UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO. 20-CIV-24867-SCOLA/GOODMAN

GRUPO UNIDOS POR EL CANAL, S.A.,
SACYR, S.A.,
WEBUILD S.p.A. and
JAN DE NUL N.V.

Movants,

v.

AUTORIDAD DEL CANAL DE PANAMÁ,

Respondent.

MOVANTS' REPLY IN SUPPORT OF THEIR CONSOLIDATED MOTION TO VACATE PARTIAL AND FINAL ARBITRAL AWARDS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

OTHER AUTHORITIES

Movants Grupo Unidos por el Canal, S.A., Sacyr, S.A., Webuild, S.p.A., and Jan De Nul, N.V. (collectively, "Movants") respectfully submit this Reply in support of their Consolidated Motion to Vacate the Partial Award (D.E. 55-5) and Final Award (D.E. 55-4).[1]

INTRODUCTION

In their Consolidated Motion to Vacate, Movants demonstrated that vacatur is warranted because the arbitrators knew of potential serious conflicts that they failed to disclose prior to the issuance of the Partial Award and the Final Award (collectively, the "Awards"). In particular, the arbitrators failed to disclose inter-relationships evidencing an appearance of a lack of impartiality and, indeed, conflicts, *inter alia*:

- Dr. Gaitskell, the arbitrator appointed by Respondent Autoridad del Canal de Panamá ("ACP"), failed to disclose that during the pendency of the Panama 1 Arbitration, he nominated (with his co-arbitrator) the Tribunal President, Mr. Gunter, to serve as president in a separate ICC arbitration.[2] It took multiple disclosure requests from Movants before Mr. Gunter disclosed that his appointment stemmed from Dr. Gaitskell's nomination.[3]

- Dr. Gaitskell also failed to disclose that ACP's lead counsel, Mr. McMullen, had appointed him to sit in another arbitration.[4] He further refused to investigate any potential conflicts within Keating Chambers.[5] Dr. Gaitskell also failed to disclose that he recently sat on a tribunal with ACP's counsel, Mr. James Loftis, despite the opportunity to do so in three different disclosure forms at the outset of the Cofferdam Arbitration, and both the Panama 1 and Panama 2 Arbitrations between the parties.[6]

- Mr. Gunter failed to disclose that both before he was appointed, and during the Panama 1 Arbitration, he sat almost continuously with Professor Hanotiau (who chaired the related Cofferdam Arbitration previously adjudicated between the parties) on multiple other arbitrations and that they supported each other's nomination as tribunal president in separate arbitrations.[7] The Awards referenced the Cofferdam Tribunal over 100 times (over 60 of which were substantive) and imported several key findings from it.[8]

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1 This Reply in support of Movants' Consolidated Motion to Vacate is further supported by the second expert opinions of Professor Chiara Giorgetti ("Second Giorgetti Decl.") and Professor Jack Coe ("Second Coe Decl."), the expert opinion of Judge Stephen Schwebel ("Schwebel Decl."), and the Second Declaration of Nicolas Bouchardie ("Second Bouchardie Decl."), attached hereto.

2 Declaration of Nicolas Bouchardie ¶ 53 (D.E. 55-3) ("Bouchardie Decl."); Letter from Pierre-Yves Gunter to the Parties dated Oct. 29, 2020 (D.E. 55-46); *see also* Consol. Mot. to Vacate 10 (D.E. 55).

3 Bouchardie Decl. ¶ 53; Letter from Pierre-Yves Gunter to the Parties dated Oct. 30, 2020 (D.E. 55-47); Consol. Mot. to Vacate 11–12 (D.E. 55).

4 Bouchardie Decl. ¶ 66 ("In response to Movants' Disclosure Requests, Dr. Gaitskell also disclosed that Mr. Manus McMullan QC of Atkin Chambers (counsel for ACP) is currently representing a party in an ICC arbitration in which Dr. Gaitskell is an arbitrator.").

5 Consol. Mot. to Vacate 14 (D.E. 55).

6 Email from Dr. Gaitskell to the Parties dated Oct. 29, 2020 (D.E. 55-45) (disclosing that Dr. Gaitskell chaired an ICC arbitration from July 2010 to July 2012 in which ACP's counsel, Mr. James Loftis, also sat as a party-appointed arbitrator).

7 Bouchardie Decl. ¶ 55; Letter from Pierre-Yves Gunter to the Parties dated Oct. 23, 2020 (D.E. 55-35); *see also* Consol. Mot. to Vacate 12–13 (D.E. 55).

8 Consol. Mot. to Vacate 10–11 (D.E. 55). ACP's argument that citations to the Cofferdam Tribunal are

- Mr. von Wobeser, the third arbitrator, failed to disclose his connection to ACP counsel Mr. Andrés Jana, with whom he has been sitting in a separate arbitration since July 2019—during the closing oral arguments, post-hearing briefing and tribunal deliberations in the Panama 1 Arbitration.[9]

ACP objects to vacatur, contending that Movants' arguments are supported neither by "evidence" nor the law, that Article V(1)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention" or "Convention") "requires *only* 'the minimal requirements of fairness,'" and that arbitrator impartiality, as provided in Section 10 of the Federal Arbitration Act ("FAA"), is not a sufficiently well-defined public policy of the United States.[10] ACP is wrong in each respect.

As detailed below, the arbitrators' repeated failures to disclose, throughout all stages of the underlying arbitration, were in clear contravention of their obligations under Article 11(2) of the ICC Rules of Arbitration ("ICC Rules"), which mandates disclosure of "any facts or circumstances" that "might . . . call into question the arbitrator's independence in the eyes of the parties."[11] Further, under the FAA, the cumulative failures to disclose potential conflicts, at times involving hundreds of thousands of dollars in fees, "would lead a reasonable person to believe that a *potential* conflict exists," which is the evident partiality standard for vacatur in this Circuit.[12] ACP insists on distorting this standard by requiring proof that the arbitrators actually breached their duties of confidentiality,[13] and by encouraging the Court to rely on the ICC Court's decision on Movants' challenge,[14] which similarly, and unreasonably, required proof of actual bias. As ACP acknowledges, however, "[t]he Parties chose ICC arbitration seated in Miami, and the effect is that this Circuit's law applies."[15]

The choice of international arbitration does not imply a surrender of impartiality.[16] ACP's argument that Movants should have "expected" repetitive and significant non-disclosures,

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"unsurprising" is incorrect and misses the point. Resp. to Consol. Mot. to Vacate 15 (D.E. 57). The multiple citations to the Cofferdam Award simply illustrate that Mr. Gunter's potential conflicts irrevocably tainted the Awards.

9 Bouchardie Decl. ¶ 73; Email from Claus von Wobeser to the Parties dated Oct. 28, 2020 (D.E. 55-35); *see also* Consol. Mot. to Vacate 15–16 (D.E. 55).

