No. ____

IN THE

Supreme Court of the United States

CATIC USA INCORPORATED, also known as
AVIC INTERNATIONAL USA, INCORPORATED,

Petitioner,

v.

SOARING WIND ENERGY, L.L.C., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly referred to as the "New York Convention," is an international treaty that creates consistent standards for the treatment of arbitration agreements and the enforcement of arbitral awards in signatory countries. This Court has explained that the adoption and implementation of the New York Convention in the United States was principally done for the purpose of "encourag[ing] the recognition and enforcement of commercial arbitration agreements in international contracts" and to create a global framework for dealing with arbitration and arbitral awards.[1]

Does a federal court, therefore, have jurisdiction under the New York Convention to confirm an arbitral award where the underlying agreement of a United States limited liability company is exclusively between United States citizens and the enterprise was focused singularly on United States activities?

2. Where the determination of whether a party is subject to an arbitration is normally for courts—and not arbitration panels— is it appropriate for courts to confirm an arbitration award where the arbitration panel based its entire award on adverse inferences drawn from the lack of participation of parties that were not signatories to the arbitration agreement and were not ever found to be properly subject to the arbitration proceedings by any court?

3. The necessity of an impartial decision maker and equity in the selection of an arbitration panel are

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[1] *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (emphasis added).

principles globally recognized as essential to having fundamental fairness in arbitration proceedings.

Therefore, should a court confirm an arbitration award where an arbitration panel is selected with one side of the dispute electing a supermajority of the panel through an absurd interpretation of the parties' agreement?

LIST OF PARTIES

Petitioner AVIC International USA, Inc. was a Defendant-Appellant in the matters below.

Respondents AVIC International Holding Corporation, AVIC International Renewable Energy Corporation, Aviation Industry Corporation of China, and China Aviation Industry General Aircraft Company Limited were also Defendant-Appellants in the matters below.

Respondents Soaring Wind Energy, L.L.C., Tang Energy Group, Limited, The Nolan Group Incorporated, Mitchell W. Carter, Jan Family Interests, Limited, and Mary M. Young, Individually and as the Independent Executrix of the Estate of Keith P. Young, Jr., Deceased, were all Plaintiffs-Appellees in the matters below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioner AVIC International USA, Inc. states that AVIC International Holding Company is its parent company, and no publicly held company owns 10% or more of AVIC International USA, Inc.'s stock.

RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

Soaring Wind Energy, LLC v. CATIC USA, Inc., No. 3:15-CV-4033-K (Aug. 9, 2018).

United States Court of Appeals (5th Cir.):

Soaring Wind Energy, L.L.C. v. Catic USA Inc., No. 18-11192 (Jan. 7, 2020).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
CORPORATE DISCLOSURE STATEMENT	iii
RELATED PROCEEDINGS	iv
TABLE OF AUTHORITIES	ix
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
INTRODUCTION	3
STATEMENT	4
1. Factual History	4
2. The Deterioration of the Parties' Relationship	6
3. The Arbitration	8
a) The Arbitration Award	10
4. Award Confirmation Proceedings	11
a) Proceedings Before the District Court	11
b) Proceedings Before the Fifth Circuit	11
REASONS FOR GRANTING THE WRIT	13
I. The Fifth Circuit Erred in Concluding Jurisdiction Exists Under the New York Convention Based Upon A Peripheral Reference to Foreign Affiliates in the Parties' Broader Agreement	14

TABLE OF CONTENTS—Continued

Page

II. The Fifth Circuit Erred by Affirming Confirmation of the Award Without First Independently Determining that the Non-Signatories Were AVIC USA's Alter-Egos and Subject to the Arbitration. 21

A. The Lack of a Court Decision Resolving Whether the Non-Signatories Were Properly Subject to the Arbitration Agreement Remains Problematic Because the Panel Could Only Draw an Adverse Inference Against a Party to the Agreement 23

B. The Adverse Inference Was Essential to the Arbitration Award.................... 25

III. The Award Must be Vacated Because the Panel Was Improperly Appointed According to an Absurd Interpretation that Ignores Internationally Accepted Principles of Fairness and Impartiality............ 27

A. Arbitration Panels Should Be Appointed Consistent with Internationally Accepted Principles of Impartiality and Fairness. 27

B. The Appointment of Arbitrators Was Contrary to the Agreement 30

CONCLUSION 35

TABLE OF CONTENTS—Continued

APPENDIX Page

APPENDIX A: JUDGMENT, Fifth Circuit Court of Appeals (January 7, 2020) 1a

APPENDIX B: OPINION, Fifth Circuit Court of Appeals (January 7, 2020) 3a

APPENDIX C: AMENDED FINAL JUDGMENT, Northern District of Texas District Court (September 17, 2018) 27a

APPENDIX D: ORDER CONFIRMING ARBITRATION AWARD, Northern District of Texas District Court (August 9, 2018) 30a

APPENDIX E: ORDER SEVERING, Northern District of Texas District Court (August 9, 2018) 63a

APPENDIX F: JUDGMENT, Northern District of Texas District Court (February 5, 2015) 66a

APPENDIX G: MEMORANDUM OPINION AND ORDER, Northern District of Texas District Court (February 5, 2015) 67a

APPENDIX H: JUDGMENT, Fifth Circuit Court of Appeals (August 25, 2015) 77a

APPENDIX I: OPINION, Fifth Circuit Court of Appeals (August 25, 2015) 79a

APPENDIX J: MEMORANDUM OPINION AND ORDER, Northern District of Texas District Court (August 4, 2015) 82a

TABLE OF CONTENTS—Continued

Page

APPENDIX K: ON PETITION FOR REHEARING EN BANC, Fifth Circuit Court of Appeals (February 4, 2020) 89a

APPENDIX L: FINAL AWARD, International Center for Dispute Resolution, International Arbitration Tribunal (December 21, 2015) 91a

TABLE OF AUTHORITIES

CASES Page(s)

Access Info. Mgmt. of Haw., LLC v. Shred–It Am.,
No. 10-00622, 2010 WL 4642045 (D. Haw. Nov. 2, 2010).................................... 17

Adam Tech. Int'l, S.A. de C.V. v. Sutherland Global Services, Inc.,
729 F.3d 443 (5th Cir. 2013)..................... 31

Armstrong v. NCL (Bahamas) Ltd.,
998 F. Supp. 2d 1335 (S.D. Fla. 2013) 18

Ascendant Renewable Energy Corp. v. Tang Energy Grp., Ltd.,
No. 3:14-CV-3314-K, 2015 U.S. Dist. LEXIS 103518 (N.D. Tex. Aug. 4, 2015)... 8, 9, 10

AT&T Techs., Inc. v. Commc'ns Workers of Am.,
475 U.S. 643 (1986)................................... 22, 28

AVIC International USA, Inc. v. Tang Energy Grp., Ltd.,
614 F. App'x 218 (5th Cir. 2015) 9

AVIC International USA, Inc. v. Tang Energy Grp., Ltd.,
No. 3:14-CV-2815-K, 2015 U.S. Dist. LEXIS 477316 (N.D. Tex. February 5, 2015)... 9

Avis Rent A Car System, Inc. v. Garage Employees Union, Local 272,
791 F.2d 22 (2d Cir. 1986) 28

Axis Reinsurance Co. v. HLTH Corp.,
993 A.2d 1057 (Del. 2010)......................... 30

TABLE OF AUTHORITIES—Continued

Page(s)

Bautista v. Star Cruises,
396 F.3d 1289 (1st Cir. 2005) 17

Bear Stearns & Co., Inc. v. N.H. Karol & Associates, Ltd.,
728 F. Supp. 499 (N.D. Ill. 1989)............. 28

BG Grp., PLC v. Republic of Argentina,
572 U.S. 25 (2014).................................... 22

Bridas S.A.P.I.C. v. Gov't of Turkmenistan,
345 F.3d 347 (5th Cir. 2003)..................... 16

Brittania-U Nigeria, Ltd v. Chevron USA, Inc.,
866 F.3d 709 (5th Cir. 2017)..................... 19

Brook v. Peak Int'l, Ltd.,
294 F.3d 668 (5th Cir. 2002)..................... 28, 30

Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos,
25 F.3d 223 (4th Cir. 1994)....................... 28

Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.,
500 F.3d 571 (7th Cir. 2007)..................... 18

Commonwealth Coatings Corp. v. Cont'l Cas. Co.,
393 U.S. 145 (1968)................................... 28, 29

Ensco Offshore Co. v. Titan Marine LLC,
370 F. Supp. 2d 594 (S.D. Tex. 2005)....... 17, 19

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995).................................. 22

Freudenspring v. Offshore Tech. Servs., Inc.,
379 F.3d 327 (5th Cir. 2004)............... 16, 17, 19

Page(s)

Hooters of Am., Inc. v. Phillips,
173 F.3d 933 (4th Cir. 1999)....................... 29, 34

Howsam v. Dean Witter Reynolds, Inc., 5
37 U.S. 79 (2002)....................................... 28

Hugs & Kisses, Inc. v. Aguirre,
220 F.3d 890 (8th Cir. 2000)..................... 27

Johnson v. NCL (Bahamas) Ltd.,
163 F. Supp. 3d 338 (E.D. La. 2016) 19

Jones v. Sea Tow Services Freeport NY Inc., 30 F.3d 360 (2d Cir. 1994)................ 18

Lander Co. v. MMP Investments, Inc.,
107 F.3d 476 (7th Cir. 1997)..................... 18

Matabang v. Carnival Corp.,
630 F. Supp. 2d 1361 (S.D. Fla. 2009) 17, 19

Murray v. United Food & Commercial Workers Int'l Union, Local 400,
289 F.3d 297 (4th Cir. 2002)..................... 29

Nomanbhoy v. Vahanvaty,
No. 11-C-2456, 2011 WL 6736052 (N.D. Ill. Dec. 21, 2011) 17

Osborn ex rel. Osborn v. Kemp,
991 A.2d 1153 (Del. 2010)......................... 29

PoolRe Ins. Corp. v. Org. Strategies, Inc.,
783 F.3d 256 (5th Cir. 2015)............... 27, 28, 30

R.J. O'Brien & Assocs., Inc. v. Pipkin,
64 F.3d 257 (7th Cir. 1995)....................... 27-28

Page(s)

S & T Oil Equip. & Mach., Ltd. v. Juridica Investments Ltd.,
456 Fed. Appx. 481 (5th Cir. 2012) 18, 19

Scherk v. Alberto-Culver Co.,
417 U.S. 506 (1974) 17

Soaring Wind Energy, LLC v. Catic USA Inc.,
333 F. Supp.3d 642 (2018) 2, 8, 11

Soaring Wind Energy, LLC v. Catic USA Inc.,
946 F.3d 742 (2020) ....*passim*

Szuts v. Dean Witter Reynolds, Inc.,
931 F.2d 830 (11th Cir. 1991) 28

Tang Energy Grp., Ltd. v. Catic USA, Inc.,
ICDR No. 01-14-0001-4150 (December 21, 2015) ....*passim*

United Indus. Workers, Serv., Transp., Prof'l & Gov't of N. Am., Atl., Gulf Lakes & Inland Waters Dist., AFL-CIO v. Kroger Co.,
900 F.2d 944 (6th Cir. 1990) 28

STATUTES

9 U.S.C. § 5 .... 28, 30

28 U.S.C. § 1254 2

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 202 ....*passim*

TABLE OF AUTHORITIES—Continued

RULES Page(s)

AAA R-22 24

AAA R-23 .... 24, 25

OTHER AUTHORITIES

Charles Nairac, *Due Process Considerations in the Constitution of Arbitral Tribunals, in* INTERNATIONAL ARBITRATION AND THE RULE OF LAW (Andrea Menaker ed., 2017) 29

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

CATIC USA Incorporated, also known as AVIC International USA, Incorporated ("AVIC USA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 946 F.3d 742. Pet. App. 3a. The opinion of the United States District Court for the Northern District of Texas is reported at 333 F. Supp.3d 642. Pet. App. 30a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 7, 2020. A petition for rehearing was denied on February 4, 2020. Pet. App. 90a. This Court extended the deadline to file a petition for a writ of certiorari to 150 days on March, 19, 2020, extending the deadline for the filing of this petition to July, 6, 2020. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Section 202 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), 9 U.S.C. § 202, provides:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

INTRODUCTION

AVIC International USA, Inc. ("AVIC USA"), a California resident and member of Delaware-formed limited liability company Soaring Wind Energy, LLC ("Soaring Wind"), had a dispute with one of its fellow LLC members, Tang Energy Group, Limited ("Tang," acting on behalf of itself and with the other respondent members "Tang Claimants"), involving their United States based enterprise comprised entirely of members with United States citizenship. Tang filed an arbitration demand and orchestrated the appointment of a panel in contravention of the intent of the parties' agreement and fundamental fairness such that the Tang Claimants appointed a supermajority of arbitrators (the "Panel"). This supermajority of arbitrators found that: (1) foreign non-signatories to the agreement could be subject to arbitration; (2) once the non-signatories failed to participate [because they were non-signatories], their lack of participation could be used to create adverse evidentiary presumptions against AVIC USA; and (3) the adverse evidentiary presumptions could overcome a complete dearth of evidence against AVIC USA and allow the Panel to conclude that purported business operations of one of these non-participating, non-signatory AVIC USA "affiliates" could be the entire basis for a multi-million dollar award against AVIC USA without corroborating evidence.

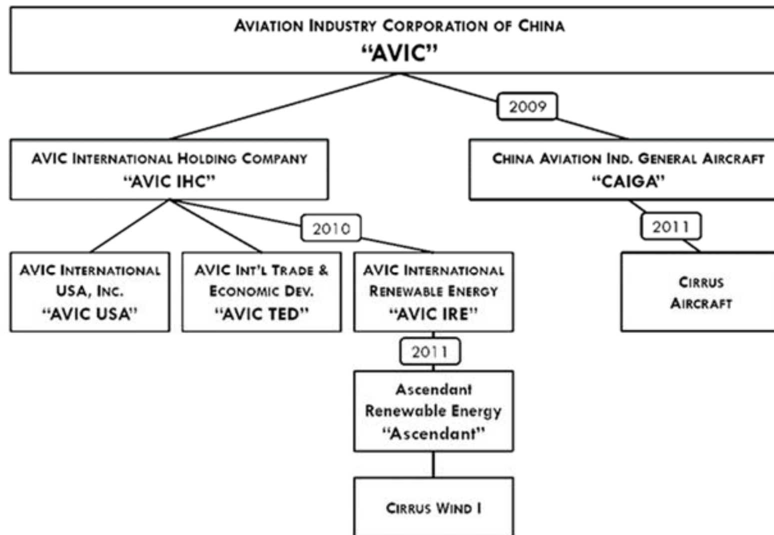
Then, in the proceedings to confirm the arbitral award, the lower courts here concluded that (1) jurisdiction was appropriate under the New York Convention because the parties' agreement includes a tangential reference to unnamed non-signatory "affiliates" of the parties which allowed the court to use those affiliates' citizenship to conclude there was jurisdiction (ignoring key jurisprudence on this issue), but (2) the court could

affirm the award against AVIC USA without considering whether the non-signatories should have been considered parties to the arbitration [even though that determination was expressly reserved for the courts and is the linchpin of the entire arbitral award] and that (3) giving significant deference to the Panel, there were no issues in its formation despite that Tang's orchestrated appointment of a supermajority of the Panel contravenes the intent of the parties agreement and widely recognized principles of fairness that are critical to maintaining confidence in arbitration proceedings. AVIC USA asks this Court to grant a writ to resolve key issues of jurisdiction under the New York Convention and arbitration due process.

STATEMENT

1. Factual History

Aviation Industry Corporation of China ("AVIC") is the umbrella entity that, *inter alia*, operates China's state-run aviation industry. ROA.30982, 5210-11. AVIC, in turn, owns or indirectly has interests in many entities, of which AVIC USA was just one. ROA.5210, 30982. The far simplified chart of entities below shows AVIC's basic organizational structure as pertinent to this matter:



ROA.3941.

Around 2007, AVIC USA's president, Xuming "Sherman" Zhang ("Zhang"), started to consider expansion of AVIC USA beyond property investments into wind energy opportunities in the United States because of strong demand in the U.S. and supply capabilities in China. ROA.5202-04, 5214.

Zhang met Patrick Jenevein ("Jenevein"), a partner in HT Blade, a wind turbine and blade manufacturer, and the principal of Tang. ROA.5205-06. In late 2007, Zhang pitched Jenevein on a sourcing strategy to bring equipment into the U.S. market. ROA.5206-07.

Later in 2008, AVIC USA, Paul Thompson ("Thompson")[1] and Respondents Tang; Jan Family Interests, Limited ("Jan"); The Nolan Group, Incorporated ("Nolan"); Mitchell W. Carter ("Carter"); and Keith P.

[1] Paul Thompson was a Class "B" member of Soaring Wind with no accrued ownership interest and is not a party to this action. ROA.361.

Young ("Young")[2] entered into the Limited Liability Company Agreement of Soaring Wind Energy, LLC (the "Agreement") and formed Soaring Wind Energy, LLC, a Delaware limited liability company. ROA.299, 359. AVIC USA had a 50% interest in Soaring Wind and the Tang Claimants collectively hold the other 50%. ROA.360-61.

The Agreement included certain exclusivity provisions which form the primary basis of the underlying dispute. Article 6.10 outlines a requirement that Soaring Wind's members "only conduct activities constituting the Business in and through the Company and its Controlled subsidiaries." ROA.332. Article 6.12 further explains: "each of the Class A Members hereby covenant and agree that neither they nor their Affiliates or Representatives will participate in wind farm land development projects (each a "Project") except through an entity owned by both the Company and [AVIC USA]. . . ." ROA.333. Under the Agreement, "Affiliate" "means with respect to any Person, any other Person that directly or indirectly Controls, is Controlled by, or is under the common Control with that first Person." ROA.304.

The Agreement also contains detailed provisions to resolve any disputes among members for "any controversy, dispute or claim arising under or related to [the] Agreement." ROA.348.

2. The Deterioration of the Parties' Relationship

The Soaring Wind members held divergent perspectives on its operation. Jenevein, Tang's principal,

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[2] Keith P. Young is deceased and Mary M. Young (also "Young") was substituted in place of Young.

thought Soaring Wind was meant to operate with Tang bringing wind farm development projects to AVIC USA to be funded. ROA.4259-60, 4291-92, 4333. AVIC USA's perspective saw Soaring Wind focused on marketing projects, not large scale investments in wind farms. ROA.5243.

AVIC International Renewable Energy ("AVIC IRE")—not a member of Soaring Wind but another AVIC entity—created a subsidiary called Ascendant Renewable Energy Corporation ("Ascendant") to develop wind projects and tasked Thompson to lead the new entity. ROA.4324-25, 3941. AVIC USA did not have any involvement with the formation of Ascendant. ROA.5232. Jenevein was not concerned with Thompson's transition to Ascendant and did not view the transition as a breach of the Agreement. ROA.4325, 4328. Even though Jenevein knew that Thompson was in talks to develop wind projects through Ascendant, Jenevein assumed the projects would return to Soaring Wind. ROA.4325, 4328.

Nothing required AVIC USA to fund any projects, and through 2013, not one project had been funded. ROA.4339. Jenevein was dissatisfied and pushed for additional support. ROA.4295-96, 4332-33. In response to such a request, Jenevein received an email (translated from Chinese to English) from AVIC IRE Vice President Xu Hang that suggested AVIC IRE "ha[d] already provided a total of [$]50 million in financing to [sic.] wind power projects in the US and will keeping [sic.] trying in the future." ROA.1147.

Tang [Jenevein], acting on behalf of all the Tang Claimants, started the underlying arbitration based on the purported activities of AVIC IRE, which Tang claimed was an alter-ego of AVIC USA, contending it competed with Soaring Wind in violation of the

exclusivity provisions in the Agreement. ROA.4387-88. There was no allegation that AVIC USA itself violated the Agreement's exclusivity provisions. Pet. App. 47a, ROA. 29635-45.

3. The Arbitration

On June 13, 2014, Tang filed a notice and demanded arbitration, insisting it also acted on behalf of Soaring Wind and its other members (the "Tang Claimants"). The Demand was initiated not only against AVIC USA and Thompson, but also various other AVIC entities including AVIC, AVIC IRE, Ascendant, Aviation Industry General Aircraft, Co., Ltd. ("CAIGA"), AVIC International Holding Corporation ("AVIC Holding"), and CATIC T.E.D. ("Catic TED") (these AVIC entities, having not been parties to the Agreement are collectively referred to as the "Non-Signatories"). ROA.29633. In their Demand notice, the Tang Claimants, acting through Tang, named one arbitrator. ROA.29633-35.

Shortly thereafter, and without providing notice as required in the Agreement, Nolan, Young, Carter, and Jan also named arbitrators. ROA.1910. AVIC USA and Thompson each chose one arbitrator and the Panel, already controlled by a supermajority chosen by the Tang Claimants, chose two additional arbitrators.

Before the arbitration hearing, AVIC USA and Thompson filed an action in the district court challenging the formation of the Panel, Pet. App. 67a, while Ascendant filed a separate action challenging its inclusion in the arbitration. Pet. App. 82a.

AVIC USA and Thompson argued that the stacked Panel as selected was "inherently unfair and not neutral" because the Agreement provided that each side to a dispute [(1) Tang, who had filed on behalf of itself, Soaring Wind, and the other members, and (2) AVIC

USA] would pick an arbitrator, and then the chosen arbitrators would select a neutral arbitrator as chair. Pet. App. 70a.

The District Court dismissed the case, finding that AVIC USA and Thompson's challenge did not satisfy the narrow requirements for judicial review of arbitration proceedings before award issuance. Pet. App. 75a. On appeal, the Fifth Circuit affirmed the District Court in a *per curiam* opinion holding that the challenge to the panel composition was premature, while also concluding in dicta that AVIC USA failed to show a lapse in the selection process. Pet. App. 80-81a.

In its action, Ascendant argued that as a non-signatory to the Agreement, the arbitration panel had no jurisdiction over it and thus Ascendant had no obligation to participate. Pet. App. 83-84a. Tang insisted Ascendant was subject to the arbitration clause of the Agreement simply because it had claimed liability based on an alter-ego theory. Pet. App. 83a. The District Court explained that "[when] the very existence of any agreement [to arbitrate] is disputed, *it is for the courts to decide at the outset* whether an agreement was reached." Pet. App. 86a (emphasis added). The District Court ruled in favor of Ascendant, declaring that no decision by the Panel "as to jurisdiction over or party-status of Ascendant is controlling on a court." Pet. App. 86a. The *Ascendant* decision was not appealed.

The Panel held hearings in Dallas, Texas August 10-14, 2015. Pet. App. 92a. Not surprisingly, all five arbitrators selected directly by Tang[3] and a sixth

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[3] Counsel for Tang circulated an agreement to pay "the legal fees for those members . . . who appoint an arbitrator *with Tang's approval*." ROA.30978-80 (emphasis added). Tang's counsel also

arbitrator selected indirectly by Tang voted in lockstep in the Tang Claimant's favor. Pet. App. 92a. The remaining three arbitrators dissented to the award in its entirety. Pet. App. 92a.

a) The Arbitration Award

The Panel found that "AVIC USA itself did not violate the contractual provision to refrain from engaging in the Business of [Soaring Wind] except through [Soaring Wind]." Pet. App. 114a. Instead, the award hinges entirely on the Tang-Selected arbitrators' determination that the Non-Signatories were subject to the Agreement (and thus also the arbitration) as AVIC USA's alter egos. Pet. App. 133-134a. This decision is foundational—all of the Panel's other conclusions flow from this decision—despite that this critical decision was not ultimately the Panel's to make. *See* Pet. App. 132a, Pet. App. 86a.

Having determined that AVIC USA was the alter ego of all the Non-Signatory entities, the Panel found that the Non-Signatories were properly served with discovery orders by the Panel. Pet. App. 131-134a, 137-138a. Because the Non-Signatories refused to produce documents as ordered, the Panel zeroed-in on the one email from Xu Hang that suggested AVIC IRE had invested $50 million in wind power projects in the United States and drew an adverse inference that it was evidence of breach of the exclusivity provisions of the Agreement and "accurate without any additional

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circulated a spreadsheet to the other Tang Claimants assessing the likelihood of favorable rulings from potential arbitrators in the Dallas-Fort Worth area. ROA.29715-18 ("stupid, unpredictable, but likes me;" "Loves Texas. Endorsed me as candidate;" "Not that bright. Likes Carlos [law partner of Tang's counsel] . . . would probably go along.").

evidence." Pet. App. 133-134a. (the Non-Signatories "refusal to participate in discovery, except when [they] felt it was to their benefit, prevented Claimants from getting the information to prove X, Y, and/or Z. ***As a result, the panel has opted to infer*** . . . .") (emphasis added). The Panel also implicitly inferred that the activity described in Hang's email was conduct prohibited by the Agreement.

4. Award Confirmation Proceedings

a) Proceedings Before the District Court

Soaring Wind moved to confirm the arbitration award against AVIC USA, AVIC, AVIC Holding, CAIGA, AVIC IRE, and AVIC TED in the United States District Court for the Northern District of Texas.[4] Pet. App. 30a. On August 9, 2018, the District Court *sua sponte* severed the motion to confirm the arbitration award as to AVIC, AVIC Holding, CAIGA, and AVIC IRE and stayed those proceedings, while confirming the award as to AVIC USA only (despite that the award was based upon alleged conduct of the Non-Signatories). ROA.35227-28. By severing the dispute, the District Court never reached the issue of whether the Non-Signatories were alter-egos of AVIC USA and properly subject to the arbitration. ROA.35228. AVIC USA timely appealed.

b) Proceedings Before the Fifth Circuit

AVIC USA challenged the District Court's order confirming the arbitration award in the United States Court of Appeals for the Fifth Circuit. Immediately upon appeal, the Fifth Circuit asked "that the parties

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[4] AVIC TED was subsequently dismissed by agreement after it challenged the District Court's personal jurisdiction over it.

address federal subject-matter jurisdiction under either complete diversity or the New York Convention . . . ." Pet. App. 8a.

The Fifth Circuit found that while complete diversity was lacking, jurisdiction was proper under the New York Convention. Pet. App. 9-16a. The Court concluded that, although the "Agreement makes explicit reference neither to China nor to any Chinese citizen, nor even to any foreign place or entity," jurisdiction was appropriate because the Agreement also provided a restriction on competition by unnamed, non-party "affiliates" to the signatories and the parties were aware that some of those entities were residents of China. Pet. App. 15-16a.

Next the Fifth Circuit found that the Panel was appropriately constituted because the Agreement provided for a Panel established by "Disputing Members" not "sides." Pet. App. 19-21a. In so holding, the Fifth Circuit did not address the fact that the Tang Claimants had represented themselves as one, had filed the demand as one, and had coordinated on arbitrator selection and litigation funding. ROA.30978-80, 29715-18. Moreover, the Fifth Circuit seemingly concluded that no amount disparity in arbitration panel appointment would warrant court intervention. Pet. App. 21a.

