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OPINION, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (JUNE 25, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ASCENSION DATA & ANALYTICS, L.L.C.;
ROCKTOP PARTNERS, L.L.C.;
ROCKTOP HOLDINGS, II, L.L.C.,

Plaintiffs-Appellants,

v.

PAIRPREP, INCORPORATED,
DOING BUSINESS AS OPTICSML,

Defendant-Appellee.

No. 23-11026

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:23-CV-552

Before: SMITH, WIENER, and DOUGLAS,
Circuit Judges.

JACQUEs L. WIENER, JR., *Circuit Judge*:

Plaintiffs-Appellants Ascension Data & Analytics, L.L.C., Rocktop Partners, L.L.C., and Rocktop Holdings II, L.L.C. (collectively, "Ascension") appeal the district court's dismissal of their application to vacate an

arbitral award made under Section 10 of the Federal Arbitration Act ("FAA"), for want of jurisdiction. Finding no error, we AFFIRM.

I. Background

This appeal arises from a contractual dispute between Ascension and Defendant-Appellee Pairprep, Inc. ("Pairprep"). Under the parties' contract, Pairprep was obligated to provide data extraction services to Ascension. However, that contract was terminated because of an alleged data breach involving Pairprep's servers and Pairprep's "failure to extract reliable data." Ascension subsequently contracted with another vendor, Altada Technologies Solutions, Ltd. ("Altada"), for data extraction services, but that contract "was terminated early after Altada suffered a crippling financial crisis."

Ascension then initiated arbitration proceedings against Pairprep in Dallas, pursuant to the parties' contract, in an attempt to recover "the remediation costs incurred as a result of [Pairprep's] data breach." Thereafter, Pairprep brought an action[1] against Ascension, Rocktop Partners, LLC, and their affiliates, in the Eastern District of Texas, in which Pairprep asserted claims for, inter alia, breach of contract and violation of the federal Defend Trade Secrets Act ("DTSA"). The district court referred that action to the Ascension arbitration, where Pairprep "asserted counterclaims in the Arbitration with nearly verbatim allegations and essentially the same claims" as those asserted in the complaint previously filed in the Eastern District of

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1 *Pairprep, Inc. d/b/a OpticsML v. Ascension Data & Analytics, LLC*, No. 2:21-CV-00057-JRG (E.D. Tex.).

Texas. However, Pairprep attempted to name Altada and its domestic subsidiary, Altada U.S., Inc., (together, "Altada") as additional counter-respondents in the arbitration, alleging that Ascension and Altada "operated as a joint enterprise." But, "[d]espite naming Altada as a party to the Arbitration, Pairprep never effectuated service on Altada in the Arbitration proceeding."[2] Instead, Pairprep brought another action[3] in the Eastern District of Texas, this time against Altada, "asserting nearly verbatim the same claims based on the same allegations in the Arbitration." Pairprep and Altada settled that litigation, and the district court dismissed Pairprep's claims against Altada with prejudice. During the arbitration proceedings, Ascension learned of the dismissal of Pairprep's claims against Altada and asserted a res judicata defense to Pairprep's DTSA and breach of contract claims. The arbitration panel ultimately rejected Ascension's defenses to Pairprep's counterclaims, "including res judicata, and granted Pairprep a monetary award."

Consequently, Ascension filed an application under the FAA to vacate the arbitration award in the Northern District of Texas, arguing that "Pairprep's [counter]claims are barred by *res judicata* arising from its dismissal with prejudice of identical claims brought against Altada in federal court based on the same common nucleus of operative facts."[4] Shortly

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[2] Altada, as a non-signatory to the arbitration agreement, refused to consent to arbitration.

[3] *Pairprep, Inc. d/b/a OpticsML v. Altada Tech. Sols., Ltd*., No. 2:22-CV-00251-JRG (E.D. Tex.).

[4] In addition to the application to vacate, Ascension also sought a declaratory judgment pronouncing Pairprep's counterclaims to

thereafter, Pairprep filed an application to confirm the arbitral award in Texas state court in Dallas County. On October 31, 2023, the state court confirmed the award and entered judgment in favor of Pairprep. In the federal proceeding, Ascension filed a motion for a preliminary injunction of the state court proceeding pursuant to the Relitigation Exception of the Anti-Injunction Act, while Pairprep argued that Ascension's application should be dismissed for lack of subject matter jurisdiction. The district court agreed that it lacked subject matter jurisdiction, dismissed Ascension's application without prejudice, and denied its motion for preliminary injunctive relief as moot. Ascension timely appealed. In a pending post-briefing motion to dismiss the appeal as moot, Pairprep contends that we should dismiss the appeal because a Texas state court has already confirmed the arbitral award at issue.[5]

II. Discussion

This court reviews a dismissal for lack of subject matter jurisdiction de novo. *Pershing, L.L.C. v. Kiebach*, 819 F.3d 179, 181 (5th Cir. 2016).

The central issue on appeal concerns a district court's subject matter jurisdiction to consider applications to confirm, modify, or vacate arbitral awards under the FAA. The FAA "authorizes a party to an

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be "barred by *res judicata*." Ascension, however, has abandoned its action for a declaratory judgment on appeal.

[5] One additional motion remains pending: (1) Pairprep's motion for the court to take judicial notice of the state court filings relevant to its application to confirm the arbitral award. We GRANT Pairprep's motion for judicial notice.

arbitration agreement to seek several kinds of assistance from a federal court." *Badgerow v. Walters*, 596 U.S. 1, 4 (2022). "[U]nder Sections 9 and 10 [of the FAA], a party may apply to the court to confirm, or alternatively to vacate, an arbitral award." *Id.* But, although the FAA permits a party to apply to a district court for this type of relief, "the federal courts . . . may or may not have jurisdiction to decide such a request." *Id.* This is because the FAA's "authorization of a petition does not itself create jurisdiction. Rather, the federal court must have . . . an 'independent jurisdictional basis' to resolve the matter." *Id.* (quoting *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582 (2008)). Accordingly, "an applicant seeking, for example, to vacate an arbitral award under Section 10 [of the FAA] must identify a grant of jurisdiction, apart from Section 10 itself, conferring 'access to a federal forum.'" *Id.* at 8 (quoting *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009)). If the applicant "cannot, the action belongs in state court." *Id.* Indeed, "state courts have a prominent role to play as enforcers of agreements to arbitrate." *Vaden*, 556 U.S. at 59; *see also Badgerow*, 596 U.S. at 18 ("'[E]nforcement of the Act,' we have understood, 'is left in large part to the state courts.'" (alteration in original) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983))).

The question becomes what may a district court look to in establishing an independent basis for its jurisdiction over an application to modify, confirm, or vacate an arbitral award under Sections 8, 9, or 10 of the FAA. Prior to the Supreme Court's recent decision in *Badgerow v. Walters*, we permitted district courts to "look through" the application to the underlying

arbitration proceeding to establish jurisdiction. *See Quezada v. Bechtel OG & C Constr. Servs., Inc.*, 946 F.3d 837, 843 (5th Cir. 2020), *rev'd*, *Badgerow*, 596 U.S. at 6–7. That changed after *Badgerow*, which concluded that the "look through" approach does not apply to applications to modify, confirm, or vacate arbitral awards. 596 U.S. at 5-6. Instead, "a court may look only to the application *actually submitted to it* in assessing its jurisdiction." *Id.* (emphasis added).[6] As the *Badgerow* Court explained:

> If [the vacatur application] shows that the contending parties are citizens of different States (with over $75,000 in dispute), then § 1332(a) gives the court diversity jurisdiction. Or if it alleges that federal law (beyond Section 9 or 10 itself) entitles the applicant to relief, then § 1331 gives the court federal-question jurisdiction.

Id. at 9. Applying this standard to the vacatur application at issue, the Supreme Court in *Badgerow* concluded that the district court lacked subject matter jurisdiction, notwithstanding the existence of "a federal-law claim satisfying § 1331" in the underlying arbitration. *Id.* This is because, to establish jurisdiction based on the federal-law claim, the district court "had to proceed downward to Badgerow's employment action." *Id.* Stated differently, it could find an independent basis for jurisdiction only by looking through the vacatur application.

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[6] This was the view of the dissent in *Quezada*. *See* 946 F.3d at 845–47 (Ho, J., dissenting).

Here, Ascension asks us to engage in the exact analysis precluded by *Badgerow*, viz., to find that the district court had subject matter jurisdiction based on (1) Pairprep's DTSA counterclaims asserted in the arbitration proceeding, and (2) Ascension's defense of res judicata. Ascension neither asserts that the parties are diverse nor persuasively suggests "that federal law . . . entitles [it] to relief."[7] *Id.* Thus, a straightforward application of *Badgerow* compels the conclusion that the district court lacked subject matter jurisdiction over the vacatur application and was correct in granting Pairprep's motion to dismiss. This conclusion holds notwithstanding Ascension's contention that Pairprep's DTSA counterclaims were originally asserted in federal court, and that its defense to those counterclaims in the arbitration was based on the purportedly preclusive effect of a separate federal judgment (Pair-prep's settled federal action against Altada). The Court in *Badgerow* explained it best:

> Recall that the two are now contesting *not* the legality of Badgerow's firing but the *enforceability* of an arbitral award. That award is no more than a contractual resolution of the parties' dispute—a way of settling legal claims. And quarrels about

[7] The closest that Ascension gets is its contention that the district court had independent jurisdiction to determine the preclusive effect of a federal judgment. But Ascension's argument is unpersuasive because it is no more than an attempt to relitigate a res judicata defense that was first raised—and rejected—during the arbitration proceeding. Necessarily, the district court would have had to look through the application to vacate to the res judicata defense in the underlying arbitration to establish its jurisdiction on this basis. It correctly declined to do so. *See Badgerow*, 596 U.S. at 9.

