

**JAMS ARBITRATION
CASE REFERENCE NO. 1110024169**

Chen, Yuhui

Claimant,

FINAL AWARD

vs.

Innogrit Corporation, et al.,

Respondents.

Incorporation and Correction of Interim Award

This Final Award incorporates by reference all the findings of fact and conclusions of law that are set forth in the Interim Award that was issued on March 18, 2021 – but with one correction of a computational or typographical error. The Interim Award stated that the value of the four million shares in SPV II was \$2,800,000. That figure was incorrect. The correct figure is \$2,840,000.

Acknowledgment of Claimant's Election re Damages

Claimant has elected to have his breach of contract damages award in the form of the value of four million (4,000,000) shares in SPV II, which is \$2,840,000.

Claimant Is Entitled to an Award of Attorneys' Fees

Claimant has petitioned for an award of attorneys' fees on three grounds: California Code of Civil Procedure section 1021.5, California Labor Code section 218.5, and an arbitrator's discretion to make such an award under general principles of public policy or fairness.

California Code of Civil Procedure Section 1021.5

CCCP section 1021.5 authorizes an award of attorneys' fees "to a successful party...

in any action which has resulted in enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement . . . are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery"

The arbitrator concludes that Dr. Chen's lawsuit did not result in the enforcement of a right affecting the public interest, as that phrase is understood in this statutory context, did not confer a significant benefit on the general public or a large class of persons, and that there were substantial financial incentives for private enforcement of the rights in issue.

As the California Supreme Court pointed out in its seminal opinion in this arena, "the public always has a significant interest in seeing that legal strictures are properly enforced and thus, in a real sense, the public always derives a 'benefit' when illegal private or public conduct is rectified . . . however . . . the legislature did not intend to authorize an award of attorney fees in every case involving a statutory [or common law] violation." *Woodland Hills Residents' Assn., Inc. v. City Council of Los Angeles*, 23 Cal.3d 917, 939 (1979). See also *Beach Colony II v. California Coastal Commission*, 166 Cal.App.3d 106, 114 (1985).

In determining whether to award fees under section 1021.5, a right's importance must be determined by realistically assessing "the significance of [the] right in terms of its relationship to the achievement of fundamental legislative goals." *Woodland Hills Residents' Assn., supra*, at 936. Dr. Chen's case was not undertaken in order to advance or achieve "fundamental legislative goals." Nor did its outcome have any such effect.

In this case, the rights Dr. Chen enforced were his own. They were, literally and materially, peculiar to him. No other player in the Innogrit drama could lay claim to a significant percentage of the equity in the Company's employee pool. And there has been no allegation from any source that Dr. Wu fraudulently enticed any other employee to join the company by promising one level of equity but then delivering only a much lesser amount or percentage. Stated more colloquially, this was a one-off case that involved, at

its heart, a *sui generis* and fraudulent promise that was broken.

In explaining the element in the section 1021.5 test that focuses on the "necessity and financial burden of private enforcement," the *Woodside* court endorsed the following statement from the Court of Appeal in *County of Inyo v. City of Los Angeles*, 78 Cal.App.3d 82, 89 (1978): "An award on the 'private attorney general' theory is appropriate when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff 'out of proportion to his individual stake in the matter.'" In *Davis v. Farmers Insurance Exchange*, 245 Cal.App.4th 1302 (2016), the court reiterated that "[t]he purpose of an award of attorney fees pursuant to section 1021.5 is to encourage suits that enforce 'common interests of significant societal importance, but which do not involve any individual's financial interests to the extent necessary to encourage private litigation to enforce the right.'" Citing *Beach Colony II v. California Coastal Commission*, 166 Cal.App.3d 106, 114 (1985).

In the case at bar, Dr. Chen had a very considerable and very personal financial stake in the matter – upwards of \$35 million under one theory of his case. His possible recovery was sufficiently sizeable to induce a large plaintiffs' law firm with substantial resources and a solid reputation to take his case on a contingency basis. This simply was not "public interest litigation [where] there are insufficient financial incentives to justify the litigation in economic terms." *Woodside, supra*. Neither altruism nor concern about vulnerable, statutorily created rights were necessary to induce Claimant's lawyers to take on this matter. There simply was no need to legislatively supplement the substantial incentives that were in place to pursue this litigation. In short, this was not the kind of case, or the kind of circumstance, that the legislature intended section 1021.5 to reach.

