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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

RONALD F. TRINCHITELLA,

Plaintiff,

v.

AMERICAN REALTY PARTNERS, LLC,  
et al.,

Defendants.

Case No. 2:15-cv-02365-KJM-EFB

ORDER

Following arbitration with one defendant, plaintiff filed an amended complaint and moved to confirm the arbitration award. Defendants did not oppose the motion to confirm the arbitration award, which the court granted, but filed a motion to dismiss the first amended complaint. Plaintiff opposes the motion to dismiss. As explained below, the court GRANTS in part and DENIES in part the motion to dismiss.

I. BACKGROUND

A. First Amended Complaint

Plaintiff Ronald F. Trinchitella is trustee of the Ronald F. and Billie Jean Trinchitella Family Trust. First Am. Compl. (“FAC”), ECF No. 35, ¶ 1; *see* ECF No. 34 (order granting parties’ stipulated leave for plaintiff to file first amended complaint following completion of arbitration). In January 2014, Jack Combs, managing partner of defendant American Realty Partners, LLC (“ARP”), contacted Trinchitella about investing in ARP. *Id.* ¶ 11. Combs assured Trinchitella that a \$150,000.00 investment would earn a minimum 8 percent annual return, with a total 15 to 18

1 percent projected return. *Id.* ¶ 12. Trinchitella later discussed his potential investment with  
2 defendant Sean Zarinegar, who is chairman of the board, CEO and President of defendant American  
3 Housing Income Trust, Inc. (“AHIT”), as well as manager of defendant Performance Realty  
4 Management, LLC (“PRM”), which, in turn, is manager of ARP. *Id.* ¶¶ 6, 13. Trinchitella also  
5 discussed the investment with Dan Sheriff, the senior account manager of ARP. *Id.* ¶¶ 6, 13; Prior  
6 Order, ECF No. 22, at 3<sup>1</sup> (discussing Sheriff’s role). Combs, Zarinegar and Sheriff repeated the  
7 promise that Trinchitella would receive a return of at least 8 percent. FAC ¶ 13.

8           Before investing in ARP, Trinchitella explained to Combs, Zarinegar and Sheriff  
9 that he did not want to invest in stock. *Id.* ¶ 14. He was told an investment in ARP would not be  
10 an investment in stock. *Id.* Trinchitella also was told he would be able to withdraw his earnings  
11 once per year without compromising the capital contribution and, if he was unhappy with his  
12 investment, he could return his “units”<sup>2</sup> and have his \$150,000 investment returned after one year  
13 of investing. *Id.* ¶¶ 14–15.

14           On February 12, 2014, relying on these representations, Trinchitella purchased 15  
15 units of ARP for \$150,000. *Id.* ¶ 16. Defendant PRM sent Trinchitella ARP’s subscription  
16 agreement, which Trinchitella signed. *Id.*; Subscription Agreement, FAC Ex. A. Zarinegar, using  
17 the name “Sean Zar,” signed the subscription agreement for ARP as PRM’s manager. Ex. A at 15<sup>3</sup>;  
18 FAC ¶ 6 (alleging Zarinegar is “also known as Sean Zar (and possibly Bejahn Zarinegar)”). The  
19 language of the Agreement provides that it is “governed by and construed in accordance with the  
20 laws of the State of Arizona,” it “can only be amended in a writing that is executed by the Company  
21 and the undersigned,” and “the undersigned agrees to be bound and become a party to the Operating  
22 Agreement of [ARP].” *Id.* ¶¶ 17-19. Trinchitella never received a copy of ARP’s operating  
23 agreement. *Id.* ¶ 19.

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25 <sup>1</sup> All citations to the briefs refer to CM/ECF page numbers, not the briefs’ internal pagination.

26 <sup>2</sup> Trinchitella refers to ARP “units” throughout his complaint without specifically defining that  
27 term.

28 <sup>3</sup> Because the complaint’s exhibits are individually paginated but were not filed as individual  
CM/ECF documents, the court cites to each exhibit’s individual pagination.

1 Sheriff, on behalf of ARP and/or PRM, called Trinchitella monthly to solicit further  
2 investments. *Id.* ¶ 21. Trinchitella declined, informing Sheriff he was waiting to receive his first  
3 return from his initial investment. *Id.* In early January 2015, in response to Trinchitella’s inquiry,  
4 Sheriff told Trinchitella that ARP was earning a return of 18 percent to 22 percent. *Id.* When  
5 Trinchitella asked for proof of this rate of return, Sheriff stopped contacting him. *Id.* Trinchitella  
6 never received proof of this return rate. *Id.*

7 In a February 2015 phone call and in his responses to later correspondence,  
8 Zarinegar did not deny that Trinchitella had been told his investment would earn a yearly return of  
9 at least 8 percent. *Id.* ¶ 22. During that phone call, Zarinegar informed Trinchitella that his ARP  
10 units would be converted into stock as part of a restructuring plan. *Id.* ¶ 23. Trinchitella explained  
11 he had invested on the condition that his investment would not be in a stock. *Id.* He then requested  
12 return of his \$150,000 investment with an 8 percent return. *Id.* Zarinegar told Trinchitella his  
13 investment would be returned in March 2015. *Id.* ¶ 24. Trinchitella sent a letter confirming this  
14 conversation on February 28, 2015. *Id.* ¶ 25.