> legal settlements—*even settlements of federal claims*—typically involve only state law, like disagreements about other contracts. So the District Court here, as Walters recognizes, had to go beyond the face of the Section 9 and 10 applications to find a basis for jurisdiction. It had to proceed downward to Badgerow's employment action, where a federal-law claim satisfying § 1331 indeed exists. In other words, the court had to look through the Section 9 and 10 applications to the underlying substantive dispute, although that dispute was not before it.

Id. (emphasis added) (internal citations omitted). Similarly, on the procedural posture here, neither Pairprep's DTSA counterclaims nor Ascension's res judicata defense to those counterclaims was before the district court. The only dispute properly before the district court was the enforceability of the arbitral award. Because the parties concede that they are not diverse, and because Ascension offers no other federal law entitling it to the relief that it seeks—vacatur of the award—the enforceability of the arbitral award must be litigated in state court. *See id.*; *see also Quezada*, 946 F.3d at 846 (Ho, J., dissenting) ("Like arbitration agreements, settlement agreements are matters of contract, designed to resolve disputes outside of the courtroom. The enforcement of settlements is ordinarily a matter for state courts, not federal courts—even when a settlement happens to resolve federal questions.").[8]

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[8] Ascension's invocation of our unpublished decision in *Rodgers v. United Services Automotive Association*, No. 21-50606, 2022

Finally, Ascension suggests that the All Writs Act, as well as the Re-litigation Exception to the Anti-Injunction Act, provided the district court with subject matter jurisdiction over its vacatur application. However, "[t]he Anti-Injunction Act is not a jurisdictional statute, but goes only to the granting of a particular form of equitable relief." *In re Mooney Aircraft, Inc.*, 730 F.2d 367, 372–73 (5th Cir. 1984) (citation omitted)). Similarly, "the All Writs Act does not confer jurisdiction on the federal courts." *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 33 (2002). Thus, the district court was again correct to dismiss the application to vacate for want of jurisdiction. And, because the vacatur application did not establish an independent justification for subject matter jurisdiction, there was no error in the district court's denial of Ascension's request to enjoin the parallel state court proceeding under the All Writs Act.

III. Conclusion

Under *Badgerow*, when a party applies to a district court to confirm, modify, or vacate an arbitral award, it must establish on the face of the application a basis for subject matter jurisdiction separate and apart from the FAA. To accomplish this, it must be shown that (1) there is complete diversity among the

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WL 2610234, at *5 (5th Cir. July 8, 2022), does not undermine our conclusion. There, the issue of the district court's jurisdiction to consider the parties' competing vacatur and confirmation applications was not in dispute. Instead, the issue on appeal was whether the district court substantively erred in confirming the award, which involved employment claims based on federal law. This distinction is especially apparent when considering that our decision in *Rodgers* neither applied nor cited to the appropriate analysis established in *Badgerow*.

parties and the amount in controversy exceeds $75,000, or (2) that "federal law . . . entitles the applicant to relief." *Badgerow*, 596 U.S. at 9. Here, Ascension seeks to relitigate issues underpinning an unfavorable arbitral award. Without an independent basis for subject matter jurisdiction, it cannot do so in federal court.

AFFIRMED.[9]

[9] Pairprep's motion to dismiss the appeal is thus DENIED AS MOOT.

MEMORANDUM OPINION AND ORDER, U.S. DISTRICT COURT, NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION (SEPTEMBER 11, 2023)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ASCENSION DATA & ANALYTICS, LLC, ROCKTOP PARTNERS, LLC, AND ROCKTOP HOLDINGS II, LLC,

Petitioners,

v.

PAIRPREP, INC. D/B/A OPTICSML,

Respondent.

Civil Action No. 3:23-CV-00552-N

Before: David C. GODBEY, Chief United States District Judge.

MEMORANDUM OPINION & ORDER

This Order addresses Petitioners' motion for preliminary injunction [51]. Because this Court lacks subject matter jurisdiction over Petitioners' petition, the Court dismisses the action without prejudice and denies all pending motions as moot.

I. Origins of the Motion

Petitioner, Ascension Data & Analytics, LLC ("Ascension"), initiated arbitration proceedings against Respondent, Pairprep, Inc. d/b/a OPTICSML ("Pairprep") to recover remediation costs for an alleged data breach. Pairprep subsequently asserted claims against Ascension and Rocktop Partners, LLC, Rocktop Holdings II, LLC, and Rocktop Technologies (collectively "Petitioners") under the Defend Trade Secrets Act, 18 U.S.C. § 1836, in federal district court in the Eastern District of Texas. *Pairprep, Inc. d/b/a OpticsML v. Ascension Data & Analytics, LLC*, No. 2:21-CV-00057-JRG. That Court compelled arbitration pursuant to the parties' arbitration agreement. Third. Am. Pet. ¶ 17 [25]. Pairprep asserted similar trade secret misappropriation claims as counterclaims in the arbitration proceedings. Third. Am. Pet. ¶ 18.

Pairprep unsuccessfully sought to join third parties, Altada Technology Solutions Ltd. and Altada U.S., Inc (collectively "Altada"), in the arbitration, alleging that Altada acted in concert with Petitioners in misappropriating its trade secrets. Pet. Mot. Prelim. Inj. ¶¶ 7-8 [51]. Subsequently, Pairprep filed Defend Trade Secret Act claims against Altada in federal district court in the Eastern District of Texas. Third. Am. Pet. ¶ 19, *Pairprep, Inc. d/b/a OpticsML v. Altada Technology Sols., Ltd.*, No. 2:22-CV-00251-JRG. Pairprep later dismissed its claims against Altada with prejudice, and a judgment reflecting the dismissal was entered. *Id.* ¶ 20; Civil Action No. 2:22-CV-00251-JRG [13]. In the arbitration proceeding, Petitioners raised defenses of res judicata and release based on Pairprep's dismissal of all claims against Altada. *Id.* ¶ 20, Resp. Brief Supp. Mot. For Sanctions at 16. The

arbitration panel rejected all of Petitioners' defenses, including res judicata, and granted Pairprep a monetary award. Pet. Mot. Prelim. Inj. ¶ 8 [51], Resp. Brief Supp. Mot. for Sanctions at 16.

Petitioners filed a petition to vacate the arbitration award, including a request for declaratory judgment that res judicata bars Pairprep's arbitration claims. Third. Am. Pet. Pairprep filed a state court action to confirm the arbitral award. Pet. Mot. For Prelim. Inj. Ex. A ¶¶ 1-2. Petitioners now seek a preliminary injunction enjoining the state court proceeding.

II. Subject Matter Jurisdiction Standard

A "federal court may not rule on the merits of a case without first determining its jurisdiction." *Daves v. Dallas Cnty.*, 64 F.4th 616, 623 (5th Cir. 2023) (en banc). Indeed, courts are "duty-bound to examine the basis of subject matter jurisdiction sua sponte," regardless of what has been raised by the parties. *Probasco v. Wal-Mart Stores Tex., LLC*, 2017 WL 11717523, at *2 (W.D. Tex. 2017) (quoting *Lane v. Halliburton*, 529 F.3d 548, 565 (5th Cir. 2008)), *rev'd on other grounds*, 766 F. App'x 34 (5th Cir. 2019). Federal court subject matter jurisdiction is circumscribed by Article III and requires both constitutional and statutory authorization. U.S. Const. art. III, § 2; *Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998). A court properly dismisses a case where it lacks the constitutional or statutory power to decide it. *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998).

III. This Court Lacks Subject Matter Jurisdiction Over Petitioners' Claims

Petitioners proffer several theories of subject matter jurisdiction over this dispute. Petitioners assert that this Court has federal question jurisdiction to determine the preclusive effect of the judgment dismissing with prejudice Pairprep's claims against Altada. Third. Am. Pet. ¶ 6. On that basis, they contend that supplemental jurisdiction exists over their motions for declaratory judgment and to vacate the arbitration award because they are part of the same case or controversy as the Altada suit. *Id.* ¶ 7, 42-43. Alternatively, Petitioners assert federal question jurisdiction exists to review their motions because the arbitration proceeding originated from federal DTSA claims Pairprep filed against Petitioners in federal court. *Id.* ¶ 7. On either basis, Petitioners argue this Court has jurisdiction to enjoin the pending state court proceeding under the Relitigation Exception to the Anti-Injunction Act or the All-Writs Act. *Id.* ¶ 6. The Court disagrees.

A. *Badgerow v. Walters* Precludes Jurisdiction Over This Matter

Petitioners assert that federal question jurisdiction exists to review the arbitration award because: (1) this Court has jurisdiction to determine the preclusive effect of the intervening Altada judgment, involving the same federal trade secret claims as the arbitration at issue; or (2) the arbitration at issue originated from the Defend Trade Secret Act claims Pairprep brought against Petitioners in federal court. The Supreme Court's decision in *Badgerow v. Walters*, 142 S. Ct. 1310 (2022), precludes federal subject matter jurisdiction on either basis.

Although the Federal Arbitration Act ("FAA") permits parties to file applications to vacate arbitration awards in federal court under sections 9 and 10, these provisions do not themselves confer subject matter jurisdiction. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 532 U.S. 576, 581-82 (2008). The Supreme Court in *Hall* made clear that there must be an "independent jurisdictional basis," apart from the FAA, for a federal court to entertain applications to confirm or vacate an arbitration award. *Hall St. Assocs.,* 532 U.S. at 582. In *Badgerow*, the Supreme Court held that, in determining whether an "independent jurisdictional basis" exists to review requests to vacate arbitration awards under FAA sections 9 and 10, federal courts may not "look through" the application to the underlying substantive controversy to find a basis for federal jurisdiction. *Badgerow*, 142 S. Ct. at 1314. Instead, there must be a basis for federal subject matter jurisdiction other than the FAA on the face of the application to enable the Court to hear the dispute. *Id.* at 1316-17. There is no independent jurisdictional basis to review the arbitral award in this case. No diversity jurisdiction is alleged, and no federal question independent of the FAA exists on the face of the application. To find jurisdiction over the petition to vacate based on the DTSA claims or the res judicata defense raised in the underlying arbitration would require applying the "look through" method proscribed in *Badgerow*.