10 Resp. to Consol. Mot. to Vacate 1, 6–7, 21 (D.E. 57).

11 Rules of Arbitration of the International Chamber of Commerce ("ICC Rules of Arbitration"), art. 11(2) (D.E. 55-10). ACP also effectively asks this Court to ignore the plain language of Sub-Clause 20.6(e) of the Conditions of Contract, establishing the arbitration venue as Miami, Florida. *See* Conditions of Contract, Sub-Clause 20.6(e) (D.E. 55-8).

12 *Gianelli Money Purchase Plan & Tr. v. ADM Inv'r Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998) (emphasis added).

13 Resp. to Consol. Mot. to Vacate 1–2, 13–14, 18 (D.E. 57).

14 Resp. to Consol. Mot. to Vacate 1–2, 9–10, 13, 19 (D.E. 57).

15 Resp. to Consol. Mot. to Vacate 6 (D.E. 57).

16 Schwebel Decl. ¶¶ 16–17.

involving multiple relationships between co-arbitrators and with counsel, as an inherent and "unremarkable" aspect of international arbitration,[17] is incompatible with the purpose of the New York Convention and the FAA, which expressly safeguard arbitral awards against arbitrator partiality and violations of U.S. public policy.[18] Parties who choose international arbitration and relinquish their right to have a dispute resolved before a vetted and independent federal judiciary have an enhanced need for mechanisms to ensure impartiality that are more, not less, stringent.[19]

In addition, the arbitrators' evident partiality is manifest in key failings of the Awards, specifically (i) the denial of an opportunity to be heard, including where a party is given neither notice nor an opportunity to respond to new positions taken by the Tribunal which were not presented by the Parties; and (ii) the absence of reasoned awards with respect to the bases on which they purportedly rest. ACP seeks to enforce awards rendered by a Tribunal that did not meet its obligations under the ICC Rules, the law applicable to the arbitration (including Section 10(a) of the FAA) as required by the Parties' contract,[20] Article V of the New York Convention, or international standards. These circumstances provide *independent* grounds for vacatur, and the Court thus should grant vacatur, even if it does not reach a finding of evident partiality—which, for all of the reasons below and in the expert opinions of Profs. Coe, Giorgetti and Judge Schwebel, is amply demonstrated.

ARGUMENT

I. EVIDENT PARTIALITY IS AN ESTABLISHED BASIS TO VACATE AWARDS UNDER THE NEW YORK CONVENTION, THE FEDERAL ARBITRATION ACT, AND APPLICABLE ELEVENTH CIRCUIT JURISPRUDENCE

As Movants established in their Consolidated Motion to Vacate, under both the New York Convention and the FAA, the Court may vacate an international arbitration award if there is evident partiality on the part of an arbitrator.[21] Contrary to ACP's view,[22] evident partiality on the part of an arbitrator contravenes "well-defined and dominant" United States public policy; consequently, an award tainted by the evident partiality of an arbitrator is subject to vacatur under Article V(2)(b)

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17 Resp. to Consol. Mot. to Vacate 2–3, 13 (D.E. 57).

18 *See* 9 U.S.C. § 10(a); Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b), June 10, 1958, 21 U.S.T. 2517 ("New York Convention").

19 *Cont'l Ins. Co. v. Williams*, No. 84-2646-CIV-Marcus, 1986 U.S. Dist. LEXIS 20322, at *11 (S.D. Fla. Sept. 16, 1986) ("It is true that arbitrators cannot sever all their ties with the business world . . . but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review."). *See also Univ. Commons-Urbana*, 304 F.3d 1331, 1338 (11th Cir. 2002) (quoting *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968)) (same).

20 Conditions of Contract, Sub-Clause 20.6(a) (D.E. 55-8); Joint and Several Guarantee, Sub-Clauses 9.2(a), 9.2(f), 20.6(f) (D.E. 55-9).

21 Consol. Mot. to Vacate 7–8 (D.E. 55) (citing New York Convention art. V(2)(b)).

22 Resp. to Consol. Mot. to Vacate 6–7 (D.E. 57).

of the New York Convention.[23] The public policy against evident partiality is express, as it is derived from codified U.S. law.[24] This public policy also is enshrined in the "laws and legal precedents" of this Circuit,[25] which provide that the evident partiality test is met when the undisclosed conflicts and facts "create an impression of possible bias."[26]

ACP disputes that evident partiality offends the "most basic requirements of morality and justice."[27] ACP cannot reasonably deny, however, that procedural fairness and impartiality by the decision-maker are central tenets of U.S. public policy.[28] This is recognized in the Restatement (Third) of the U.S. Law of International Commercial & Investor State Arbitration ("Restatement"), which provides that arbitrator partiality can serve as a "solid public policy basis for vacatur" under U.S. law.[29] Courts also have recognized that the grounds for vacatur under Section 10(a) of the FAA, which include arbitrator partiality, form a part of U.S. public policy.[30] The Restatement adopts this principle, providing that the New York Convention's public policy grounds for vacating awards are construed "similarly" to the vacatur grounds under Section 10 of the FAA because they "are in substance the same."[31] In this case, enforcing Awards that were rendered after multiple and significant failures to disclose relationships among the arbitrators, and with ACP's counsel, plainly would offend this fundamental public policy.[32]

In response, ACP asserts that the Convention is infused with a pro-enforcement "bias," that judicial review of arbitration awards is "narrow," and that vacatur is "granted only in unusual circumstances."[33] The Convention's pro-enforcement "bias," however, is not a systematic rule

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23 Consol. Mot. to Vacate at 7–8 (D.E. 55).

24 9 U.S.C. § 10(a)(2).

25 *See* Resp. to Consol. Mot. to Vacate 7 (D.E. 57) (citing *Cvoro v. Carnival Corp.*, 941 F.3d 487, 496 (11th Cir. 2019)).

26 *Univ. Commons*, 304 F.3d at 1338 (internal citations omitted); Consol. Mot. to Vacate 8–9 (D.E. 55).

27 Resp. to Consol. Mot. to Vacate 6–7 (D.E. 57).

28 *See Fitzroy Eng'g v. Flame Eng'g*, No. 94 C 2029, 1994 U.S. Dist. LEXIS 17781, at *11 (N.D. Ill. Dec. 2, 1994) ("The notion that no man . . . is permitted to try cases where he has an interest in the outcome lies at the heart of this nation's due process jurisprudence.") (internal quotation marks omitted); *see also Offutt v. United States*, 348 U.S. 11, 14 (1954) ("justice must satisfy the appearance of justice"); *Dietz v. Bouldin*, 136 S. Ct. 1885, 1893 (2016) (describing interests "related to the fair administration of justice" as "vital").