Finally, the Fifth Circuit found sufficient evidence to uphold the Arbitration Award. Pet. App. 17-18a. Although the Court claimed this was based upon evidence beyond the adverse inference, it based the entire upholding of the award on the AVIC IRE email referenced above and online "evidence" of Non-Signatory projects about which the Panel had made assumptions that were unrebutted by the absent Non-Signatories. Pet. App. 17-18.

AVIC USA filed for an *en banc* rehearing which was denied, Pet. App. 90a, and therefore AVIC USA petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted because direction from this Court is critically needed to guide lower courts in the important task of confirming arbitration awards. Specifically, as detailed below:

(1) **Proper Scope of the New York Convention** - The Fifth Circuit departed from established jurisprudence and extended jurisdiction under the New York Convention to an arbitration agreement governed by Delaware law, entered into in the United States, amongst United States citizens, and with no reference to any specific named foreign entity or any specific foreign purpose of the agreement. Instead, the court focused on a peripheral restriction on the conduct of the parties' unnamed affiliates, which in this case were known (outside the four concerns of the agreement) to include foreign Non-Signatories. Pet. App. 16a. With the increasing globalization of United States business, this is a key error in expansion of federal jurisdiction, likely to be repeated by appellate courts without further direction from this Court.

(2) **Compelling Non-Signatories to Arbitration -** The Arbitration Award was directly grounded on the Panel's conclusion it had jurisdiction over Non-Signatories to the Agreement and that it could draw an adverse inference against the Non-Signatories when they refused to participate in the arbitration. The District Court and Fifth Circuit both upheld the award and refused to address whether the Non-Signatories were properly subject to the arbitration despite this issue being reserved for the courts. The

evidentiary assumptions drawn from the adverse inference were unrebutted because the Non-Signatories refused to participate without a court order finding the Non-Signatories properly subject to the arbitration—a decision that no court has yet made, despite that the award is now in the enforcement stage. AVIC USA, therefore, asks this Court to remand so that a court may address this critical issue of whether the Non-Signatories were properly subject to the arbitration before the harm cannot be undone.

(3) **Avoiding Absurd Interpretations of Arbitration Panel Appointment Provisions** - The Fifth Circuit ignored widely held arbitration principles of impartiality and fundamental fairness when it upheld a misguided and hyper-technical interpretation of an arbitration panel appointment clause that led to an absurdly stacked supermajority panel selected by the Tang Claimants in contravention of the appointment provision of the Agreement. This Court should address whether courts should safeguard the arbitration process by interpreting appointment clauses consistent with internationally accepted principles of fairness and impartiality, especially where one party disguises the nature of its dispute to game the system and appoint a supermajority of an arbitration panel.

I. The Fifth Circuit Erred in Concluding Jurisdiction Exists Under the New York Convention Based Upon A Peripheral Reference to Foreign Affiliates in the Parties' Broader Agreement.

There is, and was, no federal subject matter jurisdiction in this case on the current record. After properly concluding that there was no diversity jurisdiction here, the Fifth Circuit improperly concluded that it had jurisdiction under the New York Convention

based upon a tangential reference in the Agreement that purportedly restricted conduct of certain Non-Signatory "affiliates" of the parties (which, in AVIC USA's case, included some unnamed foreign entities at the time the Agreement was signed). Pet. App. 16a. This is in direct contravention of key precedent and is an unauthorized expansion of federal subject matter jurisdiction.

As to the underlying Agreement at issue here, the Fifth Circuit found:

> The Agreement makes explicit reference neither to China nor to any Chinese citizen, nor even to any foreign place or entity. Aside from a generic, stated purpose "to provide worldwide marketing" in wind energy, the Agreement appears to evince a domestic character: It creates a Delaware company, comprised entirely of U.S. citizen-members, with a principal place of business in Texas. As per the Agreement, the underlying arbitration proceeded in Texas, under Delaware substantive law. In short, it would appear on its face that the Agreement bears no relation to China (or any other foreign state).

Pet. App. 15-16a.

Despite these findings, the Fifth Circuit found a reasonable relation to a foreign country that created jurisdiction because the agreement's exclusivity provision restricted unnamed, non-signatory "affiliates" of the parties from competitive conduct and the parties knew that some "affiliates" were Chinese entities. Pet. App. 16a. In using this one Agreement provision to extend jurisdiction, the Fifth Circuit mutated what

was in reality a domestic transaction, into an international one governed by the New York Convention.

There are two ways that the New York Convention could potentially apply here—but both options remain unsatisfied or woefully under-satisfied.

First, the New York Convention can confer subject matter jurisdiction when at least one party to an agreement to arbitrate is not a U.S. citizen. *Freudenspring v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 339 (5th Cir. 2004). Here, even though Soaring Wind, AVIC USA, and all of its other members are U.S. citizens, ROA.360-361, the New York Convention could still confer jurisdiction *if* the foreign Non-Signatories were found to be subject to the Agreement. Yet, no court has made such a determination to date; rather both the District Court and the Fifth Circuit failed to decide this critical issue, despite it being expressly reserved for the courts and not the arbitrators. *See Bridas S.A.P.I.C. v. Gov't of Turkmenistan* ("Bridas I"), 345 F.3d 347, 356 (5th Cir. 2003). Therefore, jurisdiction cannot exist under the New York Convention based on a foreign party being subject to the Agreement unless the federal courts, rather than an arbitration panel, properly address whether the Non-Signatories were parties to the Agreement.

Second, where arbitration is only between United States citizens, as here, without a court ruling on jurisdiction over *all* of the Non-Signatories, the New York Convention may still confer jurisdiction when the parties' legal relationship "involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more

foreign countries." 9 U.S.C. § 202.[5] The full extent and meaning of "reasonable relation" is a key issue for this Court. As detailed above, the Fifth Circuit concluded this test was satisfied by reference in the Agreement to unnamed, non-signatory "affiliates" who are known by the parties to be foreign citizens. However, most federal circuits have found this exception to be more narrowly construed.

Narrowly construing the reasonable relation exception is consistent with the principal purpose of the New York Convention.[6] This Court has explained that the adoption and implementation of the New York Convention in the U.S. was done primarily to "encourage the recognition and enforcement of commercial arbitration agreements in *international contracts*," not to create jurisdiction over awards, as here, made in domestic arbitrations for domestic parties that have domestic purposes. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (emphasis added).

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[5] *See also Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 339-41 (5th Cir. 2004), *Matabang v. Carnival Corp.*, 630 F. Supp. 2d 1361, 1364 (S.D. Fla. 2009) (citing *Bautista v. Star Cruises*, 396 F.3d 1289, 1294 n.7 (1st Cir. 2005)).

[6] Because the statute specifically talks of the relationship between the parties, it is necessarily broader than just the four corners of their contract. However, the focus is still the international nature of the overall transaction. *See, e.g., Ensco Offshore Co. v. Titan Marine LLC*, 370 F. Supp. 2d 594, 601 (S.D. Tex. 2005); *Nomanbhoy v. Vahanvaty*, 2011 WL 6736052, at *6 (N.D. Ill. Dec. 21, 2011) (evaluating testimony about whether the parties envisaged performance abroad); *Access Info. Mgmt. of Haw., LLC v. Shred–It Am.*, 2010 WL 4642045, at *4–6 (D. Haw. Nov. 2, 2010)) ("The focus of whether a commercial relationship has a reasonable relation to a foreign state is not on the Franchise Agreement alone, but rather the 'legal relationship' in which the arbitration or arbitral award arises.") (quoting *Ensco*).

It follows then, that jurisdiction under the reasonable relation exception is not conferred by any tangential or minimal relation to a foreign state—there must be an "important foreign element involved." *Jones v. Sea Tow Services Freeport NY Inc.*, 30 F.3d 360, 366 (2d Cir. 1994). The essence of the requirement is that the Convention should only apply in "the narrow context of truly international disputes. . . ." *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 500 F.3d 571, 577 (7th Cir. 2007).

Other courts looking at this "reasonable relation" test primarily focus on the actual performance of the contract and whether a central purpose of the contract creates a relation to a foreign state. *See* and *compare Lander Co. v. MMP Investments, Inc.*, 107 F.3d 476, 478 (7th Cir. 1997) (Contract that included distribution of product in Poland created reasonable relation to foreign country to confer jurisdiction), and *S & T Oil Equip. & Mach., Ltd. v. Juridica Investments Ltd.*, 456 Fed. Appx. 481, 484 (5th Cir. 2012) (finding reasonable relation to foreign country where "it is evident that the legal relationship . . . envisaged performance abroad. The Investment Agreement specifically states that it was executed in Guernsey and would be performed . . . exclusively and wholly in and from Guernsey."), with *Jones*, 30 F.3d at 361 ("It is not sufficient that English law was to be applied in the resolution of the salvage dispute and that the arbitration proceeding was to be held before an English arbitrator in England."), and *Armstrong v. NCL (Bahamas) Ltd.*, 998 F. Supp. 2d 1335, 1338–39 (S.D. Fla. 2013) (Agreement did not fall under Convention where seaman was on boat in international waters despite docking at international ports because the focus of work was not on foreign soil).

For this question, factual evidence contemplating an important foreign element such as performance in or around a particular foreign country or countries is critical. *See, e.g.*, *Brittania-U Nigeria, Ltd v. Chevron USA, Inc.*, 866 F.3d 709, 713 (5th Cir. 2017) (leases at issue "were for sale in Nigeria and all performance was to occur in Nigeria"); *S&T Oil Equip & Machinery, Ltd. v*, 456 F. App'x at 484 (Convention applied when agreement was to be performed "exclusively and wholly in and from Guernsey").

When the contract is territorially neutral for performance, courts look to other indicia that the parties envisaged performance in a foreign country or area. Without that, the New York Convention does not apply. *See, e.g., Freudenspring,* 379 F.3d at 332*; Matabang*, 630 F. Supp. 2d at 1364; *Ensco*, 370 F. Supp. 2d at 600. In *Freudenspring*, for example, work orders—including one specifically for West Africa—became part of the contract. In *Johnson v. NCL (Bahamas) Ltd.*, 163 F. Supp. 3d 338, 360–61 (E.D. La. 2016), likewise, the contract did not specify any particular country, but the vessel on which the plaintiff worked had an itinerary that took it to ten different foreign ports.

Here, as Fifth Circuit found "it would appear on its face that the Agreement bears no relation to China (or any other foreign state)." Pet. App. 15-16a. Indeed, every material aspect of the Agreement (as developed in the present record) focused on and was ultimately performed exclusively in the United States:

- The United States was the real target—it was only market targeted or specifically contemplated when the parties entered into the Agreement. ROA.4238-39, 4247, 4564.

- No other countries, projects, or locations were ever targeted for Soaring Wind ventures.
- The Agreement defines the principal place of business for Soaring Wind as Dallas, Texas. ROA.316.
- The Agreement requires arbitration in the U.S. ROA.349.
- The Agreement applies only Delaware law. ROA.357.
- Because the relationship envisaged only performance in the United States, the dispute centered around alleged breaches of the Agreement in the United States.[7]

In sum, this was a dispute between parties that envisaged a United States-focused business, involving alleged breaches that took place in the United States. Every focus was on the United States. This is a sharp contrast to the cases that have applied this exception under the New York Convention. The reasonable relation exception would therefore not apply on the current record.

This Court should either clarify the jurisdictional scope of the reasonable relation exception of the New York Convention or remand to the District Court with instruction to determine independently whether (1) the foreign Non-Signatories were parties to the agreement and, if not, (2) whether there was an actual relation to an important foreign element such as the parties contemplating performance abroad when they entered

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[7] Again, the award is based solely on the Panel adversely inferring that AVIC IRE, which is not a party to the contract, had invested $50 million in wind power projects in the United States. Pet. App. 133-134a.

into the Soaring Wind joint venture. If the answer to both questions is no, the case must be dismissed for lack of subject matter jurisdiction.

II. The Fifth Circuit Erred by Affirming Confirmation of the Award Without First Independently Determining that the Non-Signatories Were AVIC USA's Alter-Egos and Subject to the Arbitration

By not determining whether the foreign Non-Signatories were subject to arbitration, the Fifth Circuit failed to address the bedrock question on which the arbitration Panel based the entire award. That question, significantly, is one on which the arbitrators receive no deference and this Court should exercise its supervisory authority to clarify that a court confirming an arbitration award should resolve outstanding legal questions that are specifically reserved for courts to decide.

Fundamentally, the Panel's determination that AVIC USA breached the Agreement through its alter-ego's activities flowed directly from the Panel's determination that the Non-Signatories were subject to the arbitration:

- The Panel found the Non-Signatories were subject to the arbitration. Pet. App. 139a.
- Because it found that the Non-Signatories were subject to the arbitration, the Panel was able to draw an adverse inference against them for not participating in the arbitration. *See* Pet. App 133-34a.
- Based on that adverse inference, the Panel found that an affiliate of AVIC USA breached

the Agreement and, as such, that AVIC USA breached the agreement. Pet. App 138a.

- But for that adverse inference, there was no other basis to find AVIC USA breached the Agreement. In no uncertain terms, the arbitrators found that "AVIC USA itself did not violate the contractual provision to refrain from engaging in the Business of SWE except through SWE." Pet. App. 114a.

The entire arbitration award collapses if the Non-Signatories were not subject to arbitration. And, critically, whether the Non-Signatories were subject to the arbitration was not for the Panel to decide. At a minimum, that decision—*unlike* some of the Panel's other decisions—was entitled to no deference by any court.

As this Court has explained, "courts presume that the parties intend courts, not arbitrators, to decide what we have called disputes about 'arbitrability'" including questions such as "whether the parties are bound by a given arbitration clause . . . ." *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 34 (2014) (internal citation omitted). Additionally, absent "the parties clearly and unmistakably provid[ing] otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("If . . . the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently.").

This is undisputed. Indeed, the Tang Claimants have echoed the need for front-end judicial review: "All parties agree that the Court should conduct an independent review of the arbitration record" to determine whether the Non-Signatories were subject to the arbitration agreement. ROA.34391. Likewise, Soaring Wind agreed that the arbitrators' decision regarding the Non-Signatories was "not binding upon a reviewing court" and entitled to no deference. ROA.34392.

Yet as it stands, no court, even at this eleventh-hour, has answered this crucial question. By severing the foreign Non-Signatories from the case *sua sponte* before confirming the award, the District Court never reached this foundational question and likewise the Fifth Circuit reasoned that "[w]hether [AVIC] USA's non-signatory affiliates themselves [were] subject to the arbitration is irrelevant . . . ." Pet. App. 18a. The reasoning of the Fifth Circuit not only shows that it failed to answer this critical question, but also that it misapprehended the importance of the decision as well. This Court should intervene and correct this error.

A. The Lack of a Court Decision Resolving Whether the Non-Signatories Were Properly Subject to the Arbitration Agreement Remains Problematic Because the Panel Could Only Draw an Adverse Inference Against a Party to the Agreement.

The Agreement speaks directly to when and against whom the arbitrators may draw an adverse inference and makes plain that such inferences can be drawn only against Disputing Members that are parties to the arbitration. In this case, that *cannot* be any Non-Signatory, because no court determined if they are proper parties to the arbitration (other than

Ascendant, which the Panel nevertheless chose to ignore), and they are certainly not "Disputing Members."

The Arbitration Panel cited two bases for its supposed authority to impose this critical adverse inference: Section 13.3(f) of the Agreement and Rule 23 of the American Association of Arbitration ("AAA") Rules. Neither the plain language of the Agreement nor the AAA Rules support the expansion of authority improperly exercised by this Panel as to Non-Signatories.

Agreement Section 13.3(f) allows the arbitrators to consider a Disputing Member's "fail[ure] to comply with a discovery request" as a "consideration in reaching their decision." ROA.349. AVIC IRE is not a Member of Soaring Wind and is therefore not a Disputing Member. The discovery order that gave rise to the inference was issued against the Non-Signatories, who had never consented to arbitration. *See* ROA.1995. The Panel lacked the authority under the Agreement to draw an adverse inference against AVIC USA unless a court had determined AVIC IRE was a party to the Agreement and thus a de facto Member of Soaring Wind, and in turn a Disputing Member.

Commercial AAA Rule 23 similarly is not focused on non-parties. Rule 23 empowers an arbitrator to issue any orders "necessary to enforce the provisions of rules R-21 and R-22." But Rule 22 only allows an arbitrator to "require the *parties*" to exchange documents. Rule 23 does not permit an arbitration panel to draw an adverse inference against a *non-party* for its failure to participate in discovery. This rule only provided a basis for an adverse inference *after* the arbitrators

decided that AVIC IRE was a party.[8] But as the determination of whether the Non-Signatories were parties to the Agreement is for the courts, it was improper for the lower courts to confirm an arbitration award premised on an adverse inference that could only have been made if the court actually made the determination that the Non-Signatories were in fact parties to the Agreement and subject to the Arbitration.

B. The Adverse Inference Was Essential to the Arbitration Award

The arbitrators acknowledged that the Tang Claimants failed to produce evidence of a breach of the Agreement without the adverse inference. At issue was the Tang Claimants' assertion that the Non-Signatories breached the exclusivity provision by investing in wind farm projects.

Based on the Non-Signatories' refusal to participate in discovery, the Panel inferred that Xu Hang's statement in an email[9] that "AVIC International has already provided a total of $50 million USD in financing to [sic] wind power projects in the US" was "accurate without any additional evidence." Pet. App. 133-34a, ROA.1147. The Panel then calculated damages based solely on the $50 million figure. Pet. App. 127a.

This inference went to the heart of this dispute and whether the Agreement was breached at all. The Agreement defines the scope of Soaring Wind's business as "the worldwide marketing of wind energy equipment, services and materials related to wind

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[8] Regardless, Rule 23 is rendered null by the agreement, which incorporates the AAA rules except as expressly provided by the Agreement. ROA.349.

[9] Translated from Chinese to English.

energy including, but not limited to, marketing wind turbine generator blades and wind turbine generators and developing wind farms." ROA.316. Not only did the Panel infer the email was accurate without any corroboration, but it also impliedly inferred that the "financing to wind power projects" Xu Hang referenced was related to the marketing of wind energy equipment and was a breach of the Agreement.[10]

Without drawing such an adverse inference, the Panel would have had no basis to find that the Agreement was breached and the entire Award collapses. The Panel made that clear in the award, explaining that the Non-Signatories "refusal to participate in discovery, except when [they] felt it was to their benefit, prevented [the Tang Claimants] from getting the information to prove" the "factual basis for" their claims. Pet. App. 133-34a.

The adverse inference against a Non-Signatory is not merely the linchpin of the entire award, it is the *sole* basis. Without it, there is no breach. Moreover, without first determining that the foreign Non-Signatories were subject to the Agreement, there could not have been any adverse inference, because the Panel only had authority to make such inferences against parties to the Agreement. Nevertheless, we have a confirmed award based exclusively on the purported actions of and inferences against a non-party, but no court has yet made a determination as to whether that party can be subject to the arbitration. This Court should intervene and direct the lower courts to make this key preliminary determination—

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[10] It is possible, for example, that such reference could be to monies invested before the formation of Soaring Wind, or towards research related to wind power but not necessarily wind farms.

i.e., whether the Non-Signatories were in fact subject to the arbitration.

III. The Award Must be Vacated Because the Panel Was Improperly Appointed According to an Absurd Interpretation that Ignores Internationally Accepted Principles of Fairness and Impartiality.

This Court should intervene to reaffirm that arbitration panels must be selected in accordance with contractual provisions in light of internationally accepted principles of impartiality and fairness in order to avoid absurd results. Here, an absurd supermajority-stacked arbitration panel was formed based on a hyper-technical and unreasonable reading of the arbitration agreement that ignored the reality of the dispute. The arbitration's outcome was a foregone conclusion because in what was effectively a dispute between two positions advanced by the Tang Claimants collectively and AVIC USA, the Tang Claimants were allowed to appoint twice as many arbitrators as AVIC USA. To no one's surprise, all five arbitrators chosen by the Tang Claimants, alone sufficient to form a majority of the Panel, found for the Tang Claimants.

A. Arbitration Panels Should Be Appointed Consistent with Internationally Accepted Principles of Impartiality and Fairness

When an award is made "by arbitrators not appointed under the method provided in the parties' contract" it "must be vacated." *PoolRe Ins. Corp. v. Org. Strategies, Inc.*, 783 F.3d 256, 263 (5th Cir. 2015).[11]

[11] This is widely recognized among the circuit courts. *Hugs & Kisses, Inc. v. Aguirre*, 220 F.3d 890, 893 (8th Cir. 2000); *R.J.*

This is because section 5 of the Federal Arbitration Act "expressly provides that where a method for appointment is set out in the arbitration agreement, the agreed upon method shall be followed." *PoolRe*, 783 F.3d at 263 (internal quotation marks omitted). This is a substantive, not procedural issue, that is for the courts to decide because it goes squarely to the power of the arbitrators to act. *See, e.g., AT&T Tech., Inc. v. Commc'n Workers*, 475 U.S. 643, 649 (1986); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 672 (5th Cir. 2002).

Importantly here, courts interpreting arbitration panel appointment clauses with multiple reasonable interpretations should interpret those clauses consistent with principles widely recognized in arbitration, including principles of fairness and impartiality to avoid absurd results like supermajority-stacked panels as was present here. This Court has long held that "*any* tribunal permitted by law to try cases and controversies not only must be unbiased but also *must avoid even the appearance of bias*." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968) (emphasis added). This lack of bias is critical because parties that arbitrate "do not agree to forego their right to have their dispute fairly resolved by an

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O'Brien & Assocs., Inc. v. Pipkin, 64 F.3d 257, 263 (7th Cir. 1995); *Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25 F.3d 223, 226 (4th Cir. 1994); *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 832 (11th Cir. 1991); *United Indus. Workers, Serv., Transp., Prof'l & Gov't of N. Am., Atl., Gulf Lakes & Inland Waters Dist., AFL-CIO v. Kroger Co.*, 900 F.2d 944, 948 (6th Cir. 1990); *Avis Rent A Car System, Inc. v. Garage Employees Union, Local* 272, 791 F.2d 22, 26 (2d Cir. 1986); *Bear Stearns & Co., Inc. v. N.H. Karol & Associates, Ltd.*, 728 F. Supp. 499, 501 (N.D. Ill. 1989).

impartial third party." *Murray v. United Food & Commercial Workers Int'l Union, Local 400*, 289 F.3d 297, 303 (4th Cir. 2002).

Neutrality in arbitration is especially important, more so than even in court, because arbitrators might not strictly apply the law, appeals are limited, and arbitration lacks the procedural and evidentiary safeguards of the courts. *See, e.g.*, *Commonwealth Coatings Corp.*, 393 U.S. at 149 ("[W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.").

A critical aspect of such neutrality is that each side has equal input into the selection of arbitrators. *See, e.g.*, *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (declaring dispute not arbitrable because one side to the dispute had greater input into or controlled the selection of the arbitrators). This is a widely recognized principle in international arbitration. *See, e.g.,* Charles Nairac*, Due Process Considerations in the Constitution of Arbitral Tribunals, in* INTERNATIONAL ARBITRATION AND THE RULE OF LAW 119, 123-24, 124 n.15 (Andrea Menaker ed., 2017) (Parties "should receive equal treatment . . . during constitution of the tribunal," because the selection process "must ensure a level playing field.").

Further, under Delaware law, which governs here, contracts should be interpreted to avoid meanings that produce unreasonable, oppressive, or absurd results in favor of meanings that render the operation of the contract fair and reasonable. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) ("An unreasonable interpretation produces an absurd result or one

that no reasonable person would have accepted when entering the contract."); *Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057, 1063 (Del. 2010) ("where a contract provision lends itself to two interpretations, a court will not adopt the interpretation that leads to unreasonable results . . . .").

Here, the interpretation adopted by the lower courts ignored the important principles of fairness and impartiality and used a hyper-technical reading of the agreement that drained it of all rational means for reaching a fair result—a panel with a supermajority appointed by the Tang Claimants. Intervention by this Court is necessary to further clarify the important role of Courts in ensuring fairness in treatment, especially in interpreting arbitrator selection clauses.

B. The Appointment of Arbitrators Was Contrary to the Agreement.

The appointment of the arbitrators contradicted the language in the Agreement and left the Panel powerless because an award issued by an arbitration panel not appointed under the agreed-upon method "must be vacated." *Brook*, 294 F.3d at 672, 9 U.S.C. § 5. While not all arguments about panel composition are substantive, when, as here, an arbitrator is not appointed under the contractually-dictated method, that arbitrator's subsequent decisions are made without any authority, are not entitled to deference, and are null. *PoolRe Ins. Corp.* and *Brook v. Peak Intern., Ltd.*, 294 F.3d 668, 672 (5th Cir. 2002).[12]

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[12] In contrast, an arbitrator initially appointed pursuant to the contractual method has authority to act under the contract and, thus, deference attaches to actions subsequent to the proper

Here, after a Disputing Member sends a written notice requesting informal dispute resolution, which fails, the Agreement set forth how an arbitrator must be selected:

- A Member that is a *party* to a Dispute becomes a Disputing Member. ROA.348.
- That Disputing Member notifies the other Disputing Members in writing. ROA.348.
- The first Disputing Member's notice provides the name of the Arbitrator appointed by that Disputing Member." ROA.348.
- "[E]ach other Disputing Member receiving notice of the Dispute" then names an Arbitrator . . ." ROA.348.

The agreement provides that if there are more than two parties, additional arbitrators are named to ensure an odd number of arbitrators on the Panel—reinforcing the agreement's goal of fairness and balance. ROA.349.

When Tang gave written notice of the matter in dispute to AVIC USA on May 14, 2014, it did so not only in its individual capacity, but expressly on "behalf of Soaring Wind LLC" collectively. ROA.1287. Likewise, the Demand served on June 13, 2014, designated all members of Soaring Wind collectively—except for AVIC USA and Thompson—as "Claimants" and designated collectively AVIC USA, Thompson, and the foreign Non-Signatories as "Respondents." ROA.29633.

Although Tang technically "served" that notice, meaning the other members of Soaring Wind technically

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appointment. *See Adam Tech. Int'l, S.A. de C.V. v. Sutherland Global Services, Inc.*, 729 F.3d 443 (5th Cir. 2013).

"received it," the other members were not "Disputing Members" that should have been entitled to appoint their own arbitrators. Instead, they were all unified in their efforts in giving notice against AVIC USA. Indeed, the Demand's Prayer for Relief confirms this fact, stating that Tang was seeking relief "in its own name and ***on behalf of Soaring Wind Energy, LLC and the other similarly situated members*** . . . ." ROA.29644 (emphasis added). But to game the system and inappropriately stack the Panel in their favor, the other Tang Claimants, who were already part of Tang's collective arbitration demand, each named their own additional arbitrators without providing individual notice as required. Indeed, Tang agreed to pay "the legal fees for those members . . . who appoint an arbitrator with Tang's approval." ROA.30978-80. This is plainly not what the Agreement contemplated or allowed.

