney fees on all claims without any apportionment. *See, e.g., Cruz v. Fusion Buffet, Inc.* (2020) 57 Cal. App. 5th 221, 235 ("[A]s the one who has heard the entire case, it is the trial court who is in the best position to determine whether any … allocation of attorney fees is required or whether the issues were so intertwined that allocation would be impossible." (internal quotation marks and citation omitted)).

A. Reasonable Attorney Fees.

1. Legal Standards.

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart* (1983) 461 U.S. 424, 433. This figure has become known as the lodestar or touchstone. *See, e.g., Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1131-32 ("[A] court assessing

attorney fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney .... involved in the presentation of the case.'" (citation omitted)). Additionally, time spent by the prevailing party's attorneys in seeking attorney fees or defending against the opposing party's objections to a request for attorney fees are compensable as time reasonably expended on the litigation. *Serrano v. Unruh* (1982) 32 Cal. 3d 621, 639.

The party seeking attorney fees has the initial burden of establishing that the number of hours it claims are reasonable, which may be accomplished by submitting declarations of its counsel without detailed billing records or invoices. *City of Colton v. Singletary* (2014) 206 Cal. App. 4th 751, 784-85; *see also Syers Properties III, Inc. v. Rankin* (2014) 226 Cal. App. 4th 691, 699 (*Syers*) ("Because time records are not required under California law ..., there is no required level of detail that counsel must achieve." (internal quotation marks and citations omitted)); *Steiny & Co., Inc. v. Calif. Elec. Supply Co.* (2000) 79 Cal. App. 4th 285, 293 ("[T]here is no legal requirement that such [billing] statements be offered in evidence. An attorney's testimony as to the number of hours worked is sufficient evidence to support an award of attorney fees, even in the absence of detailed records.").

However, the reasonable number of hours is not necessarily the actual number of hours spent by counsel. *Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal. App. 4th 1309, 1320 (citation omitted). "For example, records may contain entries for hours that are 'excessive, redundant, or otherwise unnecessary.'" *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1203 (9th Cir. 2013) (citation omitted). "In challenging attorney fees as excessive because too many hours of work are claimed, it is the burden of the challenging party to point to the specific items challenged, with a sufficient argument and citations to the evidence. General arguments that fees claimed are excessive, duplicative, or unrelated do not suffice." *Premier Med. Mgm't Systems, Inc. v. California Insur. Guarantee Ass'n.* (2008) 163 Cal. App. 4th 550, 564. Nevertheless, "[a] fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether." *Vines v. O'Reilly Auto Enterprises LLC* (2022) 74 Cal. App. 5th 174, 182 (internal quotation marks and citation omitted).

To determine the reasonable hourly market rate, courts generally consider "the rates prevalent in the community where the court is located." *Syers*, 226 Cal. App. 4th at 700. "[A] reasonable hourly rate is the product of a multiplicity of factors ... the level of skill necessary, time limitations, the amount to be obtained in the litigation, the attorney's reputation, and the undesirability of the case." *Margolin v. Regional Planning Comm'n.* (1982) 134 Cal. App. 3d 999, 1004.

"Under our precedents, the unadorned lodestar reflects the general local hourly rate of a fee-bearing case; it does not include any compensation for contingent risk, extraordinary skill, or

any other factors a trial court may consider. ...The adjustment to the lodestar figure, e.g., to provide a fee enhancement reflecting the risk that the attorney will not receive payment if the suit does not succeed, constitutes earned compensation; unlike a windfall, it is neither unexpected nor fortuitous. Rather, it is intended to approximate market-level compensation for such services, which typically includes a premium for the risk of nonpayment or delay in payment of attorney fees." *Ketchum*, 24 Cal. 4th at 1138. "Once the lodestar has been calculated, the second step is to apply any positive or negative multipliers." *Santana v. FCA US, LLC* (2020) 56 Cal App. 5th 334, 349.

"The experienced trial judge is the best judge of the value of professional services rendered in [her] court...." *PLCM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084 1096 (internal quotation marks and citation omitted); *see also 569 East County Blvd. LLC v. Backcountry Against the Dump, Inc.* (2016) 248 Cal. App. 4th 125, 134 ("In making its calculation, the court may rely on its own knowledge and familiarity with the legal market, as well as the experience, skill, and reputation of the attorney requesting fees, the difficulty or complexity of the litigation to which that skill was applied, and the affidavits from other attorneys regarding prevailing fees in the community and rate determinations in other cases.").