15 On information and belief, Trinchitella alleges that in late 2014 or early 2015, ARP  
16 voted its majority and controlling interest in AHIT’s predecessor to merge that predecessor with  
17 AHIT. *Id.* ¶ 4. AHIT was the surviving entity. *Id.* Also on information and belief, Trinchitella  
18 alleges that ARP had a special meeting on March 7, 2015 to obtain approval to restructure ARP to  
19 convert all membership interests into shares of common stock of AHIT. *Id.* ¶ 26. Trinchitella  
20 voted by proxy against the restructuring. *Id.* At some point in late 2014 or early 2015, ARP pursued  
21 a tax-free exchange of ARP units, including Trinchitella’s units, with AHIT units, resulting in  
22 Trinchitella’s holding pro rata shares of AHIT<sup>4</sup> rather than ARP units. *Id.* ¶ 4. Trinchitella thus  
23 alleges AHIT is the successor in liability to ARP, in addition to being liable for its own actions and  
24 omissions. *Id.*

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27 <sup>4</sup> Although not specifically stated, the court assumes Trinchitella alleges he held or holds pro rata  
28 shares of AHIT stock. *See* FAC ¶ 44 (alleging Trinchitella’s ARP units “have been converted  
without his written consent into shares of common stock of AHIT with the intent of selling AHIT  
stock in the stock market . . .”).

1           Trinchitella spoke to Zarinegar in March, April and May of 2015, with Zarinegar  
2 assuring Trinchitella in their final discussion that Trinchitella’s initial \$150,000 investment would  
3 be returned by June 18, 2015. *Id.* ¶ 27. On April 7, 2015, Trinchitella received a Schedule K-1  
4 dated February 16, 2015, showing a \$36,156 loss and decrease in capital account. *Id.* ¶ 28.  
5 Defendants have not returned Trinchitella’s initial investment or the promised 8 percent return. *Id.*  
6 ¶ 29.

7           In March 2017, after Trinchitella filed this suit, he alleges on information and belief  
8 that AHIT acquired IX Bioscience and, in May 2017, AHIT changed IX Bioscience’s name to  
9 Corix Bioscience, Inc., making Corix the successor to both ARP and AHIT. *Id.* ¶¶ 4–5.  
10 Accordingly, Trinchitella alleges Corix is ARP and AHIT’s successor in liability. *Id.* ¶ 5.

11           B.    Procedural Background & Arbitration

12           1.    Initial Complaint, Motion to Dismiss and Prior Order

13           Trinchitella sued ARP, PRM, AHIT and Zarinegar in state court on September 22,  
14 2015, and defendants removed to this court on November 13, 2015. Compl., ECF No. 1 (notice of  
15 removal and complaint). ARP, PRM, AHIT and Zarinegar then moved to dismiss for lack of  
16 personal jurisdiction and improper venue; they moved in the alternative to compel arbitration of  
17 Trinchitella’s claims against ARP and stay the balance of the case pending arbitration. Prior Mot.,  
18 ECF No. 4-1. In bringing their motion to compel arbitration, defendants argued:

19           The Subscription Agreement is only between Plaintiff and ARP and  
20 it is unclear what Plaintiff’s basis is for even including the other  
21 Defendants in this case. The outcome of the Plaintiff’s claims  
22 against ARP will significantly impact, if not dispose of, Plaintiff’s  
23 claims against the other Defendants. It makes no sense to litigate this  
24 case with three peripheral Defendants that probably should not be  
25 parties anyway, while arbitrating the exact same issues, facts and  
26 claims between Plaintiff and ARP. To do so would be inefficient,  
27 unfair and prejudicial to PRM, AHIT and Zarinegar and most  
28 definitely creates the potential for inconsistent results.

25           Prior Mot. at 20.

26           Resolving defendants’ motion to compel, the court found ARP, PRM and Zarinegar  
27 had purposefully availed themselves of the privilege of conducting activities in California and were  
28 subject to the court’s jurisdiction. Prior Order at 10 (citations omitted); *see id.* (noting “defendants

1 conceded that PRM acted on ARP’s behalf when it signed the Subscription Agreement”).  
2 Regarding AHIT, however, the court found Trinchitella had “not allege[d] any intentional acts by  
3 AHIT,” “the Subscription Agreement makes no mention of AHIT,” and Trinchitella’s allegations  
4 that AHIT is an alter-ego of ARP, PRM and Zarinigar amounted to no more than legal conclusions,  
5 warranting dismissal of AHIT. *Id.* at 11–12. The court granted Trinchitella leave to amend, in the  
6 event he could sufficiently allege AHIT was the alter-ego of one or more of the defendants. *Id.* at  
7 12. The court then granted defendants’ motion to compel arbitration between ARP and Trinchitella.  
8 *Id.* at 19–22. Exercising its discretion, the court stayed the balance of claims against the remaining  
9 defendants, finding, “[i]n light of the similarity of the issues of law and fact among each of Mr.  
10 Trinchitella’s claims and the possibility of inconsistent rulings if the entire action is not stayed, the  
11 interests of economy and efficiency favor staying this entire action.” *Id.* at 23.

