UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case No. 1:20-cv-24867-RNS

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

Movants/Counter-Respondents,

v.

AUTORIDAD DEL CANAL DE PANAMÁ,

Respondent/Counter-Movant.

RESPONDENT AND COUNTER-MOVANT AUTORIDAD DEL CANAL DE PANAMÁ'S REPLY IN SUPPORT OF CONSOLIDATED CROSS-MOTION TO CONFIRM AND ENFORCE PARTIAL AND FINAL ARBITRATION AWARDS AND SUPPORTING MEMORANDUM OF LAW

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The ACP files this Reply in Support of its Consolidated Cross-Motion to Confirm and Enforce Partial and Final Arbitration Awards (DKT No. 58).[1]

I. INTRODUCTION

Movants have yet to provide any authority from the courts of this Circuit refusing to enforce an award under the New York Convention standards. Other circuits' law is just as squarely against Movants. This is not surprising, because the strong policy favoring enforcement of international awards requires limited court review of awards and sets a high standard to nullify an award.[2] Indeed, a non-superficial reading of the facts and holdings of all cases cited by Movants prove that the routine contacts about which Movants complain cannot lead to refusal of enforcement.

The attacks on the Tribunal members' integrity are almost entirely rehashed. The ACP's Response to the Motion to Vacate showed how they fail. Movants have added a new complaint that Dr. Gaitskell years ago sat with one of ACP's counsel in an arbitration. This co-service (never raised before the ICC or here) has been waived. More importantly, in that same note to the parties, Dr. Gaitskell stated he had also sat as arbitrator with one of **Movants'** counsel (Richard Preston). Movants repeat this pattern: they complain of the arbitrators' contacts with the ACP's counsel or law firms; but those parallel the arbitrators' contacts with counsel and law firms for Movants. Contacts are problematic (per Movants) only when with the ACP's counsel or firms. Instead, the contacts among the arbitrators; and among the arbitrators, counsel and law firms on **both sides** illustrate how commonplace and routine such contacts are in high-stakes construction arbitrations. The ACP has never considered the connections with Movants' counsel problematic. Moreover, and as developed below, Movants' complaints about recent correspondence[3] show—indeed—how excessive disclosure of trivial points makes for bad outcomes.

Movants and their experts create a smokescreen, citing social science (about, *e.g.*, unconscious bias), inapplicable draft codes, and inapplicable laws. Mr. Born shows how this disregards the parties' actual choice of ICC Rules arbitration, seated in Miami, in the Eleventh

[1] Capitalized terms have the same meaning as in the ACP's Cross-Mot. to Confirm **(DKT No. 58)**.
[2] *See* ACP's Cross-Mot. to Confirm **(DKT No. 58)** at 7–10 (citing authorities); *Productos Roche S.A. v. Iutum Servs. Corp.*, No. 20-20059-CIV, 2020 WL 1821385, at *2 (S.D. Fla. Apr. 10, 2020) (Scola, J.), *aff'd sub nom.*, *Guarino v. Productos Roche S.A.*, No. 20-11420, 2020 WL 7352575 (11th Cir. Dec. 15, 2020).
[3] *See* Movants' Resp. to Cross-Mot. to Confirm at 10 n.68 **(DKT No. 62)**.

Circuit. Similarly, Mr. Born step-by-step again shows how Movants' experts incorrectly conflate standards of disclosure, on the one hand, with arbitrator-removal rules and vacatur law, on the other. Smokescreen aside, the claims of arbitrator bias remain speculative conspiracy theories. Mr. Born explains how they rest on unfounded assumptions, proceed through speculative steps, leading to a speculative conclusion. His contact-by-contact, arbitrator-by-arbitrator analysis under each of the parties' chosen rules, the law of their chosen seat, and the practices of international arbitration anchored in the IBA's disclosure rules remains unrebutted. The rehashed complaints about the Awards' substance remain, in truth, disputes about the merits or evaluation of evidence, neither of which can be reviewed by courts.

Refusing to confirm the Awards on "evident partiality" grounds would render meaningless the entire system of rules to which the Parties here agreed, as well as the practices all players in international arbitration routinely adopt. Not to mention the grave disruption that adopting Movants' position would have on ongoing and concluded international arbitrations, including the entire proceedings here, in which the parties' overall costs claims exceeded $140 million.

II. THE LAW REQUIRES CONFIRMATION OF THE AWARDS

A. Article V(2)(b) of the New York Convention Does Not Allow a Court to Refuse Enforcement on Evident Partiality Grounds as a Matter of Law.

Article V(2)(b) law is squarely against Movants. This defense is "construed narrowly" and has "rarely been successful" because Convention policy favors enforcement.[4] Movants must prove (1) a violation of a "well-defined and dominant" "explicit public policy," "ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests"; and (2) that enforcing the award "would violate the [ ] most basic notions of morality and justice."[5] Movants' attempts to avoid each of these elements of the Convention's public-policy defense fail.

The ACP already detailed how Movants' argument—that Article V(2)(b) and FAA § 10 evident partiality are substantially similar—has no support in any cases in courts in this Circuit.[6] It does not provide any rule to refuse enforcement, whose grounds expressly and exclusively are in

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[4] *Cvoro v. Carnival Cruise Lines*, 941 F.3d 487, 496 (11th Cir. 2019); *see also* ACP's Cross-Mot. to Confirm **(DKT No. 58)** at 10–12 (setting out review standards and scope).