For all these reasons, the Arbitrator concludes that Dr. Chen has not proved he has an entitlement to attorneys' fees under California Code of Civil Procedure section 1021.5.

Labor Code Section 218.5

California Labor Code Section 218.5 provides that in "any action brought for the nonpayment of wages . . . the courts shall award reasonable attorney's fees and costs to the

prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action."

Dr. Chen was the prevailing party in this matter and the compensation to which he was entitled in the form of equity on the completion of one year's work for the Company constituted "wages" within the meaning of Labor Code Section 218.5. See *Schachter v. Citigroup, Inc.*, 47 Cal.4th 610 (2009).

The Arbitrator declines to endorse Respondents' argument that Dr. Chen is not entitled to fees under this statute because the contract for employment he entered was only with an individual, Dr. Wu, and not with his employer, and because it was only Dr. Wu who breached that contract by reneging on the promise to compensate Dr. Chen, over a four-year period, with 20% of the equity in the Company's employee pool.

Dr. Wu had incorporated Innogrit before he made the 20% promise to Dr. Chen – and Dr. Wu was the only officer of the Company identified in the incorporating documents. He *was the Company* when he made the promise that he broke, just as, for all practical and legal purposes, he was the Company when he broke that promise. Neither SummitView nor a board of directors purported to control the relevant acts and decisions by Dr. Wu – who, in any event, controlled the nascent Board when it finally took legal form. In other words, when Dr. Wu engaged in the conduct that is critical to Dr. Chen's breach of contract/wage claim, Dr. Wu was – and acted as – Dr. Chen's employer.

The most difficult issue with respect to Dr. Chen's pursuit of fees under this statute is whether he complied with the statutory requirement that he request "fees and costs upon the initiation of the action." The Arbitrator resolves this close question in favor of Dr. Chen for the following reasons.

As the *Davis* court reminds us, "[t]he wages an employer owes its employees are accorded 'a special status' under California law" and their full and prompt payment "is a fundamental public policy of this state." Citation omitted. As important (for present purposes), the *Davis* court emphasized that "[t]he statutes governing the employer/employee relationship are 'remedial in nature' and must be liberally construed, 'with an eye to promoting the worker protections they were intended to provide.'" Citing

Prachasaisoradej v. Ralphs Grocery Company, Inc., 42 Cal.4th 217, 227 (2007).

Given the mandate from the California Supreme Court to interpret remedial statutes like Labor Code section 218.5 liberally, the Arbitrator concludes that by including in his prayer for relief a general claim for an award of attorneys' fees and costs, Dr. Chen satisfied the notice requirement that is the primary driver of this element of a claim under section 218.5.

The statute does not require that a claimant specify in his prayer that he will be seeking fees and costs specifically under section 218.5. The statutory language only requires that a party request "attorney's fees and costs upon the initiation of the action." Dr. Chen did this. While he did not specifically cite or explicitly invoke section 218.5, Respondents clearly were on notice that, *under his employment agreement*, he was seeking *damages that constituted "wages" under applicable California law*.

Respondents were on notice that Dr. Chen was seeking attorneys' fees and costs – and clearly should have anticipated that he would seek to recover attorneys' fees if he prevailed on the claim for breach of his employment contract. Respondents were sophisticated parties who were quite capably represented by sophisticated lawyers who clearly should anticipate a claim for fees and costs if Dr. Chen prevailed, as he did, on his breach of contract claim.

The judicial opinion that makes this a closer question than it might otherwise seem is *Shames v. Utility Consumers' Action Network*, 13 Cal.App.5th 29 (2017), which is cited by all parties to this arbitration. While there is language in the opinion that suggests that a party might be required to *plead* for fees and costs *explicitly under 218.5*, the Court did not need to face that issue squarely because both parties to the appeal appeared (in the Court's view) to agree that the statute imposed "a duty on a party to plead an entitlement to 218.5 attorney fees in either an initial or amended pleading." Of course, the statute itself imposes no such requirement. And it would be curious for a *court* in California to superimpose such a requirement – especially when the legislature easily could have done so had it intended such an outcome. But the statute does not say that a party must plead for fees and costs "under" or "pursuant" to section 218.5. It only says that a party must "request attorneys'

fees and costs upon the initiation of the action."