Finding otherwise, the Fifth Circuit focuses on the distinction between the number of "sides" and "members" and "parties," and hypotheticals such as Eris tossing the Apple of Discord into a Soaring Wind conference room and the potential free-for-all that might follow. Pet. App. 19-21a. The Fifth Circuit ultimately held that each LLC member involved in the arbitration was able to appoint an arbitrator and that AVIC USA must not have expected to be outnumbered in an arbitration and must live with the consequences. Pet. App, 21a.

This Fifth Circuit reading of the Agreement misses the mark. Essentially, the Agreement requires that a Disputing Member give notice of a desire to start arbitration to the other members of the dispute and names an arbitrator. Then, those disputing members that receive the notice respond and name an arbitrator.

So if Eris did in fact throw the Apple of Discord into a conference room and all the members fought over it, each would have individually given notice, selected an arbitrator, and there would have been seven sides. Here, by contrast, Tang acted on behalf of its aligned members and they collectively gave one notice to AVIC USA and appointed one arbitrator. AVIC USA in response named its arbitrator. Then in contravention of the Agreement, and without giving their own notices, the members on behalf of whom Tang previously initiated the arbitration then named their own arbitrators. The result here in allowing each member on one side to select its own arbitrator against the one arbitrator appointed by their common opponent resulted in a lopsided arbitration panel that destroyed any hope of impartiality.

To be clear, this problem went beyond appearance. Tang championed the importance of nominating arbitrators to obtain a tribunal weighted in its favor. When Tang served the Demand on Thompson, Tang included a list identifying dozens of potential arbitrators. ROA.29715-18. The list included specific comments reflecting Tang's views of some arbitrators as favorable to the Tang Claimants, such as comments describing one potential arbitrator as "stupid, unpredictable, but likes me" and another as "smart, have a history, generally positive", and about another arbitrator; "Not that bright . . . has arbitrated in our offices recently; would probably go along" and about another "Loves Texas. Endorsed me as candidate." ROA.29715-18. The overt purpose was to control the naming of additional arbitrators who Tang believed would be favorable to it, in exchange for payment of legal fees.

Here, the Tang Claimants appointed *five* arbitrators, AVIC USA and Thompson each appointed one, and the

Panel itself appointed two more. Even those final appointments, however, were tainted by the Tang Claimants' gamesmanship. Over strenuous objections, Tang's counsel contacted its appointed supermajority of arbitrators to convey Soaring Wind's "thoughts" for who the additional arbitrators ought to be. ROA 29845-47.

Tang Claimants' tactic worked—the arbitration was decided 6 to 3, with *all five arbitrators directly appointed by Claimants and a sixth indirectly appointed by Claimants, voting for the Tang Claimants*. As the Fourth Circuit stated in an analogous case, "[t]o uphold the promulgation of this aberrational [tribunal] under the heading of arbitration would undermine, not advance, the federal policy favoring alternative dispute resolution." *Hooters,* 173 F.3d at 941.

The Fifth Circuit interpretation of the Agreement leads to absurd results which are inconsistent with widely recognized principles of fairness and impartiality (and those reflected in the Agreement itself). No reasonable party would ever agree to the stacked Panel at issue. The Fifth Circuit held that AVIC USA must not have expected to be outnumbered and that because the parties were sophisticated, they could have agreed to seemingly any degree of disproportionality in the panel composition. That contradicts the practical reality of the make-up of the LLC. AVIC USA must have expected that in a dispute it might have been pitted against all the Tang Claimants together because all of the Tang Claimants were related entities. This underscores that AVIC USA would never have agreed to be so outnumbered and likewise did not agree to the interpretation the Fifth Circuit found persuasive.

Because the interpretation of the lower courts is inconsistent with the contract and widely recognized arbitration principles of fairness, this Court should intervene to prevent such an absurd and unjust interpretation of the Agreement.

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed January 7, 2020]

No. 18-11192
D.C. Docket No. 3:15-CV-4033

SOARING WIND ENERGY, L.L.C.; TANG ENERGY GROUP, LIMITED; THE NOLAN GROUP INCORPORATED; MITCHELL W. CARTER; JAN FAMILY INTERESTS, LIMITED; MARY M. YOUNG, Individually and as the Independent Executrix of the Estate of Keith P. Young, Jr., Deceased,

Plaintiffs-Appellees,

v.

CATIC USA INCORPORATED, also known as AVIC International USA, Incorporated; AVIC INTERNATIONAL HOLDING CORPORATION; AVIC INTERNATIONAL RENEWABLE ENERGY CORPORATION; AVIATION INDUSTRY CORPORATION OF CHINA; CHINA AVIATION INDUSTRY GENERAL AIRCRAFT COMPANY LIMITED,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

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JUDGMENT

Before DAVIS, SMITH, and COSTA, Circuit Judges.

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellants pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed January 7, 2020]

No. 18-11192

SOARING WIND ENERGY, L.L.C.; TANG ENERGY GROUP, LIMITED; THE NOLAN GROUP INCORPORATED; MITCHELL W. CARTER; JAN FAMILY INTERESTS, LIMITED; MARY M. YOUNG, Individually and as the Independent Executrix of the Estate of Keith P. Young, Jr., Deceased,

Plaintiffs-Appellees,

versus

CATIC USA INCORPORATED, Also Known as AVIC International USA, Incorporated; AVIC INTERNATIONAL HOLDING CORPORATION; AVIC INTERNATIONAL RENEWABLE ENERGY CORPORATION; AVIATION INDUSTRY CORPORATION OF CHINA; CHINA AVIATION INDUSTRY GENERAL AIRCRAFT COMPANY LIMITED,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Texas

Before DAVIS, SMITH, and COSTA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Catic USA,[1] a California corporation with Chinese corporate parentage, appeals the confirmation of an adverse arbitral award. Having determined that this court has jurisdiction, we affirm: The arbitration panel was fairly constituted and did not exceed its authority.

I.

A dispute among members of Soaring Wind Energy, LLC (sometimes called "the LLC"), was submitted to an arbitration panel, which awarded the LLC $62.9 million against Catic USA (and its AVIC-group affiliates) and ordered that Catic USA be divested of its shares in the LLC without compensation. A judgment of the district court confirmed that award. Catic USA, joined by its various Chinese affiliates, appeals.

The origins of Soaring Wind Energy trace to 2007, when representatives of Tang Energy Group ("Tang Energy") and Catic USA began talks of creating a vehicle for wind-energy marketing and project development. They confirmed those talks in a Memorandum of Understanding, which the Soaring Wind Agreement (the "Agreement") superseded.

The Agreement created the LLC, whose "business" would be "to provide worldwide marketing of wind energy equipment, services and materials related to wind energy, including, but not limited to, marketing wind turbine generator blades and wind turbine generators and developing wind farms." Each member agreed to "conduct activities constituting the Business [only] in and through [Soaring Wind] and its Controlled subsidiaries." Class A members agreed that such prohibition extended to their affiliates.

[1] Catic USA is also known as AVIC International USA.

The Agreement also outlined a procedure for resolving disputes. Under its terms, "any controversy, dispute, or claim arising under or related to [the Agreement]," after failed attempts at negotiation, "shall be submitted to binding arbitration." Each "Disputing Member"—defined as "each Member that is a party to [the] Dispute"—would then have the opportunity to name its own arbitrator. Those selected as arbitrators would themselves choose an additional arbitrator (or two additional arbitrators if necessary to achieve an odd number). The panel would have the authority "to grant injunctive relief and enforce specific performance" and to issue a final, court-enforceable decision, though it would lack "authority to award special, exemplary, punitive or consequential damages."

After years without Catic USA's providing Soaring Wind any financial support, a representative from Tang Energy requested that one of Catic USA's Chinese AVIC-group affiliates[2] help fund Soaring Wind. An AVIC representative responded that "AVIC International has already provided a total of 50 million USD in financing to wind power projects in the US and will keep [] trying in the future." Paul Thompson—himself a Class B member of Soaring Wind—served as president and CEO of one such affiliate,[3] through which the AVIC group appeared to

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[2] Two years after Catic USA signed the Agreement, its parent company formed AVIC International Renewable Energy Corporation ("AVIC IRE") as a majority-owned subsidiary. AVIC IRE'S stated purpose, like Soaring Wind's, included developing wind power projects.

[3] Thompson ran Ascendant Renewable Energy Corporation ("Ascendant"), which itself funded at least one major wind farm project to completion between 2011 and 2012. Ascendant was formed as a wholly owned subsidiary of AVIC IRE.

have invested millions of dollars in wind power project development.[4]

Tang Energy subsequently demanded arbitration against Catic USA, Thompson, and Catic USA's non-signatory corporate affiliates. Among other things, Tang claimed that Catic USA had breached the Agreement through the actions of its Chinese corporate affiliates. Tang named its arbitrator in its demand, and the four remaining Class A members[5] joined Tang in the dispute and, accordingly, named their respective arbitrators. Catic USA and Thompson answered Tang's demand and named their own arbitrators, but Catic USA's non-signatory Chinese affiliates refused to participate in the arbitration. As the Agreement required, the seven selected arbitrators then collectively appointed two more.

Catic USA and Thompson preemptively sued the claimants in federal court, seeking a declaratory judgment that the panel was improperly constituted.[6] Specifically, they claimed both that fundamental fairness and the Agreement required each side of the dispute to select an arbitrator, who would then select a third and final arbitrator. The district court dismissed those claims for lack of subject matter jurisdiction

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[4] The arbitration panel found that AVIC IRE or its subsidiaries had developed at least five wind turbine projects in the United States, with additional projects located abroad.

[5] Appellees Young, Carter, Jan Family Interests, and the Nolan Group.

[6] One of Catic USA's non-signatory affiliates also preemptively sued the claimants, successfully obtaining a judgment declaring that its "party status to the arbitration [could] only be determined by a court, and not an arbitrator . . . ." *Ascendant Renewable Energy Corp. v. Tang Energy Grp., Ltd.,* No. 3:14-CV-3314-K, 2015 U.S. Dist. LEXIS 103518, at *8 (N.D. Tex. Aug. 4, 2015).

under the FAA.[7] Catic USA and Thompson made similar arguments before the arbitration panel, which determined for itself that it was constituted according to the Agreement's unambiguous terms.

After a five-day hearing, the arbitration panel issued its final award in favor of the claimants. The panel determined that "Catic USA breached the [Soaring Wind] Agreement by its Affiliates engaging in the 'Business' of [Soaring Wind Energy]." It further found that the AVIC group, including Catic USA, "operate[d] as one entity" and that "AVIC HQ and its wholly owned subsidiaries created additional subsidiaries in an attempt to get around its promises made in the [Soaring Wind] Agreement to Claimants." The panel concluded that Catic USA and its non-signatory Chinese affiliates should be held "jointly and severally liable to [Soaring Wind] in the amount of $62.9 USD million" in lost profits owed to the LLC.[8]

The arbitration panel noted that "[t]he lost profits set forth in [its] award are due to [Soaring Wind Energy] for distribution to the Claimants through their percentages set forth in the [Soaring Wind] Agreement." The panel did not, however, stop at ordering that Catic USA pay the monetary damages: "[I]n order to prevent [Catic] USA and Thompson from profiting from their breaches of the [ ] Agreement," the panel wrote, "they should be prohibited from receiving

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[7] *AVIC Int'l USA, Inc. v. Tang Energy Grp., Ltd.,* No. 3:14-CV-2815-K, 2015 U.S. Dist. LEXIS 13968 (N.D. Tex. Feb. 5, 2015), *aff'd,* 614 F. App'x 218 (5th Cir. 2015) (per curiam).

[8] The panel arrived at that amount by accepting AVIC IRE'S vice president's admission that the AVIC group had invested $50 million in wind power projects in the United States. At an anticipated 15% rate of return, the discounted present value of the $50 million investment was $62.9 million.

any profit from any award to [Soaring Wind].” Thus, in addition to the $62.9 million damages, the panel ordered that “[Catic] USA and Thompson’s equity interest in [Soaring Wind] should be divested . . . .”[9]

The claimants sought judicial confirmation of the arbitral award against Catic USA and its Chinese affiliates. At the claimants’ request, the district court bifurcated the proceedings, staying the case against the Chinese entities.[10] The court then confirmed the award in its entirety against Catic USA. Catic USA and its Chinese affiliates appeal.

II.

“[C]ourts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists . . . .” *Arbaugh v. Y&H Corp.,* 546 U.S. 500, 514 (2006). Accordingly, we requested *nostra sponte* that the parties address federal subject-matter jurisdiction under either complete diversity or the New York Convention (“NY Convention”).[11]

The parties vainly try to taint each other’s assertions with those made in the district court. Catic USA notes that “diversity jurisdiction,” not jurisdiction under the NY Convention, “is the only basis for jurisdiction” that the plaintiffs had invoked. Similarly, the plaintiffs highlight that, although Catic USA contends that jurisdiction is lacking on appeal, it invoked

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[9] The panel allowed Catic USA a $350,000 credit for its initial capital contribution to Soaring Wind.

[10] That case, relating most importantly to the Chinese entities’ joint and several liability for Catic USA’s damages, remains stayed pending the resolution of this appeal.

[11] “The Convention on the Recognition and Enforcement of Foreign Arbitral Awards,” 9 U.S.C. §§ 201 *et seq*.

the NY Convention when seeking declaratory judgment before arbitration. Those points are irrelevant, as "[i]t is well settled . . . that the subject matter jurisdiction of a federal court can be challenged at any stage of the litigation (including for the first time on appeal), even by the party who first invoked it." *Randall & Blake, Inc. v. Evans (In re Canion),* 196 F.3d 579, 585 (5th Cir. 1999).

Attempting to sidestep that maxim, the plaintiffs characterize jurisdiction under the NY Convention—here, whether a legal relationship bears a "reasonable relation" to a foreign state—as a "jurisdictional fact" capable of party admission. But what should amount to a "reasonable relation" under 9 U.S.C. § 202 is patently a question of law, not of fact. Catic USA could certainly admit facts—such as the existence of its Chinese affiliates or of projects Soaring Wind contemplated abroad—and those binding facts might be decisive in a jurisdictional inquiry. *See State Farm Fire & Cas. Co. v. Flowers,* 854 F.3d 842, 845 (5th Cir. 2017). A party is not, however, bound by its previous legal arguments as to jurisdiction. *See Canion,* 196 F.3d at 585.

The district court did not address whether there is complete diversity, but it appears to have assumed, without explanation, the applicability of the NY Convention. We examine *de* novo the presence of federal subject-matter jurisdiction, *Pershing, LLC v. Kiebach,* 819 F.3d 179, 181 (5th Cir. 2016), keeping in mind that its absence would require dismissal, *Arbaugh,* 546 U.S. at 506.

A.

For the district court to have diversity jurisdiction under 28 U.S.C. § 1332, "all persons on one side of the

controversy [must] be citizens of different states than all persons on the other side" at the time the complaint was filed. *Harvey v. Grey Wolf Drilling Co.,* 542 F.3d 1077, 1079 (5th Cir. 2008). Catic USA is a California corporation. It is undisputed that, as of the initiation of the arbitration, Catic USA was a member of Soaring Wind, LLC, and because, for diversity jurisdictional purposes, "the citizenship of a LLC is determined by the citizenship of all of its members," *id.* at 1080, Soaring Wind was at least at that point a citizen of California.

The arbitration panel purported to divest Catic USA of its membership interest in Soaring Wind. The question is whether that decision alone—absent subsequent judicial confirmation—effected Catic USA's termination from Soaring Wind and, consequently, Soaring Wind's loss of California citizenship. If not, this court would lack diversity jurisdiction.

Catic USA contends that diversity jurisdiction is lacking because the arbitral award divesting it of its membership in Soaring Wind had no legal effect pending court confirmation. The plaintiffs respond that, under the freedom of contract recognized under Delaware law, the Agreement must be interpreted as granting the arbitration panel "final, binding" authority to terminate Catic USA's membership in the LLC.

Plaintiffs' focus on Delaware's freedom of contract misses the point. The question is not whether the Agreement granted the arbitration panel authority to issue an award divesting Catic USA of membership. Even assuming the panel did have such authority, it is an entirely separate question whether the panel's decision had immediate legal effect.

It did not. It is well settled that, absent voluntary compliance, an arbitral award requires judicial confirmation to effect a change in legal status.[12] Plaintiffs' attempt to characterize the "final, binding" authority of the panel as including coercive legal authority is unpersuasive. Such commonly used terms "merely reflect a contractual intent that the issues joined and resolved in the arbitration may not be tried de novo in any court." *M & C Corp. v. Erwin Behr GmbH & Co.,* 87 F.3d 844, 847 (6th Cir. 1996). They do not grant arbitrators "the coercive power to enforce the award" without being first "transformed into a judgment, which can be executed with the enforcement mechanism of the state." *Schlumberger,* 195 F.3d at 220. That an arbitral award be "final" does not obviate the need for judicial confirmation; it only *allows* for such confirmation.[13]

Granted, parties may contract to change membership in an LLC without court approval. It is entirely different, however, when parties seek an *involuntary* termination of membership. Plaintiffs acknowledge that "a judgment would be needed, for example, to enforce a damages award by levying the judgment debtor's assets." But equity interest in an LLC is also an asset, an involuntary transfer of which no arbitrator may effect without judicial confirmation.

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[12] *Schlumberger Tech. Corp. v. United States,* 195 F.3d 216, 220 (5th Cir. 1999); *see also Mulhall v. UNITE HERE Local 355,* 618 F.3d 1279, 1293 (11th Cir. 2010); *D.H. Blair & Co. v. Gottdiener,* 462 F.3d 95, 104 (2d Cir. 2006); *Suter v. Munich Reins. Co.,* 223 F.3d 150, 156 (3d Cir. 2000); *Camping Constr. Co. v. Dist. Council of Iron Workers,* 915 F.2d 1333, 1347-48 (9th Cir. 1990).

[13] *See Grissom v. Nationwide Mut. Ins. Co.,* 599 A.2d 1086, 1090 (Del. Ch. 1991) ("The general rule is that an Arbitration Award may be confirmed only if it is a final decision.").

The plaintiffs are correct that the Agreement does not mandate judicial review of arbitration awards. Indeed, it specifies that an arbitral award "may be filed in any court of competent jurisdiction and may be enforced by any Disputing Member as a final judgment of such court." But the "optional" nature of judicial review here does not mean, as plaintiffs contend, that the arbitral award has inherent legal effect. Instead, judicial confirmation would be unnecessary (or "optional") should all parties *voluntarily* acquiesce to the award. Catic USA has not done so, which is precisely why plaintiffs seek judicial confirmation.

B.

Even without diversity of citizenship, this court would have jurisdiction should this case relate to an arbitration agreement or award "falling under" the NY Convention.[14] It is undisputed that the action to confirm the award "relates to" the award; the question is whether that award "falls under" the Convention. An "arbitral award arising out of a legal relationship" between U.S. citizens falls under the Convention if that "relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."[15]

Catic USA contends that the Agreement does not involve property abroad and does not reasonably relate to a foreign state. Catic USA suggests that this court remand with instruction to determine whether its non-

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[14] 9 U.S.C. § 203; *see also Stemcor USA Inc. v. CIA Siderurgica do Para Cosipar,* 927 F.3d 906, 909 (5th Cir. 2019) (on pet. for reh'g).

[15] 9 U.S.C. § 202; *see also Freudensprung v. Offshore Tech. Servs., Inc.,* 379 F.3d 327, 339-40 (5th Cir. 2004).

signatory Chinese corporate affiliates were party to the Agreement and whether the agreement contemplated performance abroad. If the answer to both questions be no, then there would be no subject matter jurisdiction.

The plaintiffs respond that the Agreement has a reasonable relation to China. They note that Catic USA is a subsidiary of AVIC IHC, which is itself a subsidiary of AVIC HQ—a state-owned enterprise of the People's Republic of China. They further note the arbitrators' finding that "AVIC HQ exercised such complete control" over Catic USA so that the two companies "operate[d] as one entity," and "[w]hen [Catic] USA signed the [Soaring Wind] Agreement, it was doing so on orders from AVIC HQ." According to the plaintiffs, "the Chinese entities'—and Chinese state's—involvement pervaded the parties' relationship," conferring jurisdiction under the Convention.

There is no question that the relationship among the parties broadly relates to China. Tang Energy had partnered with AVIC HQ[16] on projects within Chinese territory from 1997 through the mid-2000s. The success of those projects inspired them to create Soaring Wind, conceived as a partnership between Tang and AVIC HQ's U.S. subsidiary. The pre-Agreement Memorandum of Understanding envisioned that 9.5% of Soaring Wind's equity would be owned by AVIC HQ, whose "offices and employees in China [would] be available for support as needed."[17] An AVIC HQ vice president—

[16] At the time, the Chinese umbrella AVIC organization was known as "Catic."

[17] The eventual Agreement differed from the Memorandum of Understanding by not mentioning Catic International and by increasing Catic USA's profit interest.

who held no position in Catic USA—signed that Memorandum on Catic USA's behalf. Following the creation of Soaring Wind, Tang contracted separately with one of Catic USA's Chinese affiliates to obtain $300 million in financing for wind power project development. Plaintiffs are thus correct in stating that "[a]lthough only United States citizens signed the Soaring Wind Agreement, the parties' relationship both (i) involved Chinese citizens, including arms of the Chinese government, and (ii) had a reasonable relation to China."

The statute, however, concerns not the "parties' relationship" but the "legal relationship" whence the arbitral award arose. 9 U.S.C. § 202. That legal relationship is the Agreement, which plaintiffs accuse Catic USA of violating and which provided the basis for the underlying arbitration. We look, therefore, not to the general relationship among the parties but to the foreign character, if any, of the Agreement itself.

It is not dispositive that Catic USA, as signatory to the Agreement, is a subsidiary of a Chinese corporate umbrella. Congress has not granted federal jurisdiction whensoever there exist a legal relationship bearing any reasonable relation with a foreign state; more precisely, it has specified there be "*some other* reasonable relation" with a foreign state. *Id.* (emphasis added). The "reasonable relation" is thus limited[18]; it must be akin to "involv[ing] property located abroad" or "envisag[ing] performance or enforcement abroad"—

[18] "[W]here general words follow specific words in an enumeration . . . , the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding words." William N. Eskridge, Jr., INTERPRETING LAW 77 (2016) (quoting 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:17 (7th ed. 2015)).

that is, the relationship must contemplate overseas action or involvement. *See id.; see also Yates v. United States,* 135 S. Ct. 1074, 1086-87 (2015) (plurality opinion) (discussing the textual canon of *ejusdem generis).* It might be enough if an agreement "call[] . . . for meetings to be held in" a foreign country or if it should "contain a list of mandatory [foreign] vendors . . . ."[19] It is not enough, however, that one party, though a U.S. citizen, should happen to bear foreign corporate parentage.[20]

The Agreement makes explicit reference neither to China nor to any Chinese citizen, nor even to any foreign place or entity.[21] Aside from a generic, stated purpose "to provide worldwide marketing" in wind energy, the Agreement appears to evince a domestic character: It creates a Delaware company, comprised entirely of U.S. citizen-members, with a principal place of business in Texas. As per the Agreement, the underlying arbitration proceeded in Texas, under Delaware substantive law. In short, it would appear

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[19] *Outokumpu Stainless USA LLC v. Converteam SAS,* No. 16-00378-KD-C, 2017 U.S. Dist. LEXIS 11995, at *16 (S.D. Ala. Jan. 30, 2017), *aff'd in relevant part,* 902 F.3d 1316 (11th Cir. 2018), *cert. granted,* 139 S. Ct. 2776 (2019).

[20] *See Access Info. Mgmt. of Haw., LLC v. Shred-It Am., Inc.,* No. 10-00622, 2010 U.S. Dist. LEXIS 116862, at *17 (D. Haw. Nov. 2, 2010) ("[I]t is irrelevant to the inquiry that [the defendant] is a wholly-owned subsidiary of a [foreign] corporation . . . ."); *Williams v. Deutsche Bank AG,* No. 3:05-CV-1395-N, 2006 U.S. Dist. LEXIS 75426, at *13 (N.D. Tex. Feb. 9, 2006) ("[T]hat a domestic signatory of the agreement is a subsidiary of a foreign corporation . . . does not give the arbitration agreement a 'reasonable relation' with a foreign state.").

[21] The contract's "Definitions" section specifies that "CATIC" refers to "CATIC (USA), a California corporation."

on its face that the Agreement bears no relation to China (or any other foreign state).

Our analysis of the Agreement's relation to a foreign state does not, however, end at the four corners of the contract.[22] The Agreement specifies that a member would be in breach should its "[a]ffiliate] . . . participate in wind farm land development projects . . . except through an entity owned by both [Soaring Wind Energy] and CATIC . . . ." Such "affiliates" of Catic USA include a variety of Chinese entities, a fact of which the contracting parties were well aware. A Chinese entity's actions on foreign soil could (and did) trigger breach for one of the LLC's (domestic) members. Moreover, the arbitral award holds those Chinese affiliates jointly and severally liable for damages to the claimants. Such factors are enough for the Agreement to bear a relation to China sufficient for federal jurisdiction under the NY Convention.

III.

"We review a district court's order confirming an arbitration award de novo [and] may affirm the district court's decision on any basis presented to the district court and argued in the district court." *Light-Age, Inc. v. Ashcroft-Smith,* 922 F.3d 320, 322 (5th Cir. 2009) (per curiam). Despite that, "our review of the arbitrator's award itself . . . is very deferential." *Timegate Studios, Inc. v. Southpeak Interactive, LLC,* 713 F.3d 797, 802 (5th Cir. 2013). Indeed, this court may vacate

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[22] *See, e.g., ChampionsWorld, LLC v. US. Soccer Fed'n, Inc.,* 890 F. Supp. 2d 912, 927 (N.D. Ill. 2012) (looking to the foreign "nature" of the business); *Nomanbhoy v. Vahanvaty,* No. 11-C-2456, 2011 U.S. Dist. LEXIS 147033, at *25-26 (N.D. Ill. Dec. 21, 2011) (evaluating extracontractual testimony to determine whether the parties envisaged performance abroad).

the award only if “the arbitrators exceeded their powers”[23] by acting “contrary to express contractual provisions”[24] or if the award otherwise violates the NY Convention.[25] Even then, appellants face a heavy burden, as “[a] reviewing court examining whether arbitrators exceeded their powers must resolve all doubts in favor of arbitration.” *Rain CII Carbon, LLC v. ConocoPhillips Co.,* 674 F.3d 469, 472 (5th Cir. 2012).