B. This Court Has No Authority to Review the Arbitration Panel's Rejection of the Res Judicata Defense

In the alternative to considering its petition to vacate the arbitration award under the FAA, Ascension

argues this Court has subject matter jurisdiction to consider its motion for declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201. Petitioners contend that there is federal question jurisdiction to determine the preclusive effect of a federal judgment, and that because Petitioners registered the Altada judgment in this district pursuant to 28 U.S.C. § 1963, this Court may issue a judgment declaring that res judicata barred Pairprep's arbitration claims. The Court disagrees.

The Declaratory Judgment Act "does not of itself confer jurisdiction on the federal courts." *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 29 F.4th 226, 232 (5th Cir.), cert. denied, 143 S. Ct. 353 (2022) (quoting *Jolly v. United States*, 488 F.2d 35, 36 (5th Cir. 1974)); *see also Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 278 (5th Cir. 2010). There must be an independent basis of federal subject matter jurisdiction to hear a claim for declaratory relief. *Budget Prepay, Inc.*, 605 F.3d at 278. There is no independent basis to exercise federal question jurisdiction over Petitioners' request for a declaratory judgment.

Although the preclusive effect of a federal judgment is governed by federal common law, *Taylor v Sturgell*, 553 U.S. 880, 891 (2008) (citing *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507–8 (2001)), to find jurisdiction to determine the claim preclusive effect of the Altada judgment on Pairprep's arbitration claims would require this Court to look to the substance of the underlying dispute decided by the arbitration panel. As noted above, *Badgerow* precludes this Court from "looking through" the instant application to the substance of the arbitration to find federal question jurisdiction. *Badgerow*, 142 S. Ct. at 1314.

Accordingly, there is no subject matter jurisdiction to consider Ascension's motion for declaratory judgment.

Because there is no jurisdictional basis to hear Petitioners' motions to vacate the arbitral award or for declaratory relief, this Court likewise lacks jurisdiction to enjoin the pending state court proceedings under the Anti-Injunction Act, 28 U.S.C. § 2283, or the All Writs Act, 28, U.S.C § 1651. Nor do these provisions independently confer jurisdiction to hear Petitioners' claims for declaratory or injunctive relief. Accordingly, the Court dismisses this case for lack of subject matter jurisdiction.

CONCLUSION

For the reasons stated, the Court lacks subject matter jurisdiction over this dispute. Accordingly, this case is dismissed without prejudice for lack of subject matter jurisdiction. As a result, Ascension's motion for preliminary injunction [51], Ascension's motion for leave to file amended pleadings [38], and Pairprep's motion for sanctions [42] are denied as moot.

Signed September 11, 2023.

/s/ David C. Godbey
Chief U.S. District Judge

ORDER DENYING PETITION FOR REHEARING, U.S. COURT OF APPEAL FOR THE FIFTH CIRCUIT (AUGUST 5, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ASCENSION DATA & ANALYTICS, L.L.C.; ROCKTOP PARTNERS, L.L.C.; ROCKTOP HOLDINGS, II, L.L.C.,

Plaintiffs-Appellants,

v.

PAIRPREP, INCORPORATED, DOING BUSINESS AS OPTICSML,

Defendant-Appellee.

No. 23-11026

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:23-CV-552

ON PETITION FOR REHEARING

Before: SMITH, WIENER, and DOUGLAS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

RELEVANT STATUTORY PROVISION

9 U.S.C. § 10
Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pur-

suant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

CORRECTED FINAL ARBITRATION AWARD, AMERICAN ARBITRATION ASSOCIATION (MARCH 16, 2023)

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

ASCENSION DATA & ANALYTICS, LLC and INDIAN HARBOR INSURANCE COMPANY

Claimants,

v.

PAIRPREP, INC. D/B/A OPTICSML,

Respondent/ Counter-Claimant.

v.

REIDPIN, LLC, ROCKTOP PARTNERS, LLC, ROCKTOP HOLDINGS II, LLC, ROCKTOP TECHNOLOGIES, and LIEPOLD HARRISON & ASSOCIATES PLLC

Counter-Claimant.

AAA No. 01-20-0019-3241

(Previously docketed as AAA No. 21-19-0002-4558)

CORRECTED FINAL AWARD

On February 28, 2023, the Panel timely issued the Final Award in this case. On March 1, 2023, Respondent/Counter-Claimant PairPrep, Inc. d/b/a OpticsML submitted a request for modification under AAA Commercial Rule R-50 of the Final Award due to a clerical or typographical error in the award. Claimants/Counter-Respondents submitted a response on March 13, 2023. Respondent/Counter-Claimant submitted an unsolicited reply without leave of the Panel, upon which the Panel did not review or rely.

The Panel finds that modification is appropriate due to clerical or typographic error and hereby issues this Corrected Final Award, as follows:

The undersigned Arbitrators, having been designated and appointed in accordance with the Master Services Agreement between Claimant Ascension Data and Analytics, LLC ("Ascension") and PairPrep, Inc. d/b/a OpticsML ("PairPrep") effective as of February 6, 2017, and in accordance with the American Arbitration Association Commercial Arbitration Rules, and having been duly sworn and having heard the proofs and considered the allegations of the parties, and based on the facts and the law, as more fully explained herein, issue this CORRECTED FINAL AWARD.

PRELIMINARY STATEMENT

Claimants Ascension and its insurer Indian Harbor Insurance Company ("IHIC") (collectively, "Claimants") initiated arbitration against Respondent PairPrep seeking to recover damages for alleged breach of a Master Services Agreement effective as of Febru-

ary 6, 2017 ("MSA") and for subrogation for alleged damages arising from a data security incident in January 2019. PairPrep alleged counterclaims for breach of the MSA and for misappropriation of trade secrets against Ascension and related entities Counter-Respondents Reidpin, LLC, Rocktop Partners, LLC, Rocktop Holdings II, LLC, Rocktop Technologies, and Liepold Harrison & Associates, PLLC (collectively, "Counter-Respondents"). Counter-Respondents appeared, answered and consented to personal and subject matter jurisdiction in this arbitration. Rocktop Partners, LLC, Rocktop Holdings II, LLC, and Rocktop Technologies are referred to herein collectively as "Rocktop."

The parties conducted pre-hearing discovery, including written discovery and oral depositions, and on December 5 through 9, 2022, an evidentiary arbitration hearing was held before the undersigned Panel in Dallas, Texas.

Claimants and Counter-Respondents appeared through their counsel Chris Perque, Trent Stephens, and Katie Ackels of Fisher Broyles, LLP. Respondent PairPrep appeared through its representative Sean Lanning and counsel Asim Bhansali, Kate Lazarus, Nic Roethlisberger, and Scott Taylor of Kwun, Bhansali and Lazarus, PLLC. The official record of the testimony and hearing was transcribed by Kari Behan, Certified Shorthand Reporter and submitted to the Panel on January 13, 2023. Testimony of multiple fact and expert witnesses was presented by direct and cross-examination. Additional testimony was submitted by deposition. The credibility and demeanor of the witnesses was among the matters considered by the Panel. All exhibits referenced in the hearing were

admitted which comprised hundreds of pages of written documents.

At the conclusion of the hearing on December 9, 2022, the Panel found the parties had a fair and reasonable opportunity to fully present their evidence. On January 13, 2023, the parties presented their post-hearing legal briefing. On January 20 and 25, 2023, the parties presented their attorney's fees evidence and objections to same; and on January 25, 2023, the parties made additional submissions. The record was closed as of January 31, 2023.

The Panel has considered the filed pleadings, including all claims, counterclaims, responses, and defenses, the testimony of all proffered witnesses, whether live or by deposition, the exhibits received and discussed in testimony and admitted after the hearing, and the parties' pre-hearing and post-hearing written briefing.

The Panel has determined that jurisdiction over the parties and claims exists. All issues have been determined by the evidence presented at the final hearing. Texas substantive law governs the claims under the Master Services Agreement and the standard of proof is by preponderance of the evidence unless otherwise stated. To the extent necessary, the Panel fully incorporates all interim orders and rulings submitted in connection with this matter into this Final Award. The Panel hereby makes all factual and legal determinations necessary to support this Final Award, and the findings below detail the reasons for the Final Award.

The factual background and findings stated below are found by the Arbitrators to be true and necessary

to the Final Award. To the extent they differ from a party's positions, that is a result of the Arbitrators' determinations as to credibility, relevance, burden of proof, and weight of the evidence, both oral and written, in making this Final Award.

FACTUAL BACKGROUND

Ascension and PairPrep entered the MSA with a term of three years, by which PairPrep would develop a custom software solution for use in Ascension and Rocktop's analysis of mortgage documents. PairPrep provided services related to the MSA from February 2017 through mid-January 2019. The MSA provided that Ascension would compensate PairPrep for its technology/software development (Section 2), set very general standards for PairPrep's performance (Section 3), and contained provisions regarding Confidential Information and Work Product (as defined) (Sections 6 and 7).

After a data security incident in January 2019 and beginning in February 2019, Ascension and PairPrep attempted to negotiate a license for Ascension's continued use of PairPrep's technology created under the MSA. Sean Lanning of PairPrep and Jason Pinson of Rocktop exchanged correspondence on this topic. On July 26, 2019, Ascension requested, pursuant to Section 6(d) of the MSA, that PairPrep deliver to Ascension all "Work Product" developed under the MSA and asserted such "Work Product" exclusively belonged to Ascension, asserting that PairPrep was insolvent. The parties did not reach an agreement regarding license terms. After negotiations broke down, Ascension terminated the MSA effective August 8, 2019.