12           2.       Arbitration of Trinchitella’s Claims Against ARP

13           ARP and Trinchitella arbitrated Trinchitella’s claims against ARP under the  
14 Commercial Rules of the American Arbitration Association, with the arbitrator holding an  
15 evidentiary hearing on November 14 and 15, 2017, and issuing an interim award on liability and  
16 damages on November 16, 2017, Interim Award, FAC Ex. B, with a final award issued December  
17 28, 2017, Final Award, FAC Ex. B.<sup>5</sup> Although this court had compelled arbitration as to ARP only,  
18 it appears the arbitration began with PRM, AHIT and Zarinigar participating as well, as the  
19 arbitrator indicates the parties stipulated to dismissing PRM, AHIT and Zarinigar. Final Award at  
20 1 n.1; *but see id.* at 2 (reducing Trinchitella’s requested attorney’s fees for his having pursued  
21 “unsuccessful judicial litigation against ARP in the face of a mandatory arbitration clause, and  
22 against others not bound by the arbitration clause”). Trinchitella, represented by counsel, attended  
23 the evidentiary hearing, as did ARP, which appeared through Zarinigar as its chief executive  
24 officer, with counsel present as well. Interim Award at 1. The parties offered 32 exhibits, all of  
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27 <sup>5</sup> Exhibit B comprises both the Interim Award and Final Award but, as noted above, the  
28 documents are individually paginated and therefore the court cites them here as separate  
documents.

1 which were admitted. *Id.* Trinchitella, Sheriff, Combs and Zarinigar provided sworn testimony.  
2 *Id.* at 2.

3 Trinchitella and ARP arbitrated the following claims specifically: “(1) breach of oral  
4 contract; (2) promissory fraud; (3) Arizona Consumer Fraud statute, A.R.S. § 44-1521 et seq. [sic];  
5 (4) intentional misrepresentation; (5) negligent misrepresentation; and (6) common law fraud.”<sup>6</sup> *Id.*  
6 at 1–2. Following hearing, the arbitrator made the following findings, which the court provides  
7 with corresponding allegations in Trinchitella’s first amended complaint:

8 - Trinchitella “did not receive by mail the Operating Agreement . . . or the Private  
9 Placement Memorandum . . . before he executed the Subscription Agreement.”  
10 Interim Award at 2 (citing arbitration Exhibits 4 and 5<sup>7</sup>); *see* FAC ¶ 19 (“Plaintiff  
has never received a copy of ARP’s Operating Agreement.”).

11 - “Trinchitella informed ARP that he did not want to purchase any stock investment”  
12 and “[i]n telephone calls with Mr. Trinchitella, ARP either misrepresented the  
13 possibility that [Trinchitella’s] ownership interest might be converted to an equity  
14 investment, or they [sic] failed to inform him that ARP intended to ‘investigate the  
15 possibility of converting ARP to a real estate investment trust at some future time.’”  
16 Interim Award at 2–3 (quoting arbitration Exhibit 4 at 7); *see* FAC ¶¶ 14, 23, 31  
17 (alleging plaintiff explained in “pre-investment conversations that he did not want  
to invest in stock” and later confirmed the Zarinigar that he did not wish to invest  
in stock), *id.* ¶¶ 23, 44 (alleging that despite pre-investment assurances Trinchitella  
would not be investing in stock, Zarinigar informed Trinchitella his investment was  
being converted to stock).

18 - “ARP . . . sen[t] Mr. Trinchitella an email . . . and t[old] him over the telephone  
19 that he would receive an ‘8% preferred return,’ which Mr. Trinchitella reasonably

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20 <sup>6</sup> These claims mirror those Trinchitella brought in his initial complaint and now brings in his first  
21 amended complaint, with the exception of two claims: his claim for breach of written contract,  
22 which he withdrew from arbitration, *see* Interim Award at 2 n.1, and the Arizona Consumer Fraud  
23 claim, which is styled as “Consumer Fraud” without citation to a specific statute in both  
Trinchitella’s initial complaint and his operative first amended complaint, Compl. ¶¶ 74–88, FAC  
¶¶ 76–90.

24 <sup>7</sup> Trinchitella has not provided any of the arbitration exhibits cited in the Interim Award with the  
25 first amended complaint. Although defendants provide several exhibits in support of their motion  
26 to dismiss, including some documents the Interim Award appears to refer to, *see* ECF Nos. 41-2 –  
27 41-4 (defendants’ exhibits A–E), defendants provide the court with no basis for considering  
28 documents Trinchitella has not attached to the complaint in resolving this motion to dismiss. The  
court also notes that defendants appear to have included a potentially sensitive and/or privileged  
document that does not appear to be related to this case at ECF No. 41-3 at 94–127. As noted  
below, the court strikes this document from the docket.

1 understood to be a rate of return, when in fact, ‘preferred return’ was a term defined  
2 in ARP’s Operating Agreement . . . with an entirely different meaning.” Interim  
3 Award at 3; FAC ¶¶ 12–13, 22 (alleging Combs, Zarinegar and Sheriff falsely  
4 promised Trinchitella an 8 percent return).

5 - “ARP . . . misle[d] [Trinchitella] in at least one telephone call about his ability to  
6 demand the return of his principal after one year.” Interim Award at 3; FAC ¶ 15  
7 (“Plaintiff was told that if, after one year of investing, Plaintiff was not happy with  
8 his investment for any reason, he could return his units and receive back the  
9 \$150,000 investment.”).

