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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

ICING INVESTMENT HOLDINGS, LLC, an Arizona Limited Liability Company, Plaintiff, vs. LEGACY CARES, INC., an Arizona company, Defendant.	Case No. CV2021-003291 **MOTION FOR JUDGMENT CONFIRMING FINAL ARBITRATION AWARD** (Assigned to the Honorable Timothy J. Thomason)

Pursuant to A.R.S. § 12-3022, Plaintiff respectfully moves this Court for a Judgment confirming the Final Arbitration Award entered in Plaintiff's favor on January 30, 2023 *(Exhibit 1)*.

This matter came before this Court on March 1, 2021, when Plaintiff filed its Complaint. On March 30, 2021, this Court ordered the parties to submit the dispute to binding arbitration. *See March 30, 2021 Order*. Thereafter, the parties arbitrated the dispute before Arbitrator William A. Richards, Esq.

On January 30, 2023, Arbitrator Richards issued a Final Arbitration Award in which he found that: Plaintiff is immediately owed $1,813,221.15 as and for its fee; $184,799.52 in pre-judgment interest as of January 8, 2023; attorneys' fees in the amount of $401,399.50;

costs in the amount of $11,595.61; and that interest on all unpaid amounts will accrue at a rate of 8.5% per annum until paid in full. (*See Exhibit 1)*.

Given the above, Plaintiff respectfully requests this Court enter a Judgment confirming the Arbitrator's January 30, 2023 Final Arbitration Award on the basis of the findings and conclusions of law described in the December 12, 2022 Arbitrator's Decision (*Exhibit 2*) and the January 8, 2023 Arbitrator's Supplemental Decision (*Exhibit 3*).

DATED this 30th day of January 2023.

FR LAW GROUP PLLC

By:______________________________

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FILED this 30th day of January 2023,
with the Clerk of the Maricopa County
Superior Court

COPY of the foregoing mailed and
emailed this same date to:

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By: *__/s/ Sarah Frith______*

EXHIBIT 1

ARBITRATION PROCEEDING

ICING INVESTMENT HOLDINGS, LLC, an Arizona Limited Liability Company, Plaintiff/Claimant, vs. LEGACY CARES, INC., an Arizona company, Defendant/Respondent.	In the Arbitration of Claims Raised in Maricopa County Superior Court Case No. CV2021-003291 **FINAL ARBITRATION AWARD** (Arbitrator: William Richards)

Pursuant to the December 12, 2022 Arbitrator's Decision finding that Defendant/Respondent Legacy Cares, Inc. breached its express contractual obligation to pay a 1% advisory fee to Plaintiff/Claimant Icing Investment Holdings, LLC under an Advisory Agreement with an effective date of February 19, 2020 (the "Agreement"), and also that Legacy Cares, Inc. breached the implied covenant of good faith and fair dealing by which it was bound to Icing Investment Holdings, LLC, the Arbitrator finds, adjudges, and decrees as follows:

1. The Arbitrator finds that Legacy Cares, Inc. breached the Agreement between the parties by failing to pay Icing Investment Holdings, LLC a 1% advisory fee equal to $1,813,221.15 at close of financing on the Legacy Sport Park/Bell Bank Park multi-sports facility and family entertainment park project in Mesa, Arizona.

2. The Arbitrator finds that Legacy Cares, Inc. breached its implied duty of good faith and fair dealing to Icing Investment Holdings, LLC by taking actions to challenge Icing Investment Holdings, LLC's entitlement to be paid its 1% advisory fee and by reporting to Ziegler and the bond purchasers that no advisory fee was due to Icing Investment Holdings, LLC upon the close of the initial bond offering for the Project in August, 2020.

3. For its damages arising out of the breach of contract and breach of the implied covenant of good faith and fair dealing committed by Legacy Cares, Inc., the Plaintiff/Claimant Icing Investment Holdings, LLC has sufficient proven that it was owed

and is therefore damaged in the amount of $1,813,221.15, which is hereby awarded to Icing Investment Holdings, LLC against Legacy Cares, Inc.

4. The Arbitrator finds that the entire 1% advisory fee, in the amount of $1,813,221.15, owed by Legacy Cares, Inc. to Icing became due and owing by January 2, 2022.

5. The Arbitrator finds that pre-judgment interest at the rate of 10% began accruing in favor of Icing Investment Holdings, LLC on the $1,813,221.15 on January 2, 2022, and that such interest accrued though January 8, 2023, per the Arbitrator's Supplemental Decision dated January 8, 2023.

6. The Arbitrator finds that the accrued pre-judgment interest totals $184,799.52, which amount the Arbitrator hereby awards to Icing Investment Holdings, LLC.

7. For the reasons set forth in the Arbitrator's Supplemental Decision dated January 8, 2023, and the Arbitrator's Decision on Claimant's Request for Attorneys' Fees and Costs dated January 30, 2023, the Arbitrator finds that an award of attorneys' fees and costs to Icing Investment Holdings, LLC is appropriate because Icing Investment Holdings, LLC is the prevailing party in this arbitration and the claims on which Icing Investment Holdings, LLC prevailed arose out of a contract.

8. Having considered the application of Icing Investment Holdings, LLC for an award of attorneys' fees, as well as the objections of Legacy Cares, Inc. thereto, and having analyzed the entitlement of Icing Investment Holdings, LLC to an award of reasonable attorneys' fees in the Arbitrator's Decision on Claimant's Request for Attorneys' Fees and costs dated January 30, 2023, the Arbitrator has found that Icing Investment Holdings, LLC is entitled to an award of $401,399.50 in reasonable attorneys' fees against Legacy Cares, Inc., and Icing Investment Holdings, LLC is awarded that amount.

9. Having considered the application of Icing Investment Holdings, LLC for an award of costs related to this proceeding, as well as the objections of Legacy Cares, Inc. thereto, and having analyzed the entitlement of Icing Investment Holdings, LLC to an award of costs in the Arbitrator's Decision on Claimant's Request for Attorneys' Fees and costs

dated January 30, 2023, the Arbitrator has found that Icing Investment Holdings, LLC is entitled to an award of $11,595.61 in costs against Legacy Cares, Inc., and Icing Investment Holdings, LLC is awarded that amount.

10. The final fees of the Arbitrator are $27,360.00. Pursuant to the rationale in the Arbitrator's Supplemental Decision dated January 8, 2023, those fees are hereby assessed seventy-five percent (75%) against Legacy Cares, Inc. and 25% against Icing Investment Holdings, LLC. Legacy Cares, Inc. shall therefore promptly pay to the Arbitrator the amount of $20,520.00 and Icing Investment Holdings, LLC shall promptly pay to the Arbitrator the amount of $6,840.00.

11. The Arbitrator has found that the appropriate rate of post-judgment interest in this matter in accordance with the standards under A.R.S. § 44-1201(B) and the applicable Federal Reserve statistical release shall be 8.5% per annum. Icing Investment Holdings, LLC is therefore awarded post-judgment interest at the rate of 8.5% per annum from January 9, 2023 until this award and any judgment resulting therefrom is fully satisfied.

EXECUTED this 30th day of January 2023.

ARBITRATOR

William A. Richards

EXHIBIT 2

ARBITRATION PROCEEDING

ICING INVESTMENT HOLDINGS, LLC, an Arizona Limited Liability Company, Claimant, vs. LEGACY CARES, INC., an Arizona company, Respondent.	In the Arbitration of Claims Raised in Maricopa County Case No. CV2021-003291 **ARBITRATOR'S DECISION** (Arbitrator: William Richards)

On October 10-12, 2022, the Parties, Claimant Icing Investment Holdings, LLC ("Icing"), and the Respondent, Legacy Cares, Inc. ("Legacy"), participated in an arbitration hearing before the undersigned Arbitrator. During the hearing, the Parties submitted testimony and exhibits in support of their respective positions. After the hearing, the Parties filed with the Arbitrator post-Arbitration closing memoranda. The Arbitrator has considered the exhibits and testimony submitted by the Parties in connection with the arbitration hearing in this matter, and the Arbitrator has considered the arguments of the Parties' counsel regarding the claims and defenses presented in this matter. The Arbitrator provides below his factual findings and legal conclusions in resolution of the claims and defenses presented in this matter.

The Parties' Positions

A. Icing's Claim

This matter involves contracts executed by various parties, including Icing and Legacy, in connection with obtaining financing for and development of a 320-acre multi-sports facility and family entertainment park in Mesa, Arizona (the "Project") referred to by the Parties during the Arbitration Hearing as Legacy Sports Park or Bell Bank Park. Icing specifically seeks relief for breach of an Advisory Agreement with an effective date of

February 19, 2020, executed by Icing and Legacy (the "Advisory Agreement")[Arbitration Exhibit 3]. More specifically, Icing contends that the binding terms of the Advisory Agreement entitle Icing to payment by Legacy of a 1% fee for completing certain introduction services and other efforts regarding development of a capital solution or plan for the Project. Icing calculates the fee to which it is entitled as $2,830,000.00[1].

Icing contends that the Advisory Agreement, and the terms of performance and payment thereunder, replaced the binding contractual terms of an earlier Agreement for Financing of the Development and Construction of The Legacy Sports Family Entertainment Park, Mesa, Arizona with an effective date of October 24, 2019 (the "Development Agreement") [Arbitration Exhibit 1]. The Development Agreement was executed between Legacy Sports USA, LLC and an entity named Community Center Partners, LLC ("CCP"), which shares some common ownership with Icing – namely, Mr. Lee Ploszaj ("Mr. Ploszaj"). However, the Development Agreement was terminated by a Release and Termination Agreement effective February 19, 2020 (the "Termination Agreement"). [Arbitration Exhibit 2].

Icing contends that before executing the Termination Agreement and the Advisory Agreement, Mr. Ploszaj had performed obligations the Development Agreement required to entitle his company, CCP, to "a fee of 4.5% of the 'total costs of the project'" covered by the Development Agreement. [Icing's Closing Memorandum ("ICM"), at 1:25-26; 2:9-12; 3:9 – 6:26]. Icing identifies the required services performed by Mr. Ploszaj as:

1. Providing a capital solution and transaction model for the Project;
2. Introducing Legacy to a qualified investment banker;
3. Introducing Legacy to a qualified developer/builder; and

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[1] Icing's position regarding the fee is somewhat unclear because its Closing Memorandum states that "Icing's fee is $2,830,000.00" [ICM, at 13:20], and that "Icing has been damaged in the amount of $2,830,000.00 plus interest and costs and attorneys' fees" [*Id.*, at 20:6-7]. But, the Memorandum also states that "[c]alculated at 1%, Icing's fee is $2,837,700.00 [*Id.* at 17:13]. Given the Arbitrator's decision below on the damages amount, this $7,700.00 difference and ambiguity is immaterial.

4. Making himself available to Legacy upon reasonable request to discuss Project-related issues.

[ICM, at 3:11 – 6:16]. Icing contends it fulfilled the foregoing through Mr. Ploszaj by:

1. Introducing Legacy's agents to the concept of a bond financing plan involving non-profit ownership of the Project's sports park, which were ultimately adopted and implemented to obtain financing for the Project by two separate bond offerings/sales of some $250,770,000.00 and $33,000,000.00, respectively;
2. Introducing Legacy's agents to Ziegler Investment Banking and its agent, Ms. Miyun Fellerhoff as an investment banking firm that could underwrite the bond transactions needed to finance the Project;
3. Introducing Legacy's agents to CD Smith and its subsidiary company Summit Smith, as a qualified developer/builder for the Project; and
4. Making Mr. Ploszaj continually available to Legacy for consultation regarding Project issues such as engineering and other topics, meetings with the City of Mesa and the Arizona Sports and Tourism Authority, and to analyze a Memorandum of Understanding proposed by the City of Mesa.

[*Id.*]

Icing further contends that Mr. Randy Miller, on behalf of both Legacy Sports USA, LLC and Respondent Legacy Cares, Inc., initiated the request of Mr. Ploszaj and his companies to terminate and replace the Development Agreement with the new Advisory Agreement to which the Respondent Legacy Cares, Inc. rather than Legacy Sports USA, LLC, and Claimant Icing rather than CCP, would be a signatories. [ICM, at 1:27 – 2:3].

Icing asserts that Mr. Ploszaj, as principal and an owner of both Icing and CCP, "understood that his agreement to reduce his fee [owed under the Development Agreement] was a concession for terminating the Development Agreement and consideration for the new Advisory Agreement." [ICM, at 2:3-5]. Icing further claims that "the parties [to the Advisory Agreement] understood that Mr. Ploszaj's prior performance (i.e. providing the capital solution and transaction model and introducing Legacy to Ziegler and CD/Summit Smith) would fulfill the requirements of the Advisory Agreement," therefore, "Legacy did not expect continued performance from Mr. Ploszaj" under the Advisory Agreement. [ICM, at 2:8-11]. In other words, according to Icing, at the time Legacy executed its Advisory Agreement with Icing, Legacy and its affiliate, Legacy Sports USA, LLC, had already obtained the benefit of Mr. Ploszaj's performance of the Development Agreement and Legacy Sports USA, LLC was obligated to pay Mr. Ploszaj's company CCP a hefty fee of 4.5% of the total Project cost; so, Icing and its owner, Mr. Ploszaj, along with CCP, provided as consideration for creating the substituted fee commitment of Legacy Cares, Inc. under the Advisory Agreement the termination of the Development Agreement and the concession of CCP to forego payment of its fee thereunder. Icing asserts that the return consideration promised by Legacy was timely payment of Icing for the services that had been performed by Mr. Ploszaj through the 1% fee required by the Advisory Agreement. Icing also contended through its arbitration presentation that Mr. Ploszaj remained available to Legacy for consultation throughout the August, 2020 closing of the bond offering used to commence the Project, and Icing submitted as evidence digital communications between Mr. Ploszaj and Legacy officials. [Arbitration Exhibits 9, 24].