After Ascension terminated the MSA with PairPrep, Rocktop Partners LLC subsequently hired Altada Technology Solutions Ltd. ("Altada"), an Irish software company, in a Master Services Agreement effective June 16, 2020. Ascension and Rocktop provided confidential information and work product of PairPrep to Altada to assist in its development of a similar technology. Altada subsequently filed for and obtained a patent on technology that, at least in part, incorporated PairPrep's design and technology.

THE PANEL'S FINDINGS

Ascension and IHIC's Claims

Ascension and its insurer IHIC as subrogee allege that PairPrep breached the MSA in the January 2019 data security incident by, among other things, failing to provide its services on a professional basis and in a manner designed to minimize exposure to liability (Section 3), and to prevent disclosure of Confidential Information and to mitigate risk in the event of a security incident (Section 7). Ascension and IHIC sought as damages the remediation costs paid by IHIC as a result of the data security incident and the deductible paid by Ascension; Ascension further sought as damages refund of all amounts paid to PairPrep under the MSA.

The preponderance of credible evidence did not establish that PairPrep committed a breach of the MSA or acted negligently in the data security incident or otherwise. The Panel found the testimony of John Brozena, formerly of PairPrep, persuasive regarding the data security measures in place, the cause of the data security incident, and measures Ascension and

Rocktop could have taken to strengthen security including investing in more secure search functions for the mortgage documents. Therefore, Ascension and its insurer are not entitled to remediation costs or the deductible paid as damages for breach of the MSA.

Ascension alleges a related claim for negligence arising out of the data security incident. For the same reasons, the Panel denies the claim that PairPrep acted negligently.

Alternatively, Ascension alleges PairPrep committed fraud, negligent misrepresentation, and violations of the Texas Deceptive Trade Practices Act by overselling its knowledge, experience and capabilities. The Panel finds Sean Lanning and John Brozena were credible regarding the truth of their representations regarding their ability to provide the services under the MSA. The Panel therefore denies those claims.

Similarly, Ascension failed to prove its claims for promissory estoppel, unjust enrichment, and breach of fiduciary duty against PairPrep, and did not urge these claims in post-hearing briefing. The Panel therefore denies those claims.

Ascension also failed to carry its burden of proof to establish that it was entitled to exclusive ownership of PairPrep's Work Product under MSA Section 6(d). The Panel finds that the testimony of Ascension's expert Saul Solomon regarding PairPrep's insolvency was not persuasive because, inter alia, he failed to assign any value to PairPrep's technology in the "balance sheet" test for insolvency. Therefore, this claim by Ascension is denied.[1]

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[1] Ascension also pleaded insolvency as a defense to PairPrep's

In sum, Ascension and its insurer IHIC are not entitled to an award under any legal theory and all claims brought by Ascension and IHIC are denied.

PairPrep's Counterclaims

PairPrep alleges that Ascension breached the MSA by, among other things, using and sharing with Altada confidential information and work product of PairPrep in violation of Sections 6 and 7 of the MSA. Section 6 states that "any copyrightable works, ideas, discoveries, inventions, patents, products, or other information (collectively the 'Work Product') developed in whole or in part by [PairPrep] in connection with the Services shall be the exclusive property of [PairPrep]." PairPrep further alleges that the technology it developed contained valuable trade secrets that Ascension and Rocktop misappropriated and disclosed to Altada. The preponderance of the evidence showed that Ascension breached the MSA, and, in conjunction with Rocktop, misappropriated valuable trade secrets belonging to PairPrep in violation of the Texas Uniform Trade Secret Act and the federal Defend Trade Secret Act.

The evidence established that Ascension and Rocktop representatives (including Nandu Majedi) learned in weekly meetings certain technical details and confidential information regarding PairPrep's technology from Sean Lanning and John Brozena. Ascension and Rocktop later disclosed those details to Altada rather than requiring Altada to develop similar technology in a "clean room" environment.

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claims; for the same reason, that defense is denied.

Both parties presented opinion testimony of technical experts regarding the trade secrets and related issues: Dr. Sam Malek for PairPrep and Mr. Richard Sonnier for Ascension and Rocktop. Both experts were deposed prior to the hearing. Both experts testified on direct and cross-examination at the final hearing.[2] Each expert attended the direct and cross-examinations of the other. The Panel found that Dr. Malek's testimony was persuasive regarding the trade secrets disclosed by PairPrep and misappropriated by

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[2] Before the final hearing, Ascension objected that Dr. Malek failed to identify the specific portions of source code that he would testify about at the final hearing, allegedly hampering Ascension's ability to effectively cross-examine. Ascension did not request a continuance before the hearing. To resolve the issue raised by Ascension, the Panel moved Dr. Malek's direct testimony earlier in the hearing to allow Mr. Sonnier and counsel to Rocktop and Ascension additional time to prepare for cross-examination and to rebut Dr. Malek's testimony. The Panel further required the specific portion of source code referenced in Dr. Malek's direct testimony [R294] to be printed and admitted as an exhibit. Ascension's counsel agreed he could fully cross-examine Dr. Malek at the conclusion of his direct testimony.

Before the cross-examination of Mr. Sonnier, Ascension objected that PairPrep had not identified the specific portion of source code on which it intended to cross-examine Mr. Sonnier and requested additional time for Mr. Sonnier to review any related code before Mr. Sonnier's re-direct. The Panel addressed Ascension's concern by ordering that two witnesses testify out of turn to give Mr. Sonnier additional time to review related code with Mr. Perque prior to his re-direct testimony. Thereafter, Ascension's counsel agreed he was ready to proceed with Mr. Sonnier's re-direct testimony after having had additional time to review the exhibit containing source code [R301] and others upon which Mr. Sonnier was cross-examined. Ascension's counsel completed the re-direct of Mr. Sonnier who testified that the source code exhibits from cross-examination did not change his substantive opinion on trade secret misappropriation.

Ascension and Rocktop. The Panel found that gravamen of Mr. Sonnier's opinions, that the Altada software did not literally copy the source or object code of the PairPrep software, was not persuasive as to whether Ascension and Rocktop misappropriated PairPrep's trade secrets. Mr. Sonnier's testimony was narrower than Dr. Malek's testimony about the trade secrets and did not effectively rebut it.

In addition to the above findings that Ascension breached the MSA and, in conjunction with Rocktop, misappropriated PairPrep's trade secrets, PairPrep also proved its equitable claim for quantum meruit. The evidence showed that PairPrep developed the technology for Ascension and Rocktop with the expectation of reasonable compensation. Equity requires that PairPrep receive damages for the reasonable value of the services and technology developed under a quantum meruit theory.

Finally, PairPrep's claims for tortious interference with prospective economic advantage and fraudulent inducement were not supported by the evidence or briefed in pre-or post-trial briefing, and are denied.

The Panel does not find that Claimants/Counter-Respondents destroyed or failed to preserve relevant evidence and does not rely on any adverse inference based on spoliation in rendering this Final Award.

Damages

The Panel finds that PairPrep is entitled to an award of damages in the amount of $3,600,000.00 for breach of contract, misappropriation of trade secrets under state and federal law, and under quantum meruit.

The Panel reviewed extensive and conflicting evidence of potential damages calculations and models related to use of the PairPrep technology that ranged from zero to over thirty-five million dollars. This conflicting evidence included differing values for one-time license fees; monthly fees ranging from $20,000 to $60,000; "click fees" ranging from $5 – $30 and per loan "cost savings" of $0 to $375, each applied to actual loans processed varying between 67,000 to 86,000 and projected loans ranging from 100,000 to 192,000; with time frames ranging from three to five years for the use of the technology; as well as potential models based on amounts Rocktop invested in Altada from six to ten million dollars; and combinations of all of the above. The Panel finds that the reasonable value of the PairPrep technology misused and misappropriated by Ascension is $3,600,000.00. In calculating damages, the Panel found the evidence regarding the discussions between Sean Lanning of PairPrep and Jason Pinson of Rocktop in the summer of 2019 regarding a potential exclusive or non-exclusive license to the PairPrep technology was most persuasive regarding potential damages. The Panel determines that $60,000 a month for a period of five years would be reasonable compensation to PairPrep for Ascension and Rocktop's use and misappropriation of the PairPrep technology. This amount would satisfy a benefit-of-the-bargain measure for contract damages; a reasonable royalty for trade secret damages; and a reasonable value for extra-contractual services under an equitable quantum meruit theory.

The evidence showed that Ascension no longer does business, and that the three Rocktop entities named as Counter-Respondents (Rocktop Partners

LLC, its parent Rocktop Holdings II LLC, and its affiliate Rocktop Technologies) participated in the misappropriation of PairPrep's technology. The damages are awarded in favor of PairPrep jointly and severally against Ascension, Rocktop Partners LLC, Rocktop Holdings II, LLC and Rocktop Technologies.

The Panel denies injunctive relief in favor of PairPrep because the evidence did not support an award of such relief in this arbitration.

PairPrep is further entitled to pre-judgment simple interest on the damages of $3,600,000 set forth above, calculated at the current prime rate of 7.75% per annum, accruing as of November 12, 2021, the date on which PairPrep filed its counterclaims in this Arbitration. Such interest shall continue to accrue until the earlier of full satisfaction of this Final Award or the date on which a court enters judgment on this Final Award. The court that confirms this Final Award, if any, shall specify the post-judgment interest rate to be applied post-judgment upon entering its judgment.

Attorney's Fees

Section 8(d) of the MSA states in part that "[t]he prevailing party shall be entitled to reimbursement from the other party for costs, filing fees, arbitration filing fees, reasonable pretrial, trial and appellate attorney's fees, witness fees, expert fees and arbitration panel fees." TUTSA and DTSA allow reasonable attorney's fees to the prevailing party if trade secret misappropriation is willful and malicious. PairPrep is the prevailing party under the MSA and TUTSA and DTSA and is entitled to an award of reasonable attorney's fees and costs.