29 Restatement (Third) of U.S. Law of Int'l Commercial & Inv'r-State Arb. ("Restatement of Arb.") § 4.16, Reporters' Note f (Am. Law Inst., Proposed Final Draft 2019).

30 *See Fitzroy Eng'g v. Flame Eng'g*, 1994 U.S. Dist. LEXIS 17781, at *11 (accepting arbitrator bias as public-policy ground under the New York Convention); *Indocomex Fibres PTE v. Cotton Co.*, 916 F. Supp. 721, 727–29 (W.D. Tenn. 1996) (finding FAA Section 10(a) defenses within the "contrary to public policy" defense under the Convention). *See also Transmarine Seaways Corp. v. Marc Rich & Co. A.G.*, 480 F. Supp. 352, 357 (S.D.N.Y 1979) ("The Supreme Court's elucidation of arbitral propriety in *Commonwealth Coatings* is a declaration of public policy.").

31 Restatement of Arb. § 4.9 cmt. a, Reporters' Note a (recognizing that "courts and commentators have tended to construe the grounds similarly" and that "the grounds . . . are in substance the same").

32 Consol. Mot. To Vacate 8–10 (D.E. 55).

33 Resp. to Consol. Mot. to Vacate 5–6 (D.E. 57).

intended to replace the duty of national courts to examine international arbitration awards.[34] The Convention contemplates that national courts will provide a "vital safety net" against "denial[s] of justice in the course of international arbitration," and will have an essential role in ensuring the arbitral proceedings are "fairly administered."[35] Thus, a vague pro-enforcement "bias" cannot overcome the Convention's established grounds for vacatur. This is an extraordinary case of cumulative failures to disclose significant conflicts and serious evident partiality: the Court has a duty to scrutinize the circumstances and apply the law, rather than follow a "bias."[36]

Even if "evident partiality" does not qualify as a public policy under Article V of the New York Convention, other grounds require vacatur of the Awards in this case under Articles V(1)(b) and V(1)(d). As previously explained, Movants were denied the opportunity to be heard on arguments first raised by the arbitrators themselves in the Partial Award and also denied due process with respect to findings that are not adequately supported by the Tribunal's reasoning.[37]

ACP also contends that the standard for vacatur should be lower depending on the stage of the proceedings.[38] The IBA guidelines, however, make clear that the standard for disqualification applies "regardless of the stage of the proceedings."[39] Fundamentally, it is impossible to hold that Movants should have acted sooner in the absence of disclosure—the arbitrators concealed the facts that would have prompted action.

II. THE TRIBUNAL MEMBERS DISPLAYED EVIDENT PARTIALITY IN VIOLATION OF THE APPLICABLE STANDARDS UNDER THE FEDERAL ARBITRATION ACT AND THE NEW YORK CONVENTION

ACP contends that Movants' allegations of bias fail to satisfy the applicable bases for vacatur because Movants misconstrue the arbitrators' disclosure obligations and rely on mere "speculation" instead of establishing actual bias.[40] ACP is incorrect. First, as Movants

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34 Marike Paulsson, Chapter 1: Essential Features, *The 1958 New York Convention in Action* 13–14 (2016).

35 *Id*.

36 *See Cvoro v. Carnival Corp.*, 234 F. Supp. 3d 1220, 1229–30 (S.D. Fla. 2016) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)) (acknowledging the importance for U.S. national courts "to have the opportunity at the award-enforcement stage to ensure that the legitimate interests [of U.S. public policy] have been addressed in the arbitration proceeding"); *Polimaster Ltd. v. RAE Sys.*, 623 F.3d 832, 841, 843 (9th Cir. 2010) (refusing to confirm award where appellant had established a defense under Article V of the New York Convention, and noting that neither the "federal policy favoring arbitration" nor the "enforcement-facilitating thrust of the Convention" justified a contrary result).

37 *See e.g.*, Partial Award in ICC Case No. 20910/ASM/JPA (C-20911/ASM) ¶ 919 (calling the interpretation of paragraph 1.07.D.1 "central to the Parties' dispute") (D.E. 55-5 and 55-6) ("Partial Award"). *See also* Consol. Motion to Vacate 23–24 (D.E. 55); *infra* Part III.

38 *See* Expert Opinion of Gary Born ("Born Decl."), ¶¶ 154–55 (D.E. 57-92).

39 IBA Guidelines on Conflicts of Interest in International Arbitration, Explanation to General Standard 2(b) (D.E. 57-111).

40 Resp. to Consol. Mot. to Vacate 8–10, 29 (D.E. 57) ("Movants cannot point to any evidence of bias . . ."); Consol. Cross-Mot. to Confirm 11 (D.E. 58).

demonstrated, the arbitrators were subject to extensive and affirmative disclosure obligations—including under Article 11(2) of the ICC Rules, mandating the disclosure of "any facts or circumstances" that "might . . . call into question the arbitrator's independence *in the eyes of the parties*,"[41]—which they failed to meet. Second, the conflicts the arbitrators failed to disclose fully satisfy the standard of evident partiality—that is, a showing that the undisclosed conflicts create an "impression of possible bias,"[42] which occurs when "an arbitrator knows of, but *fails to disclose*, information which would lead a reasonable person to believe that a *potential* conflict exists."[43]

ACP misstates the level of disclosure required from the arbitrators under the ICC Rules, the Eleventh Circuit, and other U.S. case law, claiming that the arbitrators were "not required" to disclose their repeated and lucrative cross-appointments, or their connections to ACP's counsel, during the pendency of the Panama 1 Arbitration.[44] The ICC Rules, however, are express that arbitrators are required to disclose "any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence *in the eyes of the parties*, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality."[45] Under this standard, arbitrators are expected to disclose "any past or present relationship, direct or indirect, between [the arbitrator] and any of the parties, their related entities or their lawyers or other representatives, whether financial, professional or of any other kind."[46] Contrary to the suggestion of ACP's expert,[47] the ICC Rules since 1988 have been explicit in providing that arbitrators should be guided by "the parties' potential viewpoint" in deciding whether to disclose a potential conflict, and not by what they may, in their own experience, find too "unremarkable and commonplace" to warrant disclosure.[48]

Additionally, while the FAA and the New York Convention have no express provisions setting forth an arbitrator's disclosure obligation,[49] the law in this Circuit makes clear that the "irreducible minimum requirement" for arbitrator neutrality is full disclosure and that failure to

