

**IN THE
SUPREME COURT OF THE UNITED STATES**

No. _____

MONSTER ENERGY COMPANY, F/K/A HANSEN BEVERAGE COMPANY,

v.

CITY BEVERAGES, LLC, D/B/A OLYMPIC EAGLE DISTRIBUTING

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH
TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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March 13, 2020

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To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States:

Applicant Monster Energy Company (“Monster”) requests a 60-day extension from March 30, 2020, to and including May 29, 2020, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.¹

The Ninth Circuit entered judgment on October 22, 2019. App., *infra*, 1a-26a. The Ninth Circuit extended the time within which to file a petition for panel

¹ To comply with S. Ct. R. 29.6, Monster states that Monster Energy Company, f/k/a Hansen Beverage Company, is a wholly owned subsidiary of Monster Beverage Corporation. The only publicly held corporation or other publicly held entity that owns 10% or more of Monster Beverage Corporation is The Coca-Cola Company.

rehearing and rehearing en banc to December 5, 2019. On that date, Monster timely filed a petition for rehearing and rehearing en banc, which the Ninth Circuit denied on December 30, 2019, App., *infra*, 27a. A petition for a writ of certiorari is currently due on March 30, 2020. This application is being filed more than ten days before that date. *See* S. Ct. R. 13.5.

The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1). Copies of the opinion of the court of appeals, the order denying rehearing and rehearing en banc, and the district court opinion are attached to this application. App., *infra*, 1a-35a.

1. This case involves the Federal Arbitration Act (“FAA”) provision authorizing district courts to vacate an arbitration award “where there was evident partiality” in the arbitrator. 9 U.S.C. § 10(a)(2). In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, the Court held that this provision mandates vacatur for evident partiality where the arbitrator “might reasonably be thought biased against one litigant and favorable to another.” 393 U.S. 145, 150 (1968) (plurality opinion). Thus, the Court required that “arbitrators disclose to the parties any dealings that might create an impression of possible bias.” *Id.* at 149. But the FAA does not require vacatur for evident partiality where any undisclosed facts are “trivial.” *Id.* at 150 (White, J., concurring).

2. In 2006, Monster and Olympic Eagle Distributing (“Olympic”) agreed to make Olympic the exclusive distributor of Monster-branded beverages in part of Washington. App., *infra*, 28a. The agreement had a 20-year term but permitted

Monster to terminate earlier without cause upon payment of an agreed severance. App., *infra*, 29a. It also required that any dispute relating to the agreement be settled by binding arbitration conducted by JAMS. App., *infra*, 29a.

In 2015, Monster exercised its termination rights and sent Olympic the contractual severance. App., *infra*, 29a. Olympic objected, contending that, notwithstanding the agreement, Washington’s franchise law prohibited termination without cause. App., *infra*, 29a. Monster demanded arbitration and moved in district court to compel arbitration. App., *infra*, 29a. Olympic opposed on the ground that the arbitration provision was unconscionable because of the parties’ supposedly unequal bargaining power. App., *infra*, 20a, 29a. Noting Olympic’s “obvious sophistication,” the district court rejected Olympic’s challenge and compelled arbitration before JAMS. App., *infra*, 20a, 29a; CA9 SER839.

Pursuant to JAMS’s standard rules and procedures, JAMS appointed the Honorable John W. Kennedy, Jr. (Ret.) as the arbitrator. App., *infra*, 4a. Judge Kennedy provided disclosures using JAMS’s standard form, which included the statement that “[e]ach JAMS neutral, including me, has an economic interest in the overall financial success of JAMS.” App., *infra*, 5a. He also disclosed a previous arbitration with Monster—where he ruled *against* Monster—and another pending distributor-termination arbitration involving Monster, with the same counsel representing Monster in all these proceedings. App., *infra*, 19a. He further advised that “the parties should assume” JAMS had conducted other arbitrations with the parties or their counsel and may do so in the future. App., *infra*, 5a-6a. Indeed,

JAMS's website disclosed over 80 previous arbitrations involving Monster. App., *infra*, 20a & n.3. Olympic did not inquire further or move to disqualify the arbitrator. App., *infra*, 31a.

After hard-fought litigation culminating in a two-week hearing, the arbitrator ruled for Monster. App., *infra*, 29a. He found that Olympic did not qualify for protection under Washington's franchise law and that Monster thus properly terminated the agreement. App., *infra*, 29a. He awarded Monster its costs and attorney's fees. App., *infra*, 29a.

3. Monster petitioned to confirm the arbitration award. App., *infra*, 30a. Olympic cross-petitioned to vacate, alleging "evident partiality" in the arbitrator under the FAA. App., *infra*, 30a. Olympic asserted that, after the arbitration, it learned that Judge Kennedy was a part owner of JAMS. App., *infra*, 30a. It argued that the arbitrator's failure to disclose this "ownership interest," given Monster's status as a "repeat player" in JAMS arbitrations, established evident partiality. App., *infra*, 30a-31a.

The district court confirmed the award. App., *infra*, 28a-35a. It rejected Olympic's evident-partiality challenge, observing that "[a]n ownership interest in JAMS is merely a type of economic interest," and finding "no reason to require that the Arbitrator have disclosed his particular economic interest at a granular level unless the parties inquired further after he made his initial economic interest disclosure." App., *infra*, 31a.

4. In a split decision, the court of appeals reversed and vacated the arbitration award. App., *infra*, 1a-26a. The majority concluded that “the Arbitrator’s failure to disclose his ownership interest in JAMS—given its nontrivial business relations with Monster—creates a reasonable impression of bias.” App., *infra*, 17a. It assumed—without citation or support—that “as a co-owner of JAMS, the Arbitrator has a right to a portion of profits from all of its arbitrations, not just those that he personally conducts.” App., *infra*, 12a. It further presumed—again without citation or support—that “[t]his ownership interest * * * greatly exceeds the general economic interest that all JAMS neutrals naturally have in the organization” and “is therefore substantial.” App., *infra*, 12a. It determined JAMS’s 97 Monster arbitrations over five years were “hardly trivial,” while acknowledging it had no information about “the Arbitrator’s specific monetary interest in Monster-related arbitrations” or any other “empirical evidence.” App., *infra*, 12a & n.3.

Based on this series of assumptions, the majority announced a new rule: even where arbitrators disclose that they have an economic interest in their arbitration firm *and* that their firm does business with the parties and their counsel, arbitration awards must be vacated for evident partiality if arbitrators do not disclose (1) “their ownership interests, if any, in the arbitration organizations with whom they are affiliated in connection with the proposed arbitration,” and (2) “those organizations’ nontrivial business dealings with the parties to the arbitration.” App., *infra*, 17a.

Judge Friedland dissented. She concluded that the additional disclosure of the arbitrator's ownership interest in JAMS would not "have made any material difference." App., *infra*, 18a. An arbitrator's "ownership interest in the arbitration firm," beyond "a financial interest in that firm more generally, is hardly the sort of 'real' and 'not trivial' undisclosed conflict" requiring vacatur. App., *infra*, 22a (citation omitted). Judge Friedland also recognized the new rule's disruptive impact now and in the future. In the short run, it "will require vacating awards in numerous cases decided by JAMS owners (who make up about a third of JAMS arbitrators)"—and owners of other arbitration firms—"who did not disclose their ownership interests." App., *infra*, 24a. In the long run, the "uncertainty created by the majority's opinion" about "the extent of disclosures required by arbitrators" will "generate endless litigation over arbitrations that were intended to finally resolve disputes outside the court system." App., *infra*, 23a-25a.

5. Monster filed a petition for panel rehearing and rehearing en banc. JAMS filed a brief as amicus curiae supporting Monster's rehearing petition. That brief was "the first amicus brief JAMS has ever submitted in any case." JAMS Amicus Br. 1. JAMS explained that "there is simply no factual or record basis to *assume* that any ownership interest in an arbitration provider creates *any* potential bias in favor of any party or lawyer, even a 'repeat player.'" *Id.* at 13. And it noted that "[p]arties in pending and final arbitration proceedings have already begun requesting additional information from JAMS, beyond what is required by the decision (including personal financial information of the arbitrator), seeking some

basis to challenge the arbitrator or the final award.” *Id.* at 17. The court of appeals denied rehearing. App., *infra*, 27a. Monster moved to stay the mandate pending the filing and disposition of a petition for a writ of certiorari, which the court of appeals granted. CA9 ECF No. 112.