The Panel concludes that PairPrep is entitled to an award of $1,887,752.00 as reasonable attorneys' fees and $418,892.00 as reasonable costs against Ascension under the MSA and DTSA and TUTSA. Additionally, the Panel finds that PairPrep is entitled to an award of attorney's fees, but not costs, against Rocktop Partners LLC, Rocktop Holdings II, LLC, and Rocktop Technologies under TUSTA and DTSA. Therefore, the attorney's fees award of $1,887,752.00 is entered jointly and severally against Ascension, Rocktop Partners LLC, Rocktop Holdings II, LLC, and Rocktop Technologies.

Claimants/Counter-Respondents' request for attorney's fees and costs is denied.

AWARD

1. Respondent/Counter-Claimant PairPrep, Inc. d/b/a OpticsML shall recover from Claimant Ascension Data & Analytics LLC and Counter-Respondents Rocktop Partners LLC, Rocktop Holdings II, LLC, and Rocktop Technologies, jointly and severally, the amount of **$3,600,000.00** as damages.

2. Respondent/Counter-Claimant PairPrep, Inc. d/b/a OpticsML shall recover from Claimant Ascension Data & Analytics LLC and Counter-Respondents Rocktop Partners LLC, Rocktop Holdings II, LLC, and Rocktop Technologies, jointly and severally, reasonable and necessary attorney's fees in the amount of **$1,887,752.00.**

3. Respondent/Counter-Claimant PairPrep, Inc. d/b/a OpticsML shall recover from Claimant

Ascension Data & Analytics LLC costs of **$418,892.00.**

4. Respondent/Counter-Claimant shall recover from Claimant Ascension Data & Analytics LLC and Counter-Respondents Rocktop Partners LLC, Rocktop Holdings II, LLC, and Rocktop Technologies, jointly and severally, pre-judgment simple interest on the damages of $3,600,000, calculated at the rate of 7.75% per annum, accruing as of November 12, 2021.

5. Respondent/Counter-Claimant PairPrep, Inc. d/b/a OpticsML shall take nothing against Counter-Respondents Reidpin LLC and Liepold Harrison & Associates PLLC.

6. Claimants Ascension Data & Analytics, LLC and Indian Harbor Insurance Company shall take nothing against Respondent PairPrep, Inc. d/b/a OpticsML.

7. The administrative fees and expenses of the American Arbitration Association ("AAA"), totaling $45,890.00, and the compensation and expenses of the Arbitrators totaling $147,596.35, shall be borne by Claimants Ascension Data & Analytics LLC and Indian Harbor Insurance Company and Counter-Respondents Rocktop Partners LLC, Rocktop Holdings II, LLC, and Rocktop Technologies, jointly and severally. Respondent PairPrep shall recover from Claimants Ascension Data & Analytics LLC and Indian Harbor Insurance Company and Counter-Respondents Rocktop Partners LLC, Rocktop Holdings

II, LLC, and Rocktop Technologies, jointly and severally, **$101,088.17**, for its share of arbitrator compensation and administrative fees and expenses previously paid to the AAA.

8. This award disposes of all claims, counterclaims, defenses and issues submitted to this arbitration.

9. This Award is final and binding and is intended to be enforceable in any Court of competent jurisdiction.

10. All claims, counterclaims, defenses, and pending motions not expressly granted in this Award are hereby denied.

Signed on 3/16/2023.

/s/ Jennifer Lloyd
Panel Chair

/s/ Melinda Jayson
Panel Member

/s/ Dawn Estes
Panel Member

THIRD AMENDED PETITION TO VACATE CONTRACTUAL ARBITRATION AWARD AND COMPLAINT FOR DECLARATORY JUDGMENT (APRIL 19, 2023)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

ASCENSION DATA & ANALYTICS, LLC, ROCKTOP PARTNERS, LLC, AND ROCKTOP HOLDINGS II, LLC,

Petitioners,

v. CIVIL ACTION NO. 3:23-CV-00552-N

PAIRPREP, INC. D/B/A OPTICSML,

Respondent.

THIRD AMENDED PETITION TO VACATE CONTRACTUAL ARBITRATION AWARD AND COMPLAINT FOR DECLARATORY JUDGMENT

Petitioners Ascension Data & Analytics, LLC, Rocktop Partners, LLC, and Rocktop Holdings II, LLC (collectively, "Petitioners") file this third amended petition and complaint and hereby move this Court for an order: (i) vacating the arbitration award rendered on February 28, 2023 as corrected on March 16, 2023 and circulated to the parties on March 21, 2023 ("Arbitra-

tion Award"); (ii) declaring that Respondent's claims are barred by *res judicata,* and (iii) dismissing with prejudice all claims of Respondent Pairprep, Inc. d/b/a OpticsML ("Respondent") against Petitioners asserted in the arbitration proceeding, *Ascension Data & Analytics, LLC. et al. v. Pairprep, Inc. d/b/a Optics ML,* case no. 01-20-0019-3241 (the Arbitration).

I. THE PARTIES

1. Petitioner Ascension Data & Analytics, LLC ("Ascension") is a Delaware limited liability company with its principal place of business in Irving, Texas.

2. Petitioner Rocktop Partners, LLC ("Rocktop") is a Texas limited liability company with its principal place of business in Irving, Texas.

3. Petitioner Rocktop Holdings II, LLC is a Delaware limited liability company with its principal place of business in Irving, Texas.

4. Respondent Pairprep, Inc. d/b/a OpticsML ("Pairprep" or "Respondent") is a Delaware limited liability company with its principal place of business at 1 Domidion Court, Middletown, NJ 07748. Respondent's registered agent is Legalinc Corporate Services Inc. located at 651 N. Broad St., Suite 201, Middletown, DE 19709, (302) 894-8922.

II. JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction based on a federal question pursuant to 28 U.S.C. § 1331, as Respondent's claims at issue are based, in part, on the Defend Trade Secrets Act, 18 U.S.C. § 1836 *et seq* ("DTSA"). This Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1963, as

Petitioners seek to enforce a judgment entered in a related matter in the U.S. District Court in the Eastern District of Texas, a certified copy of which has been or is in the process of being properly registered in this District. In addition, this Court has jurisdiction pursuant to 28 U.S.C. § 1367 over Petitioners' request to vacate the Arbitration Award, as the issues raised therein are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy.

6. Petitioners bring this action, in part, seeking declaratory and equitable relief, pursuant to the 28 U.S.C. §§ 1651(a), 1963, and 2201-2202. Thereunder, this Court has jurisdiction to determine whether Respondent's claims in arbitration are barred by *res judicata* due to the dismissal with prejudice in the above-referenced federal judgment, entered shortly before the final hearing in the Arbitration, in a related case involving the same transaction, conduct, and common nucleus of operative facts as Respondent's counterclaims, on which the Arbitration Award is based.

7. Respondent first filed its claims in the United States District Court for the Eastern District of Texas, Judge Gilstrap presiding. Therein, Respondent alleged subject matter jurisdiction based on 28 U.S.C. § 1331 asserting federal question jurisdiction arising out of Respondent's DTSA claims. That Court ordered Respondent's claims to arbitration, administratively closing the case except to consider any post-arbitration request for injunctive relief from Plaintiff, which has not been sought.

8. The Supreme Court recently held in *Badgerow v. Walters*, 142 S. Ct. 1310, 1316 (2022) that the

Federal Arbitration Act, 9 U.S.C. §§ 9 and 10 do not themselves support federal jurisdiction; instead, a federal court may entertain an action brought under the FAA only if the action has an independent jurisdictional basis by reviewing the application. As referenced above, this Court has independent bases for subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1963, as a result of Respondent's earlier filings of **two** lawsuits in federal court based on 28 U.S.C. §§ 1331, and supplemental jurisdiction over Petitioners' motion to vacate the Arbitration Award pursuant to 28 U.S.C. § 1367.

9. In addition, courts have declined to follow *Badgerow,* where the underlying arbitration claims were first filed in federal court based on a federal question and the court administratively closed the case pending arbitration. *See Rodgers v. United Servs. Auto. Ass'n*, No. 21-50606, 2022 U.S. App. LEXIS 18895, 2022 WL 2610234, at *2 (5th Cir. July 8, 2022) (unpublished) (finding jurisdiction over a case referred to arbitration, where the federal court administratively closed but retained jurisdiction over the case.); *see SmartSky Networks, LLC v. Wireless Sys. Sols., LLC*, 2022 U.S. Dist. LEXIS 182351, 2022 WL 4933117, at *4 (M.D.N.C. Sept. 26, 2022) (finding *Badgerow* inapplicable because plaintiff's underlying claims were initially filed in federal court based on federal question jurisdiction and stayed while the parties engaged in arbitration.); *see Torgerson v. LCC Int'l, Inc.*, No. 16-2495-DDC-TJJ, 2023 U.S. Dist. LEXIS 16298, at *21 n.7 (D. Kan. 2023).

10. Venue is proper in this Court because the Arbitration was conducted in Dallas, Texas, and the award *sub judice* was made therein, as Section 10(a)

of the Federal Arbitration Act ("FAA") provides that "the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration." Moreover, venue is proper in this Court under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to Respondent's claims occurred in this District. Finally, the Master Services Agreement ("Pairprep MSA") between the Ascension and Respondent mandates that: "[a]ny arbitration hearing shall take place in Dallas, Texas." (*See* Stephens Decl., Ex. B at p. 6, filed contemporaneously herewith).

11. If this Court declines to vacate the Arbitration Award on the basis that Respondent's counterclaims are barred by *res* judicata, this Petition is brought as a predicate for a formal motion to vacate to be heard by the Court pursuant to 9 U.S.C. § 6 ("Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided."). Petitioners' brief in support of its motion and this Petition to vacate the Arbitration Award shall be filed in a timely fashion after filing this Petition or as otherwise directed by this Court.