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41 ICC Rules of Arbitration, art. 11(2) (D.E. 55-10) (emphasis added).
42 *Univ. Commons*, 304 F.3d at 1338 (internal citations omitted).
43 *Gianelli*, 146 F.3d at 1312 (emphasis added).
44 Resp. to Consol. Mot. to Vacate 1, 15, 20 (D.E. 57).
45 ICC Rules of Arbitration, art. 11(2) (D.E. 55-10) (emphasis added); *see also* Expert Report of Jack J. Coe ("Coe Decl.") ¶¶ 27-31 (D.E. 55-2); Expert Report of Chiara Giorgetti ("Giorgetti Decl.") ¶¶ 23–25 (D.E. 55-1).
46 Second Giorgetti Decl. ¶ 32 (quoting the ICC arbitrator acceptance statements signed by each of the Panama 1 arbitrators). *See also* Second Coe Decl. ¶ 23 ("[T]he ICC Rules' disclosure provision must be read in conjunction with the ICC Practice Note, which non-exhaustively lists matters that should be considered for disclosure to include 'relationships between arbitrators.'").
47 *See* Born Decl. ¶¶ 51, 177 (D.E. 57-92); see also Resp. to Consol. Mot. to Vacate 13 (D.E. 57).
48 Second Coe Decl. ¶ 8; *see also* Second Giorgetti Decl. ¶¶ 43–46 (explaining that, under the ICC Rules, "'the arbitrator is not the judge of his or her own independence and impartiality,'" especially because arbitrators "constantly overvalue their ability to be independent.").
49 Second Coe Decl. ¶ 15.

make full disclosure justifies vacatur.[50] Moreover, this Court has held that there is an "irrebuttable presumption requiring the award to be set aside once it is established that the arbitrator actually knew of, yet failed to disclose potentially prejudicial facts which could impair his judgment."[51] Valuable cross-appointments and serving as co-arbitrator with a party's counsel in other arbitrations during the underlying arbitration clearly warrant disclosure under these standards.[52] Even the ICC Court found that certain of these facts should have been disclosed, yet were not.[53]

Here, Movants have demonstrated that all three arbitrators repeatedly failed to disclose multiple potential conflicts of interest, raising doubts about their impartiality. These conflicts were ongoing throughout all stages of the Panama 1 Arbitration, as illustrated in the timeline appended hereto as **Annex 1**.[54] Significantly, while a single connection between the arbitrators might be insufficient to raise doubts about their impartiality,[55] their effect must be considered in the context of the arbitrators' cumulative failures to disclose.[56] In particular, as described above and in the Consolidated Motion to Vacate, those failures include (1) that one arbitrator helped the Tribunal President secure a lucrative appointment in a separate arbitration, (2) multiple undisclosed cross-appointments and relationships with arbitrators associated with the present dispute, and (3) that the arbitrators served on tribunals in other cases where ACP's counsel served as co-arbitrator or counsel.[57]

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50 *Metro. Delivery Corp. v. Teamsters Local Union 769*, No. 19-22649-CIV-SCOLA/TORRES, 2019 U.S. Dist. LEXIS 133452, at *5–6 (S.D. Fla. Aug. 8, 2019); *Cont'l Ins. Co.*, 1986 U.S. Dist. LEXIS 20322, at *12; *Fed. Vending, Inc. v. Steak & Ale of Fla., Inc.*, 71 F. Supp. 2d 1245, 1249 (S.D. Fla. 1999).

51 *Cont'l Ins. Co.*, 1986 U.S. Dist. LEXIS 20322, at *13.

52 Coe Decl. ¶¶ 29–31; Giorgetti Decl. ¶¶ 26–27.

53 Statement of Reasons in ICC Case No. 20910/ASM/JPA 7, 9, 10 ("ICC Statement of Reasons") (Dec. 29, 2020) (D.E. 55-62) (finding that Dr. Gaitskell should have disclosed that he was sitting as arbitrator in another case where ACP's counsel represented a party; that Mr. von Wobeser should have disclosed that he was sitting as co-arbitrator in a separate case with ACP's counsel; and that Mr. Gunter and Prof. Hanotiau's serving as co-arbitrators in unrelated cases could create an opportunity for them to discuss issues relevant to the Panama Canal arbitrations).

54 Consol. Mot. to Vacate 18 (D.E. 55).

55 ACP's expert analyzes each episode of non-disclosure and each arbitrator individually. *See* Born Decl. ¶¶ 95–124.

56 *See Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1200, 1202 (11th Cir. 1982) (affirming district court's conclusion that the "cumulative effect" of the evidence indicated that an arbitrator's potential conflicts should have been disclosed, and that the arbitrator's "repeated and significant" business dealings with one of the parties justified vacatur) (internal quotation marks omitted); *United States v. International Bhd. of Teamsters*, 814 F. Supp. 1165, 1172 (S.D.N.Y. 1993) (citing *Commonwealth*, 393 U.S. at 150–51 (White, J., concurring); *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Ben. Funds*, 748 F.2d 79, 84 (2d Cir. 1984)) ("[C]ourts should consider the totality of the circumstances in deciding the existence of evident partiality."); *A&A Farms, LLC v. Rural Cmty. Ins. Servs.*, No. 88 CIV. 4486 (DNE), 2015 U.S. Dist. LEXIS 95323, at *14–15 (D. Kan. Feb. 9, 1993) (same). *See also* Giorgetti Decl. ¶ 35 (explaining that the ICC Court's decision on Movants' challenge failed to address the cumulative effect of the arbitrators' failures to disclose); Second Coe Decl. ¶ 9 ("[S]everal cumulative instances of under-disclosure or non-disclosure by an arbitrator . . . as to concurrent professional relationships can combine to engender legitimate doubts concerning an arbitrator's independence and impartiality.").

57 *See* Consol. Mot. to Vacate 11–16 (D.E. 55); Bouchardie Decl. ¶¶ 25–42 (D.E. 55-3).

Dr. Gaitskell's cross-appointment of Mr. Gunter, far from being "unremarkable and commonplace,"[58] would raise reasonable doubts about the arbitrators' impartiality in the eyes of any party.[59] Such undeniably lucrative appointments[60] create clear conflicting interests for the arbitrators—who must remain impartial in the underlying arbitration, but also have a concrete, financial incentive to avoid making decisions that could jeopardize the appointments they have secured, or their relationship with the appointing arbitrator.[61] Similar concerns arise when an arbitrator is appointed repeatedly by the same party, as is the case with Dr. Gaitskell, since this creates an impression that the "adjudicator might feel an obligation towards the appointing party to decide in a certain way, or [] may develop a financial dependence on a party and decide in a certain way to secure future appointments."[62] Dr. Gaitskell's cross-appointment of Mr. Gunter is particularly concerning because it is coupled with the arbitrators' opportunity to communicate with each other and learn each other's approach to relevant procedural and substantive issues, even if they never specifically discussed the instant case. All of this would occur in the absence of the third arbitrator, Mr. von Wobeser, while sitting together in the separate arbitration, thus creating an imbalance.[63] The question is not, as ACP frames it,[64] whether Mr. Gunter and Dr. Gaitskell actually did breach their duties of confidentiality. Rather, it is whether these conflicts should have been disclosed in the eyes of the parties, without the need for Movants to continually press for further disclosures and clarifications, as was the case here.[65]

Together, these undisclosed potential conflicts demonstrate that the arbitrators knew each other, had several opportunities to communicate and express their views,[66] and also that they had

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58 Resp. to Consol. Mot. to Vacate 13 (D.E. 57).