Seeking to vacate the award, Catic USA and its Chinese affiliates advance three theories: (1) The district court erred by confirming the award without first reviewing the arbitrators’ power over Catic USA’s Chinese affiliates; (2) the arbitration panel was improperly constituted; and (3) the award includes speculative or punitive damages rendering it unenforceable.

A.

Catic USA suggests that the district court could not have confirmed the arbitral award without first determining that the company’s Chinese affiliates were subject to arbitration. It notes that the arbitration panel first found the affiliates to be subject to arbitration, then drew an adverse inference from their refusal to participate. Without that inference, Catic USA contends, the arbitrators had no basis for finding breach.

The panel’s inference that one or more of Catic USA’s affiliates financed a wind power development

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[23] 9 U.S.C. § 10(a)(4).

[24] *Beaird Indus., Inc. v. Local 2297, Int’l Union,* 404 F.3d 942, 946 (5th Cir. 2005).

[25] *See* 9 U.S.C. § 207.

project in violation of the Agreement was based on more than the affiliates' non-participation in the arbitration. First, the panel had access to AVIC IRE Vice President Xu Hang's e-mail that "AVIC International [had] already provided a total of $50 million USD in financing to wind power projects in the US," none of which had flowed to Soaring Wind. Second, the AVIC Group's press releases and online publications referenced ongoing (non-Soaring Wind) wind-power development projects. Catic USA failed to provide any meaningful rebuttal to such evidence.

Catic USA made its proverbial bed; therein it must lie. The company signed an agreement specifying that the actions of its affiliates could constitute its own breach. Whether Catic USA's non-signatory affiliates themselves be subject to the arbitration is irrelevant: Catic USA "assum[ed] the obligation of its affiliates' performance."[26] The arbitration panel reasonably found that a breach had occurred; given the deference owed to the panel,[27] we decline to disturb that finding.

B.

Catic USA claims that the panel was improperly constituted. It notes that one side (the plaintiffs)

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[26] *Xtria LLC v. Tracking Sys., Inc.,* No. 3:07-CV-0160-D, 2007 U.S. Dist. LEXIS 68997, at *10 (N.D. Tex. Sept. 18, 2007).

[27] Catic USA attempts to frame the issue as akin to whether its Chinese affiliates were subject to the Agreement, a question undisputedly outside the traditional deference given to arbitrators. *See Bridas S.A.P.I.C. v. Gov't of Turkm.,* 345 F.3d 347, 354 (5th Cir. 2003). But the answer to that question is immaterial to the issue at hand, which is whether conduct occurred triggering Catic USA's breach. That "is a question of fact," *Tex. Capital Bank N.A. v. Dall. Roadster, Ltd.* (*In re Dall. Roadster, Ltd.*), 846 F.3d 112, 127 (5th Cir. 2017), the resolution of which we generally leave to the arbitrators.

appointed five arbitrators, the other side (Catic USA and Thompson) only two. That method of selection was against the terms of the contract, which, according to Catic USA, required an equal number of appointed arbitrators per side. Because the panel was improperly selected, Catic USA contends, this court owes no deference to its award.

In addition, Catic USA's Chinese affiliates contend that—even assuming the Agreement's process of appointing arbitrators were followed—the result nevertheless violated the NY Convention's due process and public policy requirements. They aver that it was fundamentally unfair (and therefore invalid under the Convention) for one side to appoint more than twice as many arbitrators as the other. As this court must observe "the [Convention's] grounds for refusal . . . of recognition or enforcement of the award," 9 U.S.C. § 207, the Chinese companies suggest we set the award aside.

1.

The Federal Arbitration Act requires that "[i]f in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed . . . ." *Id.* § 5. Arbitrators appointed contrary to the contract necessarily "exceed[] their powers," *id.* § 10(a)(4), and, in such a case, "judicial deference is at an end," *PoolRe Ins. Corp. v. Org. Strategies, Inc.,* 783 F.3d 256, 262 (5th Cir. 2015). Catic USA is thus correct that, should the selection of the arbitration panel fundamentally "depart[] from the contractual selection process," vacatur would be the appropriate remedy. *Id.* at 263.

There was no such departure. Catic USA notes "that there were only two sides in this dispute," but the

Agreement contemplates the number of *parties,* not the number of sides. The Agreement lists seven total, signatory "Members."[28] For a dispute under the Agreement, "each Member that is a party to such Dispute is . . . a 'Disputing Member.'" And each Disputing Member would have the opportunity to "name an Arbitrator (or otherwise agree in writing to the Arbitrator(s) therefore chosen as its designated arbitrator)." This case involves two sides, but, more importantly, it features seven members; suppose Eris had tossed the Apple of Discord into a Soaring Wind conference room, prompting a free-for-all among the parties—the arbiter selection process would have remained the same.

This court already noted that "AVIC [was] asking us to rewrite their agreement's arbitration provision to require that every arbitration among these multiple parties comprise only two 'sides' . . . [and] precisely three arbitrators . . . ." *AVIC Ina,* 614 F. App'x at 219. Catic USA has since clarified that its proffered reading allows for more than two "sides" to a dispute (and more than three arbitrators) but nevertheless requires each "side" have equal say in arbitrator selection. But as stated above, the Agreement contemplates the number of parties, not the number of sides. Given that Catic USA does not (and cannot) seriously question that each Claimant is "a party to [the] Dispute," it cannot escape the conclusion that the Agreement's written procedure was followed.

Catic USA would therefore have us hold that following the text of the Agreement in this case leads to "absurd results." Under the Agreement, Catic USA

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[28] CATIC (USA), also known as AVIC USA; Tang Energy Group, Ltd.; Keith P. Young; Mitchell W. Carter; Jan Family Interests, Ltd.; The Nolan Group, Inc.; Paul E. Thompson.

posits, "ten minority shareholders . . . could unite together to eject a majority shareholder that controls 90% of the LLC from membership . . . [by] appointing ten of the eleven arbitrators to rubber-stamp its coup." As in this case, Catic USA submits, "the formation of a stacked, unfair arbitration panel is an absurd result to which no reasonable party would ever agree."

But the risk of such an occurrence is precisely within the plain terms to which Catic USA agreed. Catic USA urges this court not to choose from among competing, reasonable interpretations but to discard the plain text of the Agreement out of so-called fairness. "It is not the court's role to rewrite the contract between sophisticated market participants, allocating the risk of an agreement after the fact, to suit the court's sense of equity or fairness."[29] One must assume that Catic USA did not expect to be outnumbered in any dispute falling under the Agreement; that its expectations were frustrated does not render the Agreement absurd or unfair.

2.

Federal courts are to enforce the NY Convention.[30] Its Article V(1)(b) provides that a court may refuse to recognize or enforce an award where "[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case . . . ." This court has construed that passage as "essentially sanction[ing] the application

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[29] *Wal-Mart Stores, Inc. v. MG Life Ins. Co.,* 872 A.2d 611, 624 (Del. Ch. 2005), *rev'd in part on other grounds,* 901 A.2d 106 (Del. 2006).

[30] 9 U.S.C. § 201; *see also* Recognition and Enforcement of Foreign Arbitral Awards, Dec. 29, 1970, 21 U.S.T. 2517.

of the forum state's standards of due process, in this case, United States standards of due process." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 364 F.3d 274, 298 (5th Cir. 2004) (quotation marks omitted). The hearing must "meet[] the minimal requirements of fairness—adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator" once the parties have had "an opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 299 (quotation marks omitted).

Catic USA's Chinese affiliates claim that the arbitration proceedings violated due process, reasoning that because the two sides appointed an unequal number of arbitrators, the panel's decision could not have been impartial. That contention, when taken to its logical conclusion, would require this court to invalidate any arbitral award not issued by an evenly appointed panel.

We reject that notion. The Agreement was not a contract of adhesion but a bespoke deal made between extremely sophisticated parties. The Agreement did not inherently favor one party or another; it just so happened that Catic USA was outnumbered. The agreed-upon selection process was followed to the letter: Catic USA and Thompson selected the arbitrators and received the process they were due.

C.

Catic USA contends that, even assuming the panel was properly constituted, the award is improper. Specifically, Catic USA claims that the panel exceeded its authority by awarding speculative and punitive damages in violation of the Agreement's written terms. Catic USA notes that the Agreement expressly foreclosed any liability among members or affiliates for

"exemplary, punitive, special, indirect, consequential, remote, or speculative damages," and the Agreement denied any arbitrator the power to award such damages. Catic USA contends (1) that the panel's estimation of lost profits was speculative and (2) that by divesting Catic USA of its LLC membership interest yet holding it liable for the LLC's total estimated lost profits, the award was punitive. Catic USA suggests that, because the award reflects an abuse of the panel's authority, this court vacate and remand for further proceedings.

An "arbitral action contrary to express contractual provisions will not be respected on judicial review." *Executone Info. Sys., Inc. v. Davis,* 26 F.3d 1314, 1325 (5th Cir. 1994) (quotation marks omitted). The Agreement explicitly stated that "[t]he Arbitrators shall have no authority to award special, exemplary, punitive or consequential damages." Thus, the contract itself "limited the arbitrator's own authority." *Timegate,* 713 F.3d at 805 n.17. We generally defer to arbitrators' interpretation of their own authority, *see Rain,* 674 F.3d at 472, but if the panel exceeded its authority, "it would be incumbent upon us to vacate [the] award, in spite of the discretion typically granted to arbitral decisions," *Bridas,* 345 F.3d at 365.

1.

"[T]he standard remedy for breach of contract is based upon the reasonable expectations of the parties *ex ante." Siga Techs., Inc. v. PharmAthene, Inc.,* 132 A.3d 1108, 1130 (Del. 2015). Such damages "must be proven with reasonable certainty, and no recovery can be had for loss of profits which are determined to be uncertain, contingent, conjectural, or speculative." *Id.* at 1131 (quotation marks omitted). At the same time, "certain presumptions apply when evaluating harm and loss. Where the injured party has proven the *fact*

of damages . . , less certainty is required of the proof establishing the *amount* of damages." *Id.* (emphases in original). Thus, "[r]esponsible estimates that lack mathematical certainty are permissible so long as the court has a basis to make a responsible estimate of damages." *Del. Express Shuttle, Inc. v. Older,* No. 19596, 2002 Del. Ch. LEXIS 124, at *60 (Del. Ch. Oct. 23, 2002). And on the margins, it is an "established presumption that doubts about the extent of damages are generally resolved against the breaching party." *Siga,* 132 A.3d at 1131.

The award is based on much more than speculation. Having found that Catic USA breached the agreement by investing (via an affiliate) at least $50 million in wind-farm development in an outside entity, the arbitration panel was tasked with estimating claimants' resulting lost profits, if any. The panel found that Catic USA's affiliated AVIC group would invest in any given project only if it anticipated a minimum 15% return; it then discounted that return to determine the present value of the lost profits.

Catic USA does not contest that AVIC's anticipated rate of return was 15% or that the panel employed an appropriate discount rate; instead, it attacks the panel's assumption that AVIC's investment did (or would) generate profits. It is true that, although the amount of lost profits may be estimated, claimants generally "must show that there would [have been] *some* future profits" but for the breach. *Id.* at 1133 (emphasis added). But in this case, Catic USA has refused to provide the relevant information, and it was thus within the arbitration panel's authority to infer that AVIC's investment was indeed profitable. *See id.* at 1131 n.132 (noting that damages may be inferred

when uncertainty results from the breaching party's own actions).

2.

"Historically, damages for breach of contract have been limited to the non-breaching parties' expectation interest." *E.I. DuPont de Nemours & Co. v. Pressman,* 679 A.2d 436, 445 (Del. 1996). "Punitive damages . . . increase the amount of damages in excess of the promisee's expectation interest . . . ." *Id.* at 446. The Agreement explicitly denied arbitrators the authority to award punitive damages. "Thus, if punitive damages were indeed awarded in this case, it would be incumbent upon us to vacate such an award, in spite of the discretion typically granted to arbitral decisions." *Bridas,* 345 F.3d at 365.

Catic USA contends that the panel issued what are effectively punitive damages. Given the panel's determination that Catic USA's breach denied Soaring Wind $62.9 million in lost profits, claimants would be owed expectation damages of $31.45 million to reflect their 50% interest in the company. But by awarding the full $62.9 million while simultaneously divesting Catic USA and Thompson of their equity interest, Catic USA suggests, the panel granted the claimants what is, in substance, double their expected damages.

The panel acknowledged that "[t]he lost profits set forth in [its] award are due to [Soaring Wind] for distribution to the Claimants through their percentages set forth in the [ ] Agreement." Insofar as it divested Catic USA and Thompson of their equity interests, the award served not necessarily to compensate the claimants or the LLC but "to prevent [Catic] USA and Thompson from profiting from their breaches."

Although the panel did not have the authority to issue punitive damages, it did possess powers to grant court-enforceable injunctive relief. The question thus is whether the divestment constitutes permissible injunctive (or equitable) relief or improper punitive damages.

It is the former. The panel divested Catic USA and Thompson of their interest in Soaring Wind to prevent them from receiving incidental benefit for breaching their duties, duties owed not only to the other members of the LLC but also to the LLC itself. Unlike punitive damages, which are based on a perceived reprehensibility of the breaching party's actions or flow from a desire to make examples of them, *see E.I. DuPont,* 679 A.2d at 445-46, the divestment operates to achieve what the panel considered a fair result. Such concern—that relief not only compensate parties financially but also achieve a just outcome, *ex aequo et bono—is* precisely a matter of equity.[31] Catic USA's theory that the divestment effectively doubles the damages—and is therefore substantively indistinguishable from punitive damages—is well taken, but, given the broad scope of "equitable" relief,[32] combined with the deference we must grant the arbitration panel,[33] we decline to set aside the divestment as punitive and not equitable.

The judgment confirming the arbitration award is AFFIRMED.

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[31] *See 1 J.* POMEROY, EQUITY JURISPRUDENCE § 363, at 8-9 (5th ed. 1941).

[32] *See Great-W. Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204,212-18 (2002).

[33] *See Rain,* 674 F.3d at 472.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed September 17, 2018]

Civil Action No. 3:15-CV-4033-K

SOARING WIND ENERGY, LLC, TANG ENERGY GROUP, LTD., THE NOLAN GROUP, INC., MARY YOUNG (INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF KEITH P. YOUNG), MITCHELL W. CARTER, and JAN FAMILY INTERESTS LTD.,

Movants,

v.

CATIC USA, INC.
(a.k.a. AVIC INTERNATIONAL USA, INC.),

Respondent.

AMENDED FINAL JUDGMENT

This Amended Final Judgment is entered pursuant to the Court's Order Confirming Arbitration Award of August 9, 2018, in which the Court granted the Movants' motion to confirm the arbitration award, and denied Respondent's motion to vacate the arbitration award. It is ORDERED, ADJUDGED and DECREED that the arbitration award dated December 21, 2015 is hereby confirmed as to Respondent AVIC International USA, Inc. ("AVIC USA"). There are no further pending claims in this case.

It is ORDERED that:

1. The Court confirms the award to Soaring Wind Energy, LLC ("SWE") of damages against AVIC USA, in the total amount of $62,900,000.00 USD, less AVIC USA's capital contribution in SWE, plus post judgment interest at the rate of 5% per year, beginning from December 21, 2015.

2. The Court confirms the award to Tang Energy Group, Ltd. ("Tang") against AVIC USA, $897,730.72 USD for fees paid directly to the AAA/ICDR for administrative fees and arbitrator compensation.

3. The Court confirms the award to Tang against AVIC USA of $3,719,533.23 USD in reasonable attorneys' fees and expenses as of December 21, 2015.

4. The Court confirms the award to Tang against AVIC USA of $1,200,000.00 USD in legal fees and expenses Movants would reasonably incur in the event Movants are required to obtain a judgment confirming the arbitration award and effect service on multiple defendants through the Hague Convention.

5. The Court confirms the award to Tang against AVIC USA of $500,000.00 USD in legal fees and expenses that Movants will reasonably incur if they are required to attempt collection of the arbitration award.

6. The Court confirms the award to Tang against AVIC USA of $250,000.00 USD in legal fees and expenses in the event Movants are successful in any appeal of this Court's judgment confirming the arbitration award.

7. The Court confirms the award to Tang against AVIC USA of $50,000.00 USD in legal fees and expenses in the event Movants are required to respond

to a petition for writ of certiorari to the United States Supreme Court.

8. The Court confirms the award to Tang against AVIC USA of $150,000.00 USD in legal fees and expenses in the event the United States Supreme Court grants review and Movants are successful.

9. The Court confirms the award to Tang against AVIC USA of $1,875,264.71 USD for Tang's arbitration expenses including without limitation, experts' fees and expenses, all costs associated with depositions, mediation, arranging facilities, graphics, and trial consultation.

10. The Court confirms the award that AVIC USA's membership interest in SWE is divested and belongs to Tang, Jan Family Interests, Ltd. ("JFI"), The Nolan Group ("Nolan"), Mitchell W. Carter ("Carter") and Keith P. Young ("Young") in proportion to their ownership interests in SWE.

Furthermore, it is ORDERED, ADJUDGED and DECREED that all costs of court are taxed against the party incurring the same.

SO ORDERED.

Signed September 17th, 2018.

/s/ Ed Kinkeade
ED KINKEADE
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed August 9, 2018]

Civil Action No. 3:15-CV-4033-K

SOARING WIND ENERGY, LLC, TANG ENERGY GROUP, LTD., THE NOLAN GROUP, INC., MARY YOUNG (INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF KEITH P. YOUNG), MITCHELL W. CARTER, and JAN FAMILY INTERESTS, LTD.,

Movants,

v.

CATIC USA, INC.
(a.k.a. AVIC INTERNATIONAL USA, INC.),

Respondent.

ORDER CONFIRMING ARBITRATION AWARD

Before the Court are: (1) Movants Soaring Wind Energy, LLC, Tang Energy Group, Ltd., The Nolan Group, Inc., Keith P. Young, Mitchell W. Carter, and Jan Family Interests Ltd.'s Motion to Confirm Arbitration Award Against Respondent AVIC International USA, Inc. and Motion to Confirm Arbitration Award Against All Other Respondents (Doc. No. 1); and (2) Respondent AVIC International USA, Inc.'s Motion to Vacate Arbitration Award (Doc. No. 157). The Court has carefully reviewed the motions, responses, replies, the extensive record, the applicable law, and

the arbitration award. The Court finds no grounds upon which it must vacate, modify, or correct the arbitration award as to Respondent AVIC USA, Inc. ("AVIC USA"). *See* 9 U.S.C. § 9-11. The Court must confirm the arbitration award against AVIC USA because the arbitrators' ruling as to the liability of AVIC USA "'draws its essence' from the Soaring Wind Energy Agreement. Accordingly, the Court GRANTS Movants' Motion to Confirm Arbitration Award Against Respondent AVIC International USA, Inc. and DENIES Respondent AVIC USA's motion to vacate the arbitration award.

I. Factual and Procedural Background

In 2008, Soaring Wind Energy, LLC ("SWE") was created with a Limited Liability Company Agreement ("the Agreement" or "the SWE Agreement"). The members of SWE are Respondent AVIC USA, non-party Paul E. Thompson ("Thompson"), and Movants Tang Energy Group, LLC ("TEG"), Keith P. Young, Mitchell W. Carter, Jan Family Interests, Ltd., and The Nolan Group, Inc. (collectively "Movants"). AVIC USA held a 50% membership in SWE, while the five Movants held the other 50% membership in varying percentages. The Agreement defined the purpose and nature of SWE's business:

> The purpose and nature of the business to be conducted by the Company shall be to provide worldwide marketing of wind energy equipment, services and materials related to wind energy including, but not limited to, marketing wind turbine generator blades and wind turbine generators and developing wind farms (the "Business"), and to engage in any other business or activity that now or hereafter may be necessary, incidental, proper,

> advisable or convenient to accomplish the foregoing purposes (including the borrowing of money and the investment of funds) and that is not forbidden by the law of the jurisdiction in which the Company engages in that business.

The Agreement also contains a Dispute Resolution section ("Arbitration Provision") requiring disputes to be resolved in binding arbitration. The Arbitration Provision of the Agreement provides for the following process:

> (a) The Disputing Member desiring to initiate arbitration in connection with any Dispute shall notify the other Disputing Members in writing, which notice shall provide the name of the Arbitrator appointed by the Disputing Member, demand arbitration and include a statement of the matter in controversy.
>
> (b) Within 15 days after receipt of such demand, each other Disputing Member receiving notice of the Dispute shall name an Arbitrator. . . . The Arbitrators so selected shall within 15 days after their designation select an additional Arbitrator. . . . In the event that there are more than two Disputing Members to the Dispute, then unless otherwise agreed by the Disputing Members, the Arbitrators selected by the Disputing Members shall cause the appointment of either one or two Arbitrators as necessary to constitute an odd number of total Arbitrators hearing the Dispute.

It defines "Disputing Member" as "each Member that is a party to such Dispute." "Member" is defined as

"either a Class A Member or a Class B Member, or any Person hereafter admitted to the Company as a member as provided in this Agreement, but such term does not include any Person who has ceased to be a member in the Company."

In June 2014, TEG filed a Demand for Arbitration, joined by the other Movants, asserting a claim for breach of Agreement against the Respondents—Signatories AVIC USA and Thompson as well as the Non-Signatory Respondents Aviation Industry Corporation of China, China Aviation Industry General Aircraft Co., Ltd., AVIC International Holding Corp., AVIC International Renewable Energy Corp., and CATIC TED, Ltd. (collectively "Non-Signatories"). The Non-Signatories are foreign companies. After the arbitration demand was made, each SWE member selected an arbitrator for a total of seven (7) arbitrators being selected—one each by AVIC USA and Thompson, as well as one by each of the five Movants. Following the process set out in the Arbitration Provision, those seven arbitrators then selected two additional arbitrators, resulting in a nine-member arbitration panel ("the Panel") in the proceeding. The Panel later permitted SWE to intervene as a party to the Arbitration. The Non-Signatory Respondents objected to any attempt to subject them to arbitration, and provided notice that they would not participate in the arbitration.

On August 5, 2014, after the Panel had been composed but before an arbitration award had issued, AVIC USA filed a complaint for declaratory judgment, seeking the Court's intervention related to the composition of the Panel and also a stay of the arbitration proceedings. *AVIC Int'l USA, Inc. v. Tang Energy Grp., Ltd.,* Civil Action No. 14-CV-2815-K ("*AVIC USA I* case") (Doc. No. 1). The Court granted Defendant

TEG's motion to dismiss, finding the Court had no jurisdiction to address AVIC USA's claims or grant the relief requested. *AVIC Int'l USA, Inc. v. Tang Energy Grp., Ltd.,* Civil Action No. 14-CV-2815-K, 2015 WL 477316, at 4-5 (N.D. Tex. Feb. 5, 2015). The Fifth Circuit affirmed this Court's ruling. *AVIC Int'l USA, Inc. v. Tang Energy Grp., Ltd.,* 614 F. App'x 218, 219 (5th Cir. 2015) ("*AVIC USA I* appeal").

On September 12, 2014, again before an arbitration award had issued, Ascendant Renewable Energy Corporation ("Ascendant"), a named Respondent in the arbitration but a non-signatory to the SWE Agreement, filed a complaint for declaratory judgment. *Ascendant Renewable Energy Corp. v. Tang Energy Grp., Ltd.,* Civil Action No. 14-CV-3314-K ("*Ascendant* case") (Doc. No. 1). Ascendant sought a stay of the arbitration and a declaration from the Court regarding its party status to the arbitration, including whether the Panel or a court must determine if Ascendant was a proper party to the arbitration as a non-signatory to the SWE Agreement which contained the arbitration provision. *Id.* (Doc. No. 1). On August 4, 2015, the Court granted Ascendant's motion for summary judgment, declaring:

> (1) whether Ascendant, a non-signatory to the Agreement, can be subject to arbitration based on the arbitration clause of the Agreement is for a court, not the arbitration panel, to decide because Ascendant disputes the very existence of an agreement between these parties; and (2) because the existence of any agreement between these parties is in dispute, any determination by the arbitration panel as to the jurisdiction over Ascendant is not controlling on a court.

Ascendant Renewable Energy Corp. v. Tang Energy Grp., Ltd., Civil Action No. 14-CV3314-K, 2015 WL 4713240, at * 3 (N.D. Tex. Aug. 4, 2015). The Court denied as moot the requested stay. No appeal was taken in that matter.

The arbitration hearing occurred August 10-14, 2015. On December 21, 2015, the Panel issued their Final Award. The panel concluded, in relevant part, that: (1) the SWE members vested the Panel with authority to determine their own jurisdiction, including arbitrability of any claim or defense, such as any dispute related to the interpretation or construction of any provision in the Agreement; (2) AVIC USA's "Affiliates", as defined in the Agreement, engaged in the "Business" of SWE in violation of the Agreement's covenant not to compete; (3) AVIC USA as a Signatory was liable for its Affiliates' breach of the Agreement; (4) the Movants were entitled to damages for lost profits relating to the breach and AVIC USA should be divested of its membership interest in SWE; (5) SWE properly intervened to assert its own claims for damages; (6) SWE was entitled to $62.9 million in damages and TEG was entitled to arbitration fees, attorneys' fees, and expenses (up through a final appeal to the United States Supreme Court) allocated against all Respondents except Thompson; and (7) the Movants were the "prevailing Members" as defined in the Agreement.

Before the Court now are the Movant's motion to confirm the arbitration award and the AVIC USA's motion to vacate the arbitration award.

II. Applicable Law

There is a strong federal policy favoring arbitration, as reflected in the Federal Arbitration Act ("FAA"). *See*

Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 586-590 (2008). "Judicial review of an arbitration award is extraordinarily narrow and [the courts] should defer to the arbitrator's decision when possible." *Antwine v. Prudential Bache Sec., Inc.,* 899 F.2d 410, 413 (5th Cir. 1990); *see Rain CII Carbon, LLC v. ConocoPhillips Co.,* 674 F.3d 469, 471-72 (5th Cir. 2012); *Brabham v. A.G. Edwards & Sons Inc.,* 376 F.3d 377, 385 (5th Cir. 2004)("Our established rules of deference foreclose all but the most limited review."). The FAA permits a district court to vacate an arbitration award in these very limited circumstances:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). These are the exclusive grounds on which a court may vacate an arbitration award under the FAA. *Hall St. Assocs.,* 552 U.S. at 586-590 (holding "§§ 10 and 11 provide exclusive regimes for the review provided by the [FAN]"); *see Citigroup Glob. Mkts., Inc. v. Bacon,* 562 F.3d 349, 355 (5th Cir. 2009). An arbitration award may not be vacated for "mere

mistake of fact or law." *Rain CII Carbon,* 674 F.3d at 472 (internal quotation marks omitted).