12. Under 9 U.S.C. § 12, this Petition has been or will be served on Respondent within three months after issuance of the Arbitration Award on February 28, 2023, as corrected on March 16, 2023, and published to the parties for the first time on March 21, 2023, as required by the FAA. Service of this Petition on Respondent will be made in a timely fashion as provided by statute. In addition, Respondent will be electronically

served with this Petition through its counsel after the filing thereof.

III. Procedural and Factual Background

A. Overview

13. After Ascension initiated the Arbitration to recover in excess of $2 million in remediation expenses from a data breach caused by Respondent, Respondent **twice** filed suit in federal court based on federal question jurisdiction involving the same transaction and parties, dismissing the last suit with prejudice a few weeks before the Final Hearing in the Arbitration. Respondent's gamesmanship resulted in a final judgment in that suit, barring due to *res judicata* any other claims arising out of the same transaction, including the Respondent's counterclaims in the Arbitration. Although Petitioners timely urged the Arbitration Panel to dismiss Respondent's counterclaims on that basis among others, the Panel did not rule on that request, other than a general statement in the Corrected Final Award that all other requests for relief were considered and denied. (*See* Stephens Decl., Ex. A-1, pp. 4, 13.)

14. This dispute arises out of the Pairprep MSA, under which, Pairprep agreed to provide a data extraction service for mortgage loan documents within 3-4 months after its signing but never provided acceptable data at any time. All the while, Ascension continued to pay Pairprep under that agreement, until Pairprep caused a massive data breach on its servers by leaving them open to the internet for over a year, after which Ascension terminated that agreement. Even more egregious, Pairprep faked its software

demonstration to Petitioners to obtain that contract and, thereafter, failed to license its service or software to anyone else. More specifically, Petitioners were the only entity to ever pay Respondent for software services despite Respondent's futile efforts to obtain other customers. After the data breach, Respondent became a zombie-company with no revenue and no operations other than funding the Arbitration; its two founders quickly taking full-time jobs elsewhere, and one of the founders sold his forty-one percent (41%) interest in the company to the other founder for forty-one dollars ($41.00).

15. Still further, Respondent's DTSA and related counterclaims were first asserted long after the termination of the Pairprep MSA, in retaliation for Ascension's efforts to recover remediation costs. Respondent's counterclaims are based on Rocktop subsequently contracting with a different vendor, Altada Technology Solutions, Ltd., to provide a similar data extraction service and Rocktop describing the service desired from that vendor. That company also failed to provide Rocktop a data extraction service, as it soon-thereafter suffered financial collapse. Hence, Ascension over-paid Pairprep under the MSA, Pairprep failed to deliver the desired data extraction service for two years, Pairprep caused a massive data breach on its servers resulting in over $2 million in remediation costs incurred by Ascension, then Pairprep sued Petitioners when they hired a different data-extraction vendor to provide a similar service-which the different vendor also failed to successfully provide. Notwithstanding these circumstances, the Arbitration Panel remarkably concluded that Respondent should be paid an additional $5.9 million, without any liability for the

remediation costs arising from Respondent's data breach or the Respondent's failure to deliver functional software or data extraction services.

B. Claims Asserted Between the Parties and Against Altada

16. Ascension and its insurer initiated the Arbitration on December 23, 2020, asserting various claims to recover approximately $2 million in remediation costs from the above-referenced data breach caused by Respondent, where thousands of loan documents containing personal data on more than 60,000 consumers were exposed to the public (the "Data Breach"). Pairprep was notified of the Data Breach on January 15, 2019.

17. On February 22, 2021, over two months after Ascension initiated the Arbitration and after requesting multiple extensions to respond to the Arbitration proceeding, Pairprep filed suit in U.S. District Court for the Eastern District of Texas, CA No. 2:21-cv-00057-JRG (the "First Eastern District Action"), against Ascension, ReidPin LLC, Rocktop Partners LLC, and Ursus Holdings, LLC (a related company), alleging claims for Misappropriation of Trade Secrets under the DTSA, Texas Theft Liability Act, TEX. CIV. PRAC. & REM. CODE §§ 134.001-134.005, Tortious Interference with Prospective Business Advantage, Fraud and Misrepresentation, Breach of Contract, and Quantum Meruit. The above claims arose out of business relations between the parties after entering into the Pairprep MSA in February 2017 (*See* Stephens Decl., Ex. B), which was terminated by Ascension in August 2019, in part, due to the Data Breach. Defendants in the First Eastern District Action timely

moved to dismiss that case and compel arbitration given the pending Arbitration initiated in accordance with the arbitration clause in the Pairprep MSA. In September 2021, that Court compelled arbitration and stayed that case.

18. More than a year after Pairprep filed the First Eastern District Action in an effort to avoid the Arbitration proceeding, on March 2, 2022, Pairprep asserted counterclaims in the Arbitration with nearly verbatim allegations and essentially the same claims as asserted in the First Eastern District Action. (*See* Stephens Decl., Exs. C and D.) However, in addition to naming Petitioners as Counter-Respondents, Pairprep also named the above-referenced Altada Technology Solutions Ltd., an Irish company, and Altada U.S., Inc., its domestic subsidiary (collectively, "Altada"). (Stephens Decl., Ex. D, ¶¶ 20-21.) Pairprep asserted that Petitioners and Altada operated as a joint enterprise, representing to the public that they are one and the same, with each having the ability to direct and control the enterprise. (*Id.* at ¶¶ 23-25.) As discussed further below, Rocktop entered into a Master Services Agreement with Altada in June 2020 ("Altada MSA"). Pairprep alleged that Rocktop disclosed Pairprep trade secrets to Altada, which the latter allegedly used to develop software. (*Id.* at ¶¶ 106-109.) Despite naming Altada as a party to the Arbitration, Pairprep never effectuated service on Altada in the Arbitration proceeding.

19. Rather, on July 7, 2022, Pairprep filed suit against Altada in U.S. District Court for the Eastern District of Texas, C.A. No. 2:22-cv-002451-JRG ("the Second Eastern District Action"), asserting nearly verbatim the same claims based on the same allegations

in the Arbitration. (*Compare* Stephens Decl., Exs. D and E.) Altada timely answered denying all allegations. (*See* Stephens Decl., Ex. F.) In November 2022, Pairprep settled all claims asserted against Altada and executed a broad release of all claims and causes of action, known and unknown, from the beginning of time to Altada and its directors, officers, agents, investors, servants, affiliates, predecessors, successors, heirs, and assigns. (Stephens Decl., Ex. G, ¶ 4.) At that time, Rocktop was one of the largest investors in Altada, it was a customer thereof, and an additional insured on Altada's cyber related insurance policy, which covered claims for breach of contract, disclosure of confidential information, and misappropriation of trade secrets.

20. On November 9, 2022, Pairprep dismissed with prejudice all pending claims against Altada in the Second Eastern District Action, and that Court entered an Order dismissing with prejudice Pairprep's claims against Altada for the same alleged misappropriated trade secrets. (*See* Stephens Decl., Exs. H and H-1.) Petitioners discovered that dismissal shortly thereafter, amended their answer in the Arbitration to include *res judicata,* issue preclusion, and release as defenses, and requested in a detailed letter to the Arbitration Panel that it dismiss of all Pairprep counterclaims in the arbitration, as they are barred, at minimum, by *res judicata* and release. (*See* Stephens Decl., Ex. I, ¶¶ 22-23.) Despite Petitioners' request for dismissal, the Arbitration Panel did not address those defenses, other than a general statement in the Arbitration Award that all defenses of the parties are denied. (*See* Stephens Decl., Exs. A and A-1, p. 13.)

C. Business Relations Between the Parties

21. Pairprep has been a zombie company since the above-referenced Data Breach in January 2019, with its only remaining activity being the current litigation. Ascension is the only company that ever-paid Pairprep for software related services, notwithstanding Pairprep's numerous software demonstrations and other unsuccessful sales efforts to a multitude of other prospective customers. The Pairprep software at issue here has been dormant with no further development or revenue since early 2019. Moreover, as discussed below, both principals of Pairprep were employed elsewhere not long after the January 2019 Data Breach.

22. Pairprep was started by Sean Lanning and John Brozena in mid-2015, shortly after graduating from Columbia University, where they met. They wanted to develop test-preparation software, hence the name Pairprep. They initially developed a mobile application that could be downloaded and used for free; however, Pairprep was never able to generate revenue on any variation of that product.

23. In mid-December 2016, after over a year of unsuccessfully seeking to develop business for Pairprep, Mr. Brozena emailed Mike Hartman, a person he met in a start-up accelerator program, about the prospect of providing data extraction services to hedge funds. Mr. Hartman had a pre-existing relationship with Ascension and knew that it was interviewing vendors to extract data from mortgage loan documents. Before introducing Pairprep to Ascension, Mr. Hartman negotiated a finder's fee of five percent (5%) of any revenue that Pairprep may later receive from Ascension.

24. Ascension and the other Petitioners provide services related to the acquisition and management of mortgage loans, typically bought or sold as packages through a bid process, commonly called "bids" or "bid packages." Before meeting Pairprep, Petitioners used software, including artificial intelligence applications, to provide advice and other services to third parties in connection with bid packages for the acquisition or sale of mortgage loans. A single bid package may include hundreds or thousands of loans. The bid packages would often be Early Buy Out ("EBO") loans, where sufficient loan data was digitally available and could be automatically ingested into Petitioners' software to perform desired analyses without the need for data processing or extraction. Other bid packages included "scratch-and-dent" loans, for which Ascension employed data-entry personnel to manually extract certain data.

25. In late 2016, Ascension was interviewing document processing vendors to automate the task of extracting certain data from mortgage documents, when Mr. Hartman urged them to consider Pairprep for that service. In late December 2016, Pairprep demonstrated software that it would "build-out" to extract data from mortgage loans for Ascension and falsified the output and results of its software when it demonstrated the software for Ascension. Shortly thereafter, Ascension and Pairprep entered into the Pairprep MSA effective February 6, 2017. (*See* Stephens Decl., Ex. B.)