10 Based on these findings, the arbitrator determined that ARP violated Arizona’s  
11 consumer fraud statute and is liable to Trinchitella in the amount of \$201,131.51. Interim Award  
12 at 3; *see* Final Award at 1. The arbitrator also found, under the parties’ stipulation, their transaction  
13 would be rescinded and Trinchitella would return his investment to ARP. Interim Award at 3; *see*  
14 *id.* at 2 (noting, “The parties stipulated that should [Trinchitella] prevail, the transaction will be  
15 rescinded, and [Trinchitella] will return the investment”).<sup>8</sup> The arbitrator dismissed all of  
16 Trinchitella’s other claims and ARP’s defenses. Interim Award at 3. Trinchitella then moved for  
17 fees and costs. *See* Final Award at 1. Noting Trinchitella’s “pursuit of unsuccessful judicial  
18 litigation against ARP in the face of a mandatory arbitration clause, and against others not bound  
19 by the arbitration clause,” the arbitrator reduced Trinchitella’s requested amount by \$22,821.97.  
20 *Id.* at 2. The arbitrator ultimately awarded Trinchitella \$72,112.14 in attorneys’ fees, \$18,085.47  
21 in non-AAA costs and \$9,375.00 in AAA costs. *Id.*

22 C. First Amended Complaint

23 Following completion of the arbitration proceedings, Trinchitella moved to confirm  
24 the arbitration award, and the court has granted that motion. ECF No. 32 (motion to confirm); ECF  
25 No. 46 (order granting motion to confirm). The parties stipulated to Trinchitella’s filing an  
26 amended complaint “to add a successor entity (Corix Bioscience, Inc., . . . which is the successor  
27 to AHIT . . .) and to amend the complaint to address the results of the binding arbitration between  
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<sup>8</sup> The effect of this language is unclear to the court, as there is no explanation as to how Trinchitella would return the ARP investment. Without clarification, the court is unable to determine whether Trinchitella is required to return his ARP “units,” the AHIT shares his units were allegedly converted into despite his protests and which are, perhaps, now Corix stock, or the dollar value of the initial investment.

1 [Trinchitella] and ARP. . . .” ECF No. 33; *see* ECF No. 34 (order lifting stay and granting leave to  
2 file first amended complaint). Except for the breach of written contract claim, which he abandoned  
3 at arbitration, and his consumer fraud claim, which the arbitrator addressed under Arizona’s  
4 consumer fraud statute, Trinchitella now brings against ARP, PRM, AHIT, Corix and Zarinagar  
5 the same claims he raised in his original complaint and arbitrated with ARP: breach of written  
6 contract, breach of oral contract, promissory fraud, consumer fraud, intentional misrepresentation,  
7 negligent misrepresentation and common law fraud. *See generally* FAC. Trinchitella seeks  
8 damages of “at least . . . the amount of the Arbitration Award” and “[e]ntry and enforcement of that  
9 judgment and Arbitration Award against all Defendants as successors in liability to, and alter egos  
10 of, ARP.” *Id.* at 26.

## 11 II. LEGAL STANDARD

12 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move to  
13 dismiss a complaint for “failure to state a claim upon which relief can be granted.” A court may  
14 dismiss “based on the lack of cognizable legal theory or the absence of sufficient facts alleged  
15 under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.  
16 1990).

17 Although a complaint need contain only “a short and plain statement of the claim  
18 showing that the pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(2), in order to survive a motion  
19 to dismiss this short and plain statement “must contain sufficient factual matter . . . to ‘state a  
20 claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting  
21 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint must include something  
22 more than “an unadorned, the-defendant-unlawfully-harmed-me accusation” or “‘labels and  
23 conclusions’ or ‘a formulaic recitation of the elements of a cause of action.’” *Id.* (quoting  
24 *Twombly*, 550 U.S. at 555). Determining whether a complaint will survive a motion to dismiss  
25 for failure to state a claim is a “context-specific task that requires the reviewing court to draw on  
26 its judicial experience and common sense.” *Id.* at 679. Ultimately, the inquiry focuses on the  
27 interplay between the factual allegations of the complaint and the dispositive issues of law in the  
28 action. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).



1           In making this context-specific evaluation, this court must construe the complaint  
2 in the light most favorable to the plaintiff and accept as true the factual allegations of the  
3 complaint. *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007). This rule does not apply to “a legal  
4 conclusion couched as a factual allegation,” *Papasan v. Allain*, 478 U.S. 265, 286 (1986) *quoted*  
5 *in Twombly*, 550 U.S. at 555, nor to “allegations that contradict matters properly subject to  
6 judicial notice” or to material attached to or incorporated by reference into the complaint.  
7 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988–89 (9th Cir. 2001). A court’s  
8 consideration of documents attached to a complaint or incorporated by reference or matter of  
9 judicial notice will not convert a motion to dismiss into a motion for summary judgment. *United*  
10 *States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003); *Parks Sch. of Bus. v. Symington*, 51 F.3d  
11 1480, 1484 (9th Cir. 1995); *compare Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977,  
12 980 (9th Cir. 2002) (noting that even though court may look beyond pleadings on motion to  
13 dismiss, generally court is limited to face of the complaint on 12(b)(6) motion).