[5] *Cvoro*, 941 F.3d at 496.

[6] ACP's Cross-Mot. to Confirm at 10–12 **(DKT No. 58)**; *see also* ACP's Resp. to Mot. to Vacate at 6–7 **(DKT No. 57)**.

Convention Article V. Regardless, in addition, even Movants' out-of-circuit cases reinforce how narrow Convention review is that only egregious facts would permit refusal of enforcement. *Transmarine*, a New York district court case, rejected a Convention public-policy defense:[7] absent "direct financial or professional relationships between **an arbitrator and a party**", "no one could 'reasonably' conclude that [the arbitrator] was biased."[8] Movants have not even alleged any contact or relationship with a party, because they cannot. *Fitzroy v. Flame Engineering*, a Convention public-policy case granted enforcement. It does not address arbitrator bias. Rather, the award resister claimed its **own attorney** was on both sides of the litigated legal issue, violating Article V(2)(b) (public policy) and V(1)(b) (inability to present case).[9] *Continental Insurance*[10]is not a Convention case. The ACP's Response nonetheless detailed how extreme facts like those could allow vacatur.[11] But serving in unrelated arbitrations involving the arbitration-plaintiff's counsel would not permit vacatur, nor would it require disclosure.[12] *University Commons*[13] is not a Convention case. The ACP's Response

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[7] Movants' Resp. to Cross-Mot. to Confirm at 9 n.56 (**DKT No. 62**); *Transmarine Seaways Corp. v. Marc Rich & Co. A.G.*, 480 F. Supp. 352, 357 (S.D.N.Y. 1978). The Convention arguments failed. *Id.* at 361. "[T]he [public policy] argument has no merit. Whatever the tensions ... in *Commonwealth Coatings*, ... all the Justices focused upon the failure to disclose an income-producing relationship between an arbitrator and a party: namely, that the third and 'supposedly neutral' arbitrator had received $12,000 in consultant's fees from the successful party. In those circumstances, the award was vacated." *Id.* at 357.

[8] *Id.* at 357–58 (emphasis added).

[9] *Fitzroy Eng'g, Ltd. v. Flame Eng'g, Inc.*, No. 94 C 2029, 1994 WL 700173, at *4 (N.D. Ill. Dec. 13, 1994).

[10] *See generally Cont'l Ins. Co. v. Williams*, No. 84-2646-Civ, 1986 WL 20915 (S.D. Fla. Sept. 17, 1986), *aff'd*, 832 F.2d 1265 (11th Cir. 1987); *see also* Movants' Resp. to Cross-Mot. to Confirm at 9 n.61 (**DKT No. 62**).

[11] ACP's Resp. to Mot. to Vacate at 20 (**DKT No. 57**).

[12] *See Boll v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 04-80031-CIV, 2004 WL 5589731, at *6 (S.D. Fla. June 28, 2004) (citing *Matter of Andros Compania Maritima, S.A. (Marc Rich & Co., A.G.)*, 579 F.2d 691, 695–701 (2d Cir. 1978)). The *Andros* arbitrator was on 19 previous panels with an agent of a party. Co-service as arbitrators was not "the sort of information an arbitrator would reasonably regard as creating an impression of possible bias." 579 F.2d at 701.

[13] *See generally Univ. Commons–Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331 (11th Cir. 2002).

showed that Movants failed to address how the relationships and duties there differed from those of Mr. Jana and von Wobeser's acting as co-arbitrators, in an unrelated ICSID case[14] here.

Regardless of the content of "public policy," Movants must prove **both** Article V(2)(b) elements.[15] They avoid the second element because enforcing the Awards does not violate basic notions of morality and justice. Enforcing Awards of a Tribunal cleared after Movants' challenge before the ICC Court "compels" neither violation of law or acts contrary to accepted public policy.[16]

B. Movants' Alleged Conflicts Do Not Give Rise to Evident Partiality.

1. Movants' contention that a mere failure to disclose requires vacatur on evident partiality grounds is not the law.

Movants again conflate arbitrators' disclosure rules with the award-vacatur standard and try to sow confusion to avoid the ICC Court's rejecting the Challenges, avoid discussing the facts that were not disclosed, and to lessen their burden under *Gianelli*.[17] Specifically, Movants collapse the disclosure standard (which is subjective and broad) with removal and vacatur standards (both of which are objective and narrow).[18] This higher standard for vacatur rests on practical concerns: disclosure rules let a party consider whether to appoint or to challenge an arbitrator.[19] Under the ICC Rules and international practice, not disclosing a fact does not imply any doubts about impartiality.[20] In contrast, arbitrator challenge rules require a higher showing, one based on a reasonable-person standard, and comprise fewer circumstances. Common-sense considerations animate this higher, objective standard. Removing an arbitrator is a drastic step. It delays proceedings and increases costs[21] and deprives at least one party of their choice. Finally, vacatur

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[14] ACP's Resp. to Mot. to Vacate at 16–18 (**DKT No. 57**). See a continued discussion of the inapplicability of *University Commons*, *infra* at 6–7.

[15] *Cvoro*, 941 F.3d at 498 (enforcing award even when an arbitration deprived a party of a "well-defined and dominant" public policy).