26. Section 1(b) of the Pairprep MSA describes the Build-Out of Pairprep's software, during which Pairprep committed to develop, test, and refine its software into a completed product, including training

its software models on loan documents supplied by Ascension in order to identify and correct any errors. (*See* Stephens Decl., Ex. B, p. 1.) Section 2 provides that Ascension would pay Pairprep $20,000 per month continuing until the earlier of the completion of Build-Out or four months. (*Id.* at p. 2.) The parties agreed that Build-Out should only take three (3) months and that Pairprep "shall make all reasonable efforts to complete the Build-Out within this time frame." (*Id.*) Section 2(c) provides that Pairprep would be paid the greater of $2,500 per month or total "Click Fees" of $5 per loan, where Pairprep successfully extracted the desired data after the Build-Out phase. (*Id.*)

27. Pairprep and Ascension operated under the Pairprep MSA from February 2017 to January 2019, when the above discussed Data Breach occurred. During those two years, Pairprep was unsuccessful in completing the Build-Out of the software that Pairprep originally agreed would be completed in about three months. At that time, the project was put on hold, while Rocktop remediated the substantial harm caused by the Data Breach. From March to July 2019, the parties discussed options for completing the software development on Rocktop's systems and under its supervision so as to avoid the risk of Pairprep causing an additional data breach. One of Mr. Lanning's demands was that he would be paid $60,000 per month guaranteed for five years, with any source code encrypted, while he worked for Rocktop to complete development of the software. (*See* Stephens Decl., Ex. J.) Mr. Brozena had already left Pairprep for other employment, selling his 41% interest in the company to Mr. Lanning for $41.00. Rocktop did not accept Mr.

Lanning's proposal, and the Pairprep MSA was terminated effective August 2019.

28. At all relevant times, Lanning and Brozena developed the software in Pairprep's offices on its servers. Petitioners had access to a user interface to correct errors (the "proofing UI") in the data that Pairprep extracted from mortgage loan documents, which corrections were supposed to be used by Pairprep to improve the accuracy of its data extraction service. After the Data Breach in January 2019, Petitioners no longer had access to that user interface or any other aspect of Pairprep's software, and the work on the project was halted as mentioned above.

29. Notwithstanding that Pairprep agreed to build out its software in three-to-four months starting in February 2017, Pairprep did not demonstrate its data extraction service to Petitioners until late July 2017, and that demonstration was so fraught with errors that the parties agreed that a proofing UI was necessary to improve Pairprep's machine learning models. In the last quarter of 2017, Petitioners began using the proofing UI to correct errors in Pairprep's extracted data, but the accuracy of the data extraction process never improved to the point that Petitioners could use it, in lieu of manually extracting data from "scratch-and-dent" loan documents. Even in early 2019 when the Data Breach was discovered, Pairprep had yet to deliver a service that could be used in Petitioners' operations. Notwithstanding Pairprep's agreement to complete the Build-Out as promised, Ascension continued to pay Pairprep $20,000 per month throughout that period, with the payments exceeding $480,000 in total by the time the Pairprep MSA was terminated

after the Data Breach. During that period, Ascension paid in full every Pairprep invoice.

D. Rocktop's Business Relations with Altada

30. In late 2019, nearly a year after the Data Breach, Rocktop renewed its search for a document processing vendor to extract data from mortgage loan documents. It subsequently entered into an MSA with Altada for that purpose in June 2020. (*See* Stephens Decl., Ex. K.) At that time, Altada had a document processing platform that was used in various applications, including data extraction. Rocktop made significant investments in Altada during the term of that agreement and was eventually its largest outside shareholder with Rocktop's interest totaling approximately 31% of Altada. Unfortunately, Altada subsequently suffered financial difficulties that resulted in the furlough of the software personnel working on Rocktop's project, which ultimately lead to the termination of the Altada MSA in May 2022, prior to the completion of Rocktop's project. Rocktop then purchased a copy of the source code developed by Altada for Rocktop's project. Rocktop archived that code and has not decided whether it will attempt to complete its development. In mid-2022, Altada was placed in receivership and its assets have since been sold to a third party. Hence, at all relevant times before Rocktop and Altada entered into an MSA, during the course of that project, and since then, Petitioners continued to manually extract data from "scratch-and-dent" loans through the use of contract workers paid $18-20 per hour, as it failed in both attempts to automate the manual data extraction process through vendors.

31. The Altada MSA at Section 7.3(d) required it to maintain insurance coverage for claims arising out of the Altada MSA. (*See* Stephens Decl., Ex. K, p. 5.) Proof of insurance is attached to that agreement, naming Rocktop as an additional insured. (*See id.*, Ex. D thereto.) That policy includes coverage for claims arising out of breach of contract, disclosure of confidential information, and misappropriation of trade secrets. (*Id.* at pp. 1-2.)

E. The Arbitration Award

32. The arbitration was conducted by a three-person panel ("Panel"). In the Arbitration Award, the Panel rejected Ascension's claims to recover its remediation costs arising out of the Data Breach on Pairprep's servers, and it awarded Pairprep $3.6 million in damages based on findings of breach of contract, misappropriation of trade secrets under state and federal law, and quantum meruit. (*See* Stephens Decl., Ex A, pp. 5-9.) The award was based on the above-discussed demand from Mr. Lanning to Rocktop in 2019, after the Data Breach had occurred but before the termination of the Pairprep MSA, which contemplated Mr. Lanning completing the development of the Pairprep software at issue and using it to provide data extraction services to Rocktop, none of which are included in the award. (*See* Stephens Decl., Ex. A-1, pp. 9-10.) The Arbitration Award purports to also include prejudgment interest in the amount of 7.75% per annum. (*Id.* at 11.) It also awarded Pairprep $1,887,752 in attorneys' fees and $418,892 in expenses. (*Id.*) The Arbitration Award purports to direct the court that confirms the Final Award to specify the post-judgment interest rate. *Id.* Panel further denied injunctive relief sought by Pairprep. (*Id.*) The initial

Arbitration Award referred to Rocktop Technologies II, LLC at various times, an entity that was not part of these proceedings and does not appear to exist. (*Id.* at p. 12.) Pairprep requested that the Panel correct that error, and the Arbitration Panel did so by issuing a Corrected Award on March 16, 2023, and circulating it to the parties on March 21, 2023. (*Id.* at Ex. A-1.) Petitioners did not agree to any extension of the March 1, 2023 deadline for the Panel to issue a final award in the Arbitration. Consequently, Petitioners urge this Court to vacate any amendment or modification of the Arbitration Award to address those errors, and others, including the untimely Corrected Award issued on March 16, 2023, and first published to the parties on March 21, 2023. (*Id.* at Ex. A-1.)

F. Misconduct During the Arbitration Proceeding

33. The Panel caused substantial prejudice and effectively precluded Petitioners from presenting evidence in response to Pairprep's counterclaims by failing to enforce Panel Orders agreed to by the Parties and failing to continue the hearing when Petitioners demonstrated good cause for doing so. Pairprep's counterclaims are based on the assertion that it developed software that included trade secrets. Pairprep developed and stored that software on its servers, to which Petitioners had no access. Pairprep alleges that it orally disclosed trade secrets to Petitioners and that Petitioners later disclosed them to Altada. There is no writing evincing Pairprep's self-serving testimony. Pairprep's counterclaims make general allegations that the trade secrets at issue are source code, algorithms, and other nondescript things. In response to Petitioners' discovery requests regarding the

alleged trade secrets at issue, Pairprep merely parroted the same general categories. On July 20, 2022, Petitioners timely moved to compel Pairprep to supplement its discovery responses to include a legally sufficient description of the alleged trade secrets at issue, but the Panel denied that request. (*See* Stephens Decl., Exs. L and M.)

34. Pairprep, likewise, failed to comply with, and the Panel refused to enforce, the Stipulated Order re: Discovery of Electronically Stored Information ("ESI Order") entered in this matter, as it related to Pairprep's source code. (*See* Stephens Decl., Ex. P.) During the proceedings, Pairprep refused to produce its source code allegedly at issue in this case in the manner provided in the ESI Order, insisting that it would only be made available via remote access to a computer maintained by Pairprep or its counsel. Petitioners presented this issue to the Panel, and it ordered Pairprep to produce on an encrypted hard drive a copy of its source code that "contain trade secrets misappropriated by Claimants." (*See* Stephens Decl., Ex. M.) Pairprep made a partial production but did not produce the vast majority of its source code maintained on seven servers under its control. On August 29, 2022, Petitioners timely requested that the Panel enforce its Orders and compel Pairprep to produce its source code maintained on the seven servers; however, the Panel rejected that request. (*See* Stephens Decl., Exs. Q and O, respectively.)

35. Petitioners thereafter deposed Mr. Lanning seeking discovery on the alleged trade secrets at issue; however, he was repeatedly instructed by his counsel not to answer and refused to answer any questions regarding the trade secrets alleged in Pairprep's

pleadings and discovery responses. On September 19, 2022, Petitioners timely requested that the Panel compel Mr. Lanning to respond to those deposition questions, and the Panel denied that request. (*See* Stephens Decl., Exs. N and O.)

36. Pairprep's concealment of the alleged trade secrets at issue and the source code that embodied them continued through expert discovery. In advance of the deposition of its technical expert, Sam Malek, Ph.D., Pairprep produced a list of materials considered by Dr. Malek, which included a general reference to the source code on Pairprep's seven servers. In advance of his deposition, Pairprep ignored Petitioners' request to identify the portions of its source code considered by Dr. Malek, as it included millions of lines of code and thousands of files.