### 14       III.    DISCUSSION

15           Defendants ARP, PRM, Corix and Zarinagar<sup>9</sup> (collectively, “defendants” or “non-  
16 ARP defendants”) argue Trinchitella’s first amended complaint raises the same claims and seeks  
17 the same relief he previously pursued in arbitration against ARP, the non-ARP defendants’ liability  
18 is entirely derivative of ARP’s liability, and, accordingly, all claims in Trinchitella’s first amended  
19 complaint are barred by res judicata. Defendants use “res judicata” to refer to claim preclusion, as  
20 opposed to issue preclusion. *See* Mot. at 12 (noting distinction between issue and claim preclusion  
21 and clarifying defendants assert only the latter here); *Vandenberg v. Superior Court*, 21 Cal. 4th  
22 815, 828–29 (1999) (describing differences between claim and issue preclusion).<sup>10</sup> Trinchitella

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23           <sup>9</sup> As discussed below, although named as a defendant in the first amended complaint, AHIT did  
24 not join the motion and no arguments were expressly presented on its behalf.

25           <sup>10</sup> Issue preclusion is inapplicable here, as the California Supreme Court has held “a private  
26 arbitration award, even if judicially confirmed, can have no collateral estoppel effect in favor of  
27 third persons unless the arbitral parties agreed, in the particular case, that such a consequence  
28 should apply.” *Id.* at 834 (1999); *see Brinton v. Bankers Pension Servs., Inc.*, 76 Cal. App. 4th  
550, 556–57 (1999) (noting, under *Vandenberg*, claim preclusion may apply where issue  
preclusion does not) (citing *Vandenberg*, 21 Cal. 4th at 824 n.2).

1 responds that the non-ARP defendants refused to participate in arbitration, that the non-ARP  
2 defendants are liable here “based on the acts and omissions they took, not just through ARP, but  
3 directly on their own (in the case of Mr. Zarinigar) and through their own representatives (in the  
4 case of PRM and AHIT),” and argues he must be permitted to establish each defendant’s successive  
5 or alter ego liability. Opp’n, ECF No. 42. The court submitted the matter without oral argument  
6 and resolves it here.

7 A. Claim Preclusion

8 Defendants rely on both federal common law and California law in arguing claim  
9 preclusion applies while Trinchitella looks to California law alone for controlling principles.  
10 Neither party directly addresses the choice of law issue. Because this court, sitting in diversity, has  
11 confirmed the arbitration award and now determines the award’s preclusive effect, the court must  
12 apply its forum state’s law. *NTCH-WA, Inc. v. ZTE Corp.*, 921 F.3d 1175, 1180 (9th Cir. 2019)  
13 (“[F]ederal common law governs the claim-preclusive effect of a judgment rendered by a federal  
14 court sitting in diversity. But federal common law, in such circumstances, requires us to ‘determine  
15 the preclusive effect of the prior [federal] decision by reference to the law of the state where the  
16 rendering federal diversity court sits.’”) (internal citations and quotation marks omitted; alteration  
17 in original).

18 Under California law, “claim preclusion[] prevents relitigation of the same cause of  
19 action in a second suit between the same parties or parties in privity with them.” *Cal Sierra Dev.,*  
20 *Inc. v. George Reed, Inc.*, 14 Cal. App. 5th 663, 671 (2017), *as modified on denial of reh’g* (May  
21 14, 2018), *review denied* (Aug. 8, 2018). Claim preclusion applies only if the following  
22 requirements are met:

- 23 (1) the second lawsuit must involve the same “cause of action” as the  
24 first one, (2) there must have been a final judgment on the merits in  
25 the first lawsuit and (3) the party to be precluded must itself have  
been a party, or in privity with a party, to that first lawsuit.

26 *San Diego Police Officers’ Ass’n v. San Diego City Employees’ Ret. Sys.*, 568 F.3d 725, 734 (9th  
27 Cir. 2009) (applying California law).

1                   1.       Same Cause of Action

2                   Under California law, the court determines whether the prior and current  
3 proceedings raise the same cause of action “by focusing on the ‘primary right’ at stake: if two  
4 actions involve the same injury to the plaintiff and the same wrong by the defendant then the same  
5 primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery,  
6 seeks different forms of relief and/or adds new facts supporting recovery.” *Cal Sierra Dev., Inc.*,  
7 14 Cal. App. 5th at 675–76 (internal quotation marks omitted) (quoting *Eichman v. Fotomat Corp.*,  
8 147 Cal. App. 3d 1170, 1174 (1983)). This approach recognizes “only a single cause of action for  
9 the invasion of one primary right” where “the harm suffered is the significant factor.” *Id.* (citations  
10 omitted).

11                   As defendants note, Trinchitella in the first amended complaint attempts to rectify  
12 the same wrong already addressed in arbitration, with both actions turning on “the same investment,  
13 [a]lleged [p]romises, and alleged damages.” Mot. at 9. Trinchitella does not dispute this point nor  
14 otherwise attempt to show that the primary right at stake here somehow differs from the primary  
15 right at issue in arbitration. With no dispute on this point, the court finds the same cause of action  
16 that was at issue in the arbitration is also at issue here.

17                   2.       Final Judgment on the Merits

18                   Although this court granted Trinchitella’s unopposed motion to approve the  
19 arbitration award, as discussed further below, the court has not entered judgment against ARP.  
20 Defendants argue an arbitration award, even unconfirmed, constitutes a final judgment on the  
21 merits under both California and federal law. Mot. at 7 (citations omitted). Trinchitella does not  
22 address this element of claim preclusion, and thus appears to concede the point.