6. Monster requests a 60-day extension of time within which to file a petition for a writ of certiorari seeking review of the Ninth Circuit’s decision. Monster submits there is good cause for granting the request.

a. This case presents an important question regarding arbitrators’ disclosure obligations under the FAA. The Ninth Circuit majority announced a rule that effectively creates a *presumption* of evident partiality in *all* private arbitrations and conflicts with precedent from this Court and other courts of appeals. As Judge Friedland noted in dissent, neither *Commonwealth Coatings* nor any other “reported federal decision” has vacated an award for evident partiality based on “an undisclosed potential source of bias” allegedly inherent in “the structure of the private arbitration industry itself.” App., *infra*, 23a. And the majority’s unsupported and generalized presumption of bias conflicts with the approaches of other courts of appeals. For instance, the D.C. Circuit requires parties challenging awards based on evident partiality to meet a “heavy burden of proof” by presenting “specific facts” showing that any undisclosed “interest was more than trivial.” *Republic of Argentina v. AWG Grp. Ltd.*, 894 F.3d 327, 335, 337 (D.C. Cir. 2018). Likewise, under Second Circuit law, the undisclosed facts must be “strongly suggestive of bias in favor of one of the parties,” and “a showing of evident

partiality ‘may not be based simply on speculation.’” *Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 72 (2d Cir. 2012).

The additional time Monster seeks here will allow counsel to investigate further the manner in which the Ninth Circuit’s ruling conflicts with the decisions of this Court and other courts.

b. In addition, counsel for Monster had and have a number of other obligations during the period for preparation of the petition. Counsel recently filed a response brief on February 14 in *Route1 Inc. v. AirWatch, LLC*, No. 20-1031 (Fed. Cir.); a response brief on February 14 in *Ezeokoli v. Uber Technologies, Inc.*, No. A156445 (Cal. App. 1st); an amicus brief in this Court on March 2 in *Barr v. American Association of Political Consultants*, No. 19-631; and a response brief on March 10 in *Richardson v. UPS Store, Inc.*, No. SJC-12769 (Mass. Sup. Jud. Ct.). Counsel currently have an opening brief due on March 26 in *Federal Trade Commission v. Synovus Bank*, No. 20-10191 (11th Cir.); an oral argument on April 9 in *Richardson v. UPS Store, Inc.*, No. SJC-12769 (Mass. Sup. Jud. Ct.); a reply brief due April 14 in *A.C. v. Pacific Fertility Center*, No. A158155 (Cal. App. 1st); and an oral argument on April 16 in *In re Pacific Fertility Center Litigation*, Nos. 19-15885, -15886, -15888 (9th Cir.).

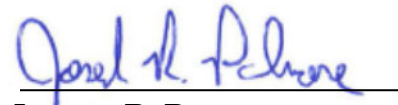
CONCLUSION

For these reasons, Monster requests that the Court extend the time within which to file a petition for a writ of certiorari in this matter to and including May 29, 2020.

Dated: March 13, 2020

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No. _____

MONSTER ENERGY COMPANY, F/K/A HANSEN BEVERAGE COMPANY,

v.

CITY BEVERAGES, LLC, D/B/A OLYMPIC EAGLE DISTRIBUTING

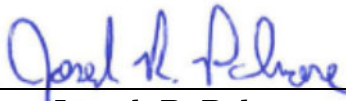
CERTIFICATE OF SERVICE

I, Joseph R. Palmore, hereby certify that I am a member of the Bar of this Court, and that I have this 13th day of March, 2020, caused one copy of the Application For An Extension of Time Within Which To File A Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to be served on the following counsel by third-party carrier and also by electronic mail.

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Dated: March 13, 2020



Joseph R. Palmore

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FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MONSTER ENERGY COMPANY, FKA
Hansen Beverage Company,
Petitioner-Appellee,

v.

CITY BEVERAGES, LLC, DBA
Olympic Eagle Distributing,
Respondent-Appellant.

Nos. 17-55813
17-56082

D.C. No.
5:17-cv-00295-
RGK-KK

OPINION

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted July 12, 2019
Pasadena, California

Filed October 22, 2019

Before: MILAN D. SMITH, JR. and MICHELLE T.
FRIEDLAND, Circuit Judges, and MICHAEL H. SIMON,*
District Judge.

Opinion by Judge Milan D. Smith, Jr.;
Dissent by Judge Friedland

* The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

SUMMARY**

Arbitration

The panel reversed the district court, vacated a final arbitration award between Monster Energy Co. and City Beverages, LLC, doing business as Olympic Eagle Distributing, and vacated the district court's award of post-arbitration fees to Monster Energy Co. for its petition to confirm the award.

After Monster terminated its distribution agreement with Olympic Eagle, the parties proceeded to arbitration. The parties chose an arbitrator from a list of several neutrals provided by JAMS, the arbitration organization specified in the agreement. The arbitrator ruled in favor of Monster, and Monster asked the district court to confirm its award. Olympic Eagle sought to vacate the award based on later-discovered information that the arbitrator was a co-owner of JAMS—a fact that he did not disclose prior to arbitration.

The panel first held that Olympic Eagle had not waived its evident partiality claim because it did not have constructive notice of the arbitrator's potential non-neutrality.

The panel then held that before an arbitrator is officially engaged to perform an arbitration, to ensure that the parties' acceptance of the arbitrator is informed, arbitrators must disclose their ownership interests, if any, in the arbitration

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

organizations with whom they are affiliated in connection with the proposed arbitration, and those organizations' nontrivial business dealings with the parties to the arbitration. In this case, the arbitrator's failure to disclose his ownership interest in JAMS, coupled with the fact that JAMS has administered 97 arbitrations for Monster over the past five years, created a reasonable impression of bias and supported vacatur of the arbitration award. Because the panel vacated the arbitration award, the panel also vacated the district court's award of post-arbitration fees to Monster.

Dissenting, Judge Friedland disagreed that, in an evaluation of whether the arbitrator might favor Monster, the additional information the majority believed should have been disclosed would have made any material difference. She would therefore reject Olympic Eagle's effort to vacate the arbitration award in Monster's favor.

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Michael D. Madigan and Brandt F. Erwin, Madigan Dahl & Harlan P.A., Minneapolis, Minnesota, for Amicus Curiae National Beer Wholesalers Association.

OPINION

M. SMITH, Circuit Judge:

City Beverages, LLC, doing business as Olympic Eagle Distributing (Olympic Eagle), and Monster Energy Co. (Monster) signed an agreement providing exclusive distribution rights for Monster's products to Olympic Eagle for a fixed term in a specified territory. After Monster exercised its contractual right to terminate the agreement, the parties proceeded to arbitration to determine whether Olympic Eagle was entitled to protection under Washington law, and thus whether Monster had improperly terminated the agreement without good cause. From a list of several neutrals provided by JAMS, the arbitration organization specified in the agreement, the parties chose the Honorable John W. Kennedy, Jr. (Ret.) (the Arbitrator). At the outset of arbitration, the Arbitrator provided a series of disclosure statements. In the final arbitration award (the Award), the Arbitrator determined that Olympic Eagle did not qualify for protection under Washington law.

The parties filed cross-petitions in the district court, with Monster seeking to confirm the Award and Olympic Eagle moving to vacate it. The district court ultimately confirmed the Award.

We conclude, given the Arbitrator's failure to disclose his ownership interest in JAMS, coupled with the fact that JAMS has administered 97 arbitrations for Monster over the past five years, that vacatur of the Award is necessary on the ground of evident partiality. We therefore reverse the district court and vacate the Award. We also vacate the district court's award of post-arbitration fees to Monster for its petition to confirm the Award.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

In 2006, Olympic Eagle, an Anheuser-Busch (AB) distributor, agreed to promote and sell Monster energy drinks for twenty years in an exclusive territory. The contract permitted Monster to terminate the agreement without cause upon payment of a severance fee. Eight years later, Monster exercised its termination right and offered to pay Olympic Eagle the contractual severance of \$2.5 million.

In response, Olympic Eagle invoked Washington's Franchise Investment Protection Act (FIPA), which prohibits termination of a franchise contract absent good cause. *See* Wash. Rev. Code § 19.100.180(2)(j). Monster served an arbitration demand on Olympic Eagle and filed an action in the district court seeking to compel arbitration. The district court ruled in favor of Monster and compelled arbitration before JAMS Orange County, as specified by Monster in its form agreement with the AB distributors.