[16] *Id.* at 499; *see also de Rendon v. Ventura*, No. 1:17-CV-24380, 2018 WL 4501059, at *6 (S.D. Fla. Aug. 8, 2018) ("[T]he award must be so misconceived that it compels the violation of law or conduct contrary to accepted public policy." (internal citations omitted)).

[17] ACP's Resp. to Mot. to Vacate at 8–10 (**DKT No. 57**); *see generally Gianelli Money Purchase Plan & Tr. v. ADM Inv. Servs.*, 146 F.3d 1309 (11th Cir. 1998).

[18] *See* Expert Opinion of Mr. Gary B. Born ("First Born Report") ¶ 164 (**DKT No. 57-92**).

[19] *Id.* ¶ 127.

[20] *Id.* (citing ICC and IBA authorities).

[21] *Id.* ¶¶ 128–29, 155.

entails more drastic consequences as it invalidates the result of the parties' agreed-upon dispute resolution procedures, invalidates the result of all three arbitrators' decision, and requires a restart of the proceeding.[22] In this context it is important to recall the length of the proceedings and the costs to the Parties well in excess of $140 million.[23] U.S. law under the FAA and Convention recognizes the radical nature of vacatur or refusal of enforcement by deploying these standards of review.

Indeed, Movants are even wrong about disclosure. Movants and their experts argue that arbitrators must make continuous and "expansive" disclosures of trivial contacts.[24] On their case, this makes failure to disclose anything into an automatic ground to vacate and refuse to enforce an award.[25] But the law requires an arbitrator to disclose only "those facts that create a 'reasonable impression of partiality' … or put another way, 'information which would lead a reasonable person to believe that a potential conflict exists.'"[26] Because a non-disclosed fact must lead a "reasonable person to believe that a potential conflict exists,"[27] nondisclosure of a particular fact does not, in and of itself, entail evident partiality.[28] As the ACP showed at length,[29] the nondisclosed facts here would not make a reasonable person believe a potential conflict exists. Indeed, the correspondence on which Movants rehash their five allegations and surrounding the never-before-raised contention about Mr. Loftis show that contacts between counsel at international-arbitration law firms and prominent arbitrators in high-stakes cases are routine and commonplace.[30]

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[22] *See id.* ¶ 156.

[23] First Declaration of Nicholas Henchie ("First Henchie Decl.") ¶ 233 **(DKT No. 57-1)** (detailing costs claimed by the parties).

[24] *E.g.*, Second Expert Report of Chiara Giorgetti ("Second Giorgetti Report") ¶ 38 **(DKT No. 64)**.

[25] *E.g.*, Movants' Resp. to Cross-Mot. to Confirm at 15 **(DKT No. 62)** (urging that "the irreducible minimum requirement … is full disclosure").

[26] *Gianelli*, 146 F.3d at 1312; *see also University Commons–Urbana*, 304 F.3d at 1339 (citing *Lifecare Int'l Inc. v. CD Med., Inc.* 68 F.3d 429, 433 (11th Cir. 1995)).

[27] *Gianelli*, 146 F.3d at 1312 (quoting *Lifecare*, 68 F.3d at 433); *see also Boll*, 2004 WL 5589731, at *5 n.3 (acknowledging the appearance of bias is not enough and that even under defendant's incorrect standard, they could not show evident partiality).

[28] *See* First Born Report ¶¶ 160–63 **(DKT No. 57-92)** (citing U.S. cases, international rules, standards, his treatise, and other authority).

[29] ACP's Cross-Mot. to Confirm at 11–12 **(DKT No. 58)**; ACP's Resp. to Mot. to Vacate at 8–20 **(DKT No. 57)**; First Born Report ¶¶ 171–212 **(DKT No. 57-92)**.

[30] *See* Section II.B.2, *infra* at 8.

Movants make much of the ICC Court's suggestion that the Tribunal members should have disclosed some things; but they cannot have it both ways. They cannot pluck out the parts they agree with but disclaim as wrong the ICC's wholesale rejection of the Challenges. Nor can Movants say that the parts of the ICC decision they like have persuasive effect here, while disclaiming the result of the ICC Court's construction and application of its own rules. Indeed, courts generally defer to an arbitrator's or institution's construction of its own rules.[31]

The suggestion that the ACP requires a showing of actual bias is mystifying. Movants cite the ACP's briefs' applying the Convention and *Gianelli* to these facts. *Gianelli*'s requirement that "alleged partiality must be direct, definite and capable of demonstration rather than remote, uncertain and speculative" is not the same as requiring an actual conflict.[32]

Movants' attacks on the ACP's case law[33] are unavailing. *Citigroup v. Berghorst* does not show how timing or relatedness of dispute matter, as Movants assert.[34] The case shows only how extreme facts permit vacatur: the arbitrator did not disclose that: (1) he had personally sued another financial firm (Wells Fargo) over his own IRA; (2) Wells Fargo had fired him for cause; (3) he was suing Wells Fargo for $20 million for alleged wrongful discharge; (4) another financial firm sued to foreclose on his house; and (5) his foreclosure defense was inability to pay his mortgage because Wells Fargo fired him. These facts "create[d] an impression of possible bias."[35]

So too, with the continued, contextless citations to *University Commons*.[36] The ACP's Response discussed at length how Movants misportray the case, ignoring the different structure of

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[31] *Belize Bank Ltd. v. Gov't of Belize*, 191 F. Supp. 3d 26, 35–40 (D.D.C. 2016); *see also* First Born Report ¶¶ 166–70 **(DKT No. 57-92)** (discussing with citations how ICC Court decision is entitled to considerable evidentiary weight); *c.f. Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) ("arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it. In the absence of any statement to the contrary in the arbitration agreement, it is reasonable to infer that the parties intended the agreement to reflect that understanding. … And for the law to assume an expectation that aligns (1) decisionmaker with (2) comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy-a goal of arbitration systems and judicial systems alike.") (citations omitted).