59 Giorgetti Decl. ¶¶ 26–27; Coe Decl. ¶¶ 28–30.

60 The Final Award reveals, for example, that the two party-appointed arbitrators in the Panama 1 Arbitration were paid USD 963,250 each for their work, while the Tribunal President was paid USD 1,926,500 (including the fees of the Tribunal's administrative assistant). *See* Consol. Mot. to Vacate 4 (D.E. 55). *See also* Consol. Mot. to Vacate 11, 12 (D.E. 55) (noting fee schedule for ICC arbitrators, which ranges from USD $3,000 to over $500,000); Schwebel Decl. ¶ 20 (describing Mr. Gunter's cross-appointment as "well compensated" and "likely resulting in hundreds of thousands of dollars (if not more) in income for Mr. Gunter").

61 Consol. Mot. to Vacate 4 (D.E. 55); Giorgetti Decl. ¶¶ 27, 39; Coe Decl. ¶ 17

62 Giorgetti Decl. ¶¶ 38–39 (quoting Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement ¶ 53, ICSID Resources (2020), https://icsid.worldbank.org/resources/code-of-conduct); *see also* Statement of Reasons in ICC Case No. 20910/ASM/JPA 9 ("ICC Statement of Reasons") (Dec. 29, 2020) (D.E. 55-62) (finding that Dr. Gaitskell failed to make timely disclosure of the fact that he was sitting as president of an arbitral tribunal in another case where Mr. McMullan, a member of ACP's counsel team, acts for one of the parties).

63 Consol. Mot. to Vacate 11–12 (D.E. 55).

64 Resp. to Consol. Mot. to Vacate 14 (D.E. 57).

65 Consol. Mot. to Vacate 11–12, 23 (D.E. 55). It is telling in this regard that, prior to being challenged, Mr. Gunter chose not to disclose this significant cross-appointments involving a co-arbitrator, as well as his having sat on another arbitration with Prof. Hanotiau, but that he recently chose—after commencement of Movants' challenges—to disclose significantly more remote potential conflicts that are completely unrelated to the Panama 1 Arbitration. *See* Consol. Mot. to Vacate 20 (D.E. 55).

66 Second Giorgetti Decl. ¶ 81.

multiple opportunities to disclose their relationships during their time in the Panama 1 Tribunal, but failed to do so.[67] In the eyes of a party, it is difficult to justify the arbitrators' choice to *repeatedly* omit this information, particularly *before* their appointment when a party could object.

ACP's expert is wrong, moreover, when he states that parties relinquish their right to have impartial decision-makers when they agree to arbitrate because such conflicts of interest are "inevitable" within the "limited pool" of experienced arbitrators.[68] As Movants' expert, Judge Schwebel, explains, the pool of experienced arbitrators is not so limited that disclosure is futile and, in any event, parties are not expected to sacrifice impartiality for expertise.[69] In fact, parties often choose international arbitration not for the arbitrators' expertise, but *because* of the arbitrators' neutrality and impartiality relative to courts in the "home" jurisdiction of one of the parties.[70] Notably, the absence of either a corrective mechanism of a *de novo* appeal from arbitral awards or a constitutional vetting mechanism for arbitrators makes it essential that the arbitrators are, and *are seen to be*, independent and impartial.[71]

The cases ACP relies on to argue that the arbitrators did not need to disclose their potential conflicts are mischaracterized and irrelevant in light of the facts here.[72] In *Levy v. Citigroup*, the petitioner had notice of the arbitrator's alleged conflict but did not object before or during the arbitration, and the conflicts at issue were less significant and material than those here.[73] Likewise, *Boll v. Merrill Lynch* featured a petitioner with prior knowledge of the potential conflict before the award was issued.[74] The same is true of *Andros*.[75] Here, by contrast, Movants had no knowledge

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67 Consol. Mot. to Vacate 18 (D.E. 55).

68 Born Decl. ¶ 22 (D.E. 57-92).

69 Schwebel Decl. ¶¶ 16–17; *see also* Second Giorgetti Decl. ¶¶ 77–79 (explaining that disclosure would be even more crucial within a small pool of arbitrators due to the increased opportunity for bias to occur and that, in any event, "[t]he parties did not waive their right to independent and objective arbitrators in favor of experience.").

70 Schwebel Decl. ¶ 16; Second Giorgetti Decl. ¶¶ 19–20, 83.

71 *See* Schwebel Decl. ¶ 21; *Cont'l Ins. Co.*, 1986 U.S. Dist. LEXIS 20322, at *11 ("It is true that arbitrators cannot sever all their ties with the business world . . . but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.").

72 Resp. to Consol. Mot. to Vacate 15–16 (D.E. 57).

73 *Levy v. Citigroup Global Mkts.*, No. 06-21802-CIV-UNGARO, 2006 U.S. Dist. LEXIS 115358, at *15–16 (S.D. Fla. Oct. 16, 2006) (refusing a request for vacatur for evident partiality based on an arbitrator's decision to allow two attorneys from one party to argue at pre-hearing meetings).

74 *Boll v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 04-80031-CIV-PAINE/JOHNSON, 2004 U.S. Dist. LEXIS 27948, at *15 (S.D. Fla. June 25, 2004).

75 *Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691 (2d Cir. 1978). In particular, the maritime arbitration in *Andros* involved significantly more attenuated allegations that the president of a corporation that served as an agent for the petitioner, and allegedly operated the vessel involved in the dispute, had previously sat on several arbitrations with the president of the underlying tribunal. *Id.* at 695. Importantly, the arbitrator *disclosed* that he had been previously appointed as arbitrator by the petitioner, but respondent did not object to this much more immediate conflict. *Id.* at 702. The court also noted that whatever connection the agent may have had to the vessel in the dispute was "easily ascertainable" from documents submitted in the arbitration. *Id.*

of the potential conflicts precisely because the arbitrators did not disclose them.[76] Indeed, ACP's criticism of the timing of Movants' challenge to the arbitrators[77] ignores the fact that Movants were deprived of a meaningful opportunity not to appoint the arbitrators and/or to seek to disqualify the arbitrators before the Partial Award was rendered *because* the arbitrators failed to disclose the full extent of their potential conflicts throughout all stages of the proceedings, including before the constitution of the tribunal and during the hearing on the merits.[78] The arbitrators only disclosed these conflicts in "piecemeal fashion" upon Movants' insistence, after the Partial Award was rendered.[79]