2. Analysis.

Cross-Respondents seek attorney fees in the amount of $1,158,318.50 (including estimated fees for the pending motion for attorney fees and costs). Livingston Supp. Decl. ¶ 7. Daniel Livingston (Livingston) is a partner in Payne and Fears LLP ("law firm") and was lead counsel representing TriPacific, Fearns and TMI. The law firm keeps track of its attorneys' and paralegals' time on a monthly basis, separately billing for work in the Superior Court and arbitration. Livingston Decl. ¶ 7. All invoices that the law firm submitted to Cross-Respondents were paid. Id. To date, the law firm has billed TriPacific for roughly 2,000 hours of legal work and expects to spend an additional 50 hours of legal work completing the attorney fees motion, with Livingston and Brown each working 25 hours, at Livingston's rate of $655 per hour and Brown's rate of $635 per hour. Livingston Decl. ¶ 9; Livingston Supp. Decl. ¶ 3, Exh. E.

Livingston's supplemental declaration establishes that he provided 900.1 hours of legal services to TriPacific, Fearns and TMI before the Superior Court and in arbitration. Livingston Supp. Decl. ¶ 3, Exh. E. His hours account for approximately 45% of the law firm's bills to Cross-Respondents. Livingston received his undergraduate degree from Stanford University in 1979 and his law degree from Brigham Young University Law School in 1982, where he was an associate editor of the law review. Livingston is an active member of the Orange County Bar Association and Orange County chapter of the American Business Trial Lawyers. Over the years, he has been named "Lawyer of the Year" for litigation in real estate, to the Southern California Super Lawyers list, and one of the Top 50 Super Lawyers in Orange County. Livingston also holds a "AV Preeminent" rating from Martindale Hubbell. During 2020 and 2021, the law firm billed Cross-

Respondents $625 per hour for his legal services. Livingston Decl. ¶ 3. Livingston's rate increased to $655 per hour in 2022. Id.

In addition to Livingston, Jeffrey K. Brown (Brown), another partner with the law firm, provided 690.1 hours of legal work to Cross-Respondents. Livingston Supp. Decl. ¶ 3, Exh. E. Brown received his undergraduate degree from Yale University in 1989 and his law degree from the University of California School of Law in 1992. Id. Brown also has been named to the Southern California Super Lawyers list and as one of the Top 50 Super Lawyers in Orange County, as well as named to the Best Lawyers in America for labor and employment. Id. Brown's hourly rate in 2020 and 2021 for this matter was $605, which increased to $635 in 2022. Id.

Livingston and Brown were assisted by senior certified litigation paralegal Donna A. McNally (McNally). Livingston Decl. ¶ 5. McNally is an experienced paralegal who billed at the rate of $190-$200 per hour for the period of 2020 to 2022. Id. McNally provided 197.3 hours of legal work on this matter. With Livingston's and Brown's hours total roughly 90% of the time billed. Livingston Supp. Decl. ¶ 4. Additionally, other attorneys (Sean O'Brien, Randy Haj, Jessica Vidal, and Sharon Shaoulian) and other paralegals (Tim Luong, Arlene Barrantes, Tiffani Engstom) assisted with discrete tasks, such as legal research, amounting to approximately 200 hours or 10% of the time the law firm billed on the matter. Id. ¶ 3, Exh. E.

Mahathirath/TFM do not challenge the law firm's hourly rates for its attorneys and paralegals. Rather, they contend that the attorney fees Cross-Respondents seek are unreasonable based on the number of hours of legal work performed, arguing *inter alia* that the hours were duplicative because two experienced attorneys were involved throughout the case instead of only one attorney. Mahathirath/TFM do not identify the specific hours by Livingston or Brown that they claim are unreasonable, as they must.

Reviewing the law firm's evidence, the Arbitrator finds that Mahathirath has not shown that the law firm's use of two experienced attorneys resulted in duplicative work or that the number of hours of legal services provided by the law firm were unreasonable. After filing the Demand, Mahathirath filed a civil action in the Orange County Superior Court, TriPacific was required to bring a petition to compel arbitration, to defend against a motion to stay arbitration, and to oppose an application for writ of attachment. While in arbitration, Mahathirath was unwilling to comply with discovery rules, which required TriPacific to expend time and resources in the Superior Court and to pursue inspection of the Surface Pro. There was a five-day evidentiary hearing with six witnesses and hundreds of documents, including depositions by non-parties, that raised complex contractual and business issues.