The Advisory Agreement provided at Section 3 "Compensation":

> The Parties acknowledge that the Project development is being financed through the sale of tax exempt and taxable bonds (the "Development Finance Program"). As full and complete consideration of the Services to be rendered pursuant to this Agreement, [Legacy] shall pay [Icing], at the earlier of the closing on the sale of the tax exempt or taxable bonds, one percent (1%) of the total cost of the Project as provided in the Development Finance Program. Attached hereto as Exhibit "A" is the Advisor representation of the Capital Plan proposed by Advisor and accompanies the Company Development Finance Program attached as Exhibit "B" to this agreement.

[Arbitration Exhibit 3]. There appears no dispute that the first bond offering of $250,770,000.00 for the Project closed on or about August 20, 2020, and the second bond offering of $32,425,000.00 for the Project closed in June, 2021.[2] [ICM, at 17:10-13];

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[2] Icing describes the second bond offering/sale as netting $33 million [ICM, at 17:11-13], while Legacy cites the Supplement to the Limited Offering Memorandum dates June 3, 2021 [Arbitration Exhibit 25] which describes the Series 2021 bonds total funding as $32,425,000.00 [LCM, at 27:23-28]. The evidence suggests that the lower number Legacy uses is the more accurate number for the net funds raised by the second bond offering.

Arbitration Exhibits 104, 25]. There is also no dispute that Legacy has not paid Icing any amounts in connection with the Advisory Agreement.

As noted above, Icing contends that the Advisory Agreement's 1% fee was to be applied to the total value of all funds raised per the two bond offerings/sales. It contends that its unpaid fee equals $2,830,000.00. [ICM, at 13:20; 20:6]. Icing offers an alternative calculation of its unpaid fee, contending that Doug Moss and Chad Miller had referred in their testimony to the "cost of construction" for the Project being defined by an initial deposit of $181,322,115.38 into the Project Fund, and that if the additional, later bond sale proceeds of $33 million were added to the Project Fund, then the "total cost of the Project" would be at least $214,322,115.38, making Icing's 1% fee $2,143,221.15. [*Id.* at 18:17-24].

Icing contends that no matter what its unpaid 1% fee equals, it is entitled to an award of interest on that amount, along with an award of attorneys' fees and costs. [ICM, at 20:6-9]. Though it does not explain in its post-hearing briefing precisely what facts or legal theories entitle Icing to any punitive damages, or what the amount of such damages should be, Icing also contends it is entitled to an award of punitive damages.

B. <u>Legacy's Defenses</u>

Legacy defends this action by contending, first, that the Advisory Agreement is not enforceable because Legacy's agreement to pay Icing a fee was not supported by valid consideration. More specifically, Legacy argues that any prior performance by CCP could not serve as consideration for the Advisory Agreement fee obligation, nor could CCP's agreement to termination of the Development Agreement and its fee rights thereunder. [Legacy Cares Inc.'s Closing Memorandum ("LCM") at 7:7 – 11:17].

Legacy further contends that the Parties never reached any meeting of the minds over the amount of the fee contemplated by the Advisory Agreement, particularly because the Parties never agreed on how "the total cost of the Project as Provided in the Development Finance Program that was supposed to be attached as Exhibit B to the Advisory Agreement" would be calculated. [LCM, at 11:20-25]. Therefore, the Advisory Agreement failed to create an enforceable contract for the payment of a fee to Icing.

Legacy also asserts that Icing did not perform the services required to entitle Icing to any fee under the Advisory Agreement, even if it was enforceable. [LCM, at 1:19-21; 2:26 – 3:22; 13:3 – 20:7]. More particularly, Legacy asserts that the Advisory Agreement required the following performance by Icing:

1. Providing "a capital solution that 'minimize[d] equity contribution by the Company' and 'preserve[d] ownership equity and operational control'".
2. Providing a transaction model for the Project.
3. Introducing Legacy to a qualified investment banking firm.
4. Introducing Legacy to a qualified developer/builder 'that has the experience and capability to provide predevelopment capital to the project, desire and capability to provide a construction loan . . ..."
5. Providing additional performance, including introducing a new investment banker or contractor if Legacy was unhappy with the parties first introduced, or making amendments to the transaction model provided by Icing to support what Legacy needed to get the Project funded.

[LCM, at 13:14 -19:8]. Legacy argues that the Advisory Agreement did not contemplate those service requirements were met by any actions by Mr. Ploszaj prior to the execution of the Advisory Agreement. And, Legacy offers the following as evidence of Icing's non-performance.

1. CCP, *not* Icing, introduced Ziegler to Legacy, and did so before the Advisory Agreement was even signed.
2. Neither Icing nor CCP introduced a qualified developer/contractor to Legacy because it was Ziegler who introduced Mr. DeMuth, of Summit Smith, to Legacy, and Mr. DeMuth did not have the authority to approve construction loans for C.D. Smith anyway. Also, Icing did not prove that C.D. Smith had both the money to make a construction loan for the Project and to pay the predevelopment expenses for the large Project, or that C.D. Smith wanted to make such a construction loan for the Project. Rather, Legacy argues that the evidence shows C.D. Smith was unwilling to provide a construction loan or

provide predevelopment expenses, which Mr. Ploszaj knew before signing the Advisory Agreement.

3. Icing offered no help to Legacy in finding a developer/construction contractor other than C.D. Smith, and Legacy had to find Waltz Construction for that role on its own.

4. Icing provided no "capital solution" for the Project, but, at best provided an incomplete proposal that relied on information provided by either Legacy or Ziegler. Also, the idea of developing the Project using bond financing through a non-profit corporation was not new to the participants in the Project, but had been floated by Mr. Ploszaj before the Project was under consideration with no expectation of him obtaining any compensation in return. Also, Mr. Ploszaj purportedly stopped advising Legacy regarding key issues involving the financing plan after the Advisory Agreement was executed, and the capital solution Mr. Ploszaj claims as his own did not raise the amount of financing needed; rather, the Project owner and Ziegler had to rework the capital structure just to get the first tranche of bonds sold, reducing the bond offering by some $50 million and requiring Legacy to secure and provide extra contributions.

5. Icing provided no "transactional model", especially not after executing the Advisory Agreement, and defaulted on providing any amendments to the model it claims to have proposed even when it became clear that not all the parties Icing had introduced could fulfill their roles.

6. Icing has provided no evidence that it provided Legacy or others any of the ongoing, additional performance required after execution of the Advisory Agreement to complete the Project financing.

[LCM, at 13:14 – 20:7].

As an independent ground for entirely denying Icing relief on its breach of contract claim, Legacy contends that the arbitration hearing evidence confirms that Icing breached its own obligations of good faith and fair dealing under the Advisory Agreement. The breach, Legacy asserts, occurred when Icing refused to agree to a last-minute, pre-closing fee deferral agreement like others who had also been owed fees at closing of the first bond offering. While Legacy does not demonstrate how this action prevented Legacy from obtaining the benefit of its bargain under the Advisory Agreement, it contends that "Icing's breach excuses further performance from Legacy Cares." [LCM, at 21:1-22; 23:2-8].

Legacy also advances arguments that Legacy is not in breach of the Advisory Agreement, and that the Arbitrator should consider adjustments to any rights Icing might have to payment under that agreement, given multiple "force majeure" events including the COVID-19 pandemic and other "circumstances beyond Legacy Cares' control (including the bond purchasers' requirement that all fees be deferred)." [LCM, at 22:11-21]. Legacy urges that even if Icing's purported breach of its implied contractual obligation to cooperate with Legacy in addressing such events does not excuse any further performance by Legacy, Icing's non-cooperation entitles the Arbitrator to determine appropriate equitable adjustments to Icing's payment rights without Icing's input, and contrary to Icing's demand for immediate payment. [LCM, at 23:2 – 24:4].

Finally, Legacy argues that Icing's calculation of the 1% fee contemplated in the Advisory Agreement is incorrect for the following reasons:

1. The term "total cost of the Project as provided in the Development Finance Program" is tied to the "development costs" for the Project, which, according to the final Closing Memorandum [Arbitration Exhibit 104] for the initial bond offering, are only $181,322,115.38, and not the total amount of financing secured for the Project.
2. The customary definition of "project cost" for bond offerings like the one contemplated by the Advisory Agreement, per the testimony of Ms. Fellerhoff, is the cost of construction of the project.
3. The Icing claim seeks a percentage of the funds raised in the second bond offering/sale completed in 2021, but the funds raised in a second offering were not contemplated as part of the total Project cost by the Parties when they executed the Advisory Agreement. Legacy notes that the second offering occurred nearly a year after the initial bond offering closed and that some $27

> million of the second offering/sale was for repair and replacement funding not contemplated by the initial bond offering that was the subject of the Advisory Agreement.

[LCM, at 27:24:9-28:17]. Legacy further offers in its closing memorandum methods by which the Arbitrator may consider "adjustment" of Icing's fee to a fair fee of just $605,305.29 based on Icing's representations in this arbitration proceeding of an appropriate introductory fee (3-5% of Legacy's fee), along with the value of ten months of Icing's monthly advisory fee ($150,000.00).

<u>The Arbitrator's Findings and Conclusions</u>

Per the statements in its Pre-Arbitration Memorandum and Closing Memorandum, Icing asserts claims based on: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) fraud by misrepresentation, and (4) conspiracy to tortiously interfere with a contract to which Icing was a party. For the reasons set forth below, the Arbitrator finds that the proof provided here only supports claims for breach of contract and breach of the implied covenant of good faith and fair dealing. But, as to those claims, Icing has met its burden of proof and no viable defenses have been proven by Legacy.

I. <u>Icing Has Not Met Its Burden of Proving Any of its Tort Theories.</u>

A. <u>Icing Has Failed to Prove a Fraud Claim.</u>

Legacy correctly identifies in its post-arbitration brief that Icing would have to prove the nine separate elements under *Echols v. Beauty Built Homes, Inc.*, 132 Ariz. 498, 500 (1982) by clear and convincing evidence to establish a fraud claim. The Arbitrator agrees with Legacy that Icing has failed to offer sufficient evidence to prove the elements of fraud.

First, Icing has not established, with clear and convincing evidence, the existence of an actionable false statement of fact on which it relied. At most, Icing has attempted to prove that Legacy misrepresented its intention to accept the performance of services by CCP and/or Mr. Ploszaj prior to execution of the Advisory Agreement as performance of the services required by the Advisory Agreement, and to perform the fee payment terms of the Advisory Agreement upon the closing of a bond sale to finance the Project. But the allegations and evidence on that point do not establish an actionable false statement.

To the extent such representations of Legacy's contractual intent preceded the Advisory Agreement, the representations appear to also be incorporated into the Advisory Agreement's terms. After all, as discussed below, the Arbitrator finds persuasive evidence that the Parties did intend that Mr. Ploszaj's performance of various introductory and other services for Legacy Sports USA, Inc. in connection with the Development Agreement would satisfy various service requirements outlined in the Advisory Agreement. And, the Parties expressly incorporated into the Advisory Agreement the promise by Legacy to pay a 1% fee to Icing. So, any false representations by Legacy that Icing alleges were mirrored in the terms of the Advisory Agreement itself.

An unfulfilled promise to do something in the future may form the basis for a cause of action for fraud only "where made with the present intention not to perform." *Enyart v. Transm. Ins. Co.*, 195 Ariz. 71, 77 (App. 1998) (citations omitted). However, to prove fraud, the claimant must provide clear and convincing evidence that the respondent made its promises without such a present intent to perform them. *MH Inv. Co. v. Transam. Title Ins. Co.*, 162 Ariz. 569, 574 (App. 1989). Moreover, a breach of contract terms is not a fraud where no evidence exists that the breaching party made its contractual promise without an intent to perform. *See Trollope v. Koerner*, 106 Ariz. 10, 19 (1970). Mere evidence of the respondent's failure to perform, including by failing to pay a required amount, will never suffice to establish a fraudulent intent not to perform. *McAlister v. Citibank Ariz., a subsidiary of Citicorp*, 171 Ariz. 207, 214 (App. 1992) (citations omitted). At best, Icing has offered evidence that Legacy failed to perform as it promised to in connection with the Advisory Agreement. That cannot suffice to establish that Legacy made any fraudulent representation.