The party seeking vacatur of an arbitration award bears the burden of proof, and the reviewing court must decide any uncertainties or doubts in favor of sustaining the award. *Brabham,* 376 F.3d at 385. In reviewing an arbitration award, the court applies the "essence" test. *See Timegate Studios, Inc. v. Southpeak Interactive, L.L.C.,* 713 F.3d 797, 802 (5th Cir. 2013); *Executone Info. Sys., Inc. v. Davis,* 26 F.3d 1314, 1320 (5th Cir. 1994). The court must confirm an arbitration award "as long as the arbitrator's decision 'draws its essence' from the contract," in other words "the arbitrator's decision is rationally inferable from the letter or purpose of the underlying agreement." *Timegate Studios,* 713 F.3d at 802 (quoting *Executone,* 26 F.3d at 1320). "[T]he question is whether the arbitrator's award was so unfounded in reason and fact, so unconnected with the wording and purpose of the . . . agreement as to manifest an infidelity to the obligation of an arbitrator." *Executone,* 26 F.3d at 1325 (internal quotations omitted). It is irrelevant whether the reviewing court disagrees with the arbitrator's interpretation of the contract. *Timegate Studios,* 713 F.3d at 802. The reviewing court considers only the arbitrators' resulting decision and "does not review the language used by, or the reasoning of, the arbitrators in determining whether their award draws its essence from the contract." *Executone,* 26 F.3d at 1325 (internal quotations omitted). "Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing

decisions of lower courts." *United Paperworkers Int'l Union v. Misco, Inc.,* 484 U.S. 29, 37-38 (1987).

The arbitrators' powers and authority are "'dependent on the provisions under which the arbitrators were appointed.'" *Brook v. Peak Int'l, Ltd.,* 294 F.3d 668, 672 (5th Cir. 2002)(quoting *Szuts* v. *Dean Witter Reynolds, Inc.,* 931 F.2d 830, 831 (11th Cir. 1991)). "Whether an arbitrator has exceeded his powers is tied closely to the applicable standard of review"—that being whether the arbitrator's decision "draws its essence" from the underlying contract. *Timegate Studios,* 713 F.3d at 802. The court looks to "whether the arbitrator's award 'was so unfounded in reason and fact, so unconnected with the wording and purpose of the [contract] as to "manifest an infidelity to the obligation of an arbitrator."'" *Id.* (quoting *Brotherhood of R.R. Trainmen v. Cent. of Ga. Ry. Co.,* 415 F.2d 403, 412 (5th Cir. 1969)). "[A]s long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.' *E. Associated Coal Corp. v. United Mine Workers of Am.,* 531 U.S. 57, 62 (2000) (internal citations omitted). The reviewing court must resolve all doubts in favor of arbitration. *Executone,* 26 F.3d at 1320-21.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention") applies "if the [arbitration] award arises out of a commercial dispute and at least one party is not a United States citizen." *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG,* 783 F.3d 1010, 1015 (5th Cir. 2015). Arbitration awards governed by the Convention are enforced under the FAA. 9 U.S.C. § 201. Just as review is exceedingly narrow under the FAA, the Convention

does not permit a reviewing court to "refuse to enforce the award solely on the ground that the arbitrator may have made a mistake of law or fact." *See Asignacion,* 783 F.3d at 1015. A court must confirm the arbitration award unless the party opposing confirmation meets its burden of establishing a reason under Article V of the Convention for the court to deny enforcement of the arbitral award. *See id.* at 1015-1016.

III. Application of the Law to the Facts

A. Selection and Composition of Arbitration Panel

AVIC USA first insists the arbitration award must be vacated because the Panel was selected in violation of the Agreement's terms and, alternatively, the composition of the Panel violates public policy and due process.

1. Did the Arbitrators' Appointment Violate the SWE Agreement?

AVIC USA contends the Panel exceeded their powers, as defined in Section 10, because they were "not selected in accordance with the provisions of the Agreement," so the award must be vacated. AVIC USA argues that the clear language of the Agreement requires the appointment of one arbitrator per side, not one arbitrator per member; this was AVIC USA's understanding of the selection provision and it would never "agree[ ] to nor contemplate[ ] arbitrating a two-sided dispute in which one side chose five arbitrators and the other side chose two."

a) Procedural Challenge for the Panel

Regardless of how AVIC USA tries to frame this argument, it comes down to a "challenge[ ] that essentially [goes] to the procedure of arbitration."' *Adam*

Techs. Int'l S.A. de C.V. v. Sutherland Glob. Servs., Inc., 729 F.3d 443, 452 (5th Cir. 2013)(quoting *Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.,* 304 F.3d 476, 488 (5th Cir. 2002)). AVIC USA's argument turns on the fairness of the selection process. Such "procedural questions" are presumed to be for an arbitrator to decide. *Adam Techs. Int'l,* 729 F.3d at 452 (citing *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 84 (2002)). AVIC USA has advanced no compelling argument or evidence to establish otherwise.

Article XIII of the SWE Agreement addresses the parties' agreement on Dispute Resolution. Section 13.1 provides, in relevant part, the Arbitration Provision "shall apply to any controversy, dispute or claim arising under or related to this [SWE] Agreement . . . including (a) any dispute regarding the construction, interpretation, performance, validity or enforceability of any provision of this [SWE] Agreement . . . ." The parties agreed to first attempt an informal resolution of any dispute then, if that negotiation failed, the parties agreed to submit the dispute to binding arbitration. *See* SWE Agmt., Secs. 13.2 and 13.3 at p. 46. The SWE Agreement specifically sets out the arbitrator selection process and incorporates the rules and procedures of the American Arbitration Association. The presumption that the arbitrators must decide any procedural question, including the arbitrator selection process, clearly applies in this case. *See Howsam,* 537 U.S. at 84. The arbitrators found that the "panel is composed in a manner provided by the unambiguous agreement of the parties as set forth in Article XIII of the SWE Agreement." They also found that the parties "clearly and unmistakably empowered this panel to determine whether this arbitration involves a controversy, dispute, or claim arising under or related to the SWE Agreement . . . including any dispute regarding

the construction, interpretation, performance, validity or enforceability of any provision of the SWE Agreement." The arbitrators' conclusion on this issue is binding and is not for this Court to review on the basis of a procedural challenge, such as the parties agreed otherwise. *See also Adam Techs. Int'l,* 729 F.3d at 452 ("Adam's appellate argument that the *Howsam* presumption disappears because of Adam's interpretation that the parties agreed otherwise is unavailing."). AVIC USA must establish a statutory reason for vacatur related to the composition of the panel that the Court may consider in its very narrow review. b)

b) The Panel Did Not Exceed Their Power

The parties to an arbitration agreement may agree by contract to the arbitrator selection process. *Brook v. Peak Int'l., Ltd.,* 294 F.3d 668, 672 (5th Cir. 2002). When the arbitration agreement provides for the appointment method of the arbitrators, the FAA specifically requires that the agreed method "shall be followed." 9 U.S.C. § 5; *see id.* at 672-73; *see also Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.,* 489 U.S. 468, 479 (1989)(recognizing "the FAA's primary purpose [is] ensuring that private agreements to arbitrate are enforced according to their terms" because "[a]rbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.").

Claiming the arbitrators exceeded their powers, AVIC USA first contends the arbitrators were not selected in accordance with the Arbitration Provision because the Panel was "dominated by [TEG] appointees" and AVIC USA never agreed to a selection provision which would allow such a lop-sided panel in a dispute. Next, AVIC USA argues the Arbitration

Provision requires a panel of three arbitrators in any scenario and asks the Court to "give effect to the plain and objectively reasonable meaning of the arbitrator selection provision for this dispute as understood by AVIC USA: one arbitrator per side plus a third arbitrator as a tie-breaker." Finally, AVIC USA contends the arbitration selection provision was misinterpreted because the Non-Signatories were not allowed to select arbitrators. As a result of these factors, AVIC USA alleges that the Court's refusal to vacate the award issued by this arbitration panel as it was composed will cause "an absurd and fundamentally unjust result."

AVIC USA attempts to characterize its arguments as being centered on an arbitration panel appointed in violation of the method provided for in the parties' arbitration agreement, therefore requiring vacatur. However, the record does not bear this out. The Arbitration Provision does indeed clearly provide for a method of selecting the arbitrators, but it is not the method alleged by AVIC USA. Presented with a similar, if not identical, argument in the *AVIC USA I* appeal, the Fifth Circuit so astutely noted:

> Simply put, when [AVIC USA's] position is reduced to its bare essentials, AVIC [USA] is asking us to rewrite their agreement's arbitration provision to require that every arbitration among these multiple parties comprise only two "sides". It is apparent from the plain wording of that provision, however, that the agreement contemplates the possibility of there being three or more "sides" among the several parties to the agreement. More to the point, AVIC's strained interpretation of the arbitration provision would mandate that there be precisely three arbitrators in any

> and every instance, no more and no fewer—one selected by one "side," a second selected by the other "side," and the third selected by the first two. The unambiguous wording of the arbitration provision eschews such a reading: The agreement expressly contemplates the possibility of (1) an even number of arbitrators (an impossibility under AVIC's proposed, three-only arbitrators interpretation) and (2) adding either one *or two* more arbitrators to achieve an odd number (also an impossibility under a three-only arbitrator situation).

AV-IC Int'l USA, 614 F. App'x. at 219 (emphasis in the original). It is readily apparent to this Court that the Fifth Circuit's summary is true and applicable even now as AVIC USA takes the same position.

As SWE Members, AVIC USA and the Movants contracted in their Arbitration Provision for a specific appointment method of the arbitrators in the event of a dispute. The FAA specifically mandates that if an appointment process is agreed-to, the agreed method "shall be followed." 9 U.S.C. § 5; *see Brook,* 294 F.3d at 672 -73; *see also Volt Info. Scis.,* 489 U.S. at 479 (recognizing "the FAA's primary purpose [is] ensuring that private agreements to arbitrate are enforced according to their terms" because "[a]rbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."). The method by which these arbitrators were selected was in accordance with the exact process agreed to by the parties in their Arbitration Agreement. AVIC USA has established nothing to the contrary. The Panel did not exceed their powers and the Court will not vacate the arbitration award on these grounds.

2. Will Violations of Public Policy and Due Process Support Vacatur?

AVIC USA argues in the alternative that even if the Arbitration Agreement permitted this particular process, the resulting panel was "stacked" which violates public policy and requires vacatur of the award. Public policy is no longer a recognized, valid ground for vacating an arbitration award under the FAA. *See Citigroup,* 562 F.3d at 358. The United States Supreme Court held that grounds for vacatur are limited to those specifically set forth in Section 10 of the FAA. *Hall St. Assocs., L.L.C.,* 522 U.S. at 586. A court may not vacate an arbitration award on common law grounds, such as public policy, because they are not specifically provided for in the statute. *See Citigroup,* 562 F.3d at 358 (any "non-statutory ground for setting aside an [arbitration] award must be abandoned and rejected."); *Am. Postal Workers Union, AFL-CIO v. US. Postal Serv.,* 3:09-CV-1084-B , 2010 WL 1962676, at *2 (N.D. Tex. May 14, 2010)(Boyle, J.)("[W]hile public policy was once recognized as a common law ground for vacating an arbitration award, in light of *Hall Street* and its progeny, it [is] no longer an adequate basis for vacatur."). AVIC USA cites to no case law post-Hall *Street* which would permit this Court to review the arbitration award on public policy grounds. This argument is outside the narrow scope of review the Court is permitted to conduct under the FAA. Accordingly, the Court will not consider the merits of this argument and will not vacate the arbitration award on this common law basis.

In a single sentence footnote, AVIC USA contends this arbitration panel violates public policy under Article V of the Convention and requires the award be vacated. The party seeking vacatur bears the burden

of proving an Article V reason precludes confirmation of the award; "[a]bsent 'a convincing showing' that one of these narrow exceptions applies the arbitral award will be confirmed." *In re Arbitration Between Trans Chem. Ltd. and China Nat. Machinery Import & Export Corp.,* 978 F. Supp. 266, 309 (S.D. Tex. 1997)(citing *Imperial Ethiopian Gov't v. Baruch-Foster Corp.,* 535 F.2d 334, 336 (5th Cir. 1976)). Although public policy may support vacatur under Article V of The Convention, AVIC USA submits no actual argument on this point, provides no citations in support, and fails to even reference which specific section of Article V applies. AVIC USA failed to meet its burden to establish vacatur is required under Article V of the Convention. *See id.*.

Finally, AVIC USA claims the process of composing this Panel violates due process because it is in contravention to the objective of the selection process and the idea of a neutral panel, resulting in "the appearance that the arbitration process can be and was rigged." However, this is essentially where the argument ends. Beyond making this claim in a sentence or two, AVIC USA fails to put forth any substantive argument on this point or provide citations to case law in support. To the extent AVIC USA asserts due process as grounds for vacatur under the FAA, the argument would fail for the same reasons as public policy violations. Common law grounds are no longer valid to support vacatur under the FAA. *See Citigroup,* 562 F.3d at 358. AVIC USA does not reference Article V of The Convention in this argument, but even if it did, the argument would fail. AVIC USA made no showing, let alone "a convincing showing," that a narrow exception under Article V applies. *See Trans Chem. Ltd.,* 978 F. Supp. at 309. The Court will not consider this due process argument as a basis for vacating the arbitration award.

In conclusion, the Court cannot vacate the arbitration award on any of the aforementioned grounds related to the selection and composition of the Panel as asserted by AVIC USA. *See Brabham,* 376 F.3d at 385 ("Given these constraints, judicial review of an award's rationality must be confined to situations in which the party challenging the award can prove that clearly applicable law or the parties' contract indisputably dictates a contrary result.").

B. Expansion of Issues Identified or Submitted to Arbitration Panel

AVIC USA argues the Panel exceeded its authority when it identified an "ambiguity" in the SWE Agreement that none of the parties identified or submitted to the panel. Specifically, AVIC USA contends the Panel read Section 6.10 to include the term "Affiliate", as defined and used in the Agreement, when that was not in dispute, thereby effectively rewriting the contract and allowing the panel to find AVIC USA liable on this unjustified interpretation.

Among their many findings, the Panel concluded:

> 62. The extent of the exclusive arrangement agreed to by the Members as set out in the Agreement is ambiguous. Section 6.10 appears to apply only to Members. On the other hand, Section 6.11 prohibits any Member, it Representatives and Affiliates from engaging in the "Business" of SWE except through SWE. Section 6.12 prohibits Class A Members and their Affiliates from "participating" in wind farm land development projects except through entities owned jointly by SWE and CATIC. The Agreement's confidentiality provision prohibits Members and their Affiliates from

> revealing confidential information about the company, the Members, Affiliates or the Agreement. The Chicago Agreement clearly states that "SWE will be the exclusive vehicle for both Tang and CATIC interest in the wind industry." The great weight of the evidence supports a construction that Members, their Affiliates and Representatives will only conduct the "Business" through SWE.
>
> 65. AVIC USA itself did not violate the contractual provision to refrain from engaging in the Business of SWE except through SWE.
>
> 66. However, AVIC USA's affiliates as defined by the SWE Agreement, competed against SWE and engaged in the "Business" of SWE thereby violating the SWE Agreement's exclusive arrangement. Specifically, AVIC HQ AVIC International, AVIC IRE and Ascendant, are "Affiliates" of AVIC USA because they directly or indirectly controlled AVIC USA and all are under the common control of AVIC HQ. As a result, AVIC USA breached the SWE Agreement by its Affiliates engaging in the "Business" of SWE.

Final Award at pp. 12-13.

The Panel found an ambiguity in reading Sections 6.10, 6.11, *and* 6.12, along with other provisions, in an attempt to define the exclusivity of the parties' Agreement on conducting wind energy-related "Business". In reading the Agreement's provisions together, the Panel found that "[t]he SWE Agreement requires Members and their Representatives and Affiliates to conduct the 'Business' of SWE solely through SWE or

its Controlled Companies." There is no citation to any specific section of the Agreement as the basis for this finding and AVIC USA never identifies any liability finding by the Panel based specifically on a breach of Section 6.10. In fact, the Panel's determinations make it clear that other provisions also prohibited Members and Affiliates from competing with SWE Business, and these could arguably have provided the basis for the liability determination. The Court's review of the award reveals that the Panel simply did not make the liability determination as to AVIC USA as it has alleged. This argument does not support vacatur.

AVIC USA's argument essentially amounts to assertions that the Panel's interpretation was flawed. This Court may not second-guess the panel's conclusions on any issues involving contract interpretation in this very narrow review. *See Am. Laser Vision, P.A. v. Laser Vision Inst., L.L.C.,* 487 F.3d 255, 260 (5th Cir. 2007), *overruled on other grounds by Hall St. Assocs.,* 552 U.S. at 584-86 ("We will not second-guess multiple, implicit findings and conclusions underpinning the award. We do not decide if the award was free from error."); *Executone,* 26 F.3d at 1325 (the reviewing court considers only the arbitrators' resulting decision and "does not review the language used by, or the reasoning of, the arbitrators in determining whether their award draws its essence from the contract."); *see also E. Associated Coal,* 531 U.S. at 62 ("[A]s long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'"); *McKool Smith, P.C. v. Curtis Int'l, Ltd.,* 650 F. App'x. 208, 211 (5th Cir. 2016)("Under this [extraordinarily narrow] review, an award may not be set aside for a mere mistake of

fact or law."). This arbitration award clearly draws its essence from the SWE Agreement, defining the "Business" arrangement's degree of exclusivity in order to determine whether a breach occurred and by whom, both of which were central issues to the arbitration. *See Timegate Studios,* 713 F.3d at 802-803 ("[A]n arbitrator has not exceeded his powers unless he has utterly contorted the evident purpose and intent of the parties—the 'essence' of the contract," and the Court must confirm it even if in disagreement with the panel's interpretation.).

The Court cannot vacate the arbitration award on these grounds.

C. Misconduct by the Arbitration Panel

AVIC USA contends the Panel engaged in misconduct in multiple instances, requiring the Court to vacate the arbitration award.

1. Did the Panel Ignore This Court's Previous Order?

Citing to this Court's order in the *Ascendant* case, AVIC USA argues that the Court "determined that the panel had no authority to adjudicate whether Ascendant (or any other non-signatory, by extension) is bound by the Agreement." Nevertheless, AVIC USA argues the Panel "impermissibly ignored this Court's prior ruling" in determining the Non-Signatories are the alter egos of AVIC USA and therefore, "are bound by the Agreement." AVIC USA contends this disobedience of a court order constitutes misconduct which prejudiced AVIC USA, and the award must be vacated. *See* 9 U.S.C. § 10(a) (3) (grounds for vacatur of award include "any other misbehavior by which the rights of any party have been prejudiced").

In the *Ascendant* case, the Court "declar[ed] that Ascendant's party status to the arbitration can only be determined by a court, not an arbitrator" because non-signatory Ascendant attacked the very existence of any agreement to arbitrate with Tang or any other respondent. *Ascendant Renewable Energy Corp.,* Civ. Action No. 3:14-CV-3314-K, 2015 WL 4713240, at *3. The Court then declared that if an arbitration panel did make a determination as to jurisdiction over or party status of Ascendant, that decision would be owed no deference and would not be "controlling on a court" reviewing an arbitration award. *Id.* (Ascendant is not a party to the instant case.)

Nowhere in that order did the Court prohibit or forbid the Panel from making any determination regarding jurisdiction over or party status of Ascendant in relation to the Agreement on any theory, including alter ego. Furthermore, the Court also did not declare or otherwise order that this Court must decide Ascendant's party status before any arbitration may proceed. The Court simply declared Ascendant's right for a court to "resolve whether an agreement to arbitrate exists that would require Ascendant to participate in the underlying arbitration," and confirmed that if the Panel did make such a determination, the reviewing court would owe the Panel's finding no deference and would not be bound by it. The Court did not opine or make any ruling as to whether an agreement to arbitrate did indeed exist or whether some alternative theory could bind Ascendant to arbitrate; neither issue was before the Court in that declaratory judgment action.

AVIC USA contends the Panel disobeyed the order "[b]y taking the non-signatory alter ego question away from this Court," and this constitutes misconduct. This argument is meritless as the Panel did not "take

away" this issue from the Court. Citing clear Fifth Circuit precedent, the Court declared in the *Ascendant* case that a reviewing court owes no deference to and is not bound by any such finding by arbitrators. No where did the Court order that the Panel could not hear the issue of or make a determination regarding the jurisdiction over and/or party status of Ascendant; rather, the Court declared simply that an arbitrator's findings would not be binding on a reviewing court in an instance where the existence of an agreement to arbitrate was in dispute. The Panel did not ignore this Court's order in the *Ascendant* case.

The Court concludes AVIC USA did not establish the Panel committed any misconduct under this theory, therefore the Court cannot vacate the arbitration award on this basis.

2. Did the Panel Make Adverse Inferences Against AVIC USA?

AVIC USA also argues the arbitration panel committed misconduct when it made "adverse inferences against AVIC USA based solely on the non-signatories' absence from the arbitration." Again citing the order in the *Ascendant* case, AVIC USA claims the Court "rul[ed] that the non-signatories had no obligation to participate in the [arbitration] proceedings" yet, the Panel determined the Non-Signatories' participation was required and, when they did not participate, punished AVIC USA.

As previously discussed, the Court did not rule or otherwise determine in the *Ascendant* case that the Non-Signatories were not required to participate in the arbitration as AVIC USA alleges. Ascendant, which is not a party to the instant action, was the only Non-Signatory to appear in that declaratory judgment

action. The Court declared Ascendant's rights under the controlling law, specifically that it was for a court, not an arbitrator, to decide Ascendant's party status because it attacked the existence of any agreement to arbitrate with Tang or any other party, and, if the arbitrator did make such a determination, it would not be controlling on a court reviewing the arbitration award. There was never a ruling from this Court that Ascendant, the only non-signatory to appear before it, had no obligation to participate in the arbitration proceedings, as AVIC USA claims. That issue was not before the Court. AVIC USA has misconstrued or misinterpreted the Court's ruling in the *Ascendant* case, and this argument fails to the extent the "adverse inference" argument relies on this misinterpretation.

AVIC USA contends that it was "punished" by the Panel when they found AVIC USA liable based on adverse inferences the Panel made as a result of the Non-Signatories' refusal to participate. AVIC USA alleges the damages award is at least some indication of how "the panel's 'adverse' view of the evidence affected its findings." The only specific adverse inference AVIC USA references is the following sentence: "As a result, the panel has opted to infer that Xu Hang's statement in CX 330 that AVIC International has invested $50 USD million in wind power projects in the United States is accurate without any additional evidence." AVIC USA argues there was no actual evidence to support any damages award and, in fact, there was uncontested evidence rebutting Xu Hang's statement.

At the heart of this argument, AVIC USA is ultimately complaining about: (1) the arbitration panel's decision to make an adverse inference pursuant to their authority under the AAA rules and language in

the SWE Agreement, as interpreted by the Panel; and (2) the weight the Panel chose to give the evidence. The Court cannot vacate the arbitration award based on errors in interpretation or application of the law, or mistakes in factfinding. *See United Paperworkers,* 484 U.S. at 38; *McKool Smith,* 650 F. App'x. at 211. Moreover, arbitrators have broad discretion in making evidentiary rulings, and a court generally does not review those rulings. *Int'l Chem. Workers Union v. Columbian Chems. Co.,* 331 F.3d 491, 497 (5th Cir. 2003)(citing *Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Neuhoff Bros.,* 481 F.2d 817, 820 (5th Cir. 1973)("[T]he arbitrator has great flexibility and the courts should not review the legal adequacy of his evidentiary rulings.")). AVIC USA did not meet its burden to establish the panel committed misconduct in this instance to support vacatur of the award.

3. Did the Panel Improperly Determine Non-Signatories Participated in Arbitration?

AVIC USA claims the Panel committed misconduct in making adverse inferences based on the Non-Signatories' "willful disobedience" in their selective participation in the arbitration discovery. This argument relates to AVIC USA's previous argument regarding the Panel's adverse inferences. Here, AVIC USA argues the Panel's basis for the adverse inferences, the Non-Signatories' "willful disobedience", constitutes misconduct.

It is well-established that "as long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," the reviewing court must affirm the award. *E. Associated Coal,* 531 U.S. at 62 (internal citations omitted). In Paragraph 128 of the award, the Panel noted the authority upon which they relied in drawing the

adverse inferences, including language from the Agreement. The Court cannot conclude that the Panel exceeded their powers by "utterly contort[ing] the evident purpose and intent of the parties—the 'essence' of the contract." *See Timegate Studios,* 713 F.3d at 802-03. AVIC USA failed to meet its burden to prove the panel committed misconduct to justify vacatur of the award.

D. Panel Exceeding Its Powers

AVIC USA argues the arbitration panel exceeded its powers in awarding damages and attorneys' fees which are expressly prohibited by the Agreement, and in exercising jurisdiction over the derivative SWE claims.

The arbitrators' powers and authority are "dependent on the provisions under which the arbitrators were appointed." *Brook,* 294 F.3d at 672 (internal quotations omitted). In deciding whether an arbitrator has exceeded his powers, the court looks to "whether the arbitrator's award 'was so unfounded in reason and fact, so unconnected with the wording and purpose of the [contract] as to "manifest an infidelity to the obligation of an arbitrator."'" *Timegate Studios,* 713 F.3d at 802 (quoting *Bhd. of R.R. Trainmen,* 415 F.2d at 412). "[A]n arbitrator has not exceeded his powers unless he has utterly contorted the evident purpose and intent of the parties—the 'essence' of the contract." *Id.* at 802-03. It is well-established that "'as long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.' *E. Associated Coal,* 531 U.S. at 62 (internal citations omitted).

1. Did the Panel Award Damages Expressly Prohibited by the Agreement?

AVIC USA contends the Panel's award of $62.9 million in lost profits violates specific language of the Agreement which prohibits consequential, speculative, and remote damages; therefore, the panel exceeded their powers.

In support of its argument, AVIC USA cites to Section 17.10 of the Agreement which provides:

> 17.10 No Consequential or Punitive Damages. IN NO EVENT SHALL ANY MEMBER OR ANY OF ITS RESPECTIVE REPRESENTATIVES OR AFFILIATES BE LIABLE TO THE COMPANY OR TO ANY OTHER MEMBER OR ITS REPRESENTATIVES OR AFFILIATES FOR ANY EXEMPLARY, PUNITIVE, SPECIAL, INDIRECT, CONSEQUENTIAL, REMOTE OR SPECULATIVE DAMAGES.