The underlying purpose of the statute is to put a party to a wage claim on notice that if it loses it will be exposed to a judgment that could be substantially larger than the unpaid wages (or benefits) that are directly in issue. In the *Shames* case, the appellate court concluded that such notice was not given for two reasons, neither of which applies in the case at bar.

The first reason is that no iteration of the pleadings included a "general, overarching request for attorney fees that could be considered a 'request' for attorney fees with respect to the cause of action for nonpayment of wages, pursuant to section 218.5" In fact, no iteration of the complaint included any general prayer for relief in the form of attorneys' fees and costs. Instead, requests for fees and costs were included only within three statutorily specific claims – and the plaintiff relied on only one of those claims in his pursuit of an award of fees and costs. But the one claim on which he relied sought fees only in the form of damages, not for the fees he had to pay counsel to prosecute his claim. As to this sole basis for an entitlement to fees and costs under section 218.5, the Court of Appeal declared: "No reasonable reading of the first amended complaint would permit one to conclude that Shames's request in paragraph 52 for \$3,000 in attorney fees that he had already incurred at the time he filed this action would also place [the defendant] UCAN at risk for any additional \$136,721.25 in attorney fees that Shames ultimately incurred in litigating this action." *Id.*, at 43.

The Arbitrator concludes that the drivers of the outcome in *Shames* are absent from the case at bar. Dr. Chen's pleadings always have included a general, "overarching" prayer for fees and costs. And Respondents clearly knew that what Dr. Chen sought to recover through his first and most important cause of action (for breach of contract) was a form of compensation that the law classifies as unpaid wages. So, Respondents were on notice that (1) a core element of relief Dr. Chen was seeking consisted of unpaid wages and (2) he was praying for an award of attorney's fees and costs if he prevailed. Thus, as a matter of law, Respondents were on notice that they were exposed to a judgment for Dr. Chen's fees and costs under section 218.5. For this reason, the Arbitrator deems the purposes and

requirements of section 218.5 satisfied.

Because the statute's purposes were satisfied, because the statute is remedial in character and is to be liberally construed, because deciding rights on the basis of forms of pleading is generally disfavored, and because Respondents have not made a persuasive argument that a failure to cite Labor Code Section 218.5 in Claimant's prayer caused them to suffer any unfair prejudice, the Arbitrator concludes that Dr. Chen has proved that he is entitled to an "award of reasonable attorney's fees and costs" in his action for non-payment of wages.

A Reasonable Allocation of Reasonable Fees and Costs

Dr. Chen has proved that he is entitled to recover a very substantial percentage of the attorneys' fees (after assessments for reasonableness) that he incurred in having this action prosecuted.

He prevailed on all but one of his most significant claims. And he established his entitlement to substantial damages. His damages would not have been appreciably greater, if greater at all, had he prevailed on any of the claims he failed to prove.¹

The one fee-significant cause of action² on which he failed to prevail was for wrongful termination in violation of public policy. Dr. Chen's counsel devoted considerable time to proving that Dr. Chen was fired (as opposed to resigning) – and most of the evidence needed for this effort was pretty clearly independent of the evidence Dr. Chen's team adduced (or needed to explore) in order to prevail on his other core claims. Counsel for Dr. Chen also had to devote substantial time to trying (without success) to prove that the proffered reasons for Dr. Chen's termination were pretextual – and that retaliation for engaging in, or threatening to engage in, protected activity was a substantial

¹Dr. Chen's damages would have been appreciably greater only if he had prevailed on his contention that he was entitled, on the date of termination, to accelerated (immediate) vesting of all 20% of the employee equity pool. He failed to prove he was entitled to accelerated vesting, but it is clear to the Arbitrator that his counsel devoted only a very small percentage of their time to trying to support this potential path to greater damages.

²Dr. Chen did not prevail on his causes of action for unjust enrichment or for breach of fiduciary duty, but his counsel have persuaded the Arbitrator that they devoted only a modest amount of time to work that needed to be done to prosecute only these claims.

factor driving the termination decision. None of this work was sufficiently intertwined with the work needed to be done to prevail on his other claims to justify a fee award for it.