JAMS provided a list of seven neutrals to conduct the arbitration, and the parties chose the Arbitrator. The Arbitrator's multi-page disclosure statement, provided to the parties at the commencement of arbitration, contained the following provision:

I practice in association with JAMS. Each JAMS neutral, including me, has an economic interest in the overall financial success of JAMS. In addition, because of the nature and size of JAMS, the parties should assume that one or more of the other neutrals who practice with JAMS has participated in

an arbitration, mediation or other dispute resolution proceeding with the parties, counsel or insurers in this case and may do so in the future.

II. Procedural Background

Following two weeks of hearings, the Arbitrator issued an interim award, finding that Olympic Eagle was not entitled to protection under FIPA. Two months later, the Arbitrator awarded Monster attorneys' fees (together with the interim award, the Award).

Thereafter, Monster filed a petition in the district court to confirm the Award, and Olympic Eagle cross-petitioned for its vacatur. Olympic Eagle sought to vacate the Award based on later-discovered information that the Arbitrator was a co-owner of JAMS—a fact that he did not disclose prior to arbitration. Olympic Eagle also requested information from JAMS regarding the Arbitrator's financial interest in JAMS, and Monster's relationship with JAMS. When JAMS refused to divulge this information, Olympic Eagle served JAMS with a subpoena. In the face of further resistance, Olympic Eagle later moved to compel JAMS's response to the subpoena.

Ultimately, the district court confirmed the Award, denying Olympic Eagle's cross-petition and finding its motion to compel moot. The district court then awarded Monster attorneys' fees from both the arbitration and the post-arbitration proceedings. Judgment was entered, and Olympic Eagle timely appealed.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over this appeal pursuant to 9 U.S.C. § 16 and 28 U.S.C. § 1291, and we review de novo the district court’s confirmation of an arbitration award. *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1105 (9th Cir. 2007).

ANALYSIS

The Federal Arbitration Act permits a court to vacate an arbitration award “where there was evident partiality . . . in the arbitrators.” 9 U.S.C. § 10(a)(2).¹ Olympic Eagle seeks vacatur of the Award based on the Arbitrator’s failure to fully disclose his ownership interest in JAMS. Monster contends that the district court correctly found Olympic Eagle’s argument waived, and, alternatively, that the Arbitrator’s disclosures were sufficient. We first consider whether Olympic Eagle waived its evident partiality claim, and, finding that it did not, then turn to the merits.

I. Waiver

The district court held, and Monster continues to argue, that Olympic Eagle waived its evident partiality claim because it failed to timely object when it first learned of

¹ Our dissenting colleague makes much of the fact that persons who litigate their claims in arbitration have voluntarily given up the extensive protections afforded to parties by the conflict of interest statutes and rules governing federal judges. However, she fails to similarly credit the fact that federal law also provides some comparable protections to parties in arbitration by also permitting courts to vacate arbitration awards when there is “evident partiality . . . in the arbitrators.” 9 U.S.C. § 10(a)(2); *see infra* Section II.

potential “repeat player” bias and the Arbitrator disclosed his economic interest in JAMS.

In *Fidelity Federal Bank, FSB v. Durga Ma Corp.* (*Fidelity*), we joined several of our sister circuits that utilize a constructive knowledge standard when considering whether a party has waived an evident partiality claim. 386 F.3d 1306, 1313 (9th Cir. 2004). There, we held that the disgruntled party was on notice that the challenged arbitrator may have been non-neutral given the process the parties employed to pick their arbitration panel: each party picked one arbitrator and the arbitrators picked the third. *Id.* Moreover, the party had failed to request disclosures from the arbitrator or object to the lack of disclosures. *Id.* Given these facts, we concluded that the party had waived its partiality objection. *Id.*

Our post-*Fidelity* waiver cases involved less complicated factual scenarios than the case before us. *See Johnson v. Gruma Corp.*, 614 F.3d 1062, 1069 (9th Cir. 2010) (finding waiver where the party knew for at least “a year or two” of the prior professional relationship between the arbitrator and opposing counsel’s spouse before the arbitrator ruled); *Metalmark Nw., LLC v. Stewart*, No. 06-35321, 2008 WL 11442024, at *1 (9th Cir. May 6, 2008) (finding no waiver because the arbitrator failed to disclose conflicts and neither party had selected the arbitrator). Unlike these prior cases, the situation here is more akin to a partial disclosure—the Arbitrator disclosed his “economic interest” in JAMS prior to arbitration, but Olympic Eagle did not know it was an ownership interest. Although the district court correctly noted that an ownership interest is “merely a type of economic interest,” the key issue is whether Olympic Eagle had constructive notice of the Arbitrator’s potential non-neutrality.

We find that Olympic Eagle lacked the requisite constructive notice for waiver. To be sure, it knew that the Arbitrator had some sort of “economic interest” in JAMS. But the Arbitrator expressly likened his interest in JAMS to that of “each JAMS neutral,” who has an interest in the “overall financial success of JAMS.” The Arbitrator also disclosed his previous arbitration activities that directly involved Monster, in which he ruled against the company. In context, these disclosures implied only that the Arbitrator, like any other JAMS arbitrator or employee, had a general interest in JAMS’s reputation and economic wellbeing, and that his sole financial interest was in the arbitrations that he himself conducted. Thus, even if the number of disputes that Monster sent to JAMS was publicly available, that information alone would not have revealed that this *specific* Arbitrator was potentially non-neutral based on the totality of JAMS’s Monster-related business.

The crucial fact—the Arbitrator’s ownership interest—was not unearthed through public sources, and it is not evident that Olympic Eagle could have discovered this information prior to arbitration. In fact, JAMS repeatedly stymied Olympic Eagle’s efforts to obtain details about JAMS’s ownership structure and the Arbitrator’s interest post-arbitration. Accordingly, Olympic Eagle did not have constructive notice of the Arbitrator’s ownership interest in JAMS—the key fact that triggered the specter of partiality.

Furthermore, we have repeatedly emphasized an arbitrator’s duty to investigate and disclose potential conflicts. *See, e.g., New Regency*, 501 F.3d at 1110–11 (holding that the arbitrator’s new employment triggered duty to investigate possible conflicts). The Arbitrator undoubtedly knew of his ownership interest in JAMS prior to arbitration yet failed to disclose it. To find waiver in this

circumstance would “‘put a premium on concealment’ in a context where the Supreme Court has long required full disclosure.” *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W. 3d 518, 528 (Tex. 2014) (quoting *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1204 (11th Cir. 1982)). Thus, we hold that Olympic Eagle did not have constructive notice of the Arbitrator’s potential non-neutrality, and therefore did not waive its evident partiality claim.

II. Evident Partiality

The Supreme Court has held that vacatur of an arbitration award is supported where the arbitrator fails to “disclose to the parties any dealings that might create an impression of possible bias.” *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 149 (1968). In a concurrence, Justice White noted that when an arbitrator has a “substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed,” *id.* at 151–52 (White, J., concurring)—a formulation of the rule that we have adopted. *See, e.g., New Regency*, 501 F.3d at 1107. By contrast, we have observed that “long past, attenuated, or insubstantial connections between a party and an arbitrator” do not support vacatur based on evident partiality. *Id.* at 1110; *see also Lagstein v. Certain Underwriters at Lloyd’s, London*, 607 F.3d 634, 646 (9th Cir. 2010) (finding no evident partiality where the arbitrator’s alleged ethical misconduct “occurred more than a decade before th[e] arbitration and concerned neither of the parties to the case”).

In *New Regency*, we considered an arbitrator’s failure to disclose his new employment as an executive at a film group that was negotiating with one of the party’s executives for the development of a movie. 501 F.3d at 1107, 1111. Prior

to the arbitration, the arbitrator disclosed only that he had “negotiated deals” with that same party’s leadership, but failed to update his disclosures once the new employment began. *Id.* at 1106. Because the film deal was “real and nontrivial,” we found a “reasonable impression of partiality [] sufficient to support vacatur.” *Id.* at 1110–11. Similarly, in *Schmitz v. Zilveti*, we vacated an arbitration award for evident partiality where the arbitrator’s law firm had represented the parent company of one party in “at least nineteen cases during a period of 35 years.” 20 F.3d 1043, 1044 (9th Cir. 1994). Thus, under our case law, to support vacatur of an arbitration award, the arbitrator’s undisclosed interest in an entity must be substantial, *and* that entity’s business dealings with a party to the arbitration must be nontrivial.