[32] *Gianelli*, 146 F.3d at 1312.

[33] Movants' Resp. to Cross-Mot. to Confirm at 14–17 **(DKT No. 62)**.

[34] *Citigrp. Global Mkts., Inc. v. Berghorst*, No. 11-80250-CIV, 2012 WL 5989628, at *4 (S.D. Fla. Jan. 20, 2012).

[35] *Id.*

[36] *See, e.g.*, *University Commons–Urbana*, 304 F.3d at 1331.

relationships and duties in that case in contrast to this one.[37] In addition, and importantly, the *University Commons* court did not have the advantage of responses from the arbitrators or a challenge decision, as here. Finally, and crucially, the award challenger in *University Commons* did not have an opportunity to challenge the arbitrators before the arbitration body. Movants here did have such an opportunity to challenge the arbitrators before the ICC, which they lost.[38]

Boll[39] did not (as Movants insist) turn on a party's knowing of the impugned facts before an award. There was no vacatur despite nondisclosure of all the following: (1) the two arbitrators had previously served together, (2) the same counsel appeared before those two on behalf of another plaintiff; and (3) the two arbitrators had joined in a decision favoring that plaintiff.[40] These circumstances, together, were not an "ongoing business relationship"[41] that should be disclosed. The lawyer's appearances before the two arbitrators was not "any relationship of any kind."[42] The only contact between the arbitrators "is their membership on the [other] arbitration panel"[43] which was also insubstantial, as it was not an "ongoing busines relationship" nor a "financial relationship" between those two.[44] The decision does not turn on the loser's knowing these facts (and thus impliedly waiving them) before any award.[45] The same is true in *Levy*. While the Court did observe the petitioner was on notice of the alleged undisclosed conflict, timing did not affect the Court's finding that "serving as an arbitrator in more than one case in which one or more of the parties is involved" was "not the kind of information that requires disclosure" in the first place.[46]

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[37] *See id.* at 1334 (no written disclosures of any kind), 1339 (verbal disclosures contended to be "inadequate and possibly misleading"); *see also* Movants' Resp. to Cross-Mot. to Confirm at 17–18 **(DKT No. 62)**.

[38] ICC Court Statement of Reasons (rejecting challenges) **(DKT No. 55-62)**.

[39] *Boll*, 2004 WL 5589731, at *3 (NASD's rejection of challenge).

[40] *Id.*

[41] *Id.* at *5–6, *7.

[42] *Id.* at *6.

[43] *Id.* at *7 n.6.

[44] *Id.* at *7; *see also id.* at *7 n.7 (citing cases, including *Marc Rich*, supporting proposition that nondisclosure of "professional" relationships does not create even an impression of possible bias).

[45] *Id.* at *8 n.9 ("*Because this Court finds no 'evident partiality' on the part of the arbitrators*, [it] declines to address Plaintiffs' arguments relating to waiver, deference to NASD Director's interpretation, and good faith compliance.") (emphasis added).

[46] *Levy v. Citigrp. Global Mkts.*, Case No. 06-21802-CIV-UNGARO-BENAGES, 2006 WL 8432648, at *5 (S.D. Fla. Oct. 17, 2006). Movants' description of *Levy* implies that the court found vacatur

2. The trivial contacts that the Tribunal allegedly failed to disclose do not even meet the *Gianelli* standard.

The only new contact Movants raise in response to the ACP's Motion to Confirm and in reply to their vacatur motion is that Mr. Loftis (counsel for ACP) sat as an arbitrator with Dr. Gaitskell over 8 years ago, from 2010 to 2012, in an ICC arbitration.[47] This co-service preceded any Panama Canal arbitration by about two years.[48] The suggestion that Mr. Loftis by virtue of his co-service years before could have asserted any influence on Dr. Gaitskell in any Panama Canal arbitration is devoid of logic and substance. Speculation fails *Gianelli*. In any event, Movants waived the point. They never asserted it before the ICC.[49] ICC Rule 14(2) prohibits a challenge more than 30 days after disclosure. Movants have known this fact for about a year, but never raised it anywhere (presumably knowing it to be groundless). It is waived.