SWE Agreement at p. 55, 11 17.10. AVIC USA first argues that this damages award constitutes consequential damages as Delaware law clearly provides that "lost profits" are consequential damages. (SWE is a Delaware limited liability company.) What AVIC USA fails to clarify is that well-established Delaware law provides that "lost profits" on "*collateral* business arrangements" are considered consequential damages. *See eCommerce Indus., Inc. v. MWA Intelligence, Inc.,* C.A. No. 7471-VCP, 2013 WL 5621678, at * 47 (Del. Ch. Sept. 30, 2013)(quoting *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.,* 487 F.3d 89, 109 (2d Cir. 2007)). "By contrast, lost profits are not considered consequential damages when 'profits are precisely what the non-breaching party bargained for, and only an

award of damages equal to lost profits will put the non-breaching party in the same position he would have occupied had the contract been performed.'" *eCommerce Indus.,* C.A. No. 7471 -VCP, 2013 WL 5621678, at *47 (principle applies in context of non-compete provision which was central to the non-breaching party's bargained-for agreement).

In making this award, the Panel clearly stated that these "lost profit" damages were the direct result of the breach of the parties' Agreement not to compete directly on wind power project(s). This breach was not related to a "collateral business arrangement", but was, at the least, a very important part of what the parties bargained for in this Agreement. *See id.* ("With respect to a non-compete provision or agreement, I conclude that the profits of the product line or business that is being protected from competition constitute the benefit for which the protected party bargained. Furthermore, lost profits on the part of the non-breaching party are the direct and natural consequence of breaching a non-compete provision."). The Court disagrees that Delaware law automatically categorizes these damages as consequential and finds AVIC USA did not establish the Panel exceeded their authority.

AVIC USA next argues the "lost profits" award is "wholly speculative" because it is based solely on adverse inferences whereas the "actual unrebutted evidence" establishes there was no such investment. As the Court discussed *supra,* AVIC USA did not meet its burden related to its adverse inferences arguments. AVIC USA's argument that the award was purely speculative because it is based on these adverse inferences must fail. The Panel indicated in the arbitration award the "lost profits" damages arose from breach of the

Agreement, and included how they arrived at it in light of the Agreement and the evidence they considered. The Court cannot agree with AVIC USA that this award was "wholly speculative" or a "complete guess".

The Court concludes that the award draws its essence from the Agreement. *See Timegate Studios,* 713 F.3d at 802 (irrelevant whether reviewing court disagrees with the arbitrator's interpretation of the contract); *Executone,* 26 F.3d at 1325. Accordingly, AVIC USA failed to meet its burden to establish the Panel had no authority under the Agreement to award these damages, thereby exceeding their powers and requiring vacatur.

2. Did the Panel Award Punitive or Special Damages by Divesting AVIC USA's Interest in SWE?

Next, AVIC USA argues the Panel exceeded its powers in divesting AVIC USA of its interest in SWE because this amounts to punitive or exemplary damages which are expressly prohibited under the Agreement. AVIC USA also argues the divestiture of its interest in SWE was "patently unreasonable" because the Panel expressly found that AVIC USA itself did not breach the Agreement.

As with the previous argument, the Court cannot agree that divesting AVIC USA of its interest in SWE was punitive or special damages. The Panel did not characterize the divestiture as "punitive" or "special" damages in the award, and AVIC USA provides no persuasive argument or case law establishing such a divestiture is considered punitive or special damages.

In *Executone,* the Fifth Circuit reaffirmed it prior holding that the arbitrators' choice of remedy is afforded more deference than their interpretation of the contract.

Executone, 26 F.3d at 1325; *see also Timegate,* 713 F.3d at 803. "The single question is whether the award, however arrived at, is rationally inferable from the contract.'" *Executone,* 26 F.3d at 1325 (quoting *Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co.,* 918 F.2d 1215, 1219 n. 3 (5th Cir. 1990)). A remedy is outside the arbitrators' jurisdiction only where "there is no rational way to explain the remedy handed down by the arbitrator as a logical means of furthering the aims of the contract." *Executone,* 26 F.3d at 1325 (internal quotations omitted). The Panel determined the lost profits award of $62.9 million was due to SWE for distribution to its Members. The Panel also noted that the divestiture was necessary to prevent AVIC USA, a member of SWE, from profiting from the breach of the SWE Agreement. The Court finds the divestiture is rationally inferable from the SWE Agreement, therefore it meets the "essence" test. *See Executone,* 26 F.3d at 1325. Accordingly, AVIC USA failed to meet its burden to establish the panel had no authority under the Agreement to award these damages, thereby exceeding their powers and requiring vacatur.

3. Did the Panel Improperly Award Attorneys' Fees to SWE?

AVIC USA contends the Panel exceeded its authority in awarding TEG past and future attorneys' fees along with costs against AVIC USA. On this point, AVIC USA makes three specific arguments. First, although the Agreement allows "prevailing Members" to recover court costs, fees, and expenses, including attorneys' fees, AVIC USA argues the Agreement specifically requires the arbitrators to "determine that compelling reasons exist for allocating all or a portion of such costs and expenses to one or more than

Disputing Members." Because the Panel did not make this determination or identify compelling reasons for this allocation, AVIC USA contends the award must be vacated.

In allocating attorneys' fees and arbitration expenses, the Panel cites to Section 13.4 of the Agreement which provides that the "prevailing Members . . . shall be entitled to recover from the other Member or Members . . . all court costs, fees and expenses of such arbitration, including reasonable attorneys' fees." AVIC USA does not dispute that the Agreement allows for the recovery of attorneys' fees and expenses. Instead, AVIC USA takes aim at the Panel's failure to reference Section 13.3(k) which, according to AVIC USA, requires the panel to identify a "compelling" reason in order to award attorneys' fees and costs against another Disputing Member. This argument attacks the Panel's interpretation of the Agreement and their authority under the specific section addressing allocation of these costs. The Court may not vacate the award on these grounds. *Timegate Studios,* 713 F.3d at 802.

Second, AVIC USA argues the allocated fees and expenses must be from a "Disputing Member" to another "Disputing Member". AVIC USA asserts that SWE was award the damages, but SWE is not a "Disputing Member", and the fees and costs were awarded to TEG, a "Disputing Member"; yet, the Panel made no finding as to whether the costs and fees being allocated were TEG's or SWE's. This argument centers on an interpretation of the Agreement which is within the panel's jurisdiction. This Court will not, and cannot, second-guess the panel's reasons for allocating the attorneys' fees and expenses as it did. Even if the Court disagreed with the panel's interpretation of the

Agreement, the Court cannot vacate an award on this basis. *Timegate Studios,* 713 F.3d at 802.

As a final argument on fees and expenses, AVIC USA contends no "Disputing Member" prevailed over AVIC USA. This argument hinges in part on AVIC USA's earlier argument in Section III.B regarding liability based on a rewriting of Section 6.10. The Court has already concluded that argument fails; therefore to the extent this argument relies on vacatur under that Section 6.10 argument, it too fails. AVIC USA argues alternatively that regardless of that prior argument, TEG is still not a prevailing party because all but one of its claims were dismissed and TEG recovered less than 1% of the damages it sought. As with the previous arguments, this argument attacks the Panel's interpretation of "prevailing party" as defined and used in the Agreement. AVIC USA simply disagrees with the Panel's conclusion. This argument does not provide a basis for vacating the arbitration award. *See id.*

4. Did the Panel Fail to Account for Any Return on the Investment?

AVIC USA argues any damages award should have included a deduction for AVIC USA's return on investment ("ROI") for wind development projects pursuant to the terms of the Agreement. AVIC USA contends it was entitled to some amount of ROI deduction for the capital contribution it would have made and because there is no way to determine the specific amount (as it was undefined in the Agreement), the entire award is speculative and in violation of the Agreement's provisions.

As stated previously many times, this Court is very limited it is review of the arbitration award. The Court

may review only "whether the award, however arrived at, is rationally inferable from the contract." *Executone,* 26 F.3d at 1325 (internal quotations omitted). "[P]erhaps most importantly, even if the arbitrators incorrectly calculated the damage award, an arbitrator's erroneous interpretation of law or facts is not a basis for vactur of an award." *Pfeifle v. Chemoil Corp.,* 73 F. App'x 720, 722-722 (5th Cir. 2003). The law is clear on this and AVIC USA's argument fails. Any error in failing to account for an ROI does not provide a basis for the Court to vacate this award.

5. Did the Panel Improperly Assert Jurisdiction Over Derivative SWE Claims?

In its final argument for vacatur, AVIC USA asserts the Panel exceeded its powers in allowing TEG to intervene on SWE's behalf and because SWE was not a proper party to the arbitration, the $62.9 million awarded to SWE must be vacated. Specifically, AVIC USA argues that the Agreement requires a Supermajority (>66%) of Class A membership interests to approve any decision outside the ordinary course of SWE's business. Because AVIC USA owned 50% of the Class A membership interests, it was necessarily required to agree to SWE's participation in the arbitration, but TEG never sought or secured AVIC USA's consent. Therefore, SWE's motion to intervene should have been denied and the award should be vacated.

AVIC USA's argument is essentially this—because AVIC USA did not authorize this legal action *against itself,* the Panel exceeded it powers in permitting SWE to intervene, and therefore this award must be vacated. While this argument is absurd, it ultimately fails just as numerous of its other arguments. AVIC USA objected on these same grounds during arbitration when SWE petitioned to intervene; the Panel,

however, decided SWE was a proper party to the arbitration because "[t]he management committee of SWE took action in accordance with article VI of the SWE Agreement authorizing SWE's claims." The Panel clearly interpreted the Agreement in ruling that SWE was a proper claimant with standing and was permitted to intervene. The Court must affirm the award "as long as the arbitrator's decision 'draws its essence' from the contract", resolving all doubts in favor of arbitration. *Timegate,* 713 F.3d at 802. AVIC USA failed to meet its burden to prove that the Panel exceeded their powers in "utterly contort[ing] the evident purpose and intent of the parties—the 'essence' of the contract." *See id.* at 802-803. The Court concludes the Panel's decision draws its essence from the Agreement, and therefore, the award may not be vacated on these grounds. *See Anderman/Smith,* 918 F.2d at 1219 n.3.

IV. Conclusion

For the reasons previously stated, the Court GRANTS the Movants' motion to confirm the arbitration award, and DENIES AVIC USA's motion to vacate the arbitration award. The arbitration award dated December 21, 2015 is hereby confirmed as to Respondent AVIC International USA, Inc. The Court will issue a separate final judgment.

SO ORDERED.

Signed August 9th, 2018.

/s/ Ed Kinkeade
ED KINKEADE
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed August 9, 2018]

Civil Action No. 3:15-CV-4033-K

SOARING WIND ENERGY, LLC, TANG ENERGY GROUP, LTD., THE NOLAN GROUP, INC., MARY YOUNG (INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF KEITH P. YOUNG), MITCHELL W. CARTER, and JAN FAMILY INTERESTS LTD.,

Movants,

v.

CATIC USA, INC. (A.K.A. AVIC INTERNATIONAL USA, INC.), AVIATION INDUSTRY CORPORATION OF CHINA, CHINA AVIATION INDUSTRY GENERAL AIRCRAFT CO. LTD., AVIC INTERNATIONAL HOLDING CORPORATION, AVIC INTERNATIONAL RENEWABLE ENERGY CORP., ASCENDANT RENEWABLE ENERGY CORP., and CATIC TED LTD. (a.k.a. AVIC INTERNATIONAL TED LTD.),

Respondents.

ORDER SEVERING

Movants' Motion to Confirm Arbitration Award Against Respondent AVIC International USA, Inc. and Motion to Confirm Arbitration Award Against All Other Respondents (Doc. No. 1) is pending before the Court. Also pending before the Court are the Motions

to Vacate Arbitration Award filed by Respondents AVIC International USA Inc. (Doc. No. 157), Aviation Industry Corporation of China and China Aviation Industry General Aircraft Co. Ltd. (Doc. No. 161), AVIC International Holding Corp. (Doc. No. 202), and AVIC International Renewnable Energy Corporation (Doc. No. 232). The Court stayed this case as to Respondents Aviation Industry Corporation of China, China Aviation General Aircraft Co., Ltd., AVIC International Holding Corporation, and AVIC International Renewable Energy Corporation pending the Court's determination of the Movants' Motion to Confirm Arbitration Award Against Respondent AVIC International USA, Inc.

The Court may sever any claim against a party, even properly joined parties, into a separate action and proceed with it as a discrete, independent action. *See also Allied Elevator, Inc. v. E. Tex. State Bank*, 965 F.2d 34, 36 (5th Cir. 1992); *Blum v. Gen. Elec. Co.*, 547 F. Supp.2d 717, 722 (W.D. Tex. 2008). The Court concludes it need not reach the other Respondents motions to vacate (most notably those arguments related to their joint and several liability pursuant to the arbitration award based on an alter-ego theory) before determining whether to confirm or vacate the arbitration award as to Respondent AVIC International USA, Inc., the signatory to the underlying agreement. Therefore, the Court ORDERS that the Motion to Confirm Arbitration Award Against Respondents Aviation Industry Corporation of China, China Aviation General Aircraft Co., Ltd.,

AVIC International Holding Corporation, and AVIC International Renewable Energy Corporation be severed and filed in a newly opened civil action, pursuant to FED. R. CIV. P. 21 (a court has broad discretion to

sever claims against a party or to order separate trials for joined parties). *See also Allied Elevator*, 965 F.2d at 36 (severance under Rule 21 creates two separate actions).

The Clerk is hereby DIRECTED to sever and copy all the docket entries of this case in CM/ECF and open a new civil action. The new style of this case shall be *Soaring Wind Energy, LLC, Tang Energy Group, Ltd., The Nolan Group, Inc., Mary Young, Mitchell W. Carter, and Jan Family Interests Ltd. (Movants) v. Aviation Industry Corporation of China, China Aviation General Aircraft Co., Ltd., AVIC International Holding Corporation, and AVIC International Renewable Energy Corporation (Respondents)*.

This newly opened action is hereby stayed and administratively closed pending resolution of *Soaring Wind Energy, LLC, et al. v. AVIC International USA, Inc.*, 3:15-CV-4033-K.

SO ORDERED.

Signed August 9th, 2018.

/s/ Ed Kinkeade
ED KINKEADE
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed February 5, 2015]

Civil Action No. 3:14-CV-2815-K

AVIC INTERNATIONAL USA, INC.
and PAUL THOMPSON,

Plaintiffs,

v.

TANG ENERGY GROUP, LTD., KEITH P. YOUNG,
MITCHELL W. CARTER, JAN FAMILY INTERESTS,
LTD., and THE NOLAN GROUP, INC.,

Defendants.

JUDGMENT

This Judgment is entered pursuant to the Court's Memorandum Opinion and Order of this same date, in which the Court granted Defendants' Motion to Dismiss.

It is therefore, ORDERED, ADJUDGED and DECREED that Plaintiffs takes nothing by their suit against Defendants, and that Plaintiff's claims are DISMISSED with prejudice, with all costs taxed against Plaintiff.

SO ORDERED.

Signed February 5th, 2015.

/s/ Ed Kinkeade
ED KINKEADE
UNITED STATES DISTRICT JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed February 5, 2015]

Civil Action No. 3:14-CV-2815-K

AVIC INTERNATIONAL USA, INC.
and PAUL THOMPSON,

Plaintiffs,

v.

TANG ENERGY GROUP, LTD., KEITH P. YOUNG,
MITCHELL W. CARTER, JAN FAMILY INTERESTS, LTD.,
and THE NOLAN GROUP, INC.,

Defendants.

MEMORANDUM OPINION AND ORDER

Before the Court are: (1) Plaintiff AVIC International USA, Inc.'s ("AVIC") Motion to Stay Arbitration (Doc. No. 16); (2) Defendant Tang Energy Group LTD's ("Tang") Amended Motion to Dismiss (Doc. No. 27); (3) Plaintiff Paul Thompson's ("Thompson") Motion for Discovery (Doc. No. 34); (4) Plaintiffs' Request for Court Consideration of Further Evidence in Support of Motion to Stay Arbitration (Doc. No. 45); (5) Defendant Tang's Motion to Strike (Doc. No. 47); and (6) Plaintiff AVIC's Motion to Strike the Purported Expert Witness Statements Filed by Tang Energy Group, Ltd. in Support of its Opposition to Motion to Stay (Doc. No.

70). Having carefully considered the motions, responsive briefing, appendices, applicable law, and record when relevant, the Court GRANTS Defendant Tang's motion to dismiss.

I. Factual and Procedural Background

In 2008, Plaintiffs AVIC and Thompson (collectively "Plaintiffs") entered into the Limited Liability Company Agreement of Soaring Wind Energy, LLC ("the Agreement") with Defendants Tang, Keith P. Young ("Young"), Mitchell W. Carter ("Carter"), Jan Family Interests, LTD. ("JFI"), and The Nolan Group, Inc. ("TNG") (collectively "Defendants"). The Agreement contains a Dispute Resolution section ("Arbitration Provision") requiring disputes to be resolved in binding arbitration. The Arbitration Provision of the Agreement provides for the following process:

> (a) The Disputing Member desiring to initiate arbitration in connection with any Dispute shall notify the other Disputing Members in writing, which notice shall provide the name of the Arbitrator appointed by the Disputing Member, demand arbitration and include a statement of the matter in controversy.
>
> (b) Within 15 days after receipt of such demand, each other Disputing Member receiving notice of the Dispute shall name an Arbitrator. . . . The Arbitrators so selected shall within 15 days after their designation select an additional Arbitrator. . . . In the event that there are more than two Disputing Members to the Dispute, then unless otherwise agreed by the Disputing Members, the Arbitrators selected by the Disputing

> Members shall cause the appointment of either one or two Arbitrators as necessary to constitute an odd number of total Arbitrators hearing the Dispute.

It defines "Disputing Member" as "each Member that is a party to such Dispute."

In June 2014, after alleged breaches of the Agreement by Plaintiffs, Tang filed a Demand for Arbitration, Designation of Arbitrator, and Statement of Matter in Controversy with the American Arbitration Association ("AAA"), based on the Arbitration Provision of the Agreement. After providing notice to the members to the Agreement, each member to the dispute, including Plaintiffs, then selected an arbitrator. This resulted in a panel of seven (7) arbitrators being selected–one by each of the two Plaintiffs and one by each of the five Defendants. Those seven arbitrators then selected two additional arbitrators, thereby creating a nine member arbitration panel ("the Panel") in the AAA proceeding.

Plaintiffs filed this lawsuit on August 5, 2014, seeking a declaratory judgment from this Court. Plaintiffs contend that the Panel as it currently exists "deviates" from the arbitrator selection provisions set forth in the Arbitration Provision of the Agreement. Plaintiffs specifically argue that the arbitrator selection provision authorizes Defendants to collectively select one arbitrator for their "side" and Plaintiffs to collectively choose one arbitrator for their "side", then those two arbitrators select a third arbitrator. Plaintiffs also argue that the current Panel fails to comply with the constitutional requirement that disputes be resolved by an impartial decisionmaker because the "deck is stacked" against Plaintiffs. Plaintiffs contend that the Panel as it currently is

comprised "is inherently unfair and not neutral" and ask the Court to order the Panel be reconstituted according to the "correct" arbitrator selection process authorized in the Arbitration Provision, which Plaintiffs argue is one arbitrator for Defendants collectively and one for Plaintiffs collectively, with a third arbitrator selected by those two arbitrators.

II. Tang's Motion to Dismiss for Lack of Subject Matter Jurisdiction

Tang argues in its motion that this Court does not have jurisdiction under the Federal Arbitration Act ("FAA") to review Plaintiffs' claims until an arbitration award has issued. Specifically, Tang contends Plaintiffs' claims do not fall within the very limited jurisdiction granted to courts under the FAA to intervene in the arbitral process. Defendants Young, Carter, JFI, and TNG join in Tang's motion to dismiss. Plaintiffs respond that this Court does have jurisdiction to entertain their challenges to the Panel because the current Panel violates Plaintiffs' rights to an impartial decisionmaker and Plaintiffs are asking to reconstitute the Panel.

A. Applicable Law

A case may be dismissed for lack of subject matter jurisdiction under rule 12(b)(1). FED. R. CIV. P. 12(b)(1). The court must first address a motion to dismiss for lack of subject matter jurisdiction before any other challenge in order to determine jurisdiction before addressing the validity of a claim. *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994). In ruling on a Rule 12(b)(1) motion, the court "'is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.'" *Stiftung v. Plains Marketing, L.P.*, 603 F.3d 295, 297 (5th Cir.

2010)(quoting *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.), *cert. denied*, 454 U.S. 897(1981)). In considering a Rule 12(b)(1) motion, the court may look solely to the complaint, the complaint along with undisputed facts, or the complaint with undisputed facts and the court's resolution of disputed facts. *Williamson*, 645 F.2d at 413. The party asserting subject matter jurisdiction bears the burden of proving it on a Rule 12(b)(1) motion. *Stiftung*, 603 F.3d at 297; *see Castro v. US*, 608 F.3d 266, 268 (5th Cir. 2010).

The Supreme Court has declared that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq*. "is a congressional declaration of a liberal policy favoring arbitration." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 24 (1983). Federal policy strongly favors the enforcement of arbitration agreements. *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 217 (1985); *Texaco Exploration and Prod. Co. v. AmClyde Engineered Prods. Co., Inc.,* 243 F.3d 906, 909 (5th Cir. 2001). Furthermore, the FAA "'expressly favors the selection of arbitrators by parties rather than courts.'" *BP Exploration Libya Ltd. v. ExxonMobil Libya Ltd.*, 689 F.3d 481, 490 (5th Cir. 2012)(quoting *Shell Oil Co. v. CO2 Comm., Inc.*, 589 F.3d 1105, 1109 (10th Cir. 2009)).

A court's jurisdiction to intervene in the arbitration process before an award has been issued is very limited under the Federal Arbitration Act ("FAA"). *Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476, 486 (5th Cir. 2002). Congress's intent with the FAA was to move parties out of the courts and into arbitration promptly and efficiently; but Congress also "recognized that judicial intervention may be required in certain circumstances" to achieve this goal. *Id.* To that end, the FAA provides, in relevant part:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but . . . if for any other reason there shall be a lapse in the naming of an arbitrator . . ., then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators . . . .

9 U.S.C. § 5. Although Congress provided for judicial intervention when an impasse in the arbitrator selection process has occurred, the FAA makes clear that the parties must adhere to their contractual arbitrator selection procedure if one exists. *Id.* at 491 (quoting *Pac. Reins. Mgmt. Corp. v. Ohio Reins. Corp*., 814 F.2d 1324, 1327 (9th Cir. 1987)). However, as part of its very limited jurisdiction, a court may select an arbitrator, upon application of a party, in three situations:

> (1) if the arbitration agreement does not provide a method for selecting arbitrators; (2) if the arbitration agreement provides a method for selecting arbitrators but any party to the agreement has failed to follow that method; or (3) if there is "a lapse in the naming of an arbitrator or arbitrators."

BP Exploration, 689 F.3d at 491. The Fifth Circuit has defined "lapse" under 9 U.S.C. § 5 as "a lapse in time in the naming of the arbitrator or in the filling of a vacancy on a panel of arbitrators, or some other mechanical breakdown in the arbitrator selection process." *Id.* at 491-92.

B. Application of the Law to the Facts

In this case, there is no dispute that there is an agreement to arbitrate between these parties or that these claims fall within the scope of that agreement. *See Gulf Guar.*, 304 F.3d at 486 ("Courts are limited to determinations regarding whether a valid agreement to arbitrate exists and the scope and enforcement of the agreement, including the arbitrability of given underlying disputes.") Instead, Plaintiffs focus solely on the selection and composition of the Panel. Plaintiffs argue the Court has jurisdiction here because there has been a "lapse" in this arbitration process. Plaintiffs contend the "lapse" is an "impasse" that has been reached by their refusal to arbitrate before the current Panel, "where the deck is stacked against them." Therefore, under 9 U.S.C. § 5, the Court must order the Panel be reconstituted.

Plaintiffs bear the burden of proving jurisdiction does in fact exist. *Arena v. Graybar Elec. Co., Inc.*, 669 F.3d 214, 223 (5th Cir. 2012). Plaintiffs attempt to characterize their claims against Defendants as a "lapse" in the arbitrator selection process, thereby authorizing the Court to intervene under its very limited jurisdiction authorized by the FAA. Plaintiffs also contend the Court has jurisdiction because the current Panel amounts to a "stacked deck" against Plaintiffs and gives the appearance of bias, violating their constitutional rights to an impartial decisionmaker. First, the facts establish there was no lapse in time of naming an arbitrator, in filling a vacancy on the panel of arbitrators, or "some other mechanical breakdown" of the arbitrator selection process to satisfy the definition of "lapse" under 9 U.S.C. § 5 by the Fifth Circuit. *See BP Exploration*, 689 F.3d at 491. Each party to this action named an

arbitrator, with no resulting delay; there was, in fact, no impasse in the arbitrator selection process at all. Plaintiffs claim the "mechanical breakdown" came when they refused to arbitrate before the current Panel. Neither the specific language of the FAA or Fifth Circuit caselaw defines "lapse" to include a party's refusal to participate in arbitration. The arbitration is pending before the American Arbitration Association with a panel of party-chosen arbitrators. The facts simply belie Plaintiffs' claim that a "mechanical breakdown in the *arbitrator selection process*" occurred. *See Gulf Guar.*, 304 F.3d at 491-92 (emphasis added). Therefore, the Court has no jurisdiction on that basis. *See* 9 U.S.C. § 5; *BP Exploration*, 689 F.3d at 491.

Next, Plaintiffs' arguments that the Court has jurisdiction because their constitutional rights are being violated are really just a challenge to the process used to select the arbitrators and to the alleged resulting unfairness of that process to Plaintiffs. Plaintiffs claim that their right to an impartial decisionmaker is being violated by the Panel as it's currently comprised because Defendants chose more arbitrators than did Plaintiffs. Therefore, the Panel is inherently unfair and amounts to a "stacked deck" against Plaintiffs. Again, Plaintiffs' allegations boil down to fairness of the arbitrator selection process set forth in the Arbitration Provision. Complaints about the arbitrator selection process, including fairness, "essentially go to the procedure of arbitration." *Gulf Guar.*, 304 F.3d at 488. It is well settled that such procedural challenges are for an arbitrator to decide. *Adam Techs. Int'l S.A. de C.V. v. Sutherland Global Servs., Inc.*, 729 F.3d 443, 452 (5th Cir. 2013)(citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)); *Gulf Guar.*, 304 F.3d at 487. This Court has no authority

under the FAA to entertain these challenges before an arbitration award has issued. *Adam Techs.*, 729 F.3d at 452; *Gulf Guar.*, 304 F.3d at 488.