Here, the Arbitrator submitted a disclosure statement in accordance with JAMS’s rules. He disclosed that within the past five years he had served as a neutral arbitrator for one of the parties, firms, or lawyers in the present arbitration; that within the past two years he or JAMS had been contacted by a party or an attorney regarding prospective employment; and that he “practice[s] in association with JAMS. Each JAMS neutral, including me, has an economic interest in the overall financial success of JAMS.” The Arbitrator also disclosed that he arbitrated a separate dispute between Monster and a distributor, resulting in an award against Monster of almost \$400,000. He did *not*, however, disclose his ownership interest in JAMS and JAMS’s substantial business relationship with Monster.

Our inquiry is thus two-fold: we must determine (1) whether the Arbitrator’s ownership interest in JAMS was sufficiently substantial, *and* (2) whether JAMS and Monster were engaged in nontrivial business dealings. If the answer

to both questions is affirmative, then the relationship required disclosure, and supports vacatur.

First, as a co-owner of JAMS, the Arbitrator has a right to a portion of profits from *all* of its arbitrations, not just those that he personally conducts. This ownership interest—which greatly exceeds the general economic interest that all JAMS neutrals² naturally have in the organization—is therefore substantial. Second, Monster’s form contracts contain an arbitration provision that designates JAMS Orange County as its arbitrator. As a result, over the past five years, JAMS has administered 97 arbitrations for Monster: an average rate of more than one arbitration per month. Such a rate of business dealing is hardly trivial, regardless of the exact profit-share that the Arbitrator obtained.³ In sum, these facts demonstrate that the Arbitrator had a “substantial interest in [JAMS,] which has done more than trivial business with [Monster]”—facts that create an impression of bias, should have been disclosed, and therefore support vacatur. *Commonwealth Coatings*, 393 U.S. at 151–52 (White, J., concurring).

We acknowledge that previous cases did not address an arbitrator’s interest in his own arbitration service.

² Indeed, only about one-third of JAMS neutrals are owner-shareholders.

³ Although the record does not reveal the Arbitrator’s specific monetary interest in Monster-related arbitrations, we do not require such empirical evidence to conduct the triviality inquiry. *See New Regency*, 501 F.3d at 1111 (finding that a “high-profile” project was not unimportant, even though “the record [did] not allow us to place a dollar value” on it); *Schmitz*, 20 F.3d at 1044, 1048 (finding generally that an arbitrator’s *firm*’s representation on nineteen cases in 35 years resulted in impression of impartiality).

Nonetheless, the Court did not distinguish between an arbitrator's organization and other entities, nor do we see any reason to insulate arbitration services from the principles that the Court articulated *Commonwealth Coatings*.

Some states within our circuit have already legislated extensive requirements for neutral arbitrators to ensure full disclosure. In California, for example, arbitrators are required to disclose "all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be impartial," including the "existence of any ground specified in [Cal. Civ. Proc. Code § 170.1] for disqualification of a judge." Cal. Civ. Proc. Code § 1281.9(a). Similarly, Montana requires arbitrators to disclose "all matters that could cause a person aware of the facts underlying a potential conflict of interest to have a reasonable doubt that the person would be able to act as a neutral or impartial arbitrator," including any ground for the disqualification of a judge. Mont. Code Ann. §§ 27-5-116(3)–(4).

In addition, under the Revised Uniform Arbitration Act (the RUAA), which has been adopted by several states in our circuit, an arbitrator must disclose "any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator," including a financial interest in the outcome of the proceeding. *See, e.g.*, Or. Rev. Stat. Ann. § 36.650(1)(1). The RUAA also establishes a presumption of evident partiality when the arbitrator does not disclose a "known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party" *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-3012(E).

In the states that have enacted the referenced measures, arbitrators currently operate under disclosure rules akin to,

or more burdensome than, the easily satisfied obligations we set forth here. Fundamentally, these disclosure requirements safeguard the parties' right to be aware of the relevant information to assess the arbitrator's neutrality.

We note that although judges are bound by somewhat different rules than arbitrators, judges are clearly not immune from recusal requirements when our neutrality might be reasonably questioned. *See, e.g., Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009) (“The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’”); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (holding that the Due Process Clause requires recusal when a judge has a “direct, personal, substantial pecuniary interest” in a case). Unlike the standards governing judges, however, our ruling in this case does not require automatic disqualification or recusal—only disclosure prior to conducting an arbitration concerning (1) the arbitrator's ownership interest, if any, in the entity under whose auspices the arbitration is conducted, *and* (2) whether the entity under whose auspices the arbitration is conducted and one or more of the parties were previously engaged in nontrivial business dealings. Once armed with that information, and the answers to any other inquiries the parties may wish to pose as a result of knowing that information, the parties can make their own informed decisions about whether a particular arbitrator is likely to be neutral. It is simplicity itself, and no real burden, for an arbitrator to disclose his or her ownership interest in an arbitration company for which he or she works, as well as the organization's prior dealings with the parties to the arbitration.

Although this litigation involved two sophisticated companies, the proliferation of arbitration clauses in everyday life—including in employment-related disputes, consumer transactions, housing issues, and beyond—means that arbitration will often take place between unequal parties. See Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. Rev. 931, 934 (1999); see also *Aspic Eng'g & Constr. Co. v. ECC Centcom Constructors, LLC*, 913 F.3d 1162, 1169 (9th Cir. 2019) (noting, “We have become an arbitration nation.”). Clear disclosures by arbitrators aid parties in making informed decisions among potential neutrals. These disclosures are particularly important for one-off parties facing “repeat players.” See Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Emp. Rts. & Emp. Pol’y J. 189, 209–17 (1997) (finding that employees disproportionately failed to recover damages against repeat-player employers compared to non-repeat-player employers).

Ultimately, we agree with Justice White:

The arbitration process functions best when an amicable and trusting atmosphere is preserved and there is voluntary compliance with the decree, without need for judicial enforcement. This end is best served by establishing an atmosphere of frankness at the outset, through disclosure by the arbitrator of any financial transactions which he has had or is negotiating with either of the parties. . . . The judiciary should minimize its role in arbitration as judge of the arbitrator’s impartiality. That role is best consigned to the parties, who are the

architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business.

Commonwealth Coatings, 393 U.S. at 151 (White, J., concurring).

In accordance with the interest of finality, judicial review of arbitration awards is often unexact. However, the Supreme Court has nonetheless clearly endorsed the judicial enforcement of an arbitrators' duty to disclose. Placing the onus on arbitrators to disclose their ownership interests in their arbitration organizations, and their organizations' nontrivial business dealings with the parties to the arbitration, is consistent with both the principles of *Commonwealth Coatings* and our court's precedents.

Although our dissenting colleague raises concerns about the finality of recent arbitral judgments in light of our ruling in this case, she correctly notes that the applicable statute of limitations to vacate an arbitration award, *which is only three months*, will limit the impact of our ruling on recently decided arbitrations. 9 U.S.C. § 12; *Stevens v. Jiffy Lube Int'l, Inc.*, 911 F.3d 1249, 1251–52 (9th Cir. 2018). Prospectively, arbitration organizations like JAMS, which are already well-accustomed to extensive conflicts checks and disclosures, will have no difficulty fulfilling, and even exceeding, the requirements described here.

CONCLUSION

As the *Commonwealth Coatings* Court stated, “We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might

create an impression of possible bias.” 393 U.S. at 149. We thus hold that before an arbitrator is officially engaged to perform an arbitration, to ensure that the parties’ acceptance of the arbitrator is informed, arbitrators must disclose their ownership interests, if any, in the arbitration organizations with whom they are affiliated in connection with the proposed arbitration, and those organizations’ nontrivial business dealings with the parties to the arbitration.

Here, the Arbitrator’s failure to disclose his ownership interest in JAMS—given its nontrivial business relations with Monster—creates a reasonable impression of bias and supports vacatur of the arbitration award. Because we vacate the arbitration award, we also vacate the district court’s award of post-arbitration fees to Monster.⁴

REVERSED and VACATED.

⁴ We further deny Olympic Eagle’s request to take judicial notice and grant Monster’s request to take judicial notice. We deny the amicus motions filed by the Legal Academics and Eric Kripke. We find moot the amicus motion filed by Warner Bros. We grant the amicus motion filed by the National Beer Wholesalers Association, finding it relevant and useful. *See* Fed. R. App. P. 29(a)(3)(B).