More crucially, Movants omit to mention that—in this same letter—Dr. Gaitskell stated he had served on a tribunal with Richard Preston, one of Claimants' counsel.[50] Dr. Gaitskell's earlier co-service with Mr. Loftis is identical to co-service with Movants' own counsel.[51] That both Mr. Preston and Mr. Loftis served with Dr. Gaitskell shows how ordinary and commonplace co-service is. Mr. Henchie's Declaration sets out the many times where Movants' counsel or members of their firms have served with, appeared before, or nominated Tribunal members.[52]

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unwarranted based on a single allegation that the arbitrator showed bias by letting two attorneys argue for a party during pre-hearing matters. *See* Movants' Reply in Supp. of Cross-Mot. to Vacate at 9 n.73 **(DKT No. 61)**. This misrepresents the holding. *Levy* rejected vacatur for evident partiality grounds for many other reasons. One was that the arbitrator's failure to disclose that he was then sitting as an arbitrator in other cases involving respondent's counsel was not evidence of partiality and did not have to be disclosed. *Levy*, 2006 WL 8432648, at *7.

[47] *See* Movants' Resp. to Cross-Mot. to Confirm at 4 **(DKT No. 62)**. The implication at page 16 of Movants' Response that Dr. Gaitskell is currently sitting with Mr. Loftis is demonstrably false.

[48] First Henchie Decl. ¶ 25(a) **(DKT No. 57-1)**.

[49] *See generally* Claimants' ICC Challenges (failing to challenge any alleged conflict with Dr. Gaitskell sitting on a panel with Mr. Loftis) **(DKT No. 55-43, DKT No. 55-44)**.

[50] *See* Terms of Reference at 4 **(DKT 57-86)** (Mr. Preston as lead counsel).

[51] The Second Declaration of Nicholas Henchie ("Second Henchie Decl.") ¶¶ 64–66 (identifying Dr. Gaitskell's connections with Movants); *id* ¶ 66 (arbitrator with Mr. Preston).

[52] Second Henchie Decl. ¶¶ 60–70 (Geisinger served with Gunter ¶ 63, Gaitskell with Voser ¶ 65).

Aside from this new, trivial allegation, Movants again point to the same five allegations in support of their case that they raised in their Motion to Vacate.[53] The ACP refers the Court to its discussion detailing why each of these fails to establish evident partiality or any New York Convention ground in the ACP's Response to Movants' Consolidated Motion to Vacate.[54]

First, as noted, Movants omitting their own law firms' overlap with the arbitrators avoids (for them) uncomfortable facts: such contacts are commonplace; no reasonable person would consider them as creating evident partiality. For example, Movants complain about one of the ACP's counsel appearing before one of the arbitrators in an unrelated case,[55] yet there are many examples where Movants' counsel have appeared and are appearing before, and indeed have nominated, one of the arbitrators in unrelated cases.[56] Again, Movants complain about one of the members of the Tribunal sitting or having sat as an arbitrator with one of the ACP's counsel in unrelated cases, yet there are examples where Movants' counsel have sat as arbitrators with one of the members of the Tribunal.[57] Finally, Movants complain about one of the arbitrators sitting in unrelated arbitrations with a member of the majority in the Cofferdam Tribunal, yet make no mention of the fact that there are other unrelated arbitrations in which members of the Tribunal have sat with Prof. Cremades (*i.e.*, Movants' nominated arbitrator in the Cofferdam Arbitration, who dissented).[58] This is a yet another reason why it is impossible for Movants to establish "evident partiality" from the contacts, since they apply on both sides. Moreover, this goes to demonstrate that the alleged undisclosed contacts Movants complain about are commonplace in arbitration and would not require disclosure. Movants' alleged conflicts of bias thus fail under both *Gianelli*'s requirement that

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[53] Movants' Resp. to Cross-Motion to Confirm at 2–4 (**DKT No. 62**); *see* Movants' Mot. to Vacate at 11–16 (**DKT No. 55**); Movants' Reply in Support of Mot. to Vacate at 1–2 (**DKT No. 61**).

[54] *See* ACP's Resp. to Mot. to Vacate at 10–18 (**DKT No. 57**).

[55] Movants again assert Dr. Gaitskell was appointed by Mr. McMullan QC in an unrelated arbitration. Movants' Resp. to Cross-Motion to Confirm at 4 (**DKT No. 62**). This is wrong, as the ACP pointed out before. *See* ACP's Resp. to Mot. to Vacate at 11–12 (**DKT No. 57**).

[56] *See* Second Henchie Decl. ¶¶ 60–70.

[57] Mr. Preston (Movants' counsel) sat with Dr. Gaitskell. Mr. Geisinger (of Movants' counsel Schellenberg Wittmer) sat with Mr. Gunter earlier; Ms. Voser, also of Schellenberg Wittmer, sat with Dr. Gaitskell earlier; their firm joined Claimants' counsel group in 2018. This is no different than Mr. von Wobeser sitting with Mr. Jana. *See* Second Henchie Decl. ¶¶ 63(3), 65, 66.

[58] *See* ACP's Resp. to Mot. to Vacate at 15 (**DKT No. 57**).

a "reasonable person … believe that a potential conflict exists"[59] and its requirement that the alleged partiality must be "direct, definite and capable of demonstration."[60]

Second, Movants improperly conflate the subjective requirement governing whether an arbitrator should disclose a fact (on the one hand) with the objective, reasonable-person standard that governs whether (i) an arbitrator ought to be challenged or (ii) an award should be annulled. Mr. Born explains each step of this analysis at paragraphs 55 through 75 of his Second Report.[61]

Third, Movants fail to engage with the facts of the relationships about which they complain, or to explain how the undisclosed circumstances could lead to any impression of bias or lack of independence from a **reasonable** third party's perspective.[62] As Mr. Born explains, "[g]eneralities about 'extensive' disclosure obligations, limited pools of arbitrators and the possibilities of unconscious bias have very little bearing on the specific issues before this Court."[63] Movants do not discuss case facts and the specific contacts at issue in this case because they fail under the law.