23                   For purposes of this motion, where ARP was party to the arbitration and the non-  
24 ARP defendants contend they are in privity with ARP, the arbitration award, now confirmed,  
25 constitutes a final judgment on the merits. *See Bucur v. Ahmad*, 244 Cal. App. 4th 175, 189 (2016)  
26 (observing, as to same party in arbitration and successive case, “[f]or purposes of res judicata, an  
27 unconfirmed arbitration award is equivalent to a final judgment”); *Trollope v. Jeffries*, 55 Cal. App.  
28 3d 816, 824 (Ct. App. 1976) (applying to arbitration award principle under which, “if a person

1 voluntarily acquiesces in or recognizes the validity of a judgment or decree, or otherwise takes a  
2 position inconsistent with the right of appeal therefrom, he thereby impliedly waives his right to  
3 have such judgment, order or decree reviewed by an appellate court”); *Cal Sierra Dev., Inc.*, 14  
4 Cal. App. 5th at 678–79 (defendant in privity with party to arbitration “can assert the confirmed  
5 arbitration award as claim preclusion, even though the award was not reduced to a judgment).

6 3. Privity

7 Both the party asserting a claim preclusion defense and the party against whom the  
8 defense is asserted must have been the same party or its privy in the prior action. *DKN Holdings*  
9 *LLC v. Faerber*, 61 Cal. 4th 813, 824–25 (2015). “[P]rivity requires the sharing of ‘an identity or  
10 community of interest,’ with ‘adequate representation’ of that interest in the first suit, and  
11 circumstances such that the nonparty ‘should reasonably have expected to be bound’ by the first  
12 suit.” *Id.* (quoting *Clemmer v. Hartford Ins. Co.*, 22 Cal. 3d 865, 875 (1978), *overruled on other*  
13 *grounds by Ryan v. Rosenfeld*, 3 Cal. 5th 124 (2017)). “Put another way, privity, ‘as used in the  
14 context of res judicata or collateral estoppel, does not embrace relationships between persons or  
15 entities, but rather it deals with a person's relationship *to the subject matter of the litigation.*”  
16 *Castillo v. Glenair, Inc.*, 23 Cal. App. 5th 262, 277 (Ct. App. 2018) (emphasis in original) (quoting  
17 *Cal Sierra Dev., Inc.*, 14 Cal. App. 5th at 674)).

18 a. ARP

19 Although not expressly conceded by Trinchitella, it is undisputed that ARP was the  
20 same party in the arbitration that is named as ARP in this case. Accordingly, claim preclusion  
21 applies to this extent. The court GRANTS the motion as to ARP.

22 b. PRM & Zarinigar<sup>11</sup>

23 PRM and Zarinigar contend their liability in this action is merely derivative of  
24 ARP’s liability and “their relationships are close enough that, for purposes of res judicata, they  
25 should be considered the same party.” Mot. at 11; see *Cal Sierra Dev., Inc.*, 14 Cal. App. 5th at

26 \_\_\_\_\_  
27 <sup>11</sup> As noted above and discussed further below, defendants do not specifically argue Trinchitella’s  
28 claims against AHIT are precluded. See Mot. at 6–7 (arguing claims against ARP are precluded);  
*id.* at 8–12 (arguing claims against Corix, PRM and Zarinigar are precluded).

1 673 (“[D]erivative liability establishes privity.”). Specifically, defendants argue PRM is merely  
2 ARP’s “manager” with “no claims made directly against it” in arbitration or in the current  
3 proceedings and Zarinegar is simply “an agent of ARP.” *Id.* at 11; *but see* FAC ¶ 6 (alleging on  
4 information and belief that Zarinegar was AHIT’s “Chairman of the Board, CEO and President”  
5 and ARP’s manager); Interim Award at 1 (identifying Zarinegar’s appearance at arbitration as  
6 ARP’s Chief Executive Officer); Subscription Agreement at 15 (ARP subscription agreement  
7 signed by “Sean Zar”<sup>12</sup> as “Manager” of PRM).

8           Trinchitella argues these defendants’ liability is not derivative of ARP’s because the  
9 defendants acted “directly on their own (in the case of Mr. Zarinegar) and through their own  
10 representatives (in the case of PRM and AHIT).” *Opp’n* at 6. In the operative complaint,  
11 Trinchitella alleges that both ARP and PRM “actively recruited investors such as Plaintiff, by  
12 [them]sel[ves] and through [one another] . . . .” FAC ¶¶ 2–3. Sheriff, acting either on behalf of  
13 ARP and PRM, or both, called Trinchitella monthly to solicit further investments. *Id.* ¶ 21. It was  
14 PRM, not ARP, that sent Trinchitella the subscription agreement containing the arbitration  
15 agreement this court later enforced as to ARP, *id.* ¶ 16, and that agreement allegedly was signed by  
16 Zarinegar as manager of PRM for ARP, Subscription Agreement at 15.