FRIEDLAND, Circuit Judge, dissenting:

The majority vacates the arbitration award for “evident partiality” because the Arbitrator failed to disclose that he had an ownership interest in JAMS. In the majority’s view, this undisclosed fact was necessary for the parties’ informed selection of this Arbitrator because it creates an impression that differs meaningfully from that created by the facts the Arbitrator did disclose: (1) that he had a financial interest in JAMS’s success generally, and (2) that Monster was a repeat customer of JAMS. I disagree that, in an evaluation of whether the Arbitrator might favor Monster, the additional information the majority believes should have been disclosed would have made any material difference. I would therefore reject Olympic Eagle’s effort to vacate the arbitration award in Monster’s favor.

I.

The Framers of our Constitution built protections against judicial partiality into Article III. Federal judges have life tenure and may not have their salaries diminished while in office. U.S. Const. art. III, § 1. As federal employees, federal judges receive their salaries from the government, not from the parties who appear before them. These structural protections are designed to help ensure that federal judges will decide cases based on the law and the facts, not out of concern about remaining popular enough to be selected to decide the next case or to receive the next paycheck. *See* The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that Article III’s provision of life tenure is meant “to secure a steady, upright, and impartial administration of the laws”).

When parties like those here, who could have their disputes resolved in federal court, instead have entered into

a contract that requires resolving any disputes in private arbitration (whether the arbitration term was desired by both parties or not), they have given up those Article III protections. *See Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983) (explaining that parties to a commercial arbitration have “cho[sen] their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen”). By nature of the fact that arbitrators are hired and paid by the parties for whom they conduct private arbitrations, arbitrators have an economic stake in cultivating repeat customers for their services. In addition, arbitrators affiliated with an arbitration firm have an interest in not causing the firm to lose its top clients. At least to some extent, this means arbitrators have incentives to make decisions that are viewed favorably by parties who frequently engage in arbitrations.¹ This feature of private arbitration, even if distressing, is an inevitable result of the structure of the industry.

In this case, the Arbitrator disclosed that he had a financial interest in JAMS’s success. He further disclosed that he had personally conducted one arbitration in which Monster was a party and had been selected to decide another case involving Monster and a different distributor. And he made clear that “the parties should assume that one or more of the other neutrals who practice with JAMS has participated in [a] . . . dispute resolution proceeding with the parties . . . in this case and may do so in the future.” Olympic Eagle also knew that Monster used a form contract with its hundreds of distributors requiring that disputes be resolved

¹ Individual arbitrators may be able to put these incentives out of their minds and make impartial decisions, but the incentives exist nonetheless.

through arbitration before JAMS—and therefore had even more reason to know that Monster had likely hired other JAMS arbitrators or at least had the potential to do so in the future.² Indeed, the parties had litigated about the form contract, and the district court had held that Olympic Eagle had validly agreed to its terms, a ruling Olympic Eagle has not appealed. And before the arbitration began, Olympic Eagle could easily have accessed an online record showing that JAMS had conducted dozens of arbitrations between Monster and its consumers.³ *See Consumer Case Information*, JAMS, <https://www.jamsadr.com/consumer-cases/> (last visited Oct. 11, 2019); *see also* Cal. Code Civ. Proc. § 1281.96 (requiring arbitration companies to disclose information about their consumer arbitrations).

This was more than enough information to allow Olympic Eagle to consider whether the Arbitrator might

² It is unclear the extent to which a JAMS arbitrator would have had a similarly strong incentive to please Olympic Eagle, itself a large beverage distribution company. There appears to be nothing in the record that indicates whether Olympic Eagle was a repeat customer of JAMS or how frequently it engages in arbitrations. But it is possible that a JAMS arbitrator would have had an incentive to please the lawyers representing Olympic Eagle, given that lawyers often help their clients choose arbitrators. According to a court filing submitted by Monster, an international law firm that helped represent Olympic Eagle in this dispute with Monster had represented parties in at least twenty-three other cases involving arbitration with JAMS.

³ As of August 27, 2015—when JAMS sent Monster and Olympic Eagle a list of potential arbitrators—JAMS had disclosed on its website at least eighty-one arbitrations involving Monster. *Consumer Case Information*, JAMS, <https://web.archive.org/web/20150506072558/http://www.jamsadr.com/files/Uploads/Documents/JAMS-Consumer-Case-Information.xlsx> (May 6, 2015) (accessed by searching for “<http://www.jamsadr.com/files/Uploads/Documents/JAMS-Consumer-Case-Information.xlsx>” in the Internet Archive Wayback Machine).

have had an incentive to try to please Monster and thereby keep its repeat arbitration business. The majority reasons, however, that the Arbitrator's interest as a JAMS owner should have been specifically disclosed because it "greatly exceeds the general economic interest that all JAMS neutrals naturally have in the organization." Maj. Op. at 12. I do not see how this information would have made a material difference in Olympic Eagle's evaluation of the Arbitrator. Owners of JAMS have an interest in maximizing JAMS's amount of business, because they share in JAMS's profits. Likewise, non-owner arbitrators have an interest in advancing their professional careers and maintaining their status with JAMS, which creates similar incentives to decide cases in a way that is acceptable to repeat player customers—otherwise, JAMS might terminate the non-owner's JAMS affiliation.

Notably, by the time the Arbitrator was being selected, Olympic Eagle had committed to resolving any dispute with Monster through arbitration at JAMS. This necessarily meant that Olympic Eagle agreed the arbitration would be conducted by a JAMS arbitrator, whether that arbitrator was an owner of JAMS or a non-owner of JAMS. Because both types of arbitrators would have at least some incentive to keep repeat customers of JAMS such as Monster happy, it is unclear why knowing the details of the financial relationship between any specific potential arbitrator and JAMS would make a material difference to whether that arbitrator was accepted by Olympic Eagle.⁴ That an arbitrator has an

⁴ The majority also highlights that the Arbitrator failed to disclose more concrete information about Monster's past use of JAMS. Maj. Op. at 11. To the extent the majority believes this nondisclosure further supports vacating the arbitration award, *compare* Maj. Op. at 11 (noting the Arbitrator did not disclose "JAMS's substantial business relationship

ownership interest in the arbitration firm, not just a financial interest in that firm more generally, is hardly the sort of “real” and “not trivial” undisclosed conflict that our court has held requires vacatur. *See New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1110 (9th Cir. 2007) (quotation marks omitted).

The majority also leaves unclear how detailed an arbitrator’s disclosures must be. Is it enough to reveal the fact that the arbitrator is an owner, or must the arbitrator disclose information such as how large the ownership interest is? Is it necessary to disclose the arbitration firm’s total profits from the prior year—or maybe each year in the prior decade—so parties may assess, for example, whether the business of the party in question is significant overall? And how many prior arbitrations must a corporation have engaged in with an arbitration firm for there to be “nontrivial business dealings,” *Maj. Op.* at 14, that require disclosure?⁵

with Monster”), *with Maj. Op.* at 17 (emphasizing “the Arbitrator’s failure to disclose his ownership interest in JAMS,” and the existence of JAMS’s “nontrivial business relations with Monster,” but not mentioning the Arbitrator’s nondisclosure of those “business relations”), I disagree. Given that owners and non-owners have similar incentives to favor repeat players, the extent of a repeat player’s relationship with the firm as a whole—which would not vary from arbitrator to arbitrator—would be of little help in deciding whether to choose any particular arbitrator. And even if the Arbitrator did not disclose precise details, he *did* disclose that Monster was a repeat customer.

⁵ The majority indicates that generally, if an arbitrator has an ownership interest in his firm, and his firm has significant prior dealings with a party, both pieces of information must be disclosed. It is unclear, however, whether the majority’s approach requires an arbitrator to disclose significant prior dealings even if he has no ownership interest, and vice-versa. *Compare Maj. Op.* at 17 (stating that “arbitrators must disclose their ownership interests, *if any*” and their firm’s “nontrivial

Does the fee paid for each of these prior arbitrations need to exceed any threshold to trigger disclosure? And, because lawyers often choose or help choose arbitrators, giving arbitrators an incentive to please lawyers who bring clients to arbitrations, must prior arbitrations with the lawyers or law firms representing the parties also be disclosed?