The Arbitrator has concluded that it is appropriate to *allocate 15% of the time* that prosecuting this case should reasonably have consumed *to the work devoted to the unsuccessful* wrongful termination claim and to the less significant unsuccessful claim for breach of fiduciary duty.

The Arbitrator also has concluded that not all the hours claimed by Dr. Chen's counsel were reasonably spent prosecuting this case. Dr. Chen has failed to prove that all the hours claimed for work performed by associates, litigation fellows, a law clerk, and summer associates were justified. Because of this failure, the Arbitrator will reduce by half (50%) the claim that is based on work performed by the people in these categories. In round numbers, the Arbitrator has determined that the total amount claimed for the work by people in these categories is \$896,305. When reduced by 50%, the entitlement (before other adjustments) for work performed by persons so categorized is \$448,153.

The hours claimed by other professionals and the hourly rates sought for them are reasonable.

After making the adjustments for non-compensable hours, the Arbitrator determines the lodestar for hours and hourly rates to be \$3,300,609 minus \$448,153, which is \$2,852,456.

This figure must be reduced by 15% (fifteen percent) to account for the lack of success on the wrongful termination and breach of fiduciary duty causes of action. Eighty-five percent (85%) of the adjusted lodestar (\$2,852,456) is \$2,424,588. This is the reasonable attorneys' fees figure to which any multiplier would be applied.

Among the factors courts are to consider when deciding whether to apply a multiplier, only one comes significantly into play in this case.³ That factor is the considerable risk of an adverse outcome. The core components of this case turned on the

³None of the other factors militate against applying a multiplier or would justify application of a negative multiplier. Counsel for Dr. Chen were skillful; they devoted a very significant percentage of their time over a two-year period to this matter, and some of the factual and legal issues were difficult, even if not highly unusual or esoteric.

credibility of the two principal antagonists. Despite the fact that documentary evidence – and the lack of documentary evidence – played a very important role in the Arbitrator's credibility determinations, the case always was fragile.

The pivotal issue turned on findings about whose version of one *unwitnessed* conversation were most likely accurate – and then on what inferences would most likely be drawn from the findings about that one conversation. Both of the key players were intelligent, sophisticated, and very well-spoken. No rational lawyer could have been confident about how these core matters would be resolved. So there remained throughout this case a very considerable risk that Claimant would fail to carry his burdens of proof and that his counsel would be paid nothing for several thousand hours of detail-dense and stressful work. The level of this risk, and the magnitude of the investment that was imperiled, justify a multiplier of 1.4%.

Applying the 1.4% multiplier to the adjusted reasonable lodestar figure of \$2,424,588 yields recoverable attorneys' fees of \$3,394,423. This is the amount of attorneys' fees to which Dr. Chen has proved he is entitled.

There is no independent basis for awarding Dr. Chen the fees he incurred before pursuing the instant claims in arbitration, i.e., when he retained separate counsel to try to negotiate a severance package.

Costs

Pursuant to California Labor Code Section 218.5 and Rule 24 of the JAMS Employment Arbitration Rules and Procedures, the Arbitrator awards Claimant \$220,061 in costs. The Arbitrator declines to award travel expenses in the sum of \$3,759.

Pre-Judgment Interest

California Labor Code section 218.6 provides that in an "action for non-payment of wages, the court shall award interest on all due and unpaid wages . . . which shall accrue from the date that the wages were due and payable."

Having prevailed on his claim for unpaid wages, Claimant is entitled to pre-judgment interest – but this is not a simple case where it was clear or clearly foreseeable

what wages would be due if Claimant prevailed. Because the wages in issue in this case took the form of shares of stock in an employee equity pool of a closely held, start-up corporation, and because the valuation date for the shares was subject to considerable uncertainty, it was not clear how to calculate the value of the wages (shares) that were due (the amount owing).

Given this combination of uncertainties, the Arbitrator has decided to exercise his equitable discretion and to award prejudgment interest as it would be determined under section 3287(b) of the Civil Code of California. In the unusual circumstances presented in this case, the damages must be considered unliquidated under the contract cause of action (which, in this case, is deemed to embrace Labor Code section 218.5).