17           The various defendants’ roles in this case are far from clear, and defendants,  
18 confined to the pleadings here, offer little in the way of clarification. In any event, defendants have  
19 not established that their liability is entirely derivative of ARP’s, and none of the cases they rely on  
20 establishes as much. For example, Zarinegar has not shown he is an “agent of ARP” as the  
21 individual defendants in the case of *Sartor* were agents and employees of the architectural and  
22 engineering services corporation against which the plaintiffs in that case had previously arbitrated  
23 their claims. *See* Mot. at 8, 11 (citing *Sartor v. Superior Court*, 136 Cal. App. 3d 322, 328 (Ct.  
24 App. 1982) for proposition a corporation acts only through its agents and its agents are thus  
25 absolved of derivative liability when corporation is absolved of liability); *see also Sartor*, 136 Cal.  
26 App. 3d at 328–29 (noting arbitrator submitted declaration as to derivative nature of liability,  
27

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28 <sup>12</sup> Trinchitella alleges Zarinegar is also known as Sean Zar. FAC ¶ 6.

1 stating “the individuals had committed no fraud, and on that basis I found that [the corporation]  
2 was not liable for fraud”).

3 While Zarinegar may be an agent of ARP as its Chief Executive Officer, *see* Interim  
4 Award at 1, he also held himself out as the manager of PRM, Subscription Agreement at 15, and  
5 allegedly held multiple other roles for the other entity defendants, leaving the scope of his agency  
6 status in this case and among its defendants unclear. Further, as noted, PRM is a corporate entity.  
7 Defendants’ assertion that PRM was ARP’s “manager,” without more, does not establish PRM’s  
8 purely derivative liability. *See* Mot. at 11. In short, at this stage and on this record, the court cannot  
9 accept defendants’ argument that “their relationships are close enough that, for purposes of res  
10 judicata, they should be considered the same party” with no substantive proof of those relationships.  
11 *See* Mot. at 11

12 Moreover, the parties neglect to address other authority that may be relevant here.  
13 For example, the California Supreme Court has held that privity is not established merely because  
14 parties are in a business partnership, are cosigners to an agreement, or because they may be subject  
15 to joint and several liability. *See DKN Holdings LLC*, 61 Cal. 4th at 825–26. In both breach of  
16 contract and tort claims, joint and several obligors and concurrent tortfeasors are independently  
17 liable “although all have contributed to the same loss.” *Id.* at 828; *id.* at 821 n.7; *see also*  
18 *Gackstetter v. Frawley*, 135 Cal. App. 4th 1257, 1272–73 & n.13 (2006) (“Joint tortfeasors’ have  
19 been referred to as ‘two or more persons who are liable to the same person for the same harm’” and  
20 “If the independent tortious conduct of two or more persons is a legal cause of an indivisible injury,  
21 each defendant is jointly and severally liable for the economic damages portion of the recoverable  
22 damages. . . .” (quoting Restatement (Second) of Torts § 886A, cmt. 1(b); Restatement (Third)).

23 If these defendants are to prove their liability is purely derivative of ARP’s or  
24 otherwise establish that they are in privity with ARP, they will need to do so in a later dispositive  
25 motion or at trial. The motion is DENIED as to PRM and Zarinegar.

26 c. Corix

27 Defendants also argue Corix’s liability is purely derivative of ARP’s liability. Mot.  
28 at 8, 11. As defendants explain, “ARP is a subsidiary of Corix” that “had no involvement with

1 Plaintiff's investment in ARP" and "had no relationship with ARP until over a year after Plaintiff  
2 invested in ARP." Mot. at 11. Trinchitella concedes that "Corix is the only Defendant that is not  
3 alleged to have committed [the] same acts and omissions [at issue here] on its own behalf, and  
4 [Corix's] liability is based on both derivative liability and its status as the alter ego of the other  
5 Defendants (not just ARP)." Opp'n at 6; *see id.* at 11 (arguing Corix liable "as the successor  
6 responsible for ARP's liability"). Consistent with this concession, in his first amended complaint,  
7 Trinchitella alleges that AHIT became the successor in liability to ARP at some point after late  
8 2014 or early 2015, then AHIT acquired IX Bioscience in March 2017 and changed AHIT's name  
9 to Corix in May 2017, making Corix the successor in liability to both ARP and AHIT with respect  
10 to the 2017 arbitration award. FAC ¶¶ 4-5.

11 In other words, Trinchitella concedes that he does not intend to pursue the claims  
12 litigated in arbitration against Corix as a direct actor, but instead intends to establish Corix's  
13 liability as an alter ego of ARP and AHIT and as their successor in interest. "The most common  
14 form of privity is succession in interest. One who succeeds to the interests of a party in the property  
15 or other subject of the action, after its commencement, is bound by the judgment with respect to  
16 those interests in the same manner as if he or she were a party." 7 Witkin, Cal. Proc. 5th Judgm.  
17 § 460 (2008) (citations omitted); *Neilson v. Union Bank of California, N.A.*, 290 F. Supp. 2d 1101,  
18 1149 (C.D. Cal. 2003). Based on his own allegations and arguments, then, Trinchitella effectively  
19 concedes that Corix is in privity with ARP. He is therefore precluded from relitigating claims  
20 against ARP by litigating the same claims against Corix as ARP's successor. The court GRANTS  
21 the motion as to Corix to this narrow extent.

22 Notably, however, Trinchitella has not yet proven that Corix is in fact ARP or any  
23 other defendant's successor, and he is not precluded from making such a showing in this case,  
24 should he choose to amend his complaint to do so. Moreover, because no other defendant has  
25 shown it is in privity with ARP, Trinchitella may still attempt to show that Corix is another non-  
26 ARP defendant's successor. *See* FAC ¶ 5 (alleging Corix is successor in liability to AHIT).