Here, "the fees are well documented and reasonable in light of the complexity of the issues, [Mahathirath/TFM's] aggressive litigation posture, and the results obtained. A [party] cannot

litigate tenaciously and then be heard to complain about the time necessarily spent by the [other party] in response." *Peak-Las Positas Partners v. Bollag* (2009) 172 Cal. App. 4th 101, 114 (internal quotation marks and citation omitted); *State Farm Gen. Ins. Co. v. Lara* (2021) 71 Cal. App. 5th 197, 225-226 (same); *see also Calvo Fisher & Jacob LLP v. Lujan* (2015) 234 Cal. App. 4th 608, 627 ("[S]ignificantly, the amount of attorney fees incurred by [TriPacific/Cross-Respondents] … was increased by [Mahathirath/TFM's] own conduct, which might be called less than forthcoming when [TriPacific/Cross-Respondents] sought discovery – and aggressive when [Mahathirath/ TFM] was the proponent."). Moreover, in light of what was at stake in the arbitration, i.e., Mahathirath sought $8 million on his Cross-Complaint, the amount of attorney fees incurred by TriPacific and Cross-Respondents is not unreasonable or out of proportion to the merits of the case.

For these reasons, the Arbitrator determines that the lodestar amount of **$1,158,318.50** (including the law firm's estimated fees of approximately $32,000 on the motion for attorney fees and costs) is reasonable. There is no request to apply an upward multiplier and the Arbitrator does not find grounds to apply a downward multiplier, as Mahathirath/TFM suggest. Thus, the foregoing amount shall be awarded as reasonable attorney fees to TriPacific, Fearns and TMI against Mahathirath and TFM, jointly and severally.

B. Additional Costs and Expenses.

1. Legal Standards.

"[A]rbitrators, unless expressly restricted by the agreement of the parties, enjoy the authority to fashion relief they consider just and fair under the circumstances existing at the time of the arbitration so long as the remedy derived from the contract and the breach." *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal. 4th 362, 383. As such, California Code of Civil Procedure §§ 1032 and 1033.5 do not control the recovery of costs or expenses in arbitration. *Britz, Inc. v. Alfa-Laval Food & Dairy Co.* (1995) 34 Cal. App. 4th 1085, 1105 n. 9; *Austin v. Allstate Ins. Co.* (1993)16 Cal. App. 4th 1812, 1815.

2. Analysis.

TriPacific seeks to recover expert fees in the amount of $125,725.40 and costs in the amount of $242,404.20 (in addition to $49,434.80 agreed to by stipulation), as well as JAMS fees and expenses. The expert fees are for the services by Jodi Ristrom ("Ristrom"), C.P.A., a retained expert with Eide Bailly, who did not testify ($7,925.40), and David Nolte of Fulcrum Financial, a retained expert who testified. Livingston Decl. ¶ 10. Other costs include mediation (ADR Services), electronic discovery (Ankura Consulting), technical trial assistance (Evidence Technologies), and JAMS fees and expenses. Id. ¶ 11.

Mahathirath/TFM challenge Cross-Respondents' requests for the following costs: (a) recovery of expert fees in the amount of $125,725.40, arguing that Labor Code § 218.5 precludes

the recovery; mediation fees in the amount of $5,450 on the grounds the Parties agreed to split the costs of mediation and, in any event, the mediation was a sham because TriPacific did not make any settlement offer or meaningfully engage in settlement discussions; and JAMS arbitration fees and expenses in the amount of $211,607.12, arguing that JAMS Rule 31(c) applies and limits an employee's arbitration fees.

For the reasons discussed above, the Arbitrator finds no merit to Mahathirath/TFM's objection to the expert fees based on Labor Code section 218.5. However, because expert Ristrom did not testify at the arbitration, the request for reimbursement of her fees in the amount of $7,925.40 is denied and will be deducted, resulting in expert witness fees being reduced to **$117,800**. The Arbitrator concludes that the mediation expenses are not reasonable because the mediation was not an essential part of the arbitration. Thus, reimbursement to TriPacific for mediation fees in the amount of $5,450 is denied.