Respondents contend that interest should be awarded not on the entire contract judgment amount, \$2,840,000, but only on half of that amount, which, in Respondents' words, is "the value of the additional equity the Arbitrator awarded Claimant." Respondents argue that Claimant already owned two million shares in SPV II and that Innogrit did not have possession of them, so it "should not be obligated to pay interest on the value of such shares." (Respondent's Brief of May 10, 2021, at 2-3).

There are difficulties with this argument. It is not at all clear that Innogrit would have paid much of anything for the shares Dr. Chen technically "owned" if he had tried to sell them after he was terminated. There was no 'aftermarket' for the shares at the time of termination and Innogrit valued the shares it did purport to buy back at a pittance. It took a full Hearing on the merits and the development of expert opinion in connection therewith to determine the value of the shares in issue – and throughout these proceedings Innogrit has continued to challenge the date on which the valuation should be determined. Thus, in Innogrit's view, Claimant did not "own" much of anything until the Arbitrator entered his ruling in this case. Stated differently, it is only because of the entry of the "judgment" in this case that there is a monetary amount of any consequence on which interest could run. In this legally critical sense, it is entirely appropriate to conclude that the full amount of the judgment on the contract claim is the amount on which interest should be calculated.

The Parties disagree about the date from which interest on the \$2,840,000 judgment on the contract claim should begin to accrue. Under Civil Code Section 3287(b), this date is left to the discretion of the Arbitrator but cannot be "earlier than the date the action was filed." The "action" that launched the proceedings that generated the subject judgment (award) was filed in court by Claimant on October 31, 2018. It was in that "action" that Claimant first sought to recover the value of the shares to which he was adjudged entitled in this proceeding. As Claimant has argued, by filing that original action, Claimant put Respondents on notice about the claim on which he eventually prevailed, thus affording Respondents an opportunity to voluntarily stanch the effect of their wrongdoing (their breach of contract). But Respondents elected not to stop the bleeding. Having made that election, they have no compelling basis for complaining that they must pay interest from the time they chose not to deliver over to Dr. Chen the value of the property to which he held legal entitlement.

For these reasons, the Arbitrator exercises his discretion to fix the date from which Respondents owe interest as October 31, 2018.

It follows that Dr. Chen is entitled to (and is hereby awarded) interest at the statutory (10%) rate on \$2,840,000 from October 31, 2018 through May 12, 2021 (the date on which the Arbitrator had expected this Final Award to be issued). The interest so calculated is \$719,726. The Arbitrator hereby awards Dr. Chen this amount of prejudgment interest. This award runs against both Respondents.

Final Award

1. Claimant is awarded \$2,840,000 in damages on his claims for breach of contract and violation of California Labor Code section 218.5. This award runs against all Respondents.

2. Claimant is awarded \$719,726 in prejudgment interest on his breach of contract award. This award runs against all Respondents.

3. Claimant is awarded \$500,00 in emotional distress damages. This award runs against all Respondents.

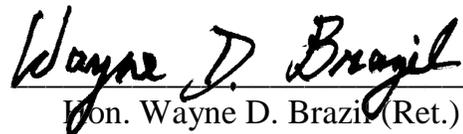
4. Claimant is awarded \$650,000 in punitive damages as against Respondent Wu only.

5. Claimant is awarded \$3,394,423 in attorneys' fees. This award runs against all Respondents.

6. Claimant is awarded \$220,061 in costs. This award runs against all Respondents.

IT IS SO FINALLY ADJUDGED AND AWARDED.

May 17, 2021.



Hon. Wayne D. Brazil (Ret.)
Arbitrator

PROOF OF SERVICE BY E-Mail

Re: Chen, Yuhui vs. Innogrit Corporation, et al.
Reference No. 1110024169

I, Aimee Hwang, not a party to the within action, hereby declare that on May 17, 2021, I served the attached FINAL AWARD on the parties in the within action by electronic mail at San Francisco, CALIFORNIA, addressed as follows:

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I declare under penalty of perjury the foregoing to be true and correct. Executed at San Francisco, CALIFORNIA

on May 17, 2021.



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