Moreover, the evidence presented here convinces the Arbitrator that Legacy intended to perform its obligations under the Advisory Agreement. In fact, the testimony of Chad Miller indicating that Legacy even now is willing to honor the agreement and pay the 1% fee to Icing when Legacy is itself entitled to payment of its fee [*see* Arbitration Hearing Transcript, Day 3, at 162:21-163:25;187:5-188:1], undermines Icing's suggestion that Legacy somehow never intended to perform the obligations of the Advisory Agreement. So does the testimony by Mr. Moss that Legacy intended to pay Icing its 1% fee up to the point in August, 2020 that Ziegler cut off their ability to do so by demanding that fees not be paid on the closing of the bond offering. [Arbitration Hearing Transcript, Day 3, at 77:18 – 78:16]. And similar confirmation that Legacy believed Icing was entitled to its fee under the Advisory Agreement came from Michael Baggett's testimony that even Mr. Ploszaj saying he was not willing to defer Icing's fee "didn't change the fact that Mr. Ploszaj will still be paid when the covenants [Legacy agreed to as a condition to receiving its fee] are net met," and that "in spite of everything that's happened, Legacy Cares would honor" Icing's fee rights once the conditions to Legacy's own deferred fee rights have been met. [Arbitration Hearing Transcript, Day 2, at 162:5 – 163:1]. Given the compelling evidence in favor of Icing's breach of contract and implied covenant claims, it would be counter-productive to Icing to contend that Legacy did not intend to pay the 1% fee as required by the Advisory Agreement; that assertion could create ambiguity about whether the Parties had a true meeting of the minds about the fee payment.

The Arbitrator also agrees with Legacy that Icing failed to prove, by clear and convincing evidence, that Icing actually relied on any alleged misrepresentations by Legacy that it would honor the Advisory Agreement and that such reliance caused damages to Icing. The evidence does suggest that Icing may not have asserted any sort of claim of breach or taken other protective actions when Legacy asked Icing's Mr. Ploszaj prior to the first bond offering closing to agree to a modification of the Advisory Agreement and delay of payment because Icing knew such action could have disrupted the bond sale entirely and prevented a prerequisite to Icing earning its fee. However, there is no clear and convincing evidence that Icing somehow took action it would not otherwise have taken in reliance on Legacy's pre-execution promises to perform. Also, the damages Icing claims – the non-payment of its 1% fee – were not caused by Icing's reliance on a fraudulent representation as opposed to Legacy's decision to not honor the fee payment terms of the Advisory Agreement. Thus, Icing has not proven any entitlement to relief under a fraud theory.

B. <u>Icing's Conspiracy to Tortiously Interfere with Contract Claim Fails.</u>

It appears to the Arbitrator that Icing may have abandoned its conspiracy claim, as Icing appeared to present little or no evidence or argument in direct support of a conspiracy claim at the arbitration hearing. *See, e.g., Starkovich v. Noye*, 111 Ariz. 347, 354 (1974). Moreover, "conspiracy" is not, by itself, an actionable claim under Arizona law. *See Tovrea Land & Cattle Co. v. Linsenmeyer*, 100 Ariz. 107, 131 (1966) ("We have held there is no such thing as a civil action for conspiracy."); *Designee LLC v. Honda Aircraft Co. LLC*, No. 1 CA-CV 19-0592, 2020 Ariz. App. Unpub. LEXIS 681, at *16 (App. June 23, 2020) (recognizing that "North Carolina does not recognize a separate civil action for conspiracy independent of an underlying tort claim against the alleged conspirators . . . ."). Instead, a claim of conspiracy requires proof of the actual commission of an underlying tort against the claimant by another, of the respondent's agreement with such tortfeasor to participate in the conspiracy, and of "a knowing action [by the respondent] which might substantially aid the tortfeasor to commit a tort." *Dawson v. Withycombe*, 216 Ariz. 84, 103 (App. 2007). Just as with fraud, proof of the agreement must be made by clear and convincing evidence. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Mason Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 499 (2002)(*en banc*).

Here, the Arbitrator received no evidence of an actual agreement by Respondent Legacy with another who separately committed a tort against Icing. As Legacy correctly argues, a corporate party generally cannot "conspire" with itself. *See, e.g., Wells Fargo Bank*, 201 Ariz. at 493 n. 19. Nor could Legacy tortiously interfere with its own contract – the Advisory Agreement. *See, e.g., Pasco Indus., Inc. v. Talco Recycling, Inc.*, 195 Ariz. 50, 53 (App. 1998). Thus, to the extent that Icing suggests it is pursuing a derivative liability conspiracy claim against Legacy for helping another tortiously interfere with the Advisory Agreement, Icing is not pursuing a legally viable claim.

Nor did the Arbitrator receive evidence proving any specific actions by Legacy that might have substantially aided an independent tortfeasor. Therefore, Icing is unable to support any claim of conspiracy to commit an actionable tort against Legacy.

C. Icing Has Not Demonstrated Any Entitlement to Punitive Damages.

While Icing claims the Arbitrator should award Icing punitive damages, it has not specified at the arbitration hearing or in its post-hearing briefing what specific actions of Legacy justify a punitive damages award. Nor has Icing offered any specific insight into how large a punitive damages award should be (beyond recommending at least twice Icing's economic damages), or what factors it proved about Legacy that support such an award.

Under the applicable Arizona law, punitive damages cannot be awarded for breach of contract; they are reserved for conduct that breaches other sorts of non-contractual duties, like those arising under tort law. *See, e.g.*, *Lerner v. Brettschneider*, 123 Ariz. 152, 156 (App. 1979); *Continental National Bank v. Evans*, 107 Ariz. 378 (1971). Moreover, punitive damages may not be awarded without proof that the respondent's tortious conduct was aggravated, outrageous, malicious or wanton. *Lerner*, 123 Ariz. at 156 (citing Hall *v. Motorists Ins. Corp.*, 109 Ariz. 334 (1973)). Further, the claimant must demonstrate through clear and convincing evidence that the respondent acted with the requisite "evil mind", which can be satisfied with proof that the respondent "either 'intended to injure the plaintiff' or 'consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others.'" *Purdy v. Metcalf*, 252 Ariz. 270, 274 (App. 2021) (quoting *Quintero v. Rogers*, 221 Ariz. 536, ¶ 17 (App. 2009)).

Because Icing did not establish proof of any violations of duties by Legacy beyond its contractual duties under the Advisory Agreement, nor any clear and convincing evidence of the sort of aggravated, malicious conduct by Legacy that was the product of an evil mind, the Arbitrator has no basis for awarding punitive damages in this action.

II. Icing Has Proven Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing Claims.

Unlike its tort theories, Icing provided substantial and persuasive evidence during the arbitration hearing on its contract-based theories of relief for breach of contract and breach of the implied covenant of good faith and fair dealing.

Moving to the contract claims, the Arbitrator finds that the principal questions posed by the Parties' positions in this proceeding are:

1. Was the Advisory Agreement an enforceable contract between Icing and Legacy?
2. Did Icing perform all its contractual obligations under the Advisory Agreement, thereby triggering its right to collect the 1% fee contemplated by the agreement?
3. Was Icing required to agree to a delay of payment of its fee as Legacy and others who provided services in support of funding and developing the Project did, and, if so, does Icing's failure to do so constitute a breach of the Advisory Agreement excusing Legacy from paying the fee contemplated by the agreement?
4. Did any event(s) triggering the force majeure clause at Section 9 of the Advisory Agreement arise and excuse Legacy from paying the 1% fee to Icing contemplated by the Advisory Agreement upon the closing of the initial bond offering, or did Legacy's failure to honor the agreement and pay Icing its 1% fee upon closing of the initial bond offering constitute a breach of contract?
5. If Icing is contractually entitled to payment of its 1% fee under the Advisory Agreement, but Legacy was excused from paying Icing its fee under the Advisory Agreement immediately upon the closing of the initial bond offering by a force majeure event, when is Icing entitled to have Legacy pay the fee?
6. If Icing is entitled to payment of the 1% fee under the Advisory Agreement, what is the total project cost that should be used to calculate the total fee?

The Arbitrator finds that sufficiently clear answers to all of the foregoing questions are found in the facts proven by the testimony and evidence submitted in the arbitration hearing. Most compelling, however, are the admissions by witnesses Doug Moss, Chad Miller and Michael Baggett discussed above that confirm that (1) on the eve of the closing of the initial bond offering, at the point where Ziegler informed Legacy officials that the bond purchasers were requiring all advisory fees be conditioned and delayed, Legacy acknowledged that Icing had a right to payment of its fee under the Advisory Agreement if the bond offering closed, and (2) Legacy even now intends to see Icing paid its fee if the conditions for Legacy earning its own fee ever arise. [*See* Arbitration Hearing Transcript, Day 2, at 162:5 – 163:1; Day 3, at 77:18 – 78:16, 162:21-163:25;187:5-188:1]. This testimony and other evidence admitted in the arbitration hearing provide the following answers.

A. The Advisory Agreement Is an Enforceable Contract.

The Parties submitted specific testimony and records demonstrating the logical progression of the Project financing plans and good reason and valid consideration for the creation of the Advisory Agreement.

First, the evidence, including testimony of Legacy's own agents, confirms that the Development Agreement was, until it was terminated in February, 2020, a binding contract supported by adequate consideration. CCP would have been, therefore, entitled to payment of its 4.5% fee upon closing of the bond offering required to finance the development of the Project so long as CCP had performed its obligations under the Development Agreement.

Legacy argues, however, that Icing cannot enforce any rights under the Advisory Agreement because the Advisory Agreement was entirely independent of the Development Agreement, the Development Agreement was entirely terminated and all of CCP's rights thereunder were released by the Termination Agreement, and the Advisory Agreement was never supported by adequate consideration. Given the content and history of the Development Agreement, the Termination Agreement, and the Advisory Agreement, Legacy's arguments are not persuasive.

First, the exhibits and testimony reviewed by the Arbitrator confirm that the Advisory Agreement and Development Agreement were not independent. Instead, it is clear that the Advisory Agreement would never have been created but for the mutual desires of the parties to the Development Agreement and the Advisory Agreement to reduce and transfer the fee payment obligation that was promised in return for Mr. Ploszaj's efforts connected to the Project. As explained below, the evidence confirms the Parties completed a valid novation through execution of the Termination Agreement and Advisory Agreement. Moreover, given that Mr. Ploszaj had already completed at least the majority of the service efforts contemplated by the Development Agreement, the Arbitrator finds that the parties to the Advisory Agreement intended to acknowledge the services already provided by Mr. Ploszaj would be eligible to fulfill the Icing service obligations under the Advisory Agreement.

Legacy offers no evidence supplying a logical reason why Mr. Ploszaj, and entities controlled by him, would agree, as Legacy suggests, that no one would receive any compensation for the services Mr. Ploszaj had already provided, and that instead Mr. Ploszaj would agree to a far lower fee for an entirely independent and different set of service obligations.

The Parties did intend to make it clear that CCP had no ongoing claims to an advisory fee, and no ongoing commitments to provide services for the Project. But they did not express in the Termination and Release Agreement, or in the Advisory Agreement, that the termination wiped out any and all credit for services previously provided by Mr. Ploszaj, or barred Legacy from recognizing pre-Advisory Agreement efforts by CCP as satisfying services requirements of the Advisory Agreement. In fact, the decision to clearly terminate the Development Agreement and release all compensation rights thereunder is consistent with and supports the conclusion that Icing and Legacy intended to use the Advisory Agreement, at least in part, to provide compensation for the services by Mr. Ploszaj that could have otherwise been used to satisfy the Development Agreement. Without the formal termination of the Development Agreement, the owners of the Legacy entities faced the risk of duplicative claims seeking enforcement of both the 4.5% fee rights under the Development Agreement and the 1% fee right under the Advisory Agreement for the same services performed by Mr. Ploszaj. Thus, the termination and release terms do not, as Legacy suggests, compel any finding that the Development Agreement and Advisory Agreement were entirely independent and the Advisory Agreement cannot be construed to recognize that the pre-agreement services by Mr. Ploszaj could satisfy the service requirements of the Advisory Agreement.

B. <u>There Existed Adequate and Valid Consideration for the Advisory Agreement</u>

Legacy's argument that the Advisory Agreement is legally invalid and unenforceable because the only services Icing can point to as consideration occurred before the agreement was executed is neither factually nor legally supported.

The first problem with Legacy's argument is that it suggests that the *only* benefit Icing offered in connection with the Advisory Agreement were the introductions and capital funding ideas Mr. Ploszaj offered *before* the Parties executed the Advisory Agreement. While Legacy argues that the release of the 4.5% fee right through the Termination Agreement could not be consideration for the fee payment obligations under the Advisory Agreement, the precedent Legacy cites (*Miles v. Bowers*, 49 Ore. 429, 434-35 (1907); *Maxwell v. Fid.Fin. Services, Inc.*, 184 Ariz. 82, 93 (1995)) is distinguishable. Moreover, those decisions support Icing by demonstrating that the Advisory Agreement is considered a valid novation agreement, which, by definition, is supported by adequate consideration.

For example, the *Miles* decision involved a claim for monies owed to a creditor by the prior owner of a hotel. The prior owner had entered into an agreement with a buyer of the hotel that the buyer would pay the amounts owed to the creditor, and the creditor had, for $1, agreed to transfer its business account for the former owner to the new owner. However, because the court found no evidence that the creditor had made any agreement to release the former owner of its pre-existing contractual obligations, both the prior owner and current owner of the hotel were liable to the creditor. *Miles*, 49 Ore. At 432-35. The point of the Oregon court's finding that the agreement to transfer the debt to a new hotel owner and the agreement by the creditor to transfer the former hotel owner's business account to the new owner were independent of one another was to establish that no novation was intended by which the creditor agreed to release the former owner entirely and substitute a new payor for the existing obligation.