37. Pairprep continued to conceal the alleged trade secrets at issue, and the Panel failed to address the matter despite a multitude of requests by Petitioners, leading up to and including during the Final Hearing. The Scheduling Order issued by the Panel required the parties to identify and exchange any exhibits to be offered at the Final Hearing by November 11, 2022. (*See* Stephens Decl., Ex. R, ¶ 14.) Pairprep's exhibit list for the Final Hearing failed to identify the source code that would be relied upon at the hearing, but rather, included general references thereto. By way of example, Pairprep's Exhibit R-243 referred to over 200 folders and more than 1000 files of Altada source code, and its Exhibit R-282 referred to over 1000 folders and more than 3300 files of Pairprep source code – none of which were exchanged by Pairprep with its other exhibits. When Petitioners objected to Pairprep's use of the undisclosed source

code at the hearing, Pairprep refused to further identify what source code would likely be used at the hearing and refused to exchange it as an exhibit, as required in the Scheduling Order. (*See* Stephens Decl., Ex. S.) Petitioners raised this issue with the Panel in advance of the Final Hearing and forewarned that Petitioners may seek a continuance of the Final Hearing, if Pairprep offered testimony based on source code that was not previously identified and exchanged as an exhibit to provide Petitioners a fair and reasonable opportunity to prepare for the hearing and present evidence in response thereto. (*See* Stephens Decl., Ex. T.)

38. At the Final Hearing, Pairprep presented evidence from Dr. Malek that Petitioners allegedly misappropriated trade secrets embedded in Pairprep's code, including for the first time, testimony regarding specific portions of Pairprep's source code. Petitioners objected during the hearing given the prejudice caused thereby and requested that the Panel continue the hearing so that Petitioners could take discovery on the source code relied upon by Dr. Malek that allegedly includes Pairprep trade secrets. (*See* Stephens Decl., Ex. U.) The Panel refused to consider this request, as one of the Panel members admitted at the close of the hearing when she remarked that she was not aware that Petitioners had requested any relief, when in fact they had. (*See* Stephens Decl., Ex. U.)

39. During the hearing, as indicated in the Arbitration Award fn. 2, the Panel asked Pairprep to present Dr. Malek's testimony a day earlier and allowed a few additional hours before redirect of Petitioners' technical expert, ostensibly to address the prejudice caused by Pairprep's persistent refusal,

with the Panel's acquiescence, to identify the source code that embodied the alleged trade secrets, at any time during the proceedings, including the Final Hearing. Such belated, tepid measures did nothing to address the harm and prejudice caused to Petitioners. One of the defenses to trade secret misappropriation is that an alleged trade secret is a matter of public knowledge. That defense is particularly pertinent in this case involving pre-existing technology, where Pairprep's software employed third-party applications to perform their intended purpose. Developing such evidence requires time and effort after obtaining discovery of the alleged trade secret, which is one of the reasons why Petitioners requested a continuance. The Panel's picayune measures did not provide Petitioners a fair opportunity to present evidence on their defenses to Pairprep's trade secret and other counterclaims. Pairprep's misconduct and the Panel's mishandling of the proceedings support vacating the arbitration award, as they violate, *inter alia*, the Federal Arbitration Act, §§ 10(a)(3) and 10(a)(4), *et seq*.

40. Further, in this instance, the Panel exceeded its power, without limitation, by wielding its own brand of justice, which was not drawn from the essence of the agreement between the parties or their business relations. Ascension was a customer of Pairprep's that agreed to pay up to $80,000 over three-to-four months for Pairprep to build out software to extract data from loan documents supplied by Petitioners. Over two years, Ascension paid Pairprep over $480,000 and never received a data extraction service that could replace its manual data extraction process, as Pairprep's extracted data was fraught with errors rendering it valueless. By August 2019, when Ascension term-

inated the Pairprep MSA, that project was five times over budget, years behind schedule, and Ascension suffered substantial losses due to the Data Breach originating from Pairprep's unsecured servers which remained open to the internet for over a year without any password protection. Ascension was the only company to ever pay Pairprep to develop software or for related services. Its business relations with Pairprep were a total loss, both in the payments made to Pairprep and the additional $2 million expended to remediate the Data Breach on Pairprep's servers.

41. Rocktop did nothing wrong when it later contracted with a different vendor (Altada), which also failed to provide a functional data extraction service. It did no more than explain the functional requirements of the desired service, in the same manner as it did for Pairprep. While Pairprep alleged in its pleadings that Altada copied its source code, Pairprep admitted that was not true at the Final Hearing. Rather, Pairprep made general trade secret misappropriation allegations, then retained Dr. Malek who opined that Pairprep's and Altada's software perform similar functions. While such similarity is not surprising, as they both extract data from mortgage loan documents, such similarities do not rise to a level of protectible trade secrets misappropriated by Petitioners or Altada.

IV. Demand For Declaratory Relief And Motion To Vacate The Arbitration Award

42. Petitioners seek a declaratory judgment that Pairprep's claims in arbitration are barred by *res judicata*. Where *res judicata* is based on a federal judgment, it should be decided by the district court, as opposed to an arbitration panel. *John Hancock Mut.*

Life Ins. Co. v. Olick, 151 F.3d 132, 137-38 (3rd Cir. 1998)*; In re Y & A Group Sec. Litig.*, 38 F.3d 380, 382 (8th Cir. 1994); *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 985 F.2d 1067, 1069 (11th Cir. 1993); *Miller Brewing Co. v. Fort Worth Distrib. Co.,* 781 F.2d 494, 499 (5th Cir. 1986); *see also Miller v. Runyon,* 77 F.3d 189, 194 (7th Cir. 1996). In that regard, the Panel's failure to dismiss Pairprep's claims on that basis should be given no deference. Petitioners urge that this Court declare that Pairprep's counterclaims are barred by *res judicata,* vacate the Arbitration Award, and dismiss all Pairprep counterclaims with prejudice.

43. Alternatively, Petitioners move to vacate the Arbitration Award, as Pairprep's claims are barred by *res judicata* arising from its dismissal with prejudice of identical claims brought against Altada in federal court based on the same common nucleus of operative facts and same transaction, as Altada is in privity with Petitioners. (*See* Stephens Decl., Exs. H and H-1) Therefore, the Panel exceeded its powers in violation of 9 U.S.C. § 10(a)(4) by failing to dismiss with prejudice Pairprep's claims.

44. In addition, the Arbitration Award should be vacated because:

a. the Panel engaged in misconduct by failing to continue the hearing when requested by Petitioners, upon sufficient cause shown, in violation of 9 U.S.C. § 10(a)(3);

b. the Panel engaged in misbehavior in violation of 9 U.S.C. § 10(a)(3), by failing to enforce its Orders, which required Pairprep to produce its source code that included the alleged trade

secrets and required Pairprep to identify and exchange its exhibits well in advance of the Final Hearing, including the portions of its source code that it intended to rely upon at the Final Hearing;

c. the Panel so imperfectly executed its powers that a mutual, final, and definite award upon the subject matter submitted was not made in violation of 9 U.S.C. § 10(a)(4);

d. the Panel exceeded its power, imperfectly exercised them, and misbehaved by brandishing its own brand of justice in violation of 9 U.S.C. § 10(a)(3) or § 10(a)(4), which was not drawn from the essence of the agreement between the parties or their business relations; and

e. the Panel exceeded its power by awarding prejudgment and post-judgment interest, failing to timely issue the Corrected Award, and otherwise ignoring or misapplying well established law in violation of 9 U.S.C. § 10(a)(4).

V. Oral Argument Requested

45. Petitioners respectfully request that the Court permit oral argument on this Petition, Motion, and request for Declaratory Relief.

VI. Prayer for Relief

46. Petitioners respectfully request that the Court enter an Order:

a. Declaring that Respondent's claims are barred by *res judicata;*

b. Vacating the Arbitration Award;

c. Awarding Petitioners their attorneys' fees and costs for this proceeding and the Arbitration;

d. Dismissing Pairprep's counterclaims with prejudice;

e. Finding that Pairprep shall take nothing from these proceedings;

f. Denying Pairprep any prejudgment and post-judgment interest;

g. Denying Pairprep any equitable remedies, including without limitation injunctive relief; and

h. Granting such other and further relief as the Court deems proper.

Dated: April 19, 2023

Respectfully Submitted

FISHERBROYLES, LLP

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ATTORNEYS FOR PETITIONERS
ASCENSION DATA & ANALYTICS,
LLC, ROCKTOP PARTNERS, LLC,
AND ROCKTOP HOLDINGS II, LLC

ARBITRATION PROVISION IN THE MASTER SERVICE AGREEMENT, RELEVANT EXCERPT

MASTER SERVICE AGREEMENT

THIS AGREEMENT FOR SERVICES (the "Agreement") is made effective as of February 6, 2017, by and between ASCENSION DATA & ANALYTICS, LLC f/k/a URSUS ADVISORS, LLC, with offices located at 701 Highlander Blvd., Ste. 510, Arlington, Texas 76015, ("Client"), and PAIRPREP, INC., with offices located at 1 Domidion Ct., Middletown, New Jersey 07748 ("Servicer Provider").

[. . .]

(d) Arbitration. If the matter is not resolved within thirty (30) days after submission to mediation, the matter shall be resolved by binding arbitration administered and conducted under the Commercial Arbitration Rules of the American Arbitration Association and Title 9 of the United States Code. A judgment upon the arbitration award may be entered in any court having jurisdiction. Any arbitration hearing shall take place in Dallas, Texas. The prevailing party shall be entitled to reimbursement from the other party for costs, filing fees, arbitration filing fees, reasonable pretrial, trial and appellate attorney's fees, witness fees, expert fees and arbitration panel fees. Nothing in this Section, however, shall prevent either party from seeking equitable relief from a court of competent jurisdiction for the other party's

breach of the Confidentiality provisions of this Agreement.

[. . . .]

IN WITNESS WHEREOF, this Master Services Agreement is made and entered into as of the Effective Date first above written.

CLIENT:

ASCENSION DATA & ANALYTICS, LLC

By: /s/ Jason Pinson
Jason Pinson, CEO

SERVICE PROVIDER:

PAIRPREP, INC.

By: /s/ Sean Lanning
Sean Lanning, CEO