Even if the Court had jurisdiction to hear Plaintiffs' claims, the Court has no jurisdiction to grant Plaintiffs' requested relief. Plaintiffs ask the Court to reconstitute the Panel, which amounts to removing the current arbitrators. The record establishes that the Panel has already been comprised and the arbitration is currently before the AAA, although no arbitration award has yet issued. Under the FAA, courts have no authority to remove an arbitrator prior to an arbitration award being made. *Gulf Guar.*, 304 F.3d at 489-90; *see Adam Techs.*, 729 F.3d at 452. The Fifth Circuit held that "*even where arbitrator bias is at issue*, the FAA does not provide for removal of an arbitrator from service prior to an award, but only for potential vacatur of any award." *Gulf Guar.*, 304 F.3d at 490 (emphasis added). Despite Plaintiffs' argument to the contrary, this Court has no authority under the FAA "to remove an arbitrator for any reason" before an arbitration award has been issued. See *id.*

The Court finds that it has no jurisdiction under the FAA to entertain Plaintiffs' claims prior to an arbitration award issuing, where Plaintiffs challenge the arbitrator selection process and alleged resulting unfairness. Furthermore, the Court has no jurisdiction under the FAA to reconstitute the Panel, as requested by Plaintiffs.

III. Conclusion

The Court finds it has no jurisdiction under the FAA to address Plaintiffs' claims and grant the requested relief. Therefore, the Court grants Defendant Tang's motion to dismiss, which all other Defendants have

joined. Plaintiffs' case against all Defendants is hereby dismissed.

SO ORDERED.

Signed February 5th, 2015.

/s/ Ed Kinkeade
ED KINKEADE
UNITED STATES DISTRICT JUDGE

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed August 25, 2015]p

No. 15-10190
Summary Calendar
D.C. Docket No. 3:14-CV-2815

AVIC INTERNATIONAL USA, INCORPORATED,

Plaintiff-Appellant

v.

TANG ENERGY GROUP, LIMITED; KEITH P. YOUNG; MITCHELL W. CARTER; JAN FAMILY INTERESTS, LIMITED; THE NOLAN GROUP, INCORPORATED,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

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Before WIENER, HIGGINSON, and COSTA, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed August 25, 2015]

AVIC INTERNATIONAL USA, INCORPORATED,

Plaintiff-Appellant

v.

TANG ENERGY GROUP, LIMITED; KEITH P. YOUNG; MITCHELL W. CARTER; JAN FAMILY INTERESTS, LIMITED; THE NOLAN GROUP, INCORPORATED,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:14-CV-2815

Before WIENER, HIGGINSON, and COSTA, Circuit Judges.

PER CURIAM:[*]

Plaintiff-Appellant AVIC International USA, Incorporated ("AVIC"), one of two original plaintiffs in the district court,[1] seeks reversal of the district court's Judgment of February 5, 2015, which dismissed those

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[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] Plaintiff Paul Thompson filed a motion for discovery but has not joined AVIC as an Appellant to this court.

plaintiffs' motion to stay the arbitration that was already pending before the American Arbitration Association ("AAA"), but had not yet commenced. The district court dismissed their action after concluding that, under the Federal Arbitration Act ("FAA"), it did not have jurisdiction to consider AVIC's claims that the arbitration panel, as selected and presently existing, "deviates" from the arbitration provisions of the parties' agreement and fails to meet the constitutional requirement of impartiality. The court ruled that it could not address such complaints before the arbitration panel renders its decision.

Our review of the district court's Memorandum Opinion and Order and the record on appeal, including the briefs of the parties, and their excerpts, satisfies us that the district court ruled correctly, committing no error – reversible or otherwise. The agreement at issue was entered into by sophisticated and experienced parties on advice of highly qualified counsel; that agreement contains their carefully crafted arbitration provision; one or more of the parties validly invoked arbitration in compliance with that provision; several of the parties to the agreement – not just two "sides" – followed by appointing one arbitrator each; and, as noted, arbitration is now before the panel comprising those arbitrators and is presumably proceeding pursuant to the rules and procedures of the AAA.

As noted by the district court, AVIC has failed to demonstrate that, as it claims, there has been a "lapse" in the appointment of arbitrators. In *BP Exploration Lybia Ltd. v. ExxonMobil Lybia, Ltd.*,[2] we defined that term as "a lapse in time in the naming of the arbitrator

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[2] 689 F.3d 481, 491-92 (5th Cir. 2012)

or in the filling of a vacancy on a panel of arbitrators, or some other mechanical breakdown in the arbitrator selection process." AVIC's allegations do not identify any occurrences that meet that definition. Simply put, when its position is reduced to its bare essentials, AVIC is asking us to rewrite their agreement's arbitration provision to require that every arbitration among these multiple parties comprise only two "sides." It is apparent from the plain wording of that provision, however, that the agreement contemplates the possibility of there being three or more "sides" among the several parties to the agreement. More to the point, AVIC's strained interpretation of the arbitration provision would mandate that there be precisely three arbitrators in any and every instance, no more and no fewer – one selected by one "side," a second selected by the other "side," and the third selected by the first two. The unambiguous wording of the arbitration provision eschews such a reading: The agreement expressly contemplates the possibility of (1) an even number of arbitrators (an impossibility under AVIC's proposed, three-only arbitrators interpretation) and (2) adding either one *or two* more arbitrators to achieve an odd number (also an impossibility under a three-only arbitrator situation).

All that aside, we agree with the analysis of the district court and its conclusions that at this stage of the ongoing arbitration proceedings, a stay to deal with the issues advanced by AVIC would be premature, and that any resolution of AVIC's objections to the makeup of the arbitration panel must await completion of the arbitration process. For essentially the reasons expressed by the district court, its Judgment is, in all respects,

AFFIRMED.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed August 4, 2015]

Civil Action No. 3:14-CV-3314-K

ASCENDANT RENEWABLE ENERGY CORPORATION,

Plaintiff,

v.

TANG ENERGY GROUP, LTD., KEITH P. YOUNG, MITCHELL W. CARTER, JAN FAMILY INTERESTS, LTD., THE NOLAN GROUP, INC. and SOARING WIND ENERGY, LLC.,

Defendants.

MEMORANDUM OPINION AND ORDER

Before the Court are: (1) Defendant Tang Energy Group, Ltd.'s ("Tang") Motion for Summary Judgment (Doc. No. 18); (2) Plaintiff Ascendant Renewable Energy Corporation's ("Ascendant") Cross-Motion for Summary Judgment (Doc. No. 42); (3) Non-party AVIC International USA, Inc.'s ("AVIC") Motion to Intervene for the Limited Purpose of Moving to Disqualify Counsel and to Strike Pleadings Filed by Disqualified Counsel (Doc. No. 58); and (4) Ascendant's Motion for Protection and to Stay Arbitration (Doc. No. 65). After careful consideration of all pending motions, the responsive briefing, the relevant record, and the applicable law, the Court DENIES AVIC's motion to

intervene and DENIES as moot Ascendant's motion for protection and stay. For the following reasons, the Court DENIES Tang's motion for summary judgment and GRANTS in part and DENIES in part as moot Ascendant's motion for summary judgment.

I. Factual and Procedural Background

The following facts are not disputed by the parties. On June 13, 2014, Defendant Tang initiated an arbitration proceeding against eight respondents pursuant to the arbitration clause of the Limited Liability Company Agreement of Soaring Wind Energy, LLC ("Agreement"). Plaintiff Ascendant is one of the named respondents, but is not a signatory to the Agreement. Before the arbitration panel, Ascendant objects to the arbitration arguing there is no jurisdiction because Ascendant is a non-signatory to the Agreement, and Ascendant will not consent to or participate in the arbitration. Also before the arbitration panel, Tang has asserted that under a theory of alter ego, Ascendant is subject to the arbitration clause of the Agreement.

Ascendant filed this declaratory judgment action, asking this Court to declare: (1) the issue of whether Ascendant, a non-signatory, is a proper party to the arbitration cannot be determined by the arbitration panel; (2) the issue of whether Ascendant, a non-signatory, is a proper party to the arbitration can only be determined by a court of law; (3) no determination, finding, or decision made in arbitration as to jurisdiction over or as to the party-status of Ascendant is valid, binding, effective, or controlling; and (4) a stay of all arbitration proceedings until this case is decided. Defendants Tang, Mitchell W. Carter ("Carter"), Jan Family Interest, Ltd. ("JFI"), The Nolan Group, Inc. ("Nolan") and Soaring Wind Energy, LLC ("Soaring

Wind") filed a counterclaim for declaratory judgment asking this Court to declare: (1) the arbitration panel has authority, right and jurisdiction to determine whether Ascendant is a proper party to the arbitration and whether jurisdiction exists over Ascendant in the arbitration, subject to independent judicial review; and (2) alternatively, should the Court rule that neither the AAA nor any arbitration panel can consider Ascendant's objection to jurisdiction, then Defendants seek leave to join remaining AVIC entities as third-party defendants and seek a declaration that all AVIC entities are proper parties to arbitration. In his counterclaim for declaratory judgment, Defendant Keith P. Young also asks that should the Court declare the arbitration panel cannot consider Ascendant's objection to jurisdiction, that the Court declare that Ascendant is a proper party to the arbitration. Although all the Defendants have joined in Tang's summary judgment motion, the Court will refer to the collective motion as "Tang's motion."

II. Analysis

A. Applicable Law

Summary judgment is appropriate when the pleadings, affidavits and other summary judgment evidence show that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A dispute of a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). All evidence and reasonable inferences must be viewed in the light most favorable to the nonmovant, and all disputed facts resolved in favor of the nonmovant. *See United States v. Diebold, Inc.,* 369

U.S. 654, 655 (1962); *Boudreaux v. Swift Transp. Co., Inc.*., 402 F.3d 536, 540 (5th Cir. 2005).

The Declaratory Judgment Act, 28 U.S.C. § 2201(a), "is an enabling act, which confers discretion on the courts rather than an absolute right on a litigant." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995). "The Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." *Id.* at 286. "In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." *Id.* at 289.

The Supreme Court has declared that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq*. "is a congressional declaration of a liberal policy favoring arbitration." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 24 (1983). Further, federal policy strongly favors the enforcement of arbitration agreements. *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 217 (1985); *Texaco Exploration and Production Co. v. AmClyde Engineered Products Co., Inc.,* 243 F.3d 906, 909 (5th Cir. 2001). However, because arbitration is necessarily a matter of contract, courts may require a party to submit a dispute to arbitration only if the party has expressly agreed to do so. *Personal Security & Safety Sys. Inc. v. Motorola Inc.,* 297 F.3d 388, 392 (5th Cir. 2002)(citing *AT&T Tech., Inc. v. Communications Workers of Am.,* 475 U.S. 643, 648 (1986)). Although there is a strong federal policy favoring arbitration, the court does not defer to this policy when making the initial determination about the existence of an agreement to arbitrate. *Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 381

(5th Cir. 2008)(internal citations omitted)*; Will-Drill Res., Inc. v. Samson Res. Co.,* 352 F.3d 211, 214 (5th Cir. 2003).

B. Application of the Law to the Facts

Controlling law is very clear that the threshold issue of whether Ascendant, a non-signatory to the contract containing the arbitration clause, is bound to arbitrate is for a court, not an arbitrator, to determine in the first instance. It is undisputed that Ascendant is not a signatory to the Agreement. The Fifth Circuit has held that "[when] the very existence of any agreement [to arbitrate] is disputed, it is for the courts to decide at the outset whether an agreement was reached." *Will-Drill,* 352 F.3d at 218-19 ("[W]here the very existence of an agreement is challenged, ordering arbitration could result in an arbitrator deciding that no agreement was ever formed [and] [s]uch an outcome would be a statement that the arbitrator never had any authority to decide the issue."). Ascendant, an undisputed non-signatory to the Agreement, attacks the very existence of an agreement to arbitrate with Tang or any other respondent. The Fifth Circuit has expressly held that a court, not an arbitrator, must resolve whether an agreement to arbitrate exists that would require Ascendant to participate in the underlying arbitration. *Id*; *see DK Joint Venture 1 v. Weyand*, 649 F.3d 310, 317 (5th Cir. 2011). Furthermore, the Fifth Circuit has expressly held that when a dispute centers on whether the parties actually entered into an agreement at all, like this one, a court would owe no deference to any decision by the arbitrator as to jurisdiction over or party-status of Ascendant. *See DK Joint Venture*, 649 F.3d at 317.

The Court finds Tang's arguments unpersuasive. Every case Tang cites in support of its argument

involves a petition or motion to confirm or vacate an arbitration award; the arbitrator's about whether a non-signatory was bound by the arbitration clause was addressed for the first time by a court after the conclusion of the arbitration. In this case, Ascendant filed this declaratory action in response to being named a respondent in the Arbitration and has objected to and not participated in the Arbitration; this case was not filed in response to any action taken by the arbitration panel. Also, alternative theories of binding Ascendant to the arbitration clause under the Agreement are not before this Court.

The Court grants Ascendant's cross-motion for summary judgment declaring that Ascendant's party status to the arbitration can only be determined by a court, and not an arbitrator, and no determination by the arbitration panel as to jurisdiction over or party-status of Ascendant is controlling on a court. In its motion for summary judgment, Ascendant also moved to stay all actions related to the arbitration pending the outcome of this case which the Court denies as moot. The Court denies Tang's motion for summary judgment. All other relief not specifically addressed herein is expressly denied.

III. Conclusion

AVIC's motion to intervene is denied and Ascendant's motion for protection and stay is denied as moot. Tang's motion for summary judgment is denied. Ascendant's motion for summary judgment is granted as to: (1) whether Ascendant, a non-signatory to the Agreement, can be subject to arbitration based on the arbitration clause of the Agreement is for a court, not the arbitration panel, to decide because Ascendant disputes the very existence of an agreement between these parties; and (2) because the existence of any

agreement between these parties is in dispute, any determination by the arbitration panel as to the jurisdiction over Ascendant is not controlling on a court. Ascendant's requested relief of a stay of the arbitration action pending outcome of this case is denied as moot.

SO ORDERED.

Signed August 4th, 2015.

/s/ Ed Kinkeade
ED KINKEADE
UNITED STATES DISTRICT JUDGE

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed February 4, 2020]

No. 18-11192

SOARING WIND ENERGY, L.L.C.; TANG ENERGY GROUP, LIMITED; THE NOLAN GROUP INCORPORATED; MITCHELL W. CARTER; JAN FAMILY INTERESTS, LIMITED; MARY M. YOUNG, Individually and as the Independent Executrix of the Estate of Keith P. Young, Jr., Deceased,

Plaintiffs-Appellees

versus

CATIC USA INCORPORATED, also known as AVIC International USA, Incorporated; AVIC INTERNATIONAL HOLDING CORPORATION; AVIC INTERNATIONAL RENEWABLE ENERGY CORPORATION; AVIATION INDUSTRY CORPORATION OF CHINA; CHINA AVIATION INDUSTRY GENERAL AIRCRAFT COMPANY LIMITED,

Defendants-Appellants

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 1/7/2020, 5 Cir., ______ ,_______ F.3d ______)

Before DAVIS, SMITH, and COSTA, Circuit Judges.

PER CURIAM:

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FR THE COURT:

/s/ Jerry Smith

UNITED STATED CIRCUIT JUDGE

APPENDIX L

INTERNATIONAL CENTRE FOR
DISPUTE RESOLUTION
International Arbitration Tribunal

[Filed December 22, 2015]

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Case No. 01-14-0001-4150

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TANG ENERGY GROUP, LTD., SOARING WIND ENERGY, LLC, JAN FAMILY INTERESTS, LTD., THE NOLAN GROUP, INC., KEITH P. YOUNG, MITCHELL W. CARTER,

Claimants,

vs.

CATIC USA, INC., a/k/a AVIC INTERNATIONAL USA, INC., AVIC INTERNATIONAL HOLDING CORP., AVIATION INDUSTRY OF CHINA, CHINA AVIATION INDUSTRY GENERAL AIRCRAFT CO., LTD., AVIC INTERNATIONAL RENEWABLE ENERGY CORP., ASCENDANT RENEWABLE ENERGY CORP., AVIC INTERNATIONAL TRADE & ECONOMIC DEVELOPMENT, PAUL E. THOMPSON,

Respondents.

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FINAL AWARD

The Panel:

Hon. Glen Ashworth, Joseph Byrne, Richard Capshaw, Hon. Jeff Kaplan, Hon. John Marshall, Gregory Shamoun, William Toles, Hon. Mark Whittington, and Steven Aldous.

The panel of arbitrators[1] presided over the oral hearing of the above-referenced matter held in Dallas, Texas, on August 10-14, 2015. The parties submitted post-oral-hearing briefs and proposed findings of fact and conclusions of law. This Final Award includes findings of fact and conclusions of law as required by the contract between the parties,[2] and is based upon the testimony and documentary evidence presented by the parties at the hearing and the evidence submitted to the panel subsequent to the hearing. The parties' objections to post-hearing evidentiary submissions are overruled. The panel will consider all evidence submitted and give the evidence the weight the panel deems appropriate as required by Section R-34(b) of the AAA Commercial Arbitration Rules. Having received and considered only the appropriate evidence, having read and considered the written arguments of counsel, having heard and considered the oral arguments of counsel, and having reviewed, considered and followed the applicable law, the undersigned now enter the following Final Award as majority decision:

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[1] The majority of the panel who signed this award includes Joseph Byrne, Richard Capshaw, Hon. John Marshall, Gregory Shamoun, William Toles, and Steven Aldous. The three arbitrators who did not concur with the award include Hon Mark Whittington, Hon, Jeff Kaplan, and Hon. Glen Ashworth. This final award is signed and notarized by those arbitrators who approved of the award in accordance with Section R-46. Those who dissented signed electronically.

[2] The contract referred to is the Soaring Wind Agreement, which is discussed at length in this Award.

Abbreviations

The following terms and definitions apply to this award:

"CX" means Claimants' Exhibit followed by the exhibit number.

"AX" means Respondent AVIC USA Exhibit followed by the exhibit number.

"TX" means Respondent Thompson Exhibit followed by the exhibit number.

"SWE" or "Soaring Wind" means Soaring Wind Energy, LLC.

"SWE Agreement" refers to the contract between members of SWE.

"Tang" means Tang Energy Group, Ltd.

"Jan" means Jan Family Interest, Ltd.

"Nolan" means The Nolan Group, Inc.

"Young" means Keith P. Young.

"AVIC HQ" means Aviation Industry Corporation of China Group Company.

"AVIC USA" means AVIC International USA, Inc. f/k/a CATIC (USA)

"AVIC International" means AVIC International Holding Corp.

"Ascendant" refers to respondent Ascendant Renewable Energy Corp.

"AVIC IRE" refers to respondent AVIC International Renewable Energy Corp.

"AVIC TED" refers to respondent AVIC International T.E.D., Ltd., f/k/a CATIC TED, Ltd.

"CATIC" refers to the China National Aero-Technology Import & Export Company.

"CAIGA" refers to respondent China Aviation Industry General Aircraft Co., Ltd.

"Thompson" refers to respondent Paul E. Thompson.

OVERVIEW

Tang, Nolan, Young, Carter, and Jan, filed a Demand for Arbitration with the AAA on June 13, 2014 ("Demand"). Subsequently, Tang filed a claim on behalf of Soaring Wind. This Final Award refers to them collectively as "Claimants." The Demand referenced paragraph 13.2(a) of the SWE Agreement as the contractual basis for arbitration of the claims set forth in the Demand. Each of the Claimants (other than Soaring Wind) is a member of SWE.

The Demand named as respondents CATIC USA, Inc., Aviation Industry of China ("AVIC"), China Aviation Industry General Aircraft, Co., Ltd. ("CAIGA"), AVIC International Holding Corp., AVIC International USA, Inc., AVIC International Renewable Energy Corp., Ascendant Renewable Energy Corp., CATIC T.E.D., Ltd., and Paul E. Thompson. CATIC USA, Inc. changed its name to AVIC International USA, Inc. sometime prior to the Demand and is referred to in this Final Award only as AVIC USA. "Respondents" refers to these entities and Thompson collectively. Among those named as Respondents in the Demand, AVIC USA and Thompson are members of SWE. The remaining respondents—AVIC, CAIGA, AVIC IRE, Ascendant, CATIC T.E.D., and AVIC International (referred to collectively as the "Non-Signatories")—did not sign the SWE Agreement. Claimants allege that the arbitration provision in the SWE Agreement binds the Non-Signatories to

arbitrate in this proceeding under several legal theories including alter ego. The Non-Signatories either sent letters to the AAA/ICDR or filed pleadings objecting to Claimants' attempt to include the Non-Signatories in the arbitration. In addition, the Non-Signatories provided the AAA/ICDR notice that those entities did not intend to participate in the arbitration.

Claimants' live pleading is Tang's Verified Fourth Amended Statement of Matters in Controversy dated April 6, 2015, with the addition of the remedy of disgorgement as asserted in Tang's Verified Fifth Amended Statement of Matters in Controversy filed August 7, 2015.[3]

AVIC USA's live pleading at the time of the hearing is its Second Amended Answer, Affirmative Defenses, Counterclaim and Reservation of Rights dated May 7, 2015. Thompson' live pleading is his Fifth Amended Answer, Affirmative Defenses, Objections to Designation of Arbitrators, Counterclaim, Reservation of Rights and Designation of Arbitrator dated April 30, 2015.

In addition to the arbitration, at least three lawsuits were filed related in some way to the subject matter of the arbitration. *Ascendant Renewable Energy Corp. v. Tang Energy Group, Ltd., et. al.*, (Case No. 3:14-CV-03314-K, in the Northern District of Texas, Dallas Division), in which Ascendant sought a declaratory judgment with respect to whether it could be compelled to arbitrate, whether arbitrability of claims against it is for judicial rather than arbitral determination, that the arbitration panel could make no determinations regarding Ascendant, and that the

[3] See Order 26, allowing the addition of the remedy of disgorgement.

arbitration should be stayed. The Honorable Ed Kinkeade entered his memorandum opinion and order dated August 4, 2015, granting Ascendant's motion for summary judgment in two respects—(1) "whether Ascendant, a non-signatory to the Agreement, can be subject to arbitration based on the arbitration clause of the Agreement is for a court, not the arbitration panel, to decide because Ascendant disputes the very existence of an agreement between these parties; and (2) because the existence of any agreement between the parties is in dispute, any determination by the arbitration panel as to the jurisdiction over Ascendant is not controlling on a court."[4] No appeal followed that order.

AVIC International USA, Inc., and Paul Thompson v. Tang Energy Group, Ltd., et. al., (Case No. 3:14-cv-02815-K, in the Northern District of Texas, Dallas Division) in which AVIC USA and Thompson sought an order staying the arbitration and an order that the arbitration panel be reconstituted to a total of three arbitrators, one selected by each "side," and one "neutral" arbitrator selected by the other two arbitrators. Defendants sought dismissal of the case based upon lack of subject matter jurisdiction. The Honorable Ed Kinkeade granted Defendants' motion to dismiss on February 5, 2015, finding "it has no jurisdiction under the FAA to address Plaintiffs' claims and grant the requested relief."[5] AVIC USA appealed that order to the Fifth Circuit. The Fifth Circuit affirmed Judge Kinkeade's order in a per curiam opinion.[6]

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[4] *See* DE 93; 3-14-CV-03314-K.

[5] DE 123, 3:14-CV-02815-K.

[6] *See* 15-10190; filed 9/16/2015.

In addition to the foregoing, the panel is aware that AVIC USA filed a lawsuit in Delaware Chancery Court challenging Tang's assertion of claims in this arbitration on behalf of SWE as unauthorized by the SWE Agreement and sought declaratory and injunctive relief.[7] The panel has no information on the outcome of this proceeding.

FINDINGS OF FACT

General

1. AVIC was formerly the Ministry of Aviation Industry in China. The first Aviation Industry Corporation was created in 1993, and the former Ministry was abolished in 1999. All of China's state-run aviation industry operates under the direction of AVIC HQ, which sits at the top of a pyramid of companies. AVIC HQ is one of 112 companies owned by the Chinese government through the State Asset Supervision and Administration Commission ("SASAC"). AVIC HQ is one of 45 corporations controlled through SASAC which evolved from industrial ministries within the Chinese government and which still enjoy a "rank" within the government equal to vice-ministerial status. The top management of AVIC HQ is appointed by the Organization Department of the central Chinese Communist Party. AVIC HQ is the top level of one of the nine centrally run defense industry conglomerates in China.

2. AVIC HQ has 19 primary business units including CATIC, AVIC International, and CAIGA. AVIC HQ has always maintained a controlling interest in its first tier subsidiaries. These first level subsidiaries also have, in many cases, subsidiaries of their own.

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[7] In the Court of Chancery State of Delaware, No. 11182.

AVIC HQ regularly appoints the Chairman and the members to the Boards of Directors to the subsidiaries. In addition, AVIC HQ controls appointment of many of the key management personnel to its first tier subsidiaries. The first tier subsidiaries consider themselves AVIC HQ companies that follow AVIC HQ strategic advice.

3. CATIC was formerly part of the industrial ministry that later became a subsidiary of AVIC HQ. CATIC is primarily engaged in the import and export of military and military use products. AVIC International is a first tier subsidiary of AVIC HQ and was formerly a subsidiary of CATIC, at which time it was known as CATIC Trade and Development Company (CATIC TED). In 1995, AVIC International spun out of CATIC and became a direct subsidiary of AVIC HQ, making CATIC and AVIC International both international subsidiaries of AVIC HQ. On November 6, 2008, AVIC HQ reorganized into its current form. In addition, AVIC HQ or at AVIC HQ's direction, reorganized its subsidiaries causing CATIC to concentrate in the military products arena and to have its civilian products arena to come under AVIC International. Among the non-military segments devoted to AVIC International was alternative energy. Several months later, China Aviation Industry General Aircraft Co., Ltd. (CAIGA) was created as an AVIC HQ subsidiary to compete in the general aviation sector. AVIC HQ has continuously reorganized in an effort to create competitive companies with strong corporate governance. All of the reorganizations have been top down, directed by AVIC HQ.

4. AVIC HQ's reorganization in the 2008-9 timeframe accompanied a new business development strategy in which AVIC HQ subsidiaries became partners.

As set forth above, AVIC International took responsibility for non-military operations of CATIC and AVIC HQ directed AVIC International to be solely responsible for development of the wind power sector, which AVIC HQ's CEO identified as a focal point for AVIC HQ. In order to carry this directive out for AVIC HQ, AVIC International created AVIC International Renewable Energy Corp. (AVIC IRE) in July 2010. AVIC International made AVIC IRE responsible for vigorously developing the renewable energy industry for AVIC HQ.

5. The historical relationship between Tang and AVIC, began in 1997 when they signed a joint venture agreement to build a gas-fired power plant at the western end of the Great Wall. In the early 2000s, Patrick Jenevein ("Jenevein") and other investors in his group made an investment in an entity in China named Zhong Hang (Baoding) Huiteng Wind Power Equipment Co. Ltd. (also known as "HT Blade"). The entity through which Jenevein and his group invested in HT Blade was named Tang Wind Energy LP, which subsequently became Tang Wind Energy Hong Kong. Some of the other investors in HT Blade included Baoding Huiyang Aviation Propeller Factory and China Aviation Industry Gas Turbine Power (Group) Company, both of which were subsidiaries of AVIC HQ. HT Blade is a manufacturer of wind turbine blades and apparently is a successful venture.