As these lingering questions demonstrate, ruling for Olympic Eagle is likely to generate endless litigation over arbitrations that were intended to finally resolve disputes outside the court system. Nothing in existing caselaw forces this error. Olympic Eagle has not pointed us to a single reported federal decision holding that an undisclosed potential source of bias stemming from the structure of the private arbitration industry itself warrants vacating an arbitration award. The majority acknowledges as much by conceding that there are no prior cases directly on point. Rather, the precedent binding us that vacated arbitration awards because of a failure to disclose information involved an arbitrator who had a relationship with one of the arbitrating parties that was totally unrelated to prior arbitrations. See *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 146, 149–50 (1968) (arbitrator failed to disclose that he had occasionally served as an engineering consultant for one of the parties over several years); *New Regency Prods.*, 501 F.3d at 1107–11 (arbitrator failed to disclose his employment with a company negotiating a film deal with one of the parties to the arbitration); *Schmitz v. Zilveti*, 20 F.3d 1043, 1044, 1048–50 (9th Cir. 1994) (arbitrator failed to disclose that his law firm represented in at least nineteen matters a parent company of one of the

business dealings with the parties to the arbitration” (emphasis added)), with Maj. Op. at 11–12 (suggesting that disclosure is only required if there is both an ownership interest and substantial business dealings).

parties to the arbitration). There is no reason the parties would know about the potential partiality arising from such a relationship unless the arbitrator disclosed the relationship. By contrast, the potential partiality that stems from the very structure of private arbitration is obvious to anyone who understands arbitrators' general economic interest in repeat business for themselves or their firm.

In the short run, adopting Olympic Eagle's position will require vacating awards in numerous cases decided by JAMS owners (who make up about a third of JAMS arbitrators) who did not disclose their ownership interest.⁶ If there are other firms where arbitrators similarly hold ownership interests, the majority's approach will likewise require vacatur in those arbitrators' cases with repeat players unless there was a disclosure of the ownership interest.

In the long run, adopting Olympic Eagle's position could spur years of quibbling over the extent of disclosures required by arbitrators. And this slippery slope may have no bottom. If the losing party to an arbitration is less of a repeat player than its opponent, it will likely be able to think up after the fact some argument that an arbitrator's disclosure did not fully convey the arbitrator's financial interest in the potential future arbitration business of the winning party or its lawyers. The result will be to prolong disputes that both parties have already spent tremendous amounts of time and money to resolve. Olympic Eagle, for example, only

⁶ Of course, the statute of limitations for filing a motion to vacate an arbitration award may place a limit on how much litigation there will be. See 9 U.S.C. § 12; *Stevens v. Jiffy Lube Int'l, Inc.*, 911 F.3d 1249, 1251–52 (9th Cir. 2018) (discussing statute of limitations for petitions to vacate arbitration awards).

objected to the Arbitrator's lack of disclosure after it lost the arbitration. By that point, more than a year had passed since the district court compelled arbitration, and the agreed-upon Arbitrator had conducted a hearing lasting nine days. The arbitration fee alone was \$160,000, and Monster was awarded \$3 million in attorney's fees and costs.⁷ To avoid the uncertainty created by the majority's opinion, which would inevitably exist even after further disclosures are attempted, parties may shift to using arbitrators who are unaffiliated with any arbitration firm. These arbitrators may be less likely to have expertise—but be at least equally likely to want to retain the business of potential repeat customers. *Cf. ANR Coal Co., Inc. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 498–99 (4th Cir. 1999) (“[S]ubjecting arbitrators to extremely rigorous disclosure obligations would diminish one of the key benefits of arbitration: an arbitrator's familiarity with the parties' business.” (citing *Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring))).

Although I would affirm the Arbitrator's award in favor of Monster, I note that lack of disclosure about a party's prior arbitrations might require vacatur in some instances. For

⁷ Ruling for Olympic Eagle could also lay the groundwork for further disputes over whether arbitrators with ownership interests have a conflict that disqualifies them under state law from arbitrating cases involving a repeat player. *See* Cal. Code Civ. Proc. § 1281.91(d) (allowing for disqualification under certain circumstances, including those described in Cal. Code Civ. Proc. § 170.1(a)(6)(A)(iii)—when “[a] person aware of the facts might reasonably entertain a doubt that the [decision-maker] would be able to be impartial”); *see also* Alaska Stat. § 09.43.380(b) (“An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding . . . may not serve as an arbitrator required by an agreement to be neutral.”); Ariz. Rev. Stat. Ann. § 12-3011(B) (same); Haw. Rev. Stat. § 658A-11(b) (same); Nev. Rev. Stat. § 38.226(2) (same).

example, if one of the parties had used the exact same arbitrator to resolve numerous disputes, and the arbitrator always ruled in its favor, vacatur might be appropriate based on the arbitrator's failure to disclose that arbitration history. But the facts of this case are nowhere near so extreme. The Arbitrator had previously decided one dispute between Monster and a distributor, and that proceeding resulted in an award of almost \$400,000 *against* Monster. The Arbitrator had also been selected to decide a dispute between Monster and another distributor, which was still pending at the time of the arbitration involving Monster and Olympic Eagle. The disclosure the Arbitrator made to the parties provided accurate information about both arbitrations.

II.

To the extent that the private arbitration system favors repeat players, I think it is unfortunate that so many parties forgo the protections of Article III and turn to arbitration instead. It is especially unfortunate when arbitrations involve a non-repeat player party that had no choice but to agree to arbitration in order to acquire employment, purchase a product, or obtain a necessary service. The majority laudably seeks to mitigate disparities between repeat players and one-shot players in the arbitration system. But I disagree that requiring disclosures about the elephant that everyone knows is in the room will address those disparities. It will only cause many arbitrations to be re-done, and endless litigation over how many repeated arbitrations there will be.

I therefore respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 30 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MONSTER ENERGY COMPANY, FKA
Hansen Beverage Company,

Petitioner-Appellee,

v.

CITY BEVERAGES, LLC, DBA Olympic
Eagle Distributing,

Respondent-Appellant.

Nos. 17-55813, 17-56082

D.C. No.

5:17-cv-00295-RGK-KK

Central District of California,
Riverside

ORDER

Before: M. SMITH and FRIEDLAND, Circuit Judges, and SIMON,* District Judge.

Judges M. Smith and Simon voted to deny the petition for panel rehearing, and Judge Friedland voted to grant it. Dkt. 105. Judge M. Smith voted to deny the petition for rehearing en banc and Judge Simon so recommends. Dkt. 105. Judge Friedland voted to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35. The petitions for panel rehearing and rehearing en banc are DENIED.

* The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	5:17-cv-00295-RGK-KK	Date	May 09, 2017
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Title	Monster Energy Company v. City Beverages d/b/a Olympic Eagle Distributing
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Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE
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Sharon L. Williams	Not Reported	N/A
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Deputy Clerk	Court Reporter / Recorder	Tape No.
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Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
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Not Present

Not Present

Proceedings: (IN CHAMBERS) Order Re: Petition to Confirm Arbitration Award (DEs 9, 11) & Cross-Petition to Vacate Arbitration Award (DE 23)

I. INTRODUCTION

On April 27, 2015, Monster Energy Company (“Monster”) filed a Complaint in a separate action before this Court¹ for Declaratory Relief against City Beverages, LLC d/b/a Olympic Eagle Distributing (“Olympic”) regarding a contractual dispute. Monster sought a judicial determination that the arbitration provision in their contract was valid and enforceable. On September 29, 2015, the Court agreed with Monster and granted Monster’s Motion to Compel Arbitration.

Monster prevailed following a lengthy arbitration of the underlying contract dispute, and the Arbitrator awarded Monster roughly \$ 3,000,000 in attorney’s fees and costs (“Arbitration Award”).

On March 3, 2017, Monster filed the petition in the present action asking the Court to: (1) confirm the Arbitration Award, (2) enter judgment against Olympic, and (3) grant post-arbitration attorney’s fees. On March 17, 2017, Respondent filed a Cross-Petition to vacate the Arbitration Award.

For the following reasons, the Court **GRANTS in part** Monster’s Petition and **DENIES** Olympic’s Cross-Petition.

II. FACTUAL BACKGROUND

Olympic is a beverage distribution company located in the state of Washington, and is the exclusive distributor of Anheuser-Busch (“AB”) beer within its territory. Monster is an energy drink company that reached an agreement with AB in 2006 regarding the distribution of Monster’s products. Under the terms of the Monster-AB agreement, all of AB’s existing distributors could elect to also distribute Monster products. Pursuant to this setup, Olympic became a Monster distributor, and began distributing Monster branded beverages in Washington under the terms of two separate Monster-Olympic distribution agreements (one for on-premises distribution, and one for off-premises distribution).