The Arizona Supreme Court's decision in *Maxwell* emphasizes that the Arizona law embraces the same concepts of novation whereby valid obligations under a prior contract may be released in exchange for new, enforceable obligations by new parties based on the same previously exchanged consideration. "'Novation may be defined as the substitution by mutual agreement of . . . a new debt or obligation for an existing one which is thereby extinguished.'" 184 Ariz. at 91 (quoting *Western Coach Corp. v. Roscoe*, 133 Ariz. 147, 152 (1982)). "[A] valid novation requires a previously enforceable debt, the agreement of all parties to a new contract, the extinguishment of the old debt, and the validity of the new one." *Id.* (citing *Dunbar v. Steiert*, 31 Ariz. 403, 404 (1927); *United Sec. Corp. v. Anderson Aviation Sales Co.*, 23 Ariz. App. 273, 275 (1975); Rest. (2d) of Contracts, § 280 cmt. b).

Unlike the facts in *Miles*, the evidence here demonstrates that the Termination Agreement and the Advisory Agreement were inextricably linked and intended specifically to create a novation of the prior obligation to pay a 4.5% fee for the services Mr. Ploszaj had provided in connection with the Development Agreement. As primary evidence of this intent, the Termination Agreement and the Advisory Agreement were executed on the exact same day, demonstrating their interconnection and the intent to substitute one for the other. [*See* Arbitration Exhibits 2 and 3].

But the record provides much additional evidence that the Parties would not have entered into the Termination Agreement and Advisory Agreement unless they understood that the parties to those agreements were executing a novation of the prior obligation and transferring both the fee payment obligation and the rights to obtain a fee for such services to new parties. The intention of parties to create a novation "may be shown by other writings, or by words, or by conduct or by all three." *Buttonwood Farms, Inc. v. Carson*, 329 Pa. Super. 312, 478 A.2d 484, 487 (Pa. Super. 1984)). Here, all three sources allow Icing to prove a novation.

The circumstances under which the change in agreements was requested, the communications of the parties during negotiations of the Advisory Agreement and Termination Agreement, and testimony by witnesses from both sides about the purposes for the Advisory Agreement and the Termination and Release Agreement support a novation. So does the careful way in which the drafters of the two agreements, which were executed on the same day, placed the "effective dates" of the two agreements two weeks apart and left out of the two agreement potentially confusing cross-referencing of the two agreements.

Legacy points out that the Termination Agreement was "made effective two weeks before the effective date of the Advisory Agreement" (and two weeks before it was actually executed by the parties) [LCM, at 10:5-6], suggesting that, as an independent agreement among different parties, it entirely extinguished the agreement to pay a 4.5% fee so that such agreement could not be transferred in any way through the later-executed Advisory

Agreement. But this distinction in "effective dates" merely coincides with the logical desire of the persons documenting a novation to demonstrate that payment rights of CCP under the Development Agreement did not in any way contemporaneously co-exist with the rights of Icing to be paid for the previously provided services. Contemporaneous effective dates could have raised confusion over whether the payment rights were really being extinguished as to CCP and transferred completely via novation.

The Arbitrator finds similar logic rebuts Legacy's arguments about: (1) the failure of the Advisory Agreement to mention CCP, Legacy Sports USA, Inc., the Termination Agreement, or the Development Agreement; (2) the Advisory Agreement's use of parties and a fee rate different from the Development Agreement; and (3) the inclusion of merger clauses in the Advisory Agreement and Termination Agreement. [LCM, at 10:12 – 11:7]. None of those factors preclude a finding that the Parties here intended a novation. Instead, they are consistent with the fundamental nature of a novation agreement, which is to substitute new parties, and the fact that the fee rate or compensation rights are decreased (or increased) may also be evidence that a novation was intended. *See Erickson v. Brown*, 2008 ND 57, ¶ 50, 747 N.W.2d 34, 51 (N.D. 2008); *Jampole v. Matthews*, NO. 01-96-00028-CV, 1997 Tex. App. LEXIS 3867, at *25 (Tex. App. July 24, 1997); *cf. Rains v. Jones*, 152 So. 356, 357 (La. Ct. App. 1934); *In re Naumann*, No. 09-32092, 2010 Bankr. LEXIS 2056, at *9 (Bankr. S.D. Ill. June 8, 2010) ("'The greater degree of change in obligation or increase in obligation, the more likely a novation will be found.'").

The Arbitrator has also considered the emails from Mr. Ploszaj to Randy Miller dated January 28, 2020 and February 7, 2020, just prior to execution of the Advisory Agreement and the Termination Agreement. [Arbitration Exhibits 43, 83]. The first reveals that Mr. Ploszaj (as advised by counsel) requested the simultaneous execution of a Release and Termination Agreement and the Advisory Agreement, stating "[i]nasmuch [sic] as it's [a] new party Legacy Sports vs Legacy Cares this is more simple." [Arbitration Exhibit 43]. This reflects the Parties' intent to use the simultaneously executed Termination Agreement and Advisory Agreement to substitute parties for the same, pre-existing obligations.

In the second email, Mr. Ploszaj summarized the discussion at his earlier breakfast meeting with Mr. Miller of Legacy. [Arbitration Exhibit 83]. Mr. Ploszaj stated, in pertinent part: "Hope we can clean up our agreements and move on down the road. As I said I'm ok with termination of our previous agreement replaced by a new Advisory agreement. . . . Just don't want any ambiguities in our side do [sic] the deal. Simple clean end one deal enter into a new one." [*Id.*] This communication describes a clear intent to create a novation.

Finally, the fact of an enforceable novation agreement accepting Mr. Ploszaj's pre-Advisory Agreement efforts as performance earning Icing a fee is compelled by the testimony by Messrs. Doug Moss, Chad Miller and Michal Baggett in the arbitration hearing. As noted above, their testimony confirmed that, based on the efforts Mr. Ploszaj performed before and after executing the Advisory Agreement, Legacy believed that Icing was entitled to its fee just before Ziegler demanded around August, 2020 that payment of all pre-bond closing fees be delayed, and Legacy still believes that Icing deserves to be paid that fee once Legacy meets the conditions for payment of its own fee. [*See* Arbitration Hearing Transcript, Day 2, at 162:5 – 163:1; Day 3, at 77:18 – 78:16, 162:21-163:25;187:5-188:1]. Given the facts about what Mr. Ploszaj did to produce a capital plan, introduce a banker, and introduce a construction contractor – most all of which occurred before execution of the Advisory Agreement – the confirmation by Legacy's agents that Icing was nevertheless entitled to be paid under that agreement constitutes confirmation that Icing's Advisory Agreement performance obligations were fulfilled and constituted consideration acceptable to Legacy.

Legacy argues that even if the Parties had intended to allow Mr. Ploszaj's prior services on behalf of CCP to provide the trigger for Icing's fee rights under the Advisory Agreement, the law declares prior actions to be invalid consideration for new agreements to future payments. Therefore, Icing could not, as a matter of law, prove that the Advisory Agreement was supported by valid consideration; instead, the contract would be void. [LCM, at 7:23 – 9:8].

Were there no evidence of a novation agreement here, Legacy's argument would require more careful evaluation. After all, Legacy correctly notes that the general rule of contract law precludes purely gratuitous past performances, unattached to any contractual agreement, from serving as valid consideration for a future promise. *See, e.g., Hill v. Chubb Life Am. Ins. Co.*, 182 Ariz. 158, 164, 894 P.2d 701, 707 (1995). But this rule does not apply where, as here, the agreement at issue is not merely a promise to pay another for services performed gratuitously in the past, but instead possesses all the characteristics of a novation, substituting payors and payees who are compensating services that were performed as consideration for a prior agreement.

In addition, where the performance involves business services earlier performed at the request of or for the benefit of the promisor under a later contract, legal authority supports that the prior performance can provide valid consideration for the later contractual promises. *Reece v. Reece*, 239 Md. 649, 651, 212 A.2d 468, 469 (1965). Here, the services performed by Mr. Ploszaj before the execution of the Advisory Agreement were of benefit to Legacy, which had a direct financial interest in the financing and development of the Project, and the same principals who controlled Legacy were the persons requesting, through the Development Agreement, that Mr. Ploszaj and CCP perform those services.

Moreover, in a novation agreement the "'extinguishment of the original obligation is viewed as consideration for the new, and the new promise consideration for the release of the old, each being consideration for the other.'" *Goodall Oil Co. v. Pilot Corp.*, No. 19-cv-428-jdp, 2020 U.S. Dist. LEXIS 238943, at *17-18 (W.D. Wis. Dec. 18, 2020) (quoting *United States v. Bachman*, 601 F. Supp. 1537, 1541 (E.D. Wis. 1985); and citing *Everlite Mfg. Co. v. Grand Valley Mach. & Tool Co.*, 44 Wis. 2d 404, 408, 171 N.W.2d 188, 190 (1969)); *Brown v. Everhard*, 52 Wis. 205, 8 N.W. 725, 726 (1881) ("[T]he same consideration which existed for the old agreement is imported into the new agreement which is substituted for it."). Moreover, "'the discharge of the existing obligation of a party to a contract is sufficient consideration for a contract of novation.'" *Moneywatch Cos. v. Wilbers*, 106 Ohio App. 3d 122, 126, 665 N.E.2d 689, 692 (1995); *cf. Maxwell*, 184 Ariz. at 91-92 (citing with approval caselaw finding that a creditor's surrender of an old claim "'whether the claim was well founded or not, so long as it was not wholly frivolous and unreasonable,' was sufficient consideration for a novation.").

Here, there is no question that the Parties engaged in a transactional relationship by which prior claims were extinguished in exchange for substituted obligations. Therefore, the Arbitrator finds that: (1) there existed a previously enforceable contractual obligation, supported by valid consideration, to pay a service fee; (2) all parties to the Termination Agreement and the Advisory Agreement knew and agreed they transferring the fee rights, including for the services already provided, to a new promisee – Icing – and transferring the commitment to pay the fee for such services to a new promisor – Legacy; and (3) all such parties also knew that they were extinguishing the rights and obligations that had existed under the Development Agreement. Icing has therefore provided proof that the parties engaged in a novation when executing the Advisory Agreement, and the Advisory Agreement was a valid and binding contract. Icing has also proved that the Advisory Agreement was supported by adequate consideration, which included both the termination and release of the Development Agreement fee rights, and the efforts Mr. Ploszaj had performed in connection with the Development Agreement.

C. **Icing Must Be Credited with Performing the Service Obligations Entitling it to a Fee.**

As an alternative to its challenges to the enforceability of the Advisory Agreement, Legacy argues that Icing (or its predecessor in the novated agreement, CCP) did not perform the services required to trigger the fee right under the Advisory Agreement. The simplest answer to this argument is found, again, in the testimony of Messrs. Doug Moss, Chad Miller and Michael Baggett. [*See* Arbitration Hearing Transcript, Day 2, at 162:5 – 163:1; Day 3, at 77:18 – 78:16, 162:21-163:25;187:5-188:1]. Their testimony confirmed that on the eve of closing the initial bond offering, Legacy considered Icing entitled to receive its fee. Their testimony further confirms that Legacy officials still believe Icing is entitled to its fee, but that it should have to wait until Legacy is entitled to recover its own fee for the Project. Legacy officials cannot affirm those beliefs and also credibly argue that the services required to earn Icing its fee were not completed.

Also, contrary to Legacy's arguments, the evidence did confirm that Mr. Ploszaj made efforts that did assist in moving the Project toward funding and development. Legacy's evidence did not persuasively demonstrate that Mr. Ploszaj's familiarity with and promotion over a series of time of a bond financing solution involving a non-profit Project operator was a plan that would have come together in the successful way it did without his introductory efforts and promotion. Moreover, while the Arbitrator was also surprised that Mr. Ploszaj's efforts did not result in a greater production of plan and analytical materials regarding both the financing and the development and construction of the Project, the record did not contain substantial evidence of Legacy demanding more from him or communicating that his efforts were inadequate. It appeared, instead, that until they learned that bond purchasers were objecting to payment of any fees upon closing, Legacy officials were not upset or disappointed with Mr. Ploszaj's efforts. Furthermore, though Mr. Ploszaj's communications with Legacy after the Advisory Agreement was executed were largely follow-ups to assess the status of the bond funding, Mr. Ploszaj presented credible testimony indicating that he remained accessible and willing to offer further consulting services throughout the period pre-dating the bond closing.

Though Legacy's witnesses did also provide testimony contesting whether it Mr. Ploszaj really introduced what could be called a "capital solution" for the Project, whether Mr. Ploszaj really ever adequately introduced Legacy to a qualified developer/construction contractor since Legacy did not use C.D. Smith or Summit Smith, and whether it was really Mr. Ploszaj who introduced anyone on the Legacy or Ziegler side of the transaction to C.D. Smith or Summit Smith, such challenges appeared to be after-the-fact excuses for not honoring Icing's fee rights. Indeed, the Arbitrator finds that based on the testimony of Messrs. Moss, Chad Miller and Baggett, and the emails that were exchanged between Legacy and Ziegler officials when Mr. Ploszaj refused to delay Icing's fee payment rights, Legacy and Ziegler officials unjustifiably contrived the claim that Icing had not completed the services required for its fees only as an excuse to allow Legacy and Ziegler to represent to the bond purchasers that no advisory fees would be paid upon closing. However, the Legacy officials did not believe the story they contrived.

Legacy's arguments now also appear to be mostly challenges to how valuable Mr. Ploszaj's efforts really turned out to be. The Arbitrator is sympathetic with questioning whether a few simple introductions, a paper or two outlining some elements of the capital plan for the Project, and some ongoing e-mails or attendance at a few meetings with City of Mesa officials should warrant a fee of well over $1 million. However, whether the fee amount is disproportionate to the value of the services rendered is not a relevant consideration. "Any performance which is bargained for is consideration. Courts do not ordinarily inquire into the adequacy of consideration." *Sun World Corp. v. Phoenix*, 166 Ariz. 39, 42, 800 P.2d 26, 29 (Ct. App. 1990) (citing *Carroll v. Lee*, 148 Ariz. 10, 712 P.2d 923 (1986)).