ACP's attempt to rely on *Belize Bank Ltd. v. Government of Belize* to minimize the impropriety of Dr. Gaitskell's refusal to investigate connections through his British Chambers also falls short.[80] A connection "between an arbitrator and another person connected to an arbitration through membership in the same British Chambers may lead to disqualification" because of the *perception* of the role of English Chambers to outsiders, regardless of the technical legal status of the Chambers.[81] Contrary to ACP's assertions, the structure of English Chambers does not change that fundamental obligation. Another of ACP's authorities, in fact, emphasizes this very point.[82] ACP's further attempt to analogize to a situation where two barristers from the same Chambers acted in the same case as opposing counsel, where an arbitrator with a duty of neutrality to both parties has refused to conduct a conflicts search, demonstrates ACP's misapprehension of the special duty of arbitrators to preserve their (actual and perceived) impartiality.[83]

Contrary to ACP's contention,[84] the facts in this case are most comparable to those in *University Commons*, in which the Eleventh Circuit reversed the district court's confirmation of an award. There, one arbitrator and one counsel served in the same cooperative role in a previous

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76 Consol. Mot. to Vacate 5 (D.E. 55) (explaining that Movants only discovered the arbitrators' potential conflicts after repeated requests for further disclosures and clarification).

77 Resp. to Consol. Mot. to Vacate 1, 4 (D.E. 57).

78 Consol. Mot. to Vacate 17–18 (D.E. 55); Schwebel Decl. ¶ 25 ("[T]he failures to disclose deprived [Movants] of the opportunity to consider, weigh and make timely challenge or even refuse to appoint [the arbitrators], and the material that was not disclosed created the appearance of bias from an objective standpoint.").

79 Consol. Mot. to Vacate 5 (D.E. 55); Schwebel Decl. ¶ 19.

80 Resp. to Consol. Mot. to Vacate 10–11 (D.E. 57) (citing *Belize Bank Ltd. v. Gov't of Belize*, 852 F.3d 1107 (D.C. Cir. 2017) (attempting to distinguish Barrister's Chambers from U.S. law firms regarding investigation of conflicts).

81 Giorgetti Decl. ¶ 17 (citing ICC Case No. 16553/GZ, as reported by Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators* 139 (2017)) (emphasis added); *see also* Second Giorgetti Decl. ¶¶ 63–65.

82 *See* 'Information Note regarding barristers in international arbitration,' Bar Council, 2015 ¶¶ 29–32, 33 (D.E. 33-47) ("What is clearly important, however, is that steps are taken to ensure that *disclosure is made as early as possible in the arbitration*. What should be avoided is a situation in which the relevant facts are disclosed *so late that the proceedings are disrupted*.").

83 Resp. to Consol. Mot to Vacate 10–11 (D.E. 57).

84 Resp. to Consol. Mot. to Vacate 17–18 (D.E. 57).

dispute, just as Mr. von Wobeser and Mr. Jana have here.[85] In *University Commons*, the counsel represented University Commons in the appealed dispute, just as Mr. Jana is counsel for ACP in this case.[86] In that case, as in this one, arbitrators failed to make continuing disclosures during the arbitration.[87] The Eleventh Circuit held that "a reasonable person might envision a potential conflict if an arbitrator, *concurrently with the arbitration*, partakes in a proceeding in which counsel for one of the parties to the arbitration is also participating."[88]

Similarly, in *Metro. Delivery Corp.*, the court found that a "reasonable impression of bias" arose from the fact that the arbitrator had worked at least twice as an instructor for the defendant union on a voluntary basis.[89] The court emphasized that where there "is any doubt as to whether circumstances of which the arbitrator is aware might create an impression of partiality, [the arbitrator] should disclose those circumstances."[90] Dr. Gaitskell's repeat appointments by ACP's counsel and Mr. Gunter's cross-appointment—both resulting in substantive fees—certainly raise graver concerns about partiality than these voluntary relationships, and should have been disclosed. This conclusion is in line with evident partiality case law in this Circuit and throughout the United States.[91]

These repeated failures to disclose the close inter-relationships among the arbitrators, and between the arbitrators and ACP's counsel, are significant and serious, and, taken together, plainly would lead a reasonable person to believe that a *potential* conflict exists—which is sufficient to vacate the Awards for evident partiality.[92] ACP is mistaken in its suggestion that proving evident

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85 *Univ. Commons*, 304 F.3d at 1339.

86 *Id.*

87 Consol. Mot. to Vacate 11–16 (D.E. 55).

88 *Univ. Commons*, 304 F.3d at 1340 (emphasis in original).

89 *Metro. Delivery*, 2019 U.S. Dist. LEXIS 133452, at *6–7.

90 *Id.*

91 *See, e.g.*, *Crow Constr. Co. v. Jeffrey M. Brown Assoc.*, 264 F. Supp. 2d 217, 225–26 (E.D. Pa. 2003) (finding that arbitrator should have disclosed that one of the parties had appointed her in another matter and paid her directly); *Monster Energy Co. v. City Bevs., LLC*, 940 F.3d 1130, 1136–37 (9th Cir. 2019) (finding that arbitrator should have disclosed his ownership interest in the arbitration organization, which had administered 97 arbitrations for the prevailing party over the past five years); *Schmitz v. Zilveti*, 20 F.3d 1043, 1044 (9th Cir. 1994) (finding that arbitrator should have disclosed that his law firm represented the parent company of one of the parties in at least 19 cases during a period of 35 years before the underlying arbitration began); *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1111 (9th Cir. 2007) (finding an "impression of bias" warranting vacatur where arbitrator failed to disclose that, during the arbitration, he began working at a company that was negotiating with a production executive of one of the parties to co-produce a motion picture). *See also Hamilton v. Royal Caribbean Cruise Lines*, No. 21-20906-CV-MARTINEZ, 2021 U.S. Dist. LEXIS 130684, at *12 (S.D. Fla. July 13, 2021) (citing *Univ. Commons*, 304 F.3d at 1338) ("The measure for a disclosure's sufficiency is whether it relays the 'impression' of a potential conflict.").