¹ *Monster Energy Co., v. Olympic Eagle Distrib.*, No. 15-cv-00819-RGK-KK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	5:17-cv-00295-RGK-KK	Date	May 09, 2017
Title	<i>Monster Energy Company v. City Beverages d/b/a Olympic Eagle Distributing</i>		

These agreements provided that the Monster-Olympic distribution relationship would last for 20 years, but Monster had the right to terminate the agreements without cause if Monster: (1) repurchased Olympic's unsold Monster inventory, advertising material, and equipment; and (2) paid Olympic an amount equal to Olympic's twelve-month trailing gross profit earned from its sale of Monster products.

In 2014, Monster decided to seek a broader master distribution agreement with Coca-Cola that would require Monster to terminate its existing distribution agreements, including the ones with Olympic. As such, Monster sent Olympic written notice terminating their agreements, repurchased the excess inventory, advertising material, and equipment, and sent Olympic a check for \$2,523,923.68, representing Olympic's twelve-month trailing gross profits from Monster sales.

On March 3, 2015, Olympic notified Monster that it was challenging the termination based on Washington franchise law, which Olympic contended prohibits Monster from terminating their agreement without cause.

At this point, Monster sought declaratory relief before this Court, asking the Court to enforce the identical arbitration provisions in the Monster-Olympic distribution agreements. The Court found that the parties' dispute over Monster's right to terminate the agreement fell within the terms of their arbitration agreement, and ordered the parties to arbitration.² Per the Monster-Olympic arbitration agreement, the arbitration was conducted using JAMS, a large alternative dispute resolution services firm.

On November 14, 2016, following extensive briefing and a two-week arbitration proceeding, the JAMS arbitrator found that Olympic was not a "franchisee," and Monster was not a "franchisor," for purposes of the Washington Franchise Investment Protection Act ("FIPA"), Wash. Rev. Code § 19.100 et seq. (Arbitrator's Award, p.7, ECF No. 9-5.) The arbitrator determined that because FIPA did not apply, the early termination provisions in the Monster-Olympic distribution agreements were valid and enforceable. (*Id.*)

The arbitrator also found that the arbitration provisions in the distribution agreements allowed the arbitrator to award reasonable attorneys' fees and costs to the prevailing party. (*Id.* at 11.) On January 24, 2017, after reviewing the declarations and briefs submitted by the parties on the issue, the arbitrator awarded Monster \$3,000,000 in attorney's fees and costs.

The Parties now dispute whether the Arbitration Award should be vacated or confirmed, and whether the prevailing party on this question is entitled to recover its attorney's fees and costs incurred in this post-arbitration proceeding.

III. JUDICIAL STANDARD

Under the Federal Arbitration Act ("FAA"), a federal court has only very limited authority to review arbitration decisions "because broad judicial review would diminish the benefits of arbitration."

² *Monster Energy Co.*, No. 15-cv-00819-RGK-KKx, 2015 WL 12781213, at *6-7 (C.D. Cal. Sept. 29, 2015).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	5:17-cv-00295-RGK-KK	Date	May 09, 2017
Title	<i>Monster Energy Company v. City Beverages d/b/a Olympic Eagle Distributing</i>		

Lifescan, Inc. v. Premier Diabetic Servs., 363 F.3d 1010, 1012 (9th Cir. 2004). A district court may vacate an arbitration award “only in very unusual circumstances.” *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). Under § 10 of the FAA, an arbitration award may only be vacated if: (1) “the award was procured by corruption, fraud, or undue means”; (2) “there was evident partiality” on behalf of the arbitrators; (3) “the arbitrators were guilty of misconduct”; or (4) “the arbitrators exceeded their powers.” 9 U.S.C. § 10(a); *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 584 (2008). An arbitrator is deemed to have exceeded his powers if he acts in “manifest disregard of the law.” *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2016). In the Ninth Circuit, an arbitrator has manifestly disregarded the law when it is clear that he recognized, but ignored, some “well defined, explicit, and clearly applicable” law. *Wawock v. CSI Elec. Contractors, Inc.*, 649 F. App’x. 556, 557 (9th Cir. 2016).

IV. DISCUSSION

Monster petitions the Court to confirm the Arbitration Award, enter judgment against Olympic, and grant attorney’s fees and costs for this post-arbitration litigation. Olympic argues that the Court should instead *vacate* the Arbitration Award because of the arbitrator’s evident partiality and manifest disregard for the law. Olympic also contends that, in any case, Monster is not entitled to post-arbitration fees and costs.

The Court will first determine whether the Arbitration Award will be confirmed or vacated by analyzing whether, as Olympic claims, (a) the arbitral proceedings were marred by evident partiality, or (b) the arbitrator acted in manifest disregard of the law. The Court will then address whether the prevailing party is entitled to recover attorney’s fees and costs incurred in this post-arbitration action.

A. Vacatur of the Arbitration Award for Evident Partiality

The parties selected the Honorable John W. Kennedy, Jr. (“Arbitrator”) as the JAMS neutral who would preside over their arbitration proceedings. On October 6, 2015, the Arbitrator submitted a list of disclosures to both parties. In the “Declarations of Arbitrator” section, the Arbitrator stated:

I practice in association with JAMS. Each JAMS neutral, including me, has an economic interest in the overall financial success of JAMS. In addition, because of the nature and size of JAMS, the parties should assume that one or more of the other who practice with JAMS has participated in an arbitration, mediation or other dispute resolution proceeding with the parties, counsel or insurers in this case and may do so in the future.

(Vaska Decl. Ex. G, at 6, ECF No. 26-10.)

Olympic contends, however, that the Arbitrator has *much more* than a mere “economic interest” in the financial success of JAMS, as he is actually a part owner of JAMS. Olympic argues that the

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Arbitrator's failure to disclose his ownership interest in JAMS, in light of Monster's status as a "repeat player" in JAMS arbitration proceedings, creates an impression of evident partiality.

To show that an arbitrator demonstrated evident partiality, the party seeking to vacate an arbitration award need not show that the arbitrator "was actually guilty of fraud or bias in deciding the case." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 147 (1968)). Instead, the party need only establish that the arbitrator failed to disclose any dealings to the parties "that might create an impression of possible bias." *New Regency Prods. v. Nippon Herald Films*, 501 F.3d 1101, 1105 (9th Cir. 2007) (quotations and citations omitted).

As a threshold matter, the Court determines that Olympic has waived its evident partiality claim because Olympic failed to timely object when it first learned of the potential "repeat player" bias due to the Arbitrator's economic interest in JAMS. *See Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1313 (9th Cir. 2004) ("Holding that the waiver doctrine applies where a party to an arbitration has constructive knowledge of a potential conflict but fails to timely object is the better approach in light of our policy favoring the finality of arbitration awards."). As a sophisticated commercial entity, Olympic certainly should have been aware of the potential for a "repeat player" bias after the Arbitrator disclosed his "economic interest" in JAMS at the outset of the arbitration. The proper time for Olympic to further investigate or object to the Arbitrator's potential conflict of interest, therefore, was *before* the arbitration award was issued.

Even assuming that Olympic had *not* waived its argument, however, the Court sees nothing that would strongly suggest evident partiality on the part of the Arbitrator. The Arbitrator disclosed from the beginning that he had an economic interest in JAMS, and Olympic nonetheless consented to his serving as the arbitrator without any further investigation. An ownership interest in JAMS is merely a type of economic interest. In this case, the Court sees no reason to require that the Arbitrator have disclosed his particular economic interest at a granular level unless the parties inquired further after he made his initial economic interest disclosure. Moreover, Olympic offers no *particularized* evidence of the Arbitrator's partiality or bias resulting from his economic interest in JAMS. *See Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1285 (9th Cir. 2006) ("[M]erely raising the 'repeat player effect' claim, without presenting more particularized evidence demonstrating impartiality, is insufficient under California law to support an unconscionability finding."). Therefore, the Court **DENIES** Olympic's Motion to Vacate the Arbitration Award on this ground.

B. Vacatur of the Arbitration Award for Manifestly Disregarding the Law

Olympic next contends that the Arbitrator demonstrated a manifest disregard for the law in two instances. First, Olympic argues that the Arbitrator applied the wrong test to determine whether FIPA applies to the parties' dispute. Second, Olympic argues that the Arbitrator ignored the one-way fee provision of Washington's Consumer Protection Act in awarding Monster attorney's fees and costs.