Given the foregoing, the Arbitrator finds that Icing provided sufficient evidence that Icing performed the services required to trigger a fee right under the Advisory Agreement.

D. Icing Did Not Breach the Advisory Agreement By Not Agreeing to a Delay in Payment of its Fee; Rather, the Force Majeure Clause Merely Entitled Legacy to Reasonable Relief from Strict Compliance with its Payment Obligations.

Legacy argues that circumstances constituting a force majeure event arose before the first bond closing in August, 2020, and that Icing was required under Section 9 of the Advisory Agreement to agree to condition and delay its fee, just as Legacy and others had. The Arbitrator agrees with Legacy that conditions creating a force majeure event, as contemplated in Section 9, occurred prior to the bond closing. The Arbitrator does not agree, however, that Icing had an obligation to enter into a new and separate agreement like Legacy did making its fee payment subject to specific conditions and delays. Therefore, Icing's failure to agree to such new terms was not a breach, and does not provide Legacy a basis for not performing its obligations under the Advisory Agreement.

The key to resolving this issue is comparing the language of Section 9 of the Advisory Agreement to the conditions existing in August, 2020, when Legacy asked Mr. Ploszaj to agree to condition and delay Icing's fee rights. Section 9 states:

> Advisor and Company shall not be liable for failure or delay in performance of their obligations under this Agreement to the extent such failure of [sic] delay is caused by an act of God, act of a public enemy, war or national emergency, rebellion, insurrection, riot, epidemic, quarantine restriction, fire, flood, explosion, storm, tornado, interruption in the supply of electricity, power,

> water, energy or utility service, supply or material shortage, other catastrophe, terrorist attack, labor dispute or disruption or other event beyond the reasonable control of either party. In the event of a force majeure event described in this Section that affects the ability of either party to perform under this Agreement, the Parties agree to cooperate in good faith to resume the affected Services as soon as commercially possible to the extent commercially reasonable and with an equitable time, cost, and performance adjustments for the benefit of each of the parties.

[Arbitration Exhibit 3, at ICING_000026-27].

Legacy's position at the hearing, combined with its closing memorandum, contend that at least two force majeure conditions occurred. The first was the COVID-19 pandemic whose societal and economic changes hit with full force after the Advisory Agreement was executed, creating diluted interest in financing for the Project and making it critical to appease concerns of potential bond purchasers. The second was that Legacy officials learned from Ziegler that the prospective bond purchasers for the Project's initial bond offering would not complete the transaction unless there were no advisory fees (like Icing's) to be paid upon closing, and that any such fees would need to be delayed and contingent on certain financial performance targets for the Project. Legacy notes that Mr. Ploszaj admits receiving this information and being asked by Randy Miller to defer Icing's fee to help "get us to the finish line" of the bond closing. [LCM, at 21:1-17].

The Arbitrator finds that the pandemic and related, intervening demands of prospective bond purchasers fall within a reasonable interpretation of "force majeure" events defined in Section 9 of the Advisory Agreement. That clause is written in broad terms that cover a large variety of potential events, economic conditions or societal circumstances that could excuse strict performance by the parties of the terms of the agreement. It is reasonable to conclude that unforeseeable economic consequences of a global pandemic like the Parties faced in 2020 were contemplated by the force majeure clause. It is also reasonable to include within the "other event[s] beyond the reasonable control of either party" referenced in Section 9 the resulting economic trepidations and demands of prospective bond purchasers. The result of those circumstances, however, was not to impose on Icing an obligation to enter into a specific delay agreement as suggested by Legacy.

Rather, the force majeure clause excused Legacy from strictly complying with portions of the agreement that were interfered with by the force majeure conditions. The Arbitrator finds credible the position that Legacy was unable to financially afford a full payment of Icing's fee upon the bond closing, and Icing offered no persuasive evidence to the contrary. Therefore, the evidence indicates that Legacy was excused from strict compliance with the fee payment provisions of the Advisory Agreement. And, Legacy's request that Icing accept some delay in payment of its fee to ensure the bond purchasers would not back out was reasonable and consistent with its rights under the force majeure clause.

This does not mean, however, that Icing was *obligated* to honor Legacy's request and specifically condition and delay its fee payment as Legacy did. Rather, Icing has offered some evidence that Legacy might earn income or access to capital that could be used to pay fees from its role in developing, constructing and managing the Project. [*See*, *e.g.*, Arbitration Hearing Transcript, Day 3, at 52:5 – 53:7, 54:19 – 57:18 (explaining Legacy's process for obtaining disbursements of project funds), 185:24 – 187:8)]. The testimony also suggested that there may have been some proceeds of the original bond sale reserved for payment of certain fees. [*See, e.g.*, Arbitration Hearing Transcript, Day 3, at 185:24 – 187:8]. While the force majeure clause excused Legacy from paying Icing's fee upon the bond closing in August, 2020, it did not excuse Legacy indefinitely from paying that fee, and it did not allow Legacy to condition its payment obligations exclusively to its first having received the fee payment it had originally intended to receive as of the bond closing. The force majeure clause imposed no specific duties on Icing to adjust its payment rights in any particular manner. Therefore, Icing was, in refusing to agree to the specific conditional delayed payment terms Legacy agreed to, performing in accordance with its own reasonable interpretation of the contract. That cannot constitute an anticipatory breach. *See Wells Fargo Bank, Nat'l Ass'n v. Superstition Commerce Park, L.L.C.*, Nos. 1 CA-CV 14-0339, 1 CA-CV 14-0443, 2015 Ariz. App. Unpub. LEXIS 861, at *7-8 (App. June 30, 2015) (citing *Snow v. W. Sav. & Loan Ass'n.*, 152 Ariz. 27, 32 (1986)).

Furthermore, the language of the Section 9 force majeure clause speaks to the Parties "cooperat[ing] in good faith to resume the affected Services as soon as commercially possible to the extent commercially reasonable and with an equitable time, cost, and performance adjustments for the benefit of both parties." These terms express that Icing was only required to accept that it would not be paid its fee until such time as it was commercially possible for Legacy to commence payments, and that Legacy would only be required to make commercially reasonable payment efforts with an equitable time and performance adjustment, taking into account what was necessary to benefit both of the Parties.

The evidentiary record suggests that Legacy may have earned considerable income from which it might have distributed material payments to Icing's fee. The fact that Legacy has not attempted to make *any* such payments, but has instead defended Icing's payment demands with arguments that Icing is owed nothing, indicates that Legacy is in breach of its obligations under the Advisory Agreement.

E. Icing Has Proven a Breach of the Implied Covenant of Good Faith and Fair Dealing.

Every contract in Arizona implies an obligation on each party to take no actions that will prevent the other party from obtaining the reasonably expected benefit of their bargain. *See, e.g.*, *Rawlings v. Apodaca*, 151 Ariz. 149, 153-54 (1986); *Beaudry v. Ins. Co. of the W.*, 203 Ariz. 86, 91 (App. 2002). Here, the record shows Legacy attempted to use its discretion under the Section 9 force majeure clause to eliminate Icing's fee payment rights, and did so through a contrived, post-hoc analysis that claimed Icing had not performed the obligations of the Advisory Agreement. Legacy first incorrectly asserted that the Section 9 terms allowed it to demand that Icing agree to condition and delay its fee payment. Then, when Icing did not capitulate, Legacy falsely claimed that Icing had failed to perform and inaccurately reported to Ziegler for the prospective bond purchasers that Icing was owed no fees on closing of the bond offering. Legacy then doubled down and asserted to Icing that it was, in fact, owed no fee.

But Legacy's actions exceeded its authority under the force majeure clause, and also demonstrated bad faith by contriving a convenient failure of performance allegation that Legacy's principals had, to that point, not believed. This constitutes a violation of Legacy's implied good faith obligations.

III. **The Arbitrator Must Decide How Much Icing is Owed, and How Much of that Amount is Past Due.**

Given the Arbitrator's finding that Legacy is contractually obligated to pay Icing its fee, and that Legacy is already in breach of its payment obligations to some extent, the Arbitrator must next resolve: (1) what Icing's total fee entitlement is; (2) how much, if any, of that entitlement Legacy was contractually obligated to have paid by now; and (3) how much Legacy remains obligated to pay. The following addresses each of those issues in turn.

A. **Icing is Not Entitled to Calculate its Fee Based on the Total Amount of Money Raised by the Bond Offerings.**

Icing contends that its 1% fee must be calculated against the total amount of funds raised by sale of the bonds in the two closed offerings. For Icing's position to be correct, the Parties must have intended the phrase "total cost of the Project as provided in the Development Finance Program", used in Section 3 of the Advisory Agreement, to mean the total amount paid by the bond purchasers over the two bond offerings. The Arbitrator finds that Icing's interpretation is not reasonable, and that Icing's fee should be calculated against the total construction cost of the Project as projected in the final closing memorandum for the first bond offering, and it should not include any monies raised in the second bond offering.

First, the evidentiary record affirms there is substantial ambiguity in the "total cost of the Project" phrase. The ambiguity is especially caused by the agreement attaching the language "as provided in the Development Finance Program" to the phrase "total cost of the Project", even though the term "Development Finance Program" is only defined in the Advisory Agreement by reference to an Exhibit B which was not actually attached to the executed agreement.

The ambiguity here encourages both sides to try and advocate for interpretations that most benefit them financially. But the ambiguity does not render the Advisory Agreement void for a lack of a meeting of the minds on the fee calculation issue, as Legacy argues. Instead, so long as the contract is ambiguous and both Parties can offer conflicting reasonable interpretations of the term "total Project cost as provided in the Development Finance Program", the Arbitrator is obligated to determine the reasonable expectations and intent of the Parties under that term, and may resort to extrinsic evidence to do so. *See Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 154, 158-59 (1993) ("Generally, and in Arizona, a court will attempt to enforce a contract according to the parties' intent."); *Long v. City of Glendale*, 208 Ariz. 319, 328, ¶ 28 (App. 2004) ("If the court finds that the writing is 'reasonably susceptible' to the interpretation suggested by the proponent of the extrinsic evidence then the court should admit the extrinsic evidence." (quoting *Taylor*, 175 Ariz. at 155)). Still, in construing the intent of the Parties here, the Arbitrator should interpret the contract "in such a way as to reconcile and give meaning to all of its terms, if reconciliation can be accomplished by way of reasonable interpretation." *Gfeller v. Scottsdale Vista N. Townhomes Ass'n*, 193 Ariz. 52, P13 (App. 1998); *see also Taylor*, 175 Ariz. at 154; *Shields v. Provident Life & Accident Ins. Co.*, No. 1 CA-CV 22-0057, 2022 Ariz. App. Unpub. LEXIS 987, at *9 (Ct. App. Nov. 22, 2022) ("If the language is ambiguous, we must examine the whole transaction, giving 'a reasonable and harmonious meaning and effect to all provisions,' rendering none meaningless.").

The Arbitrator considers the following analysis of the language in the Advisory Agreement, and the following extrinsic evidence, relevant to determining the Parties' reasonable expectations regarding the meaning of "total Project cost" under the compensation clause.

1. Icing's proposed definition of "total Project cost" uses the total amount of funds paid by bond purchasers as a proxy for the "cost" of the Project. There is a logical disconnect in that approach. After all, a large amount of the capital raised from bond purchasers would be used to pay the costs of the financing, including to address debt service obligations and costs of issuing the bonds. These financing

costs would not inure directly to the benefit of the Project like investments made in construction services, materials, furnishing and equipment. So, as Legacy argues, Icing claims entitlement to collect a fee on amounts that were owed by the Project to cover the costs of financing. Mr. Ploszaj's testimony admitted that Icing's position would require payment to Icing of a percentage of someone else's fees. [Arbitration Hearing Exhibit, Day 2, at 84:11-21]. It does not seem logical that the Parties reasonably expected the Project to be paying such fees on its financing costs and debts, as well as fees on capital obtained for direct Project development and construction expenses.

2. The Parties obviously meant to tie the term "total Project cost" to a calculation provided in an extrinsic document – the "Development Finance Program" that was supposed to be attached as Exhibit B to the Advisory Agreement. What the parties intended to use for Exhibit B was not clearly identified in the testimony and exhibits presented. However, the Arbitrator did receive various other extrinsic documents concerning the same topic, and Mr. Ploszaj did variously suggest in testimony that the intended Exhibit B Development Finance Program might either be Arbitration Exhibit 113 (a Business Plan) or Arbitration Exhibit 114 (an Executive Summary to the Offering Memorandum for the first bond offering), or a combination of the two. [Arbitration Hearing Transcript, Day 2, 19:7 – 20:3, 94:3-10]. The Arbitrator believes that construing the Executive Summary documents and their "Project Development Budget" table as what was reasonably intended for Exhibit B is not only consistent with Mr. Ploszaj's testimony, but it best harmonizes with the language of the rest of the Advisory Agreement. Using language similar to the "Project Development Budget" title in the offering memoranda Executive Summary tables, the recitals to the Advisory Agreement define the "Project" as "the development of a multi-sports and entertainment park to be located on leasehold land in Mesa, Arizona." [*Compare* Arbitration Hearing Exhibit 105 *with* Arbitration Hearing Exhibit 3, at 1]. The Executive Summary "Project Development Budget" tables included many costs of development,

including construction costs, furniture, fixture and equipment costs, design and engineering costs, and pre-development costs. They did not, however, include various financing costs such as debt service obligations on the bonds, capitalized interest obligations, or costs of issuance of the bonds. [*See, e.g.*, Arbitration Exhibits 105, 114].