92 *Gianelli*, 146 F.3d at 1312; *Univ. Commons*, 304 F.3d at 1333.

partiality requires a showing of actual bias[93]—rather, evident partiality exists where undisclosed conflicts and facts "create an *impression* of possible bias."[94]

In *Citigroup v. Berghorst*, for instance, the court found evident partiality on the part of an arbitrator who failed to disclose that, during the underlying arbitration, he was participating in an unrelated dispute concerning similar subject matter.[95] The court took particular note of the fact that the conflict occurred "during the very time he was serving as an arbitrator in [the underlying] matter"[96] and that "[a]t a minimum [] these facts at least demonstrate an appearance of partiality, which is all [plaintiff] must show to prevail because the integrity of the arbitral process depends on arbitrators not only being unbiased in fact but also avoid[ing] even the appearance of bias."[97] Courts in other jurisdictions similarly have found that non-disclosure of repeat appointments or lucrative relationships with a party's counsel creates an impression of possible bias, which is sufficient for vacatur.[98] Contrary to ACP's assertions, Movants have satisfied the "impression of bias" test here, by identifying potential conflicts that are "direct, definite, and capable of demonstration."[99] The failures to disclose are revealed in the arbitrators' letters to the ICC, in Movants' ICC challenge letters, and through the information in Mr. Bouchardie's declarations.[100]

ACP cites *Hamilton* to contest the applicability of the *Monster Energy* decision—which upholds the "impression of bias" standard[101]—arguing that this Circuit refused to follow *Monster Energy* where the allegations of bias were too "speculative and uncertain."[102] *Hamilton*, however, is plainly distinguishable. There, the plaintiff was involved in an arbitration against a cruise line and complained that the arbitrator accepted employment in a separate arbitral institution (not the

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93 Resp. to Consol. Mot. to Vacate 2, 13–14, 18 (D.E. 57).

94 *Univ. Commons*, 304 F.3d 1331 at 1338 (internal quotation marks omitted) (emphasis added).

95 *Citigroup Global Mkts., Inc. v. Berghorst*, No. 11-80250-CIV-RYSKAMP/VITUNAC, 2012 U.S. Dist. LEXIS 76459, at *13–14 (S.D. Fla. Jan. 20, 2012).

96 *Id.* at *14.

97 *Id.* (internal quotation marks omitted).

98 *See, e.g., Crow Constr. Co.*, 264 F. Supp. 2d at 225–26; *Monster Energy*, 940 F.3d at 1136–37; *Schmitz*, 20 F.3d 1043, 1046–48 (9th Cir. 1994).

99 Resp. to Consol. Mot. to Vacate 8 (D.E. 57) (citing *Gianelli*, 146 F.3d at 1312).

100 *See* ICC Challenge Application in ICC Case No. 20910/ASM/JPA (C-20911/ASM) (D.E. 55-43); ICC Challenge Application in ICC Case No. 22466/ASM/JPA (C-22967/ASM) (D.E. 55-44); Letters dated Nov. 12, 2020 from Pierre-Yves Gunter, Robert Gaitskell QC and Claus von Wobeser to the ICC Secretariat (D.E. 55-54, 55-55, 55-56); Bouchardie Decl. ¶¶ 50–73; Second Bouchardie Decl. ¶¶ 2–6.

101 *Monster Energy*, 940 F.3d at 1136–37 (finding an "impression of bias" warranting vacatur where arbitrator failed to disclose ownership interest in the arbitration organization, which had administered 97 arbitrations for the prevailing party over the past five years).

102 Resp. to Consol. Mot. to Vacate 19 (D.E. 57) (citing *Hamilton*, 2021 U.S. Dist. LEXIS 130684). ACP also argues that *Hamilton* distinguished *Monster Energy* on the basis that it was decided under the FAA and not the New York Convention. *Id.* However, unlike the plaintiff in *Hamilton*, Movants have asserted a public policy ground for vacatur under the New York Convention. *See* Consol. Mot. to Vacate 7 (D.E. 55). Thus, while cases decided under the FAA may have been irrelevant to the *Hamilton* court, these cases are relevant here because they elucidate the U.S. public policy against evident partiality.

one conducting the arbitration), which had administered a number of cruise-line related arbitrations.[103] Crucially, the arbitrator *disclosed* this relationship, despite its remoteness, before the award was rendered—a point that the court repeatedly emphasized in declining to vacate.[104] Here, by contrast, Movants did not have the benefit of proceeding with knowledge of the facts and objecting as appropriate.[105]

Finally, contrary to ACP's suggestion that the ICC Court's decision should be final,[106] the ICC Court's partial and perfunctory denial of the disqualification request is of no consequence on the question of whether Movants have met the *U.S. standard* of evident partiality, because the ICC decision—which lacks detailed reasoning, in any event—appeared to require proof of *actual* bias[107] (which is not required by either the ICC or the U.S. standard).[108] As Prof. Giorgetti explains, the ICC Court's decision is of "limited usefulness" because it appeared to require evidence that the arbitrators "actually met and discussed separately," while U.S. law only requires that there is a *possibility* thereof in the eyes of a reasonable person.[109] The ICC Court decision also failed to consider the lucrative financial nature of the arbitrators' potential conflicts.[110] As soon as the disclosures were made, Movants sought to remove the arbitrators from the Tribunal and, within the time limits, sought vacatur of the Awards for evident partiality on the basis of the late disclosures.[111] Regardless, however, the ICC Court, while reaching the wrong conclusion, still confirmed many of Movants' allegations.[112]

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103 *Hamilton*, 2021 U.S. Dist. LEXIS 130684, at *3–4.

104 *Id.* at *3, *6, *13–17 (finding that plaintiff waived any objection to evident partiality because she acted with "full knowledge of the facts").

105 In fact, the Panama 1 arbitrators have supplemented their disclosures—as recently as September 4, 2021—opting to disclose significantly more remote potential conflicts than they did before being challenged, including at least one potential relationship between Dr. Gaitskell and Prof. Hanotiau to which Movants have objected. Second Bouchardie Decl. ¶¶ 2–6. In particular, Dr. Gaitskell recently disclosed that he was chosen as a party-appointed arbitrator in an unrelated arbitration, but that the other party-appointed arbitrator suggested Prof. Hanotiau as president for the tribunal. *Id.*

106 Resp. to Consol. Mot. to Vacate 10, 13, 19 (D.E. 57).

107 ICC Statement of Reasons, at 7.

108 *Gianelli*, 146 F.3d at 1312 (noting that vacatur is appropriate where "the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that *a potential conflict exists*") (emphasis added); *see also Mendel v. Morgan Keegan & Co.*, 654 F. App'x 1001, 1003 (11th Cir. 2016) (per curiam) (citing *Gianelli*, 146 F.3d at 1312) (same).

109 Giorgetti Decl. ¶¶ 32–35; Second Giorgetti Decl. ¶¶ 70–71.

110 Mr. Gunter's cross-appointment by Dr. Gaitskell, worth hundreds of thousands of dollars in fees, is precisely the type of tribunal imbalance that Professors Giorgetti and Coe describe. Giorgetti Decl. ¶ 39; Coe Decl. ¶¶ 28–31.

111 Bouchardie Decl. ¶¶ 36–51.

112 ICC Statement of Reasons, at 7, 9–10 (D.E. 55-62); Response to Consol. Cross-Mot. To Confirm and Enforce ("Opposition") Part I.C.ii.