Fourth, contrary to *Gianelli*, the claims of bias are speculative, based on unfounded assumptions, not evidence. In short, alleged partiality must be "direct, definite and capable of demonstration rather than remote, uncertain and speculative."[64] The most salient example: Movants' expert, Judge Schwebel, claims that a reasonable observer could conclude that Dr. Gaitskell's joint appointment of Mr. Gunter as tribunal president in an unrelated arbitration could make Mr. Gunter partial to or dependent on the ACP. Mr. Born shows how each step necessary to Judge Schwebel's unstated reasoning rests on speculation, untethered from any evidence.[65]

Fifth, Movants try to add up trivial conflicts, arguing cumulative failures to disclose create the impression of bias.[66] To make non-disclosure itself the problem elides analysis of the actual facts

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[59] *Gianelli*, 146 F.3d at 1312.
[60] *Id.*
[61] Second Expert Opinion of Mr. Gary B. Born ("Second Born Report") ¶¶ 55–75 (explaining how Movants' experts conflate subjective standard for disclosure with objective standards for challenge (used by the ICC) and objective standard for vacatur (used by courts)).
[62] Second Born Report ¶¶ 6(b),23–25; *see* First Born Report ¶¶ 95–137, 171–212 **(DKT No. 57-92)**.
[63] Second Born Report ¶ 25.
[64] *Gianelli*, 146 F.3d at 1312 (quotations and citation omitted).
[65] Second Born Report ¶¶ 37–47.
[66] Second Giorgetti Report ¶ 58 (contending that aggregating nondisclosures, without more, requires vacatur) **(DKT No. 64)**.

themselves.[67] Movants' approach would also allow disgruntled parties to argue for vacatur based on undisclosed contacts of trivial nature.[68]

Sixth, it is bad policy that leads to bad results. In the Panama 2 Arbitration, Dr. Gaitskell disclosed in September 2021 that he was an arbitrator in a completely unrelated arbitration in Africa. His co-arbitrator (unconnected to any Panama Canal disputes) had proposed Prof. Hanotiau as chair. Prof. Hanotiau chaired the Cofferdam Arbitration, whose July 2017 award this Court confirmed. When Dr. Gaitskell sought the parties' comments, Movants opposed Prof. Hanotiau's nomination, preventing him from serving in any arbitration in which the Panama 1 Tribunal members sit.[69] Movants' blocking Prof. Hanotiau illustrates the costs of an excessive disclosure regime: disgruntled parties can remove a qualified chair from the pool available to unrelated third parties.[70] Regardless of the harm to a potential appointee, third parties lose a capable arbitrator. This undoes a key arbitration benefit: decisions by qualified, experienced persons whom parties choose.[71]

C. Attacks on the Substance of the Awards Do Not Make Out Any Convention Defense.

Movants cannot camouflage their impermissible attempt to re-litigate the merits of their loss in the Awards, or the Tribunal's weighing of the evidence behind due process or other New York Convention defenses. During six years of arbitration, thousands of pages of pleadings, and hundreds of hours of hearings,[72] Movants had adequate opportunity to plead and argue their case and present evidence. Nothing required the 565-page Partial Award to adopt *verbatim* the arguments of either party, as Movants urge. The parties did not choose baseball arbitration, which requires an arbitrator to take one party's position or the other. The ACP addressed Movants' four complaints in detail in response to Movants' Motion to Vacate.[73] Few points remain.

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[67] Second Born Report ¶¶ 6(b), 23–25; *see also* First Born Report ¶¶ 95–137, 171–212 **(DKT No. 57-92)**.
[68] Second Born Report ¶¶ 26–31.
[69] E-mail from Nicolas Bouchardie to Parties, September 6, 2021 **(DKT No. 63-4)**; e-mail from Dr. Gaitskell to Parties, September 6, 2021 **(DKT No. 63-5)**.
[70] Second Born Report ¶ 85.
[71] *See* 2018 International Arbitration Survey: The Evolution of International Arbitration, White & Case LLP & Queen Mary University of London, School of International Arbitration (2018) at 10 (ranking the most valuable characteristics of international arbitration, with "ability of parties to select arbitrators" ranking fourth on the list) **(DKT No. 66-1)**.
[72] *See* First Henchie Decl. ¶¶ 44, 50 **(DKT No. 57-1).**
[73] ACP's Resp. to Mot. to Vacate at 20–29 **(DKT No. 57)**.