3. The Arbitrator received testimony and copies of deferral agreements indicating that others who claim similar entitlement to fees associated with the total project cost intend their fees to be limited to a percentage of the total capital expenditures for the Project, and not the total amount raised by the bond offerings. [*See* Arbitration Hearing Transcript, Day 2 (testimony of Doug Moss); Arbitration Exhibit 28]. This evidence was credible, and was not rebutted by Icing. While the testimony is not alone sufficient to justify a finding that the "total Project cost" did not mean the total amount raised in the bond offerings, it provides supplemental, relevant extrinsic support for such an interpretation.[3]

4. The plain language of the Advisory Agreement does not contemplate more than one sale of bonds to which Icing's fee would relate. Instead, the Recitals and Section 1 speak of "***a*** capital solution" and Section 3 requires payment "at the earlier of the closing on the sale of ***the*** tax exempt or taxable bonds." [Arbitration Hearing Exhibit 3, at 1, 2 (Sections 1 and 3) (emphasis added)]. This cuts against finding that the Parties reasonably expected that Icing's fee would be calculated against any money raised by any future bond offerings, or the Project-related costs such monies were budgeted for.

5. Moreover, Legacy notes that the majority of the funding raised in the second bond offering in June, 2021, was budgeted for repair and replacement costs and turf replacement expenses, and the Arbitrator heard testimony that such funds and their uses were not contemplated as part of the Project-related costs at the closing

[3] The Arbitrator considers the contracts and testimony of other persons or entities owed fees similar to Icing's more persuasive than any testimony of supposed "customary" fee calculation practices Ms. Fellerhoff may have testified to. Therefore, the Arbitrator's analysis disregards Ms. Fellerhoff's testimony.

of the first bond offering. [*See* Arbitration Hearing Transcript, Day 3, 61:20 – 62:1, 65:5-12, 80:1-25, 81:1-10]. Icing did not effectively rebut that evidence. Therefore, the express terms of the Advisory Agreement and the extrinsic facts demonstrating what Project-related costs the Parties contemplated when they executed that agreement lead the Arbitrator to conclude that Icing's fee was not intended to include any percentage of funds raised in the second (or any later) bond offerings.

Given the foregoing, the Arbitrator finds that relevant terms of the Advisory Agreement, construed harmoniously, and relevant extrinsic evidence establishes that the Parties to the Advisory Agreement reasonably expected and intended that the "total Project cost" against which Icing's 1% fee would be assessed would be those amounts raised by the initial bond offering and budgeted for the construction and other development-related costs as defined in the offering documents, but that they would exclude the financing costs.

Moreover, Mr. Ploszaj testified that his fee was contingent on the bond offering actually closing, and was subject to changes in the that might be made to the bond offering details up to closing. [Arbitration Hearing Transcript, Day 2, at 52:1-8]. The final version of the total Project cost, defined using the foregoing analysis, is found in the Closing Memorandum for the first bond offering – Arbitration Exhibit 104. The cost calculated there for the amount of the bond proceeds distributed to the "Project Fund" as opposed to the "Capitalized Interest Fund", the "Debt Service Reserve Fund", and the "Costs of Issuance Fund", is $181,322,115.38 [Arbitration Exhibit 104, at LCI_000146; Arbitration Hearing Transcript, Day 2, at 188:5-22]. A 1% fee calculated against that number is $1,813,221.15. The Arbitrator finds that this fee amount - $1,813,221.15 – is consistent with the reasonable expectations and intent of the Parties under the Advisory Agreement. Icing is entitled to payment of that fee per the terms of the Advisory Agreement.

B. <u>How Much is Past Due and How Much is Still Owed But Not Yet Due?</u>

As noted above, just *when* Icing was or is entitled to payment of the foregoing fee is dependent on application of the principles under the force majeure clause at Section 9 of the Advisory Agreement. As found above, Icing was entitled under the terms of that clause to have Legacy commence payments of the fees owed as soon as commercially possible and subject to commercially reasonable terms, including timing and cost terms, considering the mutual benefit of the Parties.

To the extent it would have been commercially possible for Legacy to have made any commercially reasonable payments on the fee amount owed to Icing prior to the date of this decision, Legacy is in breach of its contractual obligations to Icing and all such amounts are past due and owing. Icing would be entitled to a judgment for all such amounts, and the amount of its judgment would become immediately collectible against Legacy. And, per the interest provisions of A.R.S. § 44-1201, Icing should be entitled to prejudgment interest on all such unpaid amounts accruing from the date they were due, as well as post-judgment interest once a judgment is entered against Legacy.

As for those portions of the $1,813,221.15 fee Legacy could not have paid Icing to date applying the "commercially possible" and "commercially reasonable" standards of Section 9 of the Advisory Agreement, the Arbitrator finds that Legacy remains contractually obligated to pay such amounts in accordance with the terms of Section 9 when it becomes commercially possible for Legacy to pay such amounts applying commercially reasonable payment terms.

The Arbitrator did not receive evidence from either Party from which he could determine just how much of the $1,813,221.15 fee, if any, Legacy should have paid Icing from its available financial resources by now, and how much Legacy is entitled (and required) to pay in the future. This presents a challenge to the final resolution of this matter, as the Parties are entitled to know how much Legacy is in arrears as a result of its breach, and how much it remains obligated to pay as commercially reasonable circumstances and terms dictate. To address this challenge, the Arbitrator hereby orders that the Parties, through counsel, appear for a status conference in this matter within the next ten (10) calendar days, to be set at a time mutually convenient to counsel and the Arbitrator. The Parties shall be prepared to address procedures whereby the Parties can provide the Arbitrator appropriate supplemental evidence and briefing to answer the following questions:

1. Applying the standards under Section 9 of the Advisory Agreement, when did it first become commercially possible for Legacy to have commenced payments on the fee owed to Icing, and how much money could Legacy have provided Icing using commercially reasonable payment terms since that time?
2. Given answers to the questions in 1 above, and applying the prejudgment interest rules at A.R.S. § 44-1201, what amount owed by Legacy to Icing for its fee is still not subject to payment until repayment is commercially possible for Legacy using commercially reasonable payment terms?
3. Is any party entitled to an award of attorneys' fees or costs of arbitration, and, if so, on what basis?

The Arbitrator intends to use the evidence and legal answers provided to the foregoing questions to decide how much of Legacy's debt to Icing is currently in arrears and should form the basis of a final Arbitrator's Award and money judgment for amounts past due, and how much of such debt should be declared in a final Arbitrator's Award and judgment to be immediately due and owing in the future once it becomes commercially possible for Legacy to pay such amounts using commercially reasonable payment terms. The Arbitrator also intends to use the answers to such questions to decide whether either of the Parties is entitled to an award of attorneys' fees or costs of arbitration, and to include that in a final Arbitrator's Award that may be converted to a judgment.

IV. Conclusion

For the reasons set forth above, the Arbitrator finds that Claimant Icing has met its burden of proving that Respondent Legacy has breached its express contractual obligations to Icing under the Advisory Agreement by contesting its obligation to pay Icing its 1% fee, and its implied covenant of good faith and fair dealing by taking actions to challenge Icing's entitlement to be paid its 1% fee, and by reporting to Ziegler and the bond purchasers that no advisory fees were legally due upon closing of the initial bond offering in August, 2020. Icing is entitled to entry of a final Arbitration Award declaring Icing entitled to enforce against Legacy its right to be paid a 1% fee, equaling $1,813,221.15, in accordance with the terms of the Advisory Agreement. And, if further proceedings establish that Legacy has failed to pay amounts owed to Icing in connection with its 1% Advisory Agreement fee when it became commercially possible for Legacy to do so under commercially reasonable terms, then Icing shall further be entitled to a final Arbitration Award identifying the amounts past due and owing to Icing from Legacy, along with all prejudgment and post-judgment interest obligations thereon as provided by Arizona law. At this time, the Arbitrator is continuing these proceedings for completion of the exercise outlined above, at the conclusion of which the Arbitrator intends to issue an appropriate final Arbitration Award which will also address any entitlement of any party to attorneys' fees or costs.

ARBITRATOR

Date: December 12, 2022

/s/ William A. Richards
William A. Richards

EXHIBIT 3

ARBITRATION PROCEEDING

ICING INVESTMENT HOLDINGS, LLC, an Arizona Limited Liability Company, Claimant, vs. LEGACY CARES, INC., an Arizona company, Respondent.	In the Arbitration of Claims Raised in Maricopa County Case No. CV2021-003291 **ARBITRATOR'S SUPPLEMENTAL DECISION** (Arbitrator: William Richards)

The Arbitrator issued his initial Arbitrator's Decision on December 12, 2022, and requested thereafter that the Parties submit supplemental briefing on the following issues:

1. Applying the standards under Section 9 of the Advisory Agreement, when did it first become commercially possible for Legacy Cares, Inc. ("Legacy") to have commenced payments on the fee owed to Icing Investment Holdings, LLC ("Icing"), and how much money could Legacy have provided Icing using commercially reasonable payment terms since that time?

2. Given answers to the questions in 1 above, and applying the prejudgment interest rules at A.R.S. § 44-1201, what amount owed by Legacy to Icing for its fee is still not subject to payment until repayment is commercially possible for Legacy using commercially reasonable payment terms?

3. Is any party entitled to an award of attorneys' fees or costs of arbitration, and, if so, on what basis?

The Parties have submitted their supplemental briefs addressing the foregoing issues, and the following discussion explains the Arbitrator's final findings on the issues briefed.

I. How Much, If Any, of the $1,813,221.15 Fee of Claimant Icing Investment Holdings, LLC is Past Due and Owing?

The Arbitrator found previously that Claimant Icing is entitled to a fee of $1,813,221.15 from Respondent Legacy per the terms of the Advisory Agreement dated February 19, 2020, but that the terms of the "Force Majeure" clause at Section 9 of the

Advisory Agreement excused Legacy from paying that fee immediately upon closing of the tax exempt bonds sold to finance the Project contemplated by the Advisory Agreement. However, the Force Majeure clause specifically provides that Legacy and Icing would resume their contractual obligations "as soon as commercially possible to the extent commercially reasonable and with an equitable time, cost, and performance adjustments [sic] for the benefit of each of the parties."

Therefore, the Arbitrator must decide whether conditions making it "commercially possible" for Legacy to pay any portion of Icing fee have existed and, if so, what amounts of the fee it could have been "commercially reasonable" for Legacy to pay. For if the facts indicate it was, indeed, "commercially possible" for Legacy to have made some "commercially reasonable" payments to Icing in satisfaction of its fee, it is undisputed that Legacy has never attempted to do so. That failure to make any attempts to pay Icing after it became "commercially possible" for Legacy to do so would constitute a breach of the Advisory Agreement, and, especially, a breach of the implied covenant of good faith and fair dealing for which damages can be recovered.

Icing argues that the Arbitrator should declare the entire fee amount past due and owing, noting the evidence adduced at the arbitration hearing that any Covid-19-related delays had ended, the initial bond sale to which the Icing fee relates had been completed, and that Legacy itself received or paid large amounts of funds to various related parties. The Arbitrator agrees that the conditions triggering the Force Majeure clause were virtually resolved with the closing of the first bond sale and the administrative actions that occurred thereafter by which various proceeds of the sale were divided, distributed to various funds, and made available for requisitioning by Legacy per the terms of the transaction documents. Deciding when it became "commercially possible" for Legacy to make "commercially reasonable" payments to start satisfying Icing's fee, however, requires an examination of the funds that Legacy had arranged, both before and after the closing, to become available to or through it.

The Arbitrator finds that the evidentiary record admitted through the Arbitration

Hearing and the post-hearing briefing of the Parties shows that Legacy had influence, responsibility and control over how various funds would be distributed after the closing, including the following:

1. Legacy was entitled to requisition $1,200,000.00 on closing for reimbursement of Legacy Sports USA LLC for qualified pre-development costs incurred. Michael Baggett testified at the Arbitration Hearing that this amount was "dedicated to the reimbursement of Legacy for its costs that it had incurred . . . [r]eimbursements of costs to do whatever Legacy wanted to do with it and Legacy paid back the investor, paid the rest of it back to the investor who had invested in the project." [Arbitration Hearing Transcript, Day 2, at 122:20 – 123:6]. According to the deposition of Ms. Cho Fellerhoff, the "investor" referenced by Mr. Baggett appears to have been Randy Miller [*See* Respondent's Arbitration Exhibit 109, at 39:7-21];
2. After closing Legacy began paying its President, Doug Moss, some $350,000.00 per year, which was modified to $245,000.00 per year starting in approximately August, 2022; and
3. Legacy has been paying some $102,500.00 per month to Legacy Sports USA LLC for salaries of Chad Miller ($40,000.00/month) and Randy Miller ($40,000.00/month), and for a monthly retainer to Michael Baggett ($22,500.00/month) since closing.
4. Legacy was entitled to receive from the Trustee payment of some $3,128,272.50 for issuance expenses associated with charges of the AZ IDA, charges of issuer's counsel, bond counsel, Trustee's counsel, purchaser's counsel, underwriter's printing, and other associated expenses [*See* Respondent's Arbitration Exhibit 104, at LCI_000147]. Michael Baggett testified he obtained $150,000.00 after closing, which corresponds to an amount listed on the Final Closing Memo as payment to "Borrower's counsel". [*See, id.*]. That Final Closing Memo listed Legacy as the "Borrower." [*See, id.*, at LCI_000145]. So, Legacy had arranged to pay, and did pay, Mr. Baggett $150,000.00 after closing as a creditor of Legacy.