As discussed above, "[a]lthough the words 'manifest disregard for law' do not appear in the FAA, they have come to serve as a judicial gloss on the standard for vacatur set forth in FAA §

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10(a)(4).” *Johnson v. Wells Fargo Home Mortg., Inc.*, 635 F.3d 401, 414 (9th Cir. 2011). To rise to the level of manifest disregard for the law, the record must clearly show that the arbitrator recognized the applicable law and then ignored it. *Comedy Club*, 553 F.3d at 1290. Moreover, the law that the arbitrator allegedly ignored “must be well defined, explicit, and clearly applicable.” *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007) (emphasis omitted). “[A]rbitrators ‘exceed their powers’ . . . not when they merely interpret or apply the governing law incorrectly, but when the award is ‘completely irrational.’” *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003) (en banc) (citations omitted).

1. Substantial Association

In the first alleged instance of manifest disregard of the law, the Arbitrator found that Olympic was not entitled to protection under FIPA because one the requirements for FIPA to apply—that the distributor of a company’s products be “substantially associated” with the company’s trade name or trademarks—was not satisfied.

Olympic argues that the Arbitrator improperly applied a percentage test to determine whether a distributor is substantially associated with a company, basing the determination on the percentage of the distributor’s business that comes from selling that company’s products. Olympic argues that the percentage test—adopted by courts in Connecticut—is improper under Washington law, and that the Arbitrator should have instead looked to how courts in *California* have dealt with the idea of “substantial association.”

Washington law does not define “substantial association,” and very few cases have analyzed this element under FIPA. Olympic argues that “the only Washington court to directly address the interpretation of ‘substantial association’ under [FIPA],” *Atchley v. Pepperidge Farm, Inc.*, declared that courts should look to California law on the issue. 2012 U.S. Dist. LEXIS 173974 (E.D. Wash. December 6, 2012). (Olympic’s Pet. To Vacate 17, ECF No. 22-1.) But the “Washington court” in *Atchley* was actually a *federal district court* speculating about how Washington state courts might deal with the issue, and thus *Atchley*’s interpretation of FIPA does not have any binding precedential effect. Moreover, in reaching its decision, the *Atchley* court does not explicitly state that courts must only look to California law when interpreting FIPA. Indeed, *Atchley* references both Connecticut and Indiana franchise laws when interpreting other FIPA provisions.

Finally, even if *Atchley* stands for the proposition that courts should look to California law to interpret the “substantial association” prong of FIPA, the Arbitrator never stated that his finding of a lack of substantial association was *entirely* premised on Connecticut law. Rather, he noted that Connecticut’s percentage test was one of nine non-exhaustive factors that “primarily lead [the Arbitrator] to this finding.” (Arbitrator’s Interim Award, p. 7, ECF No. 9-5.)

After reviewing the Arbitrator’s decision, the arguments of both parties, as well as the relevant case law, the Court is not convinced that there is a “well defined, explicit, and clearly applicable” rule

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regarding the interpretation of FIPA’s “substantial association” prong in Washington. As such, the Arbitrator’s interpretation cannot rise to the level of manifest disregard for the law.

Therefore, the Court **DENIES** Olympic’s Motion to Vacate the Arbitration Award on this ground.

2. Attorney’s Fees Provision

In the second alleged instance of manifest disregard of the law, the Arbitrator found that the one-way fee provision under Washington’s Consumer Protection Act (“CPA”), Wash. Rev. Code § 19.86.09, did not apply, and awarded Monster attorney’s fees and costs under the terms of the Monster-Olympic distribution agreement, which explicitly allowed for such an award.

The attorney’s fees provision of the CPA is “one-way,” in that only a *claimant* seeking protection under FIPA may recover attorney’s fees. Wash. Rev. Code § 19.86.09. If the CPA applied, Monster would have been precluded from getting attorney’s fees at arbitration. The arbitration provision of the Monster-Olympic distribution agreements, by contrast, contains a “two-way” attorney’s fees provision, which states that “[i]n addition to all other relief, the arbitrator shall have the power to award reasonable attorney’s fees and costs to the prevailing party.” (Gardenswartz Decl., ¶ 9, Ex. 5 § 26, ECF No. 32-6.)

Olympic argues that because the CPA is the exclusive means of enforcing FIPA, and its claims at arbitration arose out of FIPA, the CPA’s one-way attorney’s fees provision should have applied. The Arbitrator determined, however, that since Olympic failed to show that it was a “franchisee” under FIPA, it *had* no FIPA or CPA claims, and thus the CPA’s one-way fee provision was inapplicable. The Arbitrator then looked to the terms of the parties’ own arbitration agreement for guidance on whether Monster was entitled to attorney’s fees.

The Arbitrator’s decision that the Monster-Olympic arbitration agreement’s fee provision applied instead of the CPA’s fee provision was not “completely irrational.” *See Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal. 4th 362, 367 (1994) (“[I]n the absence of more specific restrictions in the arbitration agreement . . . the remedy an arbitrator fashions does not exceed his or her powers if it bears a rational relationship to the underlying contract as interpreted, expressly or impliedly, by the arbitrator.”). Nor was it in direct contravention of well-defined, explicit, and clearly applicable law. Therefore, the Court finds that the Arbitrator did not manifestly disregard the law, and **DENIES** Olympic’s Motion to Vacate the Arbitration Award on this ground.

C. Post-Arbitration Attorney’s Fees

“[T]here is nothing in the Federal Arbitration Act which provides attorneys’ fees to a party who is successful in seeking confirmation of an arbitration award in the federal courts.” *Menke v. Monchecourt*, 17 F.3d 1007, 1009 (7th Cir.1994). However, federal courts may nonetheless award attorneys’ fees if there is a contractual provision that provides for the award. *See, e.g., SCIE LLC v. XL Reinsurance Am., Inc.*, 397 F. App’x 348, 351 (9th Cir. 2010). Here, the arbitration provision in the Monster-Olympic

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distribution agreement provides that the arbitrator can award reasonable attorney's fees, but is silent as to whether a court tasked with *enforcing* an arbitration award can award *post-arbitration* fees.

Under California law, courts have held that a contract provision giving an arbitrator authority to grant attorney's fees to the prevailing party *also* allows for provision of attorney's fees in post-arbitration proceedings, such as this one. *Ajida Techs., Inc. v. Roos Instruments, Inc.*, 87 Cal. App. 4th 534, 552 (2001) (holding that an arbitration attorney's fees clause "is broad enough to cover fees on this appeal."). As the Court has jurisdiction over the present action through diversity, the Court must apply California law to this question. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938); *SCIE LLC v. XL Reinsurance Am., Inc.*, 397 F. App'x at 351 (9th Cir. 2010) ("The district court did not err in awarding plaintiffs the attorney's fees and expenses incurred in . . . confirming the arbitration award.") (citing *Ajida*, 87 Cal. App. 4th at 552).

Therefore, the Court holds that, at the Court's discretion, Monster *may* be entitled to attorney's fees incurred to confirm the arbitration award in these proceedings. The Court will not, however, grant Monster's request for \$130,000 in attorney's fees without proper briefing and supporting documentation. If Monster wishes to seek attorney's fees relating to its confirmation of the arbitration award in this action, Monster must file a properly noticed motion for attorney's fees and costs.

V. CONCLUSION

For the foregoing reasons, the Court hereby **GRANTS** Monster's First Amended Petition to Confirm the Final Arbitration Award (DEs 9, 11). If Monster wishes for the Court to enter a separate judgement in addition to this Order, it should submit a proposed judgment consistent with this Order within 7 days of the date of this Order.

The Court consequently **DENIES** Olympic's Cross-Petition to Vacate the Arbitration Award (DE 23).

The Court **DENIES without prejudice** Monster's request for post-arbitration attorney's fees, and orders that any further motions regarding attorney's fees must be filed within 7 days of the date of this Order.

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The Court **DENIES** the following ex parte applications and motions as **MOOT**:

- (1) Olympic’s Ex Parte Application to Continue Hearing on Cross-Motions to Confirm and Vacate Arbitration Award (DE 36)
- (2) Olympic’s Motion to Compel Production of Documents (DE 38)
- (3) Olympic’s Motion to Strike (DE 44)

IT IS SO ORDERED.

Initials of Preparer