Interpretation of paragraph 1.07 D.1. Complaining of the Tribunal's interpretation of paragraph 1.07 D.1 goes to the dispute's merits, which are not reviewable in court. The ACP already set out the arbitration record showing Movants' opportunity to address any and all potential arguments on interpreting 1.07 D.1 of the Contract.[74] A table summarizes the briefing and argument on 1.07 D.1 during the six-year-plus proceeding.[75] As set out in detail in Mr. Henchie's two Declarations, the Parties had every opportunity to respond to the substance of the arguments forming the basis of the Tribunal's interpretation of paragraph 1.07 D.1. The Tribunal evaluated the evidence and arguments and agreed with the ACP's position (and, for good measure, Movants' own previous admissions of what that provision meant).[76] That suffices and is dispositive.[77] The contention that the Partial Award was not reasoned enough is belied by *Cat Charter*[78] and by the Awards passing ICC Court muster per ICC Rules. Finally, the contention that the Tribunal's interpretation of 1.07 D.1 was the only reason Panama law claims were dismissed again misreads the Partial Award; other evidence supported those findings, and 1.07 D.1 was not critical to the overall decision at all.[79] Regardless, arbitrators' evaluation of the evidence is not reviewable in court, either.[80]

Prudent Industry Practices. Movants' case was that errors in the Employers' Requirements gave rise to a claim under Contract Clause 1.9.4. The Tribunal dismissed that claim on the facts and law,[81] as the ACP's Response discussed.[82] The Tribunal's consideration whether GUPC should have conducted bulk testing, required by Prudent Industry Practices, would have been an independent reason to dismiss the claim. Movants repeat that the discussion of Prudent Industry Practice was not

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[74] First Henchie Decl. ¶¶ 120–85 (discussing parties' competing interpretations of paragraph 1.07 D.1 and the Tribunal's reasoning on it) **(DKT No. 57-1)**; Second Henchie Decl. ¶¶ 16–40.
[75] *See* Second Henchie Decl. ¶ 14 (table); *see also id.* ¶¶ 16–40 (extensively detailing the Parties' briefing on 1.07 D.1 and all sub-issues raised therein).
[76] Second Henchie Decl. ¶¶ 16–40.
[77] *E.g.*, *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 572–73 (2013) ("[T]he question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all."); *Wiregrass Metal Trades Council AFL–CIO v. Shaw Envtl. & Infrastructure*, 837 F.3d 1083, 1092 (11th Cir. 2016) (finding arbitrator interpreted contract though award gave no indication thereof).
[78] *See Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 841–44 (11th Cir. 2011), *infra* n. 98.
[79] Second Henchie Decl. ¶¶ 37–40 (noting independent grounds supporting those findings).
[80] *See* ACP's Resp. to Mot. to Vacate at 28 n.170 (citing cases) **(DKT No. 57)**.
[81] *See* Partial Award ¶ 972 ("there was no error in the Employer's Requirements") **(DKT No. 55-5)**.
[82] ACP's Resp. to Mot. to Vacate at 27–28 **(DKT No. 57)**.

dicta. But the Award says, "*even if* any of these statements had been found to be in error, the Tribunal considers that such error would have been discoverable by an experienced contractor exercising Prudent Industry Practices… ."[83] This wording shows an additional reason the claim would have failed; and the Tribunal then provided an additional 15 paragraphs evaluating the Parties' evidence on whether a contractor exercising Prudent Industry Practices would have discovered the alleged errors.[84] Mr. Bouchardie does not address this and cannot dispute the Tribunal's unreviewable evaluation of the evidence.

C.A.N.A.L. Bid. The C.A.N.A.L. bid was inessential to the dismissal of Movants' claims,[85] as the ACP explained.[86] Regardless, despite Movants' mischaracterizing the Partial Award's consideration of C.A.N.A.L.'s bid,[87] the Tribunal's observations were founded on an issue expressly pleaded, and rested on the evidence of Movants' own expert.[88] Movants' complaining about the Tribunal's interpretation as novel (it was not) is on its face a complaint about the unreviewable interpretation or evaluation of evidence.

The Cofferdam Award. The ACP's Response points out that the Parties argued the Cofferdam Award's preclusive effect; that Movants prevailed to the effect that the Partial Award was not preclusive; and that the Partial Award stated it determined issues *de novo*.[89] Movants nonetheless assert the Tribunal simply copied and pasted from that Award, implying no independent analysis. This is belied by the Partial Award, in which the Tribunal both agreed and disagreed with important aspects of the Cofferdam Award.[90] Agreement with parts of that award is no surprise: both concern the same Project, Parties, and Contract. Finally, Movants claim Mr. Gunter sitting in unrelated arbitrations with Cofferdam chair Prof. Hanotiau "irrevocably tainted" the Awards,[91] but they relied on the "tainted" Partial Award often in the pleadings in the Lock Gates Arbitration.[92]

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[83] Partial Award ¶ 972 **(DKT No. 55-5)**; *see also* First Henchie Decl. ¶ 195 **(DKT No. 57-1)**.
[84] Partial Award ¶¶ 973–87 **(DKT No. 55-5)**; *see also* Second Henchie Decl. ¶¶ 41–47.
[85] Second Henchie Decl. ¶ 48.
[86] ACP's Resp. to Mot. to Vacate at 28–29 **(DKT No. 57)**.
[87] Second Henchie Decl. ¶¶ 49–50.
[88] *Id.* ¶¶ 50–51.
[89] ACP's Resp. to Mot. to Vacate at 29 **(DKT No. 57)**.
[90] Second Henchie Decl. ¶¶ 52–56.
[91] Movants' Reply in Supp. of Mot. to Vacate at 1–2 n.8 **(DKT No. 61)**.
[92] First Henchie Decl. ¶¶ 247–48 **(DKT No. 57-1)**.

D. The Defenses in Convention Articles V(1)(b), V(1)(c), or V(1)(d) Aim at the Merits of the Awards or the Tribunal's Evaluation of Evidence, and Thus Fail.