Mahathirath/TFM misread the JAMS Rules. Rule 31(c) does not preclude the Arbitrator from awarding JAMS fees and expenses to a party who prevails under a contract. Moreover, such an award is specifically provided for in the JAMS Rules that apply to arbitration awards. JAMS Rule 24(f) provides that the Arbitrator may allocate arbitration fees and Arbitrator compensation and expenses *unless* expressly prohibited by the Parties' Agreement. Similarly, JAMS Rule 24(g) provides that the Arbitrator may allocate expenses if provided by the Parties' Agreement or allowed by applicable law. Here, the Parties' 2016 Agreement or contract specifically provides that the prevailing party shall recover costs, including reasonable attorney fees, expert costs and expenses. Thus, the request by TriPacific, Fearns and TMI for an award of JAMS fees and expenses is granted. To date, JAMS fees and expenses total **$211,607.12**.

Of course, this amount does not include JAMS fees and the Arbitrator's expenses for the preparation of the Final Award. The Arbitrator has submitted bills to JAMS for drafting the Final Award, including review of the Parties' stipulation re interest and consideration of Cross-Respondents' motion for reasonable attorney fees, expert costs and expenses, the opposition thereto and the reply. The Arbitrator's submission is in the amount of $29,750. The JAMS fees of 12% or $3,570 are added to that amount, resulting in additional JAMS fees and Arbitrator's expenses totaling $33,320. Thus, in addition to the JAMS fees and expenses billed to date that total $211,607.12, discussed above, Mahathirath/TFM also owe Cross-Respondents an additional **$33,320** for JAMS fees and the Arbitrator's expenses related to the Final Award, bringing the total amount of JAMS fees and Arbitrator expenses to **$244,927.12**. In the event there is a request to correct or amend the Final Award, there may be additional JAMS fees and Arbitrator's expenses.

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VII. FINAL AWARD.

This Final Award resolves all issues submitted for decision in this arbitration. Accordingly, the following Final Award shall issue:

1. The Cross-Complaint filed by Tom F. Mahathirath and TFM Advisors, Inc. is dismissed.

2. A declaratory judgment shall be entered declaring: (i) Tom F. Mahathirath has no right, title or interest in any sums received or net profits earned by TriPacific Capital Advisors, LLC, after September 30, 2020; and (ii) Tom F. Mahathirath has no right to further commissions or bonuses beyond those previously paid.

3. In satisfaction of the conversion claim, Tom F. Mahathirath shall return the Surface Pro 6 laptop and power cord to TriPacific Capital Advisors, LLC, no later than five days from the date of this Final Award.

4. TriPacific Capital Advisors, LLC, shall recover fees and costs from Tom F. Mahathirath and TFM Advisors, Inc., jointly and severally, in the total amount of **$49,434.80** (comprising $8,062.82 for filing fees, copying costs, service of process fees and court appearance fees and $41,371.98 for deposition and hearing transcripts and deposition videos).

5. TriPacific Capital Advisors, LLC, Geoffrey Fearns and TriPacific Managers, Inc., jointly, shall recover from Tom F. Mahathirath and TFM Advisors, Inc., jointly and severally, the total amount of **$1,521,045.62,** comprised of:

a. costs or reasonable attorney fees in the total amount of **$1,158,318.50**;
b. expert costs or expenses in the total amount of **$117,800**; and
c. costs or JAMS fees and expenses in the total amount of **$244,927.12.**

Date: December 7, 2022

1200057704.Final

By: _____
Hon. Rosalyn Chapman (Ret.)
Arbitrator

PAYNE & FEARS LLP
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4 PARK PLAZA, SUITE 1100
IRVINE, CALIFORNIA 92614
(949) 851-1100

PROOF OF SERVICE

Tom Mahathirath et al v. TriPacific Capital Advisors, LLC, et al.
OCSC Case No. 30-2020-01170513-CU-BC-CJC

STATE OF CALIFORNIA, COUNTY OF ORANGE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is 4 Park Plaza, Suite 1100, Irvine, CA 92614.

On April 24, 2023, I served true copies of the following document(s) described as **[PROPOSED] JUDGMENT** on the interested parties in this action as follows:

David W. Affeld, Esq.
Brian R. England, Esq.
Affeld Grivakes LLP
2049 Century Park East, Suite 2460
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Email: dwa@agzlaw.com
bre@agzlaw.com
gb@agzlaw.com

Attorneys for Plaintiffs Tom Mahathirath and TFM Advisors, Inc.

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address cvansteenbergen@paynefears.com to the persons at the e-mail addresses listed in the Service List.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 24, 2023, at Irvine, California.

/s/ Chris Van Steenbergen
Chris Van Steenbergen