6. In 2007, because of its successful investment in HT Blade and the development of several wind power projects, Tang, Jenevein, and some of its investors decided to create a business to develop wind farms and promote the sale of wind power equipment as part of the development. Out of this idea came the creation of

Soaring Wind Energy. AVIC HQ expressed an interest in being part of Soaring Wind Energy.

The Memorandum of Understanding

7. In order to carry out their desire to create a company to promote wind power and develop wind power projects, AVIC USA, a subsidiary of AVIC International, and Tang entered into a Memorandum of Understanding (the "MOU") effective January 28, 2008, to set out the terms by which they would establish a limited liability company named Soaring Wind Energy. Although the MOU states that it is between AVIC USA (formerly CATIC USA) and Tang Energy Group, Ltd., the agreement also references CATIC, which at the time was CATIC TED, the precursor to AVIC International, as an equity participant and is signed by Liu Rongchun on behalf of "CATIC." At the time, Mr. Rongchun was Vice President of AVIC International and held no position with AVIC USA.

8. The MOU is the precursor to the SWE Agreement.

9. The MOU states that "SWE will be the exclusive vehicle for both Tang and CATIC[8] interest in the wind industry" and that the geographical area will "initially include North America, Central America and South America. Expansion to Europe, Africa, and Asia is designated for future expansion."[9]

10. The MOU also provides that CATIC USA will be responsible for different aspects of the business and that "CATIC offices and employees in China will be available for support as needed." Tang was to be

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[8] As previously stated, CATIC became AVIC International.

[9] The quotes in this Award of the various agreements are quoted verbatim without noting the grammatical deficiencies.

responsible for general management as well as "wind farm development." The MOU identifies Thompson as the person to fill the role as SWE's general manager.

11. MOU recites that wind farm development projects will have separate budgets with CATIC USA as the primary source for development funds.

12. The MOU further states that "[i]t is not a binding document and there will be no damages to the parties if the LLC is not established."

The Soaring Wind Energy Agreement

13. In accordance with the MOU, Soaring Wind Energy (SWE) was created effective June 1, 2008.

14. SWE is a limited liability company organized under the laws of the State of Delaware.

15. CX 2 is the operative agreement setting forth the terms for membership in SWE.

16. The members of SWE are Tang, Nolan, Jan, Young, Carter, AVIC USA, and Thompson (Thompson signed as a Class B Member) (collectively "Members").

17. Some definitions in section 1.1 of the SWE Agreement are relevant to this dispute include the following:

> "Affiliate" means with respect to any Person, any other Person that directly or indirectly Controls, is Controlled by, or is under common Control with that first Person.
>
> "Control" means the possession, directly or indirectly, through one or more intermediaries, of either of the following: (i) in the case of a corporation, more than 50% of the outstanding voting securities thereof; (ii) in the case of a limited liability company, partnership,

limited partnership or venture, the right to more than 50% of the distributions therefrom (including liquidating distributions); (iii) in the case of a trust or estate, including a business trust, more than 50% of the beneficial interest therein; and (iv) in the case of any other Entity, more than 50% of the economic or beneficial interest therein; or (v) in the case of any Entity, the power or authority, through the ownership of voting securities, by contract or otherwise, to exercise a controlling influence over the management of the Entity.

"Member" means either a Class A Member or a Class B Member, or any Person hereafter admitted to the Company as a member as provided in this Agreement, but such term does not include any Person who has ceased to be a member in the Company.

"Person" means any natural person or Entity.

18. Section 2.3 of the SWE Agreement provides that "[t]he purpose and nature of the business to be conducted by the Company shall be to provide worldwide marketing of wind energy equipment, services and materials related to wind energy including, but not limited to, marketing wind turbine generator blades and wind turbine generators and developing wind farms (the "Business"), and to engage in any other business or activity that now or hereafter may be necessary, incidental, proper, advisable or convenient to accomplish the foregoing purposes (including the borrowing of money and the investment of funds) and that is not forbidden by the law of the jurisdiction in which the Company engages in that business.

19. Section 2.7 of the SWE Agreement states that the term of the company is from commencement until dissolved or terminated in accordance with the terms of the Agreement.

20. Section 6.8 of the SWE Agreement provides in part that no Member shall be required to devote full time to Company business and the "Members expressly acknowledge and agree hereby that their relationship to the Company and each other is strictly contractual in nature and is not that of partners, joint venturers or any similarly situated persons and is not fiduciary in nature. No Member shall take, or cause or permit its Affiliates, Officers, employees or agents to take, any action that would bind or obligate the Company in any manner not expressly authorized by this Agreement. Each Member may grant or withhold their consent, approval or vote, in their sole discretion, as directed or otherwise determined by such Member, without regard to the interests of the other Members, it being understood that each such Member shall have no fiduciary duty or other duty to represent or act in the best interests of the other Members."

21. Section 6.10 of the SWE Agreement provides that each Member "agrees that during the term of this Agreement, each shall only conduct activities constituting the Business in and through the Company and its Controlled subsidiaries."

22. Section 6.11 of the SWE Agreement provides:

> Except as restricted by Section 6.10, each of the Members and its respective Affiliates shall be free to engage in other businesses or activities and to receive the income and benefits thereof (and neither the Company nor any other Member shall have any interest therein

by reason of this Agreement), and no Member shall have any duty or obligation to present to the Company or any other Member any such other business opportunities that are outside the scope of the Business. Subject to the terms of this Agreement, nothing in this Agreement shall restrict any Member from establishing, independently or with other Persons, any business in any part of the world, other than the Business, and each Member acknowledges and agrees that the other Member and its Representatives and Affiliates, and the managers, directors, employees or other representatives of such other Members or its Representatives or Affiliates serving as Managers of the Company (any such Person being referred to herein as a "Designee") or as Officers of the Company (any such Person being referred to herein as a "Common Officer") may engage in any business other than the Business. Further, there is no contractual, legal or other requirement on any Member or its Affiliates, Designees, Common Officers or any other Person to offer any business opportunity or participation in any business opportunity, other than the Business, to the Company, and each Member acknowledges and agrees that all Members and their respective Affiliates, Designees, Common Officers and other Persons have the right to pursue any business opportunity or activity that does not consist of the Business. Each Member recognizes that the other Members and their respective Affiliates, Designees, Common Officers and other Persons (a) participate and will continue to

participate in businesses other than the Business, directly and through their respective Affiliates, (b) may have interests in, participate with, and maintain seats on the boards of directors of or serve as managers or employees of other Persons engaged in such other businesses (other than the Business) and (c) may develop business opportunities outside of the Business for themselves and their Affiliates and such other Persons. Subject to the terms of this Agreement, each Member (i) acknowledges and agrees that neither a Member, its Affiliates, Designees, Common Officers nor any such other Person shall be restricted or prohibited, by the relationships that exist between or among the Members and the Company, or by a Member's or its Affiliates' designees serving as a Manager of the Company or Common Officer, from engaging in any business other than the Business, (ii) acknowledges and agrees that neither a Member nor its Affiliates, Designees, Common Officers nor any such other Person shall have any obligation to offer the Company or any of its Affiliates any business opportunity other than with respect to the Business, and (iii) waives any claim that any business opportunity pursued by a Member or any of its Affiliates, Designees, Common Officers or any such Person constitutes a corporate opportunity of the Company or any of its Affiliates that should have been presented to the Company, unless such business opportunity was pursued in violation of the terms of this Agreement.

23. Section 6.12 provides:

> "Each of the Class A Members hereby covenant and agree that neither they nor their Affiliates or Representatives will participate in wind farm land development projects (each a "Project") except through an entity owned by both the Company and CATIC (each a "Project Entity"), the governing documents of which shall provide that (a)
>
> (a) CATIC shall contribute 100% of the capital to the Project Entity required to fund such Project;
>
> (b) Distributions made by the Project Entity, whether distributions of available cash or distributions of proceeds in connection with the sale of a Project or in liquidation, shall be made in the following order of priority unless agreed otherwise in writing by a Supermajority Interest of the Members based upon Secondary Sharing Ratios: (i) first, to CATIC until the sum of all distributions made to CATIC equals an amount which equates to (A) the return of all capital contributions made by CATIC plus (B) an amount equal to 25% of the aggregate amount of capital contributions made by CATIC, and then (ii) all remaining amounts (on liquidation, sale of assets, distributions of available cash or otherwise, to the Company)."

24. Section 8.2 provides in part that "Each Member shall indemnify . . . the other Members, and their Managers, directors, officers, employees, agents, Affiliates and Representatives from all claims, losses, damages, liabilities, costs and expenses of whatever

nature, including reasonable attorney's fees, incurred by them, arising out of . . . (b) any breach by the indemnifying Member or any of its Representatives or Manager designees of any obligation or representation or warranty contained in the Agreement."

25. Section 8.4 of the SWE Agreement relates to confidentiality and generally prohibits Members and their Affiliates from revealing to third parties confidential or proprietary information of the Company and its Members except under certain conditions.

26. Section 9.1 of the SWE Agreement provides that a "Member shall be in default if. . . (b) such Member otherwise fails to perform any of its material obligations or breaches a material representation, warranty or agreement under, or its Representatives fail to comply with the terms of this Agreement or any guaranty entered into pursuant to, this Agreement . . . If a Member is in Default, the other Members and the Company shall have all rights and remedies available at law and in equity with respect to such breach, including the remedies of specific performance and injunctive relief."

27. Article XIII of the SWE Agreement contains an agreement to arbitrate "any controversy, dispute, or claim arising under or related to this Agreement (whether arising in contract, tort or otherwise, and whether arising at law or in equity), including (a) any dispute regarding the construction, interpretation, performance, validity or enforceability of any provision of this Agreement, and (b) the applicability of this Article XIII to a particular dispute."

28. Section 13.1 of the SWE Agreement provides that with respect to a particular dispute, "each Mem-

ber that is a party to such Dispute is referred to herein as a 'Disputing Member.'"

29. Section 13.2 of the SWE Agreement describes the procedure that "shall" be followed to attempt to resolve a "Dispute." The section states "the Disputing Member shall provide written notice to the other Disputing Members of the matter in Dispute," the executive officers of the Disputing Members meet in a good faith attempt to resolve the Dispute, and only then may an arbitration be initiated.

30. Section 13.3 (a) and (b) requires the "Disputing Member" initiating arbitration to notify the other "Disputing Members" of the arbitrator appointed by the "Disputing Member" and the demand for arbitration and statement of matters in controversy. Within 15 days, "each other Disputing Member" shall name an arbitrator. In the event there are more than two "Disputing Members" to the dispute, the arbitrators selected by the "Disputing Members" shall cause the appointment of either one or two arbitrators as is necessary to create an odd number of total arbitrators.

31. Section 13.3 (e) provides that the Commercial Arbitration Rules of the AAA will apply to the arbitration unless otherwise stated in the SWE Agreement.

32. Section 13.3 (f) provides in part that the "Disputing Members" shall make their witnesses available in a timely manner for discovery and if a "Disputing Member" fails to comply with discovery requests, the arbitrators may take such failure to comply into consideration in reaching their decision.

33. Section 13.3 (i) provides that any decision by a majority of the arbitrators shall be final and binding with no right of appeal.

34. Section 13.3 (j) provides that the statute of limitations will be tolled from the date of the notice of a Dispute is provided to the Disputing Members.

35. Section 13.3 (l) provides that the arbitrators shall have no authority to award special, exemplary, punitive or consequential damages.

36. Section 13.4 provides that the prevailing Member(s) in arbitration are entitled to recover court costs, fees and expenses, including reasonable attorney's fees.

37. Section 17.8 of the SWE Agreement provides that the agreement is governed by the laws of the State of Delaware.

38. The SWE Agreement does not require capital contributions from the members beyond the initial capital requirements set out in Exhibit A to the Agreement.

39. Section 17.11 of the SWE Agreement provides that the Agreement constitutes the entire agreement among the Members and supersedes all prior agreements among them with respect to the subject matter hereof.

40. The notable changes from the MOU to the SWE Agreement are that AVIC USA is the only AVIC affiliated entity with an equity interest in SWE and its profit interest is 50% rather than a lesser amount set forth in the MOU for any "AVIC" entity.

41. CX 2 is not the first version of the SWE Agreement. It is a corrected version substituting Nolan for Jenevein individually and Young in place of Tersus Energy PLC. However, there is no evidence of any other changes between the initial version and CX 2. All of the parties agreed that CX 2 contains the same

material terms as the original agreement other than the names of two of the members. Although Thompson contends that his signature on CX 2 is a forgery, he admits that he signed an agreement to create SWE and that the terms of CX 2 are materially the same as the version he signed.

42. All members of SWE paid their initial capital requirements set forth in Exhibit A to the Agreement.

43. All members of SWE had the opportunity to review the SWE Agreement prior to signing the Agreement.

44. All members of SWE signed the SWE Agreement freely and voluntarily.

45. The SWE Agreement was not procured through artifice or fraud on the part of any Member.

46. All members of SWE agreed to the material terms of CX 2.

The Chicago Agreement

47. On April 28, 2009, Tang and AVIC TED signed an agreement entitled "Preliminary Agreement for Wind Power Project Development" (the "Chicago Agreement"). The agreement recites in part that "CATIC-TED" wishes to participate in the development of wind power industry in the United States" and "has experience in oversea projects development" and has "sales and after-sales service capacity and related resources in the United States." The agreement also states, "Tang has been committed in energy industry and has professional staff to develop wind power projects in the United States." The agreement recites that in consideration of the mutual covenants in the agreement and other consideration, "both sides agree

to cooperate for develop wind power projects in the United States . . ..”

The Chicago Agreement further states:

> “Both sides agree to develop wind power projects together through cooperation and finish the development of wind power projects for total capacity of 200 Megawatt within 5 years after this preliminary agreement becoming effective. “CATIC-TED” will totally finance 300,000,000.00 US Dollars in wind power projects development, in which 200,000,000.00 US Dollars will be used to purchase related wind power equipments from China, 100,000,000.00 US Dollars will be used to purchase services including, transportation, warranty services, after-sales services, operation services and related spare parts and consumables parts.
>
> Due to the specialty of wind power projects and related equipments, the 200 Megawatt wind power project is not a single project but composed of several projects. The total capacity of these projects is 200 Megawatt with 5% tolerances. The above wind power projects include Cohasset project, Plymouth project, Ratheon and other projects which now being estimated by both sides. The total capacity of these projects is 45 Megawatt and they constitute the first phase of the whole program.”

48. The Chicago Agreement called for Tang to perform a “preliminary assessment” for projects in the United States, but CATIC TED would be responsible for the “entire project development.”

49. Bian Tao signed the Chicago Agreement on behalf of CATIC TED and Jenevein signed on behalf of Tang. At the time he signed the Chicago Agreement, it is unclear whether Mr. Tao was an officer of AVIC International or CATIC TED, or whether those two were one and the same. Some evidence suggests that CATIC TED had already been folded into AVIC International as part of the 2008-9 reorganization. Xu Hang of CATIC TED authored the Chicago Agreement.

50. The Chicago Agreement is part of the sequence of agreements between the Tang "side" and the AVIC "side", which began with the MOU, followed by the SWE Agreement, and completed by the Chicago Agreement.

51. Although the Chicago Agreement is difficult to read and poorly worded at times, its language imposes no affirmative duty on CATIC TED to agree to any specific wind power project in sufficiently definite terms.

Cirrus Aircraft

52. Technical similarities exist between aviation and wind power technologies. In April of 2009, Cirrus Aircraft informed Jenevein that Cirrus was interested in expanding into wind-turbine blade manufacturing.

53. Tang alerted AVIC USA to the possible opportunities presented through some association or acquisition of Cirrus Aircraft.

54. AVIC USA could make no decision on Cirrus Aircraft and had to report the opportunity to AVIC entities up the chain of AVIC companies. The evidence is unclear whether Sherman Zhang of AVIC USA took the matter up with AVIC International or AVIC HQ.

55. After Tang and CATIC TED held a signing ceremony for the Chicago Agreement in April of 2009, Tang escorted a delegation of AVIC officials to Duluth, Minnesota to meet the officials with Cirrus Aircraft and tour its facilities.

56. AVIC executives invited Jenevein to Paris, France in June 2009, to the Paris Air Show to meet with Cirrus management, to answer additional questions concerning Cirrus Aircraft and discuss AVIC's acquisition of the company.

57. In July of 2009, AVIC HQ created CAIGA, a wholly owned AVIC "subsidiary," to make the Cirrus Aircraft acquisition, which closed in June of 2011.

58. After the Paris meeting, Jenevein did not hear from AVIC about the Cirrus Aircraft acquisition until after it closed.

59. There is no evidence in the record that Cirrus Aircraft manufactured wind-turbine blades after the CAIGA acquisition of Cirrus Aircraft.

Breach of Contract by AVIC USA and Thompson

60. The Members of SWE agreed in the SWE Agreement that the "Business" is worldwide marketing of wind energy equipment, services and materials related to wind energy and includes development of wind farms.

61. The Members of SWE agreed that SWE would be the exclusive vehicle through which its Members would conduct activities constituting the "Business."

62. The extent of the exclusive arrangement agreed to by the Members as set out in the Agreement is ambiguous. Section 6.10 appears to apply only to Members. On the other hand, Section 6.11 prohibits any Member, its Representatives and Affiliates from

engaging in the "Business" of SWE except through SWE. Section 6.12 prohibits Class A Members and their Affiliates from "participating" in wind farm land development projects except through entities owned jointly by SWE and CATIC. The Agreement's confidentiality provision prohibits Members and their Affiliates from revealing confidential information about the company, the Members, Affiliates or the Agreement. The Chicago Agreement clearly states that "SWE will be the exclusive vehicle for both Tang and CATIC interest in the wind industry." The great weight of the evidence supports a construction that Members, their Affiliates and Representatives will only conduct the "Business" through SWE.

63. With regard to Class B Members of SWE, the SWE Agreement also prohibits them from engaging in the "Business" of SWE except through SWE. The SWE Agreement's use of the term "participating" in 6.12 is different from the phrase "activities constituting the Business" and the "Business" as used in Sections 6.10 and 6.11. The term "participating" as used in Section 6.12 means taking an equity position in a Project as defined by the SWE Agreement.

64. The SWE Agreement requires Members and their Representatives and Affiliates to conduct the "Business" of SWE solely through SWE or its Controlled Companies.

65. AVIC USA itself did not violate the contractual provision to refrain from engaging in the Business of SWE except through SWE.

66. However, AVIC USA's affiliates as defined by the SWE Agreement, competed against SWE and engaged in the "Business" of SWE thereby violating the SWE Agreement's exclusive arrangement. Specifi-

cally, AVIC HQ, AVIC International, AVIC IRE and Ascendant, are "Affiliates" of AVIC USA because they directly or indirectly controlled AVIC USA and all are under the common control of AVIC HQ. As a result, AVIC USA breached the SWE Agreement by its Affiliates engaging in the "Business" of SWE.

67. Thompson violated the SWE Agreement by engaging in the "Business" of SWE on behalf of Ascendant.

68. Sections 6.10, 6.11, and 6.12 do not limit former employees of SWE in their professional mobility or restrict former employees from soliciting SWE's customers. Sections 6.10, 6.11, and 6.12 by their terms relate to Members and their Representatives and Affiliates. As a result, the provisions are not covenants not to compete.

Theft of Trade Secrets

69. Section 8.4 of the SWE Agreement prohibits Members and their Affiliates from disclosing any confidential or proprietary information of the other Members or of SWE to third parties.

70. Claimants failed to produce evidence of any specific confidential or proprietary information that any other Member or its Affiliates provided to a third party.

71. Claimants failed to identify any information that derives independent economic value from not being generally known or readily ascertainable by proper means, which Claimants provided any Respondent. While Claimants demonstrated a benefit to Respondents' access to Claimants contacts and general knowledge, those facts alone are insufficient to show the information was a trade secret.

Tortious Interference

72. Claimants' assertion of tortious interference with existing contracts is an alternative allegation to its alter ego claims. As a result of the panel's decision on alter ego, it will not consider the claims for tortious interference of existing contracts.

73. With respect to Claimants' allegation of tortious interference with prospective business opportunities, Claimants offered no evidence that they had a reasonable probability of entering into a business relationship with Wind Tex related to what became the Cirrus 1 project without financing from AVIC. Further, Claimants offered no evidence that intentional interference by Respondents is what caused Claimants from entering into a business relationship with Wind Tex.

Breach of Fiduciary Duty

74. Section 6.8 (b) of the SWE Agreement disclaims any fiduciary duty between Members or between Members and the Company. The Members "expressly acknowledge and agree hereby that their relationship to the Company and each other is strictly contractual in nature and is not that of partners, joint venturers or any similarly situated persons and is not fiduciary in nature."

75. Claimants failed to offer any evidence of a fiduciary relationship between them and any of the Respondents outside of the SWE arrangement, other than that which may have existed while Thompson was a managerial employee of SWE prior to his termination. However, Claimants failed to produce any evidence of a breach of a fiduciary duty by Thompson while he held such a position.

Unjust Enrichment

76. A contract exists between Claimants and Respondents governing the relationship between the parties with respect to the claims alleged.

Single Business Enterprise/Alter Ego

77. The evidence overwhelmingly shows that AVIC HQ, AVIC International, AVIC IRE, AVIC TED, and Ascendant operated as one entity with respect to the MOU, SWE Agreement, and the Chicago Agreement. AVIC HQ exercised such complete control over the other entity Respondents in this case the AVIC Respondents operate as one entity.

78. The Organization Department of the central Chinese Communist Party ("CCP") appoints the top management of AVIC HQ. Among the AVIC Respondents, it is undisputed that officers of parent companies frequently serve as officers and/or directors of subordinate units. By virtue of its controlling interest in its subsidiaries, AVIC HQ appoints its own managers to key positions in the subsidiaries, including the Chairman and members of the Board of Directors and the Board of Supervisors to insure compliance with its directives. The leadership of AVIC HQ has its own personnel department that makes the personnel appointments for its subsidiary units. Lin Zuoming, the Chairman of AVIC HQ, is also a member of the Central Committee of the CCP.

79. All of China's state-run aviation industry operates under the direction of AVIC HQ, which sits at the top of a pyramid of subsidiary companies. AVIC HQ is one of 112 companies owned by the Chinese government through the State Asset Supervision and Administration Commission ("SASAC").

80. SASAC represents the Chinese government in overseeing the management of assets, personnel and operations of State Owned Entities (SOEs), like AVIC HQ and its subsidiaries. SOE leaders are treated like government officials. AVIC HQ previously argued to the Sixth Circuit that it is a part of the Chinese Government.[10] AVIC HQ follows the policy guidance from an organization called the State Administration for Science Technology Industry for National Defense (SASTIND). In 2007, SASTIND directed AVIC to get involved in alternative energy including wind power. In response, AVIC HQ established a project group designed to take responsibility for wind power development and Xu Hang was the head of that group. Lin Zuoming, the CEO of AVIC HQ, also stated that the resources of the entire AVIC group would be employed to develop wind power.

81. The MOU came about as a direct result of AVIC HQ's desire to compete in the wind power industry as directed by SASTIND. Although the MOU was facially an agreement between Tang and CATIC USA, the agreement also proposed that CATIC receive an equity

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[10] *Global Tech. Inc. v. Yubei (Xinxiang) Power Steering Sys. Co*., 2015 U.S. App. LEXIS 21147, *8-9 (6th Cir. 2015) ("The People's Republic of China ("PRC") owns AVIC. The company has a business license for both military products and "general business items," including automobile parts. AVIC's business license shows a stamp of the official seal of the State Administration for Industry and Commerce of the People's Republic of China, and the license states that AVIC is "Owned by the Whole People." AVIC is a Fortune 500 company, with over 400,000 employees and $23 billion in annual revenue, directly owned by China's State Council (the chief administrative authority of the Chinese central government). The State Council's State-Owned Assets Supervision and Administration Commission supervises and manages the state-owned assets of enterprises like AVIC.")

interest in the new company. A CATIC officer signed the MOU. CATIC USA had no experience in the wind power business at the time the MOU was signed and it did not have the financial ability to fund wind power development projects except through its parent company or companies.

82. The SWE Agreement was a continuation of AVIC HQ's directive from SASTIND. The original idea for SWE came from Tang and CATIC TED or AVIC HQ were the AVIC entities indicating a desire to be part of the business. Further, the MOU states that SWE would be the exclusive vehicle for Tang and CATIC in the wind power industry. When AVIC USA signed the SWE Agreement, it was doing so on orders from AVIC HQ.

83. AVIC HQ has a finance section, it has an accounting section, it has an audit section, but it has no sales or products of its own. AVIC HQ uses these sections to govern the access to resources of its subsidiaries and its subsidiaries of subsidiaries by determining how much the subsidiaries can retain of their funds, by assisting them with access to credit from state-owned banks and by distributing quotas for bond and equity money raising. For instance, Xu Hang testified to the effect that AVIC International used money from AVIC TED to capitalize AVIC IRE. Prof. deLisle, AVIC USA's expert, indicated that AVIC HQ– which all parties agree engages in no commercial activity *independent* of its subordinate units – has "powerful design, research and development, and product manufacturing abilities."

84. AVIC HQ's subsidiaries readily acknowledge that they are controlled by AVIC HQ. AVIC International's shareholder introduction states that it is controlled by AVIC HQ. AVIC IRE's web site describes

itself as a unit directly subordinate to AVIC HQ. For further example, Sherman Zhang, AVIC USA's president, stated, ". . . we have a division in charge of International Affair[s] . . . AVIC has an international affairs division," which he suggested might assist Tang in resolving its complaints. Xu Hang, stated AVIC USA was responsible for the networks of AVIC Group and who described AVIC USA on March 25, 2015, as "just really an office" from which Sherman tries to support "the entire group . . . AVIC group," providing "information or support or assistance ... for anything they want." Sherman Zhang acted as a spokesman of AVIC Group and commented publicly on Cirrus Aircraft sales trends, the merits of AVIC IHC's corporate acquisitions, and held himself out as a representative of AVIC Group generally. AVIC HQ owns a controlling interest in AVIC International, which in turn owns 100% of AVIC IRE. AVIC IRE, in turn, owns 100% of Ascendant.

85. AVIC HQ capitalizes its subsidiaries and directs the transfer of assets, including securities and cash, from one subsidiary to another and from subsidiaries to AVIC HQ itself. Prof. deLisle noted that "the way that group companies of this type generally operate where funding/financing is provided from higher levels to lower levels. And in some of these entities the financial side in the sense of the providing of capital for projects by lower-level entities is subject to a degree of central control." He also testified that "[i]t's a special set of rules for state-owned assets. And there are limits to the degree to which entities subject to the state-owned assets, regulations, and laws can acquire or dispose of