Movants had the opportunity to present their case and received a reasoned award pursuant to the agreed ICC Rules and Eleventh Circuit law. None of Movants' asserted Convention defenses —Articles V(1)(b) (unable to present case), V(1)(c) (excess of authority), and V(1)(d) (arbitration contrary to parties' agreement)—have any merit. Confirmation is thus required. Movants assert that the Tribunal did not adopt arguments advanced by either party about a specific contract provision (paragraph 1.07 D.1); adopted portions of the Cofferdam Award without explanation, thus denying Movants due process; and failed to provide a properly reasoned award, in which the Tribunal explained adequately its decision on the meaning of paragraph 1.07 D.1 under Panamanian law.[93]

First, the substance of the Awards is no evidence that Movants were denied due process, just as the substance provides no indication of evident partiality, *supra* Section II(C). Citing *Mathews v. Eldridge*, Movants argue that due process is "flexible,"[94] which actually supports confirming Awards stemming from years of a contractually-agreed process. Regardless, due process requires only a "meaningful opportunity to present [a] case."[95] Reams of pleadings and hearing transcripts show that meaningful opportunity (including on paragraph 1.07 D.1).[96] *Second*, the Awards comply with the Contract and law: the ICC Court vetted the Awards and found they complied.[97] At law, if an arbitrator even arguably interprets the parties' contract, that interpretation stands.[98]

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[93] Movants' Resp. to Cross-Mot. to Confirm at 25–27 **(DKT No. 62)**. In footnote 150 Movants argue Article V(1)(c) excess of jurisdiction, claiming the Tribunal did not "adequately" justify its reasoning in interpreting paragraph 1.07 D.1 under Panamanian law. This admits the Tribunal **was** interpreting the Contract, to which courts defer. *See Wiregrass*, 837 F.3d at 1092 (court presumed arbitrator interpreted the agreement in rendering an award).

[94] Movants' Resp. to Cross-Mot. to Confirm at 26 **(DKT No. 62)**; *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

[95] *Mathews*, 424 U.S. at 349.

[96] *See* ACP's Resp. to Mot. to Vacate at 20–29 **(DKT No. 57)** (rebutting same complaints made here). *see also* Second Henchie Decl. ¶¶ 16–40; *see also id.* ¶ 14 (table showing submissions on 1.07. D.1).

[97] ACP's Resp. to Mot. to Vacate at 22–23 (describing ICC Rules' grant of broad discretion in how to write awards, and analyzing ICC scrutiny and US law on reasoned awards) **(DKT No. 57)**.

[98] *Oxford Health Plans LLC*, 569 U.S. at 572–73; *Wiregrass*, 837 F.3d at 1092; *Cat Charter*, 646 F.3d at 841–44 (award was sufficiently "reasoned" when it merely stated one party proved its claims by a greater weight of the evidence); *see also* Second Declaration of Nicolas Bouchardie Decl. ¶ 12 **(DKT No. 63)** (noting the Tribunal conducted a "contextual analysis" of contract).

III. PAYING THE AWARDS DOES NOT MOOT THE CASE

Judgment confirming the Awards would ensure preclusive effect in further court proceedings. An example: the Panama 2 Arbitration arises from the same Project and same Contract, and is pending before the same tribunal. Confirming these Awards disposes of all New York Convention defenses and vacatur grounds (identical to Article V's refusal grounds).[99] Also, Movants dispute the Awards' validity and attack the arbitrators rendering them, so the entitlement controversy is live.[100] Movants do not address this. *Christian Coalition* discusses neither the FAA nor the Convention.[101] The *Local 2414 of United Mine Workers* court found FAA confirmation inappropriate because "neither party ha[d] contended that the awards were invalid … ."[102] Movants do here. Payment in *Beatty* mooted the case when there was no attack on the award,[103] as there is here.

IV. OBJECTION TO MOVANTS' REQUEST FOR ORAL HEARING

All motions here can and should be decided on the papers. Judicial review of arbitration awards is limited. Movants offer no valid reason the Court should order re-trial of the nearly six-year arbitral process that led to the Awards.

V. CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, for the reasons set forth above, in its Consolidated Cross-Motion to Confirm and Enforce, its Response in Opposition to Movants' Consolidated Motion to Vacate, and all accompanying exhibits and declarations filed in support, the ACP respectfully requests that the Court enter a Final Judgment confirming both Awards.

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[99] *See Restatement (Third) Int'l Com. and Inv.-State Arb.* (Apr. 2019) § 1.1.
[100] Movants' Resp. to Cross-Mot. to Confirm at 25 (**DKT No. 62**).
[101] *Christian Coalition of Fla., Inc. v. United States*, 662 F.3d 1182, 1190 (11th Cir. 2011).
[102] *Local 2414 of United Mine Workers v. Consolidation Coal Co.*, 682 F. Supp. 399, 399 (S.D. Ill. 1988).
[103] *Beatty v. Passaro*, No. 17-11613 (KM) (JBC), 2018 WL 3141835, at *4 (D.N.J. June 26, 2018).

Date: October 21, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on, October 21, 2021 a true and correct copy of the foregoing will be emailed and conventionally served to all counsel or parties of record.

By: */s/ Sujey S. Herrera*
Sujey S. Herrera