III. THE TRIBUNAL'S EVIDENT PARTIALITY MANIFESTED ITSELF IN KEY ISSUES IN THE AWARDS AND THE AWARDS LACKED DUE PROCESS

In their Consolidated Motion to Vacate, Movants explained that the Tribunal's appearance of bias is reflected in the Awards themselves.[113] In its Response, ACP attempts to rebut Movants' demonstration by misstating the applicable legal standards, mischaracterizing Movants' arguments as objections to the merits, and misidentifying the defective portions of the Awards as *dicta*.[114] As described here, however, and further elaborated in Movants' Opposition to ACP's Cross-Motion to Confirm, none of these arguments refutes that the Tribunal drew conclusions from reasoning that no Party ever raised or had an opportunity to discuss, and that the Tribunal failed to justify its decision with the degree of reasoning that the Parties' arbitration agreement required. Those failings compel vacatur of the Awards under the FAA and New York Convention.

Specifically, Movants did not have the opportunity to respond to the Tribunal's reasoning related to its interpretation of Paragraph 1.07.D.1,[115] prudent industry practices,[116] and its decision relating to C.A.N.A.L.[117] Similarly, the Tribunal ignored—without explanation or justification—Movants' arguments relating to prudent industry practice[118] and relating to the defects and irrelevancy of the Cofferdam Award.[119] In response, ACP does not deny the lack of proffered evidence or arguments prior to the Tribunal's decision related to Paragraph 1.07.D.1, and instead asserts (incorrectly) that these various decisions were *dicta*.[120]

ACP's response to Movants' due process arguments are equally baseless. The defects in the substance of the Awards, as Movants have already shown,[121] require vacatur because the Tribunal denied Movants due process by depriving them of an opportunity to be heard and failing to render an adequately reasoned award as mandated under Articles V(1)(b) and V(1)(d) of the New York Convention.[122] The New York Convention requires that parties be given the

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113 Consol. Mot. to Vacate 23–29 (D.E. 55).
114 Resp. to Consol. Mot. to Vacate 20–29 (D.E. 57).
115 Consol. Mot. to Vacate 25–28 (D.E. 55); *see also* Partial Award ¶¶ 931, 934–35 (D.E. 55-5, 55-6).
116 Consol. Mot. to Vacate 28; Partial Award ¶ 972 (D.E. 55-5, 55-6).
117 Consol. Mot. to Vacate 28–29 (D.E. 55); Partial Award ¶ 1060 (D.E. 55-5, 55-6).
118 Consol. Mot. to Vacate 28 (D.E. 55).
119 Consol. Mot. to Vacate 29 (D.E. 55).
120 Resp. to Consol. Mot. to Vacate 24, 27–28 (D.E. 57).
121 Resp. to Consol. Mot. to Vacate 29 (D.E. 57).
122 Denial of the opportunity to be heard creates circumstances in which a party "was . . . unable to present its case" within the meaning of Article V(1)(b) of the New York Convention. *See* Restatement of Arb. §§ 4.11(a)(2) & cmt. a, 4.19 & cmt. a (recognizing "procedural misconduct," including "a serious procedural defect in the arbitral process" that "materially denied the party challenging the award the opportunity to present its case," as a basis for vacatur of a non-domestic award under Article V(1)(b) of the New York Convention). The equivalent ground for vacatur of a domestic award is FAA Section 10(a)(3). *See* Restatement of Arb. § 4.19 cmt. a (recognizing that FAA Section 10(a)(3) "corresponds with some aspects of Articles V(1)(b) and V(1)(d) of the New York Convention . . . which also protect the fundamental fairness of arbitral proceedings and the basic procedural rights of the parties"). Failure to render an adequately reasoned award constitutes a failure to apply an arbitral procedure

opportunity to comment on and respond to all material legal and factual issues on which a tribunal bases its award. The Convention also requires that the award contain the degree of reasoning for which the parties have contracted in their arbitration agreement.[123]

In its Response, ACP misconstrues and attempts to undermine the law. ACP suggests that the requirement of an opportunity to be heard was satisfied by "[t]he sheer length of the proceedings, the mass of evidence and argument, the Partial Award's size and detail, and party costs exceeding $140 million," as well as by the facts that the Parties confirmed "they had no objections as to how the Tribunal conducted the procedural aspects of the arbitration" and that the Tribunal stated it had "considered all arguments" in its Awards.[124] ACP further argues that the reasoning of the Award need only have been "bare-bones"[125] and excuses the deficiencies by characterizing them as *dicta*.[126] These arguments, however, do not effectively refute Movants' arguments. The Tribunal's failure to justify its decision with the degree of reasoning that the Parties' arbitration agreement required violated due process. Similarly, ACP's arguments related to the failure to state reasons in the Award also fail. As ACP's own Response indicates, the ICC Rules specify that this review is "as to its form," not the substance of the reasoning—therefore not reviewing whether the Awards stated sufficient reasons for which it was based.[127] These failures compel vacatur of the Awards under Article V of the New York Convention.

CONCLUSION

The improper Awards imposed on the shareholders of GUPC substantial losses and unjust damages in the hundreds of millions of dollars—inconsistent with any arbitration to which they agreed. Justice and a restoration of due process for GUPC and its shareholders require vacatur of the Awards, which are tainted by evident partiality as a result of the arbitrators' concealment and failure to disclose conflicting relationships that clearly convey an appearance of impartiality in the eyes of the parties. For the foregoing reasons, and those set forth in the consolidated motion to vacate and response to ACP's consolidated cross-motion to confirm, Movants request that this Court vacate the Awards and grant such other relief as the Court should deem proper.

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that was "in accordance with the agreement of the parties" within the meaning of Article V(1)(d) of the New York Convention. *See* Restatement of Arb. §§ 4.13 Reporters' Note a, d, 4.20 Reporters' Note d (recognizing a failure to render an adequately reasoned award as a basis for vacatur of a no-ndomestic award under Article V(1)(d) of the New York Convention). The equivalent ground for vacatur of a domestic award is FAA Section 10(a)(4). *See* Restatement of Arb. § 4.20 Reporters' Note a (correlating Section 10(a)(4) of the FAA with New York Convention Article V(1)(d)).

123 Consol. Mot. to Vacate 24 (D.E. 55).

124 Resp. to Consol. Mot. to Vacate 21 (D.E. 57).

125 Resp. to Consol. Mot. to Vacate 22 (D.E. 57).

126 Resp. to Consol. Mot. to Vacate 20–29 (D.E. 57).

127 Resp. to Consol. Mot. to Vacate 22 n.134 (D.E. 57).

REQUEST FOR ORAL ARGUMENT

Movants request an oral argument on this motion, as well as ACP's Cross-Motion to Confirm the Awards. A brief argument will give the Parties an opportunity to address the complex factual background underlying this case and legal arguments supporting vacatur of the Awards.

Date: September 13, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 13, 2021, a true and correct copy of the foregoing document was served on all counsel of record through the CM/ECF system.

/s/ Carolyn B. Lamm
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