Legacy argues that at no time since the first bond sale closing has Legacy *ever* been able to pay any amounts to Icing. But Legacy's argument rests on the following logic: (1) Legacy's only revenue comes from distributions of bond sale proceeds from the Trustee; (2) the documents governing the use of the bond proceeds, including the Indenture of Trust, the Loan Agreement, the Management Agreement, the Deposit Control Agreement, the Leasehold Deed of Trust, and other transactional documents (the "Bond Documents"), forbid distribution from the Trustee of any of the bond proceeds or revenues from the operations of Bell Bank Park (the "Park") outside of limited, defined purposes and require applications confirming that any distributions requested fall within such defined purposes; and (3) the payment of Icing's fee is not one of the purposes for which the Bond Documents have allowed distributions from the bond proceeds and revenues received from operations of the Park.

Legacy's arguments are unpersuasive for two reasons. First, Icing is correct that it is not a party to the Bond Documents, and therefore not subject directly to any of their terms. Also, Legacy points to nothing in the Advisory Agreement that tied any condition of payment for Icing's fee to the final language or operation of the Bond Documents. Based on the testimony at the arbitration hearing, and the language of the Advisory Agreement, the Arbitrator finds that the parties to the Advisory Agreement did not intend to limit Icing's right to payment to amounts that could be released directly to Icing pursuant to the Bond Documents.

Second, Legacy's logic resting entirely on the terms of the Bond Documents might be more convincing if Legacy had identified any terms in those Bond Documents that have expressly prohibited Legacy from using funds the Trustee has paid in response to Legacy's valid distribution claims to satisfy any particular debts of Legacy. But Legacy has made no such arguments, and identified no such limitations in the Bond Documents.

Instead, it appears clear that Legacy operates like many non-profit and for-profit entities. It has agreed to pay certain financial obligations, which include Icing's fee, the $150,000.00 pre-closing legal fee claim of Mr. Baggett, the monthly charges of Legacy Sports USA LLC, including the ongoing, monthly salary claims of Randy Miller and Chad Miller, the monthly retainer obligation of Legacy Sports USA LLC to Mr. Bagget, and also the ongoing salary commitments Legacy has made to Mr. Moss. And like other non-profits sometimes do, Legacy committed itself to debts in excess of its revenues. In such cases, where the entity is over-committed, it has options for trying to remedy that condition. Those include working with creditors to make debt adjustments like the voluntary suspensions of claims, waiver of claims, or settling of favorable, delayed repayment terms. Available debt adjustment options may also include arranging deferrals of executive compensation to allow Legacy to prioritize repayment of large creditors.

The express terms of the Section 9 Force Majeure clause of the Advisory Agreement required Legacy to investigate and execute upon such options wherever reasonable. The clause stated, in pertinent part, that "[i]n the event of a force majeure event described in this Section that affects the ability of either party to perform under this Agreement, the Parties agree to cooperate in good faith to resume the affected Services as soon as commercially possible to the extent commercially reasonable . . .."[1] The facts demonstrate it was both commercially possible and commercially reasonable for Legacy to have commenced payments on Icing's fee as soon as Legacy started requisitioning and receiving funds from the Trustee.

For example, Legacy received some $1.2 million on closing to reimburse certain pre-development costs of Legacy Sports USA LLC. Legacy has not offered any legal reason why, having found a way to incur $1.2 million in pre-closing debt obligations in support of a bond sale that was contingent and might never have happened, it could not thereafter attempt to make financial arrangements that would allow it to use some or all of such amounts, legitimately paid to Legacy, to satisfy Icing's fee right. Also, Legacy has apparently made or authorized payments to allow Mr. Moss, Mr. Chad Miller, Mr. Randy Miller, and Mr.

[1] As previously found by the Arbitrator, Icing had performed all services required to earn its 1% fee by the time the first bond sale closed. Therefore, the "service" the Force Majeure clause required to be resumed through good faith cooperative efforts was Legacy's return obligation to pay Icing its fee.

Baggett to receive hundreds of thousands of dollars after the closing. Legacy has not offered any legal reason why Legacy could not have entered into agreements whereby these individuals (including its own President) authorized a deferral of their compensation from the funds Legacy receives, allowing Legacy to pay Icing installments on its fee from such amounts. The Arbitration record indicates that Legacy has instead decided to forego even investigating such options and favored other creditors like Legacy Sports USA LLC (which Legacy has agreed to reimburse for the salaries of Messrs. Randy Miller and Chad Miller, and the "retainer" of Mr. Baggett), and Mr. Moss over Icing. Legacy was required by its Section 9 "good faith" obligation to cooperate and resume performance of its payment duties to Icing under the Advisory Agreement when Legacy knew it would be able to obtain revenue. Its failure to have commenced any efforts to try and retain funds and pay Icing once it started receiving revenues from the bond Trustee is a contractual breach.

The Arbitrator also finds that Legacy's obligation to develop and structure arrangements by which it could free up revenues to use for payment of Icing, wherever possible, was at least part of Legacy's implied duty of good faith and dealing under the Advisory Agreement. By failing to attempt to utilize revenues Legacy could requisition and was receiving to fulfill its fee payment obligation to Icing, Legacy denied Icing the benefits of its bargain under the Advisory Agreement. Again, "[a]ll contracts as a matter of law include the implied duties of good faith and fair dealing, and contract damages are available for their breach." *United Dairymen of Ariz. v. Schugg*, 212 Ariz. 133, 137-38 (App. 2006) (*citing Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 490-91, PP 59-60, 38 P.3d 12, 28-29 (2002); *Rawlings v. Apodaca*, 151 Ariz. 149, 153-54, 726 P.2d 565, 569-70 (1986); *Enyart v. Transamerica Ins. Co.*, 195 Ariz. 71, 76, 985 P.2d 556, 561 (App. 1998)). Moreover, "[a] party can breach the implied covenant of good faith and fair dealing without breaching an express provision of the underlying contract." *Id.* (citing *Beaudry v. Ins. Co. of the West*, 203 Ariz. 86, 91, P18, 50 P.3d 836, 841 (App. 2002) (quoting *Wells Fargo Bank*, 201 Ariz. at 491, P64, 38 P.3d at 29)). Legacy's failure to even attempt to develop options whereby it could satisfy part, or all, of

Icing's fee, despite receiving millions in revenues for various business purposes since the closing of the first bond sale, constitutes a breach of the covenant of good faith and fair dealing implied in the Advisory Agreement.

The Arbitrator is not ruling that any particular re-arrangements of Legacy's debt obligations were required, and the Arbitrator acknowledges that such re-arrangement might require careful legal documentation and structure to ensure they gave the Trustee no justification for withholding distributions requested by Legacy. However, the Arbitrator finds that Icing has proven, by a preponderance of the evidence, that it was commercially possible for Legacy to commence some material payments to Icing not long after closing, and that using commercially reasonable paths could have allowed Legacy to have repaid Icing by now had Legacy simply tried. This is especially so because Legacy has been paying substantial amounts to persons intimately involved with the Project who have close ties or former ties to Legacy and who would have had incentive to cooperate with Legacy and maximize its ability to pay its debt to Icing. The Arbitrator is justified in finding that Icing's entire fee debt of $1,813,221.15 is now past due and owing per the terms of the Advisory Agreement. Moreover, the Arbitrator finds that given Legacy's violation of its implied obligations of good faith and fair dealing, Icing has been damaged, and that the reasonable amount of damage is the amount Icing would have received had Legacy complied with its obligation, $1,813,221.15.

II. <u>Interest.</u>

Icing claims entitlement to prejudgment interest on its unpaid fee at 10% per annum starting September 1, 2020. Icing asserts its claim is a liquidated amount to which A.R.S. § 44-1201 applies, and that it is owed $427,224.64 in prejudgment interest. Icing further claims post-judgment interest on its unpaid fee amount should be awarded at a rate of 8.5% per annum commencing January 9, 2023.[2]

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[2] Icing's supplemental brief uses the date of January 9, 2022, for commencement of the post-judgment interest, but that is an obvious typo given Icing's reference to the post-judgment interest accruing after the Arbitrator enters his final award.

Legacy contends that no prejudgment interest can be awarded because any amount due Icing is unliquidated, citing *Cont'l Townhouses E. Unit One Ass'n v. Brockbank*, 152 Ariz. 537, 540, 733 P.2d 1120, 1123 (App. 1986), and because no amounts are past due and owing to Icing.

The Arbitrator's decision above undermines Legacy's second argument. As to Legacy's first argument, a party is entitled to prejudgment interest as a matter of right, and not a matter of discretion, on a liquidated claim, but not if the party's claim is unliquidated. *Ariz. Feeds v. S. Pac. Transp. Co.*, 21 Ariz. App. 346, 355, 519 P.2d 199, 208 (1974) ("Prejudgment interest is not allowed on unliquidated claims."); *Suciu, v. Amfac Distrib. Corp.*, 138 Ariz. 514, 520-21, 675 P.2d 1333, 1339-40 (App. 1983) (citing *Banner Realty, Inc. v. Turek*, 113 Ariz. 62, 546 P.2d 798 (1976)). Claims that were capable of precise mathematical computation before litigation are considered liquidated. *See, id.*; *Suciu* 138 Ariz. at 520-21, 675 P.2d at 1339-40 ("The claim is liquidated if the evidence furnishes data which, if believed, make it possible to compute the amount with exactness without reliance upon opinion or discretion." (citing *Costanzo v. Stewart Title & Trust of Phoenix*, 23 Ariz. App. 313, 533 P.2d 73 (1975)). All others are unliquidated.

The existence of a difference between the amount of damages claimed and the amount awarded does not preclude the award of prejudgment interest; in other words, it does not make the claim "unliquidated". *Suciu* 138 Ariz. at 520-21, 675 P.2d at 1339-40 (citing *Coleman Engineering Co. v. North American Aviation, Inc.*, 65 Cal.2d 396, 420 P.2d 713, 55 Cal.Rptr. 1 (1966); *Overland Machined Products, Inc. v. Swingline, Inc.*, 263 Cal.App.2d 642, 69 Cal.Rptr. 852 (1968); *Homes & Sons Construction Co., Inc. v. Bolo Corp.*, 22 Ariz.App. 303, 526 P.2d 1258 (1974)). Nor does the existence of a dispute between a debtor and creditor about how much is actually due and owing. *See, Homes & Son Constr. Co.*, 22 Ariz. App. at 306, 526 P.2d at 1261 ("Mere differences of opinion as to the amount due does not preclude prejudgment interest since disputes as to liability itself does not preclude interest.")

The Arbitrator has found that Icing is entitled to collect a fee of $1,813,221.15 from Legacy. That is an amount calculated using the 1% fee rate in the Advisory Agreement, multiplied against the bond proceeds assigned to the "Project Fund" for the Bell Bank Park project upon closing of the bond sale. There is no doubt this is a liquidated amount capable of precise determination using data that was available to Legacy. The fact that Icing demanded a higher fee than the Arbitrator has determined was earned, and that Legacy disputed the fee amount, does not render the amount owed to Icing unliquidated.

The more difficult question here is when does Icing's entitlement to prejudgment interest commence? Given the Arbitrator's finding that Icing was not owed the fee precisely "at the . . . closing of the [bond] sale" as stated in Section 3 of the Advisory Agreement, Icing's request to commence prejudgment interest on the entire $1,813,221.15 fee immediately on September 1, 2020 is not justified. Nevertheless, the Arbitrator finds here that the amounts Legacy either received, or had arranged to be paid, shortly after the closing triggered payment obligations under the Force Majeure clause because amounts were commercially possible and commercially reasonable to pay. For instance, the record reflects that Legacy had agreed that Legacy Sports USA LLC should be paid $1.2 million for reimbursement of "qualified pre-development costs" (which were really mostly personal debts of Randy Miller) through a requisition that would be submitted by Legacy, and had agreed to pay Mr. Baggett some $150,000.00 as part of another requisition Legacy would make post-closing. [*See* Arbitration Exhibit 104, at Bates No. LCI_000147]. And, the record reflects that Legacy began paying its President, Mr. Moss, over $29,166.00 per month shortly after closing, and began paying amounts to Legacy Sports USA Inc. that allowed Randy Miller, Chad Miller and Michael Baggett to receive, collectively, some $102,500.00 per month. These facts indicate that just by using one-half the amount Legacy had arranged to pay Legacy Sports USA LLC for pre-development costs and Mr. Baggett for pre-closing attorneys' fees (which would equal, together, some $675,000.00), and then just one-half the amounts paid for salaries or retainer amounts to Messrs. Randy and Chad Miller, Moss and Baggett for the first year after closing (which would equal $702,500.00, collectively), Legacy could have arranged for payment of Icing of some $1,377,500.00 of its $1,813,221.15 fee by September 1, 2021, and then the $435,721.15 balance could have been paid using just one-half the amounts being paid to Messrs. Moss, Randy Miller and Chad Miller, and Baggett in under four more months, so that the entire fee balance was repaid by approximately January 1, 2022. Thus, January 2, 2022 is a reasonable starting point to assume the 1% fee to Icing of $1,813,221.15 was fully due and owing and accruing prejudgment interest.