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1           B.     Leave to Amend

2           Trinchitella seeks leave “to set up the claims necessary to pursue and prove the  
3 Defendants’ liability for th[e] [arbitration] award as alter egos [and successors] of ARP.” Opp’n at  
4 11; *see* Ehlers’ Decl., ECF No. 42-1, ¶ 5 (“If and when the arbitration award is confirmed, Plaintiff  
5 will be able to amend the Complaint to pursue those Defendants as alter egos liable for the award  
6 (and to segregate out the claims in addition to those addressed at the arbitration that remain to be  
7 decided separately against the other Defendants).”).

8           Defendants did not respond to this request, which the court GRANTS to the extent  
9 any amendment is consistent with the balance of this order.

10          C.     Status of AHIT

11          As noted above, the court granted AHIT’s motion to dismiss Trinchitella’s original  
12 complaint, but granted Trinchitella leave to amend his allegations as to AHIT. Prior Order at 12.  
13 Trinchitella has since amended his complaint and includes AHIT as a defendant. *See* FAC. All  
14 defendants in this action share the same counsel, yet only ARP, PRM and Zarinegar moved to  
15 dismiss Trinchitella’s first amended complaint.

16          In short, AHIT has not responded to the first amended complaint. Accordingly,  
17 within 14 days of this order, Trinchitella is ORDERED to request entry of default as to AHIT or  
18 file a status report indicating his plans otherwise to prosecute this case against AHIT. *See* Fed. R.  
19 Civ. P. 55.

20          D.     Entry of Judgment as to ARP

21          There is authority for the position that a court granting a motion to confirm an  
22 arbitration award must also enter judgment in accordance with the arbitration award. 9 U.S.C.  
23 § 13 (“The party moving for an order confirming, modifying, or correcting an award shall, at the  
24 time such order is filed with the clerk for the entry of judgment thereon, also file the following  
25 papers with the clerk . . . .”); *Cal Sierra Dev., Inc.*, 14 Cal. App. 5th at 678 n.5 (noting, under  
26 California law, “judgment should have been entered on the order [confirming arbitration award]”)  
27 (citations omitted); *but see Didio v. Jones*, No. CV 13-4949 PSG, 2016 WL 6674992, at \*3–4 (C.D.  
28 Cal. Feb. 3, 2016) (noting 9 U.S.C. § 9 does not require entry of judgment and declining to enter



1 judgment, after reviewing Rule 54(b), where unarbitrated issues were pending and ultimate  
2 disposition was uncertain).

3 Here, the court has confirmed the award but has not entered judgment as to ARP.  
4 Because the arbitration award is final as to ARP and no further action in this case will change that  
5 result, the court identifies only one barrier to entry of judgment against ARP: Trinchitella seeks  
6 interest but has not supported his request. *See* ECF No. 32 at 5 (seeking judgment against ARP “in  
7 the full amount of the award as of December 28, 2017 [the date of the Final Award], with interest  
8 accruing thereon at the maximum legal rate until paid in full.”). The request therefore is inadequate.  
9 The subscription agreement Trinchitella and ARP entered into contains a choice of law provision,  
10 *see* Subscription Agreement at 14, but Trinchitella does not indicate whether the court should look  
11 to California, Arizona or federal law in determining whether prejudgment or postjudgment interest  
12 is appropriate here, and, if so, the amount of interest owed. *See In re Exxon Valdez*, 484 F.3d 1098,  
13 1101 (9th Cir. 2007) (“[P]rejudgment interest is a substantive aspect of a plaintiff’s claim, rather  
14 than a merely procedural mechanism”); *Fields v. Legacy Health Sys.*, 413 F.3d 943, 950 (9th Cir.  
15 2005) (“Federal courts sitting in diversity must apply the forum state’s choice of law rules to  
16 determine the controlling substantive law.”).

17 Accordingly, within fourteen (14) days of this order, Trinchitella may file a  
18 supplemental brief, not to exceed ten pages, providing authority for the interest rate that controls  
19 here. ARP may file a response, not to exceed ten pages, seven days thereafter. Alternately, the  
20 parties may file a joint stipulation and proposed order, within fourteen (14) days. The court will  
21 then determine the appropriate interest, if any, and enter judgment against ARP.

#### 22 IV. CONCLUSION

23 The motion to dismiss is GRANTED as to ARP, GRANTED in part as to Corix and  
24 DENIED as to the other defendants. Trinchitella may file an amended complaint consistent with  
25 this order and the court’s confirmation of the arbitration award within fourteen days. Defendants’  
26 answer is due fourteen days thereafter.

27 Also within fourteen days, Trinchitella shall request entry of default as to AHIT or  
28 otherwise indicate his plans to prosecute this case against AHIT. He may file a supplemental brief,

1 not to exceed ten pages, identifying the appropriate rate of prejudgment and postjudgment interest,  
2 if any, that applies in light of the parties' choice of law provision. ARP may respond to  
3 Trinchitella's supplemental brief, also not to exceed ten pages, seven days thereafter. Alternately  
4 the parties may address the amount of interest in a joint stipulation to be filed within fourteen days.

5 Finally, the court STRIKES ECF No. 41-3 and orders defendants to refile Exhibits  
6 E-I without the sensitive information contained in pages 94-127.

7 IT IS SO ORDERED.

8 DATED: June 19, 2019.

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12 UNITED STATES DISTRICT JUDGE  
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