Icing correctly contends that the prejudgment interest rate on the amount owed to Icing is 10%. A.R.S. § 44-1201(A)(2). Given the analysis provided above, the Arbitrator finds that it is appropriate to commence prejudgment interest on January 2, 2022. The prejudgment interest on the $1,813,221.15 owed to Icing therefore equals $184,799.52 as of this 8th day of January, 2023.

The Arbitrator agrees with Icing's calculation of the post-judgment interest rate applicable here. It is 8.5% per annum per A.R.S. § 44-1201(B) and Federal Reserve statistical release H.15 in effect at the time of this decision.

III. <u>Attorneys' Fees and Costs.</u>

Icing contends it is the prevailing party, that it is entitled to an award of attorneys' fees in accordance with A.R.S. § 12-341.01, and that it is entitled to an award of arbitration costs pursuant to A.R.S. § 12-341. Icing also seeks to have the Arbitrator award all the Arbitrator's fees against Legacy.

Legacy contends that Icing cannot be awarded attorneys' fees because A.R.S. § 12-341.01 does not contemplate awarding any fees in an arbitration, which is not an "action" to which the statute applies. Legacy cites as support *WB, The Bldg. Co.*, 227 Ariz. 302, 312 ¶ 29 (App. 2011) ("*WB*"). Legacy's argument, however, implicitly acknowledges that the decision in *WB* considered only whether attorneys' fees could be awarded in an arbitration matter governed by A.R.S. § 12-1510 where the parties had not contractually agreed such fees could be awarded. The Arbitrator finds that this matter is instead governed by the Arizona Revised Uniform Arbitration Act, whose applicable statutory section is A.R.S. § 12-3021.

The language of A.R.S. § 12-3021 is materially different from the language in A.R.S. § 12-1510, and that material difference has led the Arizona courts to recognize a fees award under A.R.S. § 12-341.01 can be made in a case like this one. Section 12-1510 states: "Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, ***not including counsel fees***, incurred in the conduct of the arbitration, shall be paid as provided in the award." (emphasis added). The Court of Appeals in *WB* recognized that the arbitration statute created a "general prohibition on fees." So, a fee award under A.R.S. § 12-341.01 could only be made if that statute itself authorized attorneys' fees awards in arbitration actions. *WB*, 227 Ariz. at 311-12.

The Revised Act section, 12-3201(B) states instead: "An arbitrator ***may award reasonable attorney fees*** and other reasonable expenses of arbitration ***only if that award is authorized by law in a civil action involving the same claim*** or by the agreement of the parties to the arbitration proceeding." (emphasis added). Thus, the statute in play here specifically authorizes, rather than prohibits, attorneys' fees awards, with the caveat being a similar award must be "authorized by law in a civil action involving the same claim." The Arizona Court of Appeals has ruled that "§ 12-3021(B) grants an arbitrator the same power the superior court has to award fees in a civil action." *RS Indus. v. Candrian*, 240 Ariz. 132, 135, 377 P.3d 329, 332 (App. 2016). And, the Arizona Supreme Court recently affirmed that in a case where the arbitrating parties cannot rely upon an attorneys' fees clause in the arbitration agreement, "Arizona law would allow a prevailing party to recover 'all costs expended or incurred therein unless otherwise provided by law.' A.R.S. § 12-341." *Rizzio v. Surpass Senior Living LLC*, 251 Ariz. 413, 420, 492 P.3d 1031, 1038 (2021). If an arbitrator in a case like this one can invoke the expense award powers under A.R.S. § 12-341, they can logically also invoke the attorneys' fees award powers under A.R.S. § 12-341.01 when the case, like this one, is subject to A.R.S. § 12-3021(B).

Of course, to consider awarding fees to Icing, the Arbitrator must first find Icing to be the "prevailing" or "successful" party. Legacy contends that Icing is not the prevailing party, as it did not prevail on the full amount of its claim, and Legacy prevailed on its argument that the Force Majeure clause of the Advisory Agreement applied and excused strict compliance with the Advisory Agreement's payment terms.

However, Legacy overlooks that its arbitration position actually asked the Arbitrator to find that Icing had not performed its obligations under the Advisory Agreement and was entitled to no fee whatsoever. Legacy also argued that Icing was not entitled to any payment of a fee until the conditions arise under which other fee claimants who expressly agreed to defer their fees can be paid. The Arbitrator has found that because Icing never agreed to defer its fees, Icing need not await such conditions before it is entitled to be paid. Therefore, the Arbitrator finds that, faced with a contracting partner who argued in its legal filings that Icing was not entitled to payment of its fee, Icing had no choice but to litigate. And, in the end, Icing prevailed on its primary objective – proving its entitlement to be paid a fee under the Advisory Agreement. Therefore, Icing is the prevailing party.

Next, to determine whether a prevailing party is entitled to attorneys' fees and costs under A.R.S. § 12-341.01, the Arbitrator must "consider the following factors: (1) the merits of the claim or defense presented by the unsuccessful party; (2) whether the litigation could have been avoided or settled, and whether the successful party's efforts 'were completely superfluous in achieving the result'; (3) whether assessing attorneys' fees 'against the unsuccessful party would cause an extreme hardship'; (4) whether the successful party prevailed on all the relief sought; (5) the novelty of the legal questions presented and whether the claims or defenses had been previously adjudicated in Arizona; and (6) whether an award of attorneys' fees 'would discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues out of fear of incurring liability' for fees." *Haese v. Stewart Title Guar. Co.*, No. CV-10-01687-PHX-SRB, 2014 U.S. Dist. LEXIS 200306, at *3-4 (D. Ariz. Jan. 7, 2014) (*citing Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 694 P.2d 1181, 1184 (Ariz. 1985)). No one factor is determinative, and the determination of whether to award fees is "highly discretionary". *Wilcox v. Waldman*, 154 Ariz. 532, 744 P.2d 444, 450 (App. 1987); *Hall v. Read Dev., Inc.*, 229 Ariz. 277, 274 P.3d 1211, 1213 (App. 2012).

Again, the Arbitrator finds that Icing was forced to litigate by Legacy's actions and positions. And, Icing prevailed substantially on the primary dispute – whether it was entitled to a fee. Icing obviously pursued meritorious claims, and Icing's counsel proved able at overcoming colorable defenses that were well presented by Legacy's counsel. Icing would not have prevailed without the professional assistance of its attorneys. There are no hardships, or policy concerns regarding discouragement of future defenses of contract claims implicated by an award of attorneys' fees to Icing. Therefore, the Arbitrator finds Icing entitled to an award of reasonable attorneys' fees.

The remaining question on fees, then, is how high an award is justified. Icing first posits that it should be awarded the full value of its contingent fee. The Arbitrator disagrees. First, the contingent amount represents a premium on the "reasonable fees" that were actually incurred. This does not mean that the contingent fee amount is not reasonable as far as contingent fees go. A premium fee is certainly allowed under Arizona law and the Rules of Professional Responsibility. *See, In re Swartz*, 141 Ariz. 266, 272, 686 P.2d 1236, 1242 (1984). And, the Arbitrator believes that the efforts demonstrated by Icing's counsel would justify the contingent fee amount if Icing were to challenge it as inappropriate. Nevertheless, the Arbitrator finds that the "reasonable attorney fees" awardable per 12-341.01(A) in this case are more appropriately determined from the actual fee records of Icing's counsel, documenting the legal services efforts actually incurred.

As to those records, there appear to be some potential issues with Icing's time entries. First, it appears that some entries may violate certain precepts of Arizona law applied to claims under A.R.S. § 12-341.01. For example, Arizona standards for time entry generally discourage "block billing". *See, e.g., Fieber v. Weisner (In re Estate of Farrell),* No. 1 CA-CV 18-0305, 2019 Ariz. App. Unpub. LEXIS 635, at *4-5 (App. May 30, 2019). The Arizona Code of Judicial Administration provides that: "Unless otherwise ordered by the court, . . . '[b]lock billing' is not permitted." Ariz. Code of Jud. Admin. ("CJA") § 3-303(D)(2)(c). This is consistent with the long-standing Arizona rule that "the fee application must be in sufficient detail to enable the court to assess the reasonableness of the time incurred." *Schweiger v.*

China Doll Rest., Inc., 138 Ariz. 183, 188, 673 P.2d 927 (App. 1983). This does not mean that the Arbitrator must reject all block billing entries. *Fieber*, 2019 Ariz. App. Unpub. LEXIS 635, at 4-5. But the Arbitrator must review each entry of block billing to assess whether they each provided "sufficient detail" to establish that the time/fees recorded are "reasonable". *See, Guardianship of Sleeth*, 226 Ariz. 171, 178, ¶ 34 (2010).

As for the "sufficient detail" standard, the Arbitrator notes further concerns with some of Icing's counsel's time entries. For instance the time entries include numerous generalized entries noting only "[p]repare for arbitration", or "work on arbitration" or "work on arbitration of claims." Many of these entries record substantial blocks of time covering hours of work. While the Arbitrator can reasonably envision the types of efforts involved in preparing for the arbitration hearing shortly before the hearing commenced, time entries further out bearing such generalized statements can be difficult to resolve.

Also, while counsel's fee declaration did state that the hourly rate charged for the attorneys and paralegals whose time appears on Icing's counsel's requested fees was "commensurate with his/her experience and skill and in line with fees charged for similar litigation matters, the Arbitrator did not receive any details regarding the respective years of practice, areas or examples of experience, or other background or skills of the attorneys and paralegals listed. This makes it impossible for the Arbitrator to fully assess whether the fee rates being charged are, in fact, commensurate with the attorneys' or paralegals' skills and fees charged by similarly experienced personnel in the Phoenix metropolitan area market.

As for Icing's application for award of expenses of litigation, the Arbitrator is again bound by the express requirements of A.R.S. § 12-3021(B), which, in a contract case like this one, necessarily incorporates A.R.S. § 12-341 for purposes of cost or expense awards. *Rizzio*, 251 Ariz. at 420, 492 P.3d at 1038. Given that restriction, there appear to be entries in Icing's Expenses spreadsheet that are not recoverable under the limitations imposed through A.R.S. § 12-341 and A.R.S. § 12-342.

The Arbitrator has also considered Icing's request that the Arbitrator award all the costs and fees of the Arbitrator against Legacy. The Arbitrator retains discretion to determine whether to award the Arbitrator's fees against one Party, or whether to split them between the Parties as the Parties had originally agreed to pay them. In this case, the Arbitrator has decided that Legacy should be ordered to cover three-fourths of the Arbitrator's fees. While Icing is clearly the prevailing party, Icing's insistence on a much higher fee recovery than the Arbitrator found justified by the facts and the Advisory Agreement contributed to the dispute that required resolution by arbitration. Also, the Arbitrator finds that Legacy asserted its defenses in good faith. Therefore, in the final Arbitration Award, the Arbitrator will include a provision that provides that Legacy will be required to pay three fourths of the Arbitrator's fees.

Given the foregoing, and the fact that Legacy has not had an opportunity to object to or otherwise provide argument regarding the attorneys' fees application submitted by Icing, the Arbitrator is ordering the following:

1. That Icing may submit, no later than 5 p.m. on Monday, January 9, 2023, details concerning the years of practice, experience, skills and other background of its attorneys and paralegals to support its claims that the hourly rates charged for them are commensurate with their skills and experience and the rates charged by similarly skilled and experienced attorneys in the relevant market. Icing shall NOT file any amendments to its time entries, which shall stand as submitted.
2. That Legacy has until 5 p.m., Friday, January 13, 2023, to submit any objections it has to the fee application filed by Icing. Legacy's filing, if any, shall not exceed 5 pages, exclusive of any additional exhibits Legacy desires to file to clearly illuminate any objections it has to the fee entries in Icing's application. Unless otherwise ordered after motion and good cause shown, Icing shall not file a reply.
3. That Legacy has until 5 p.m., Friday, January 13, 2023, to submit any objections it has to the application for award of costs/expenses of litigation filed by Icing. The objections shall not exceed 5 pages. They may combined with Legacy's objections to Icing's attorneys' fees application.

IV. Decision.

The Arbitrator finds that Icing has proven, by a preponderance of the evidence, that the fee amount of $1,813,221.15 is fully due and owing to Icing, and Icing is entitled to immediate payment thereof.

The Arbitrator further finds that Icing is owed prejudgment interest on its unpaid fee amount in the amount of $184,799.52 through Sunday, January 8, 2023. This amount will be properly adjusted for the passage of additional time before entry of the final Arbitrator's Award.

The Arbitrator finds Icing shall be entitled to recover post-judgment interest at the rate of 8.5% per annum.

The Arbitrator shall award Icing one-half of its half of the Arbitrator's fees in this matter.

The Arbitrator intends to award reasonable attorneys' fees to Icing based on a proper analysis of the time and fee entries submitted by Icing with its fee application after review of any objections made by Legacy per the timeline set forth above.

The Arbitrator intends to award to Icing those costs/expenses that would be allowable in a judicial proceeding pursuant to A.R.S. § 12-341 after submission by Legacy of any objections to Icing's costs/expenses application and review thereof.

ARBITRATOR

Date: January 8, 2023

/s/ William A. Richards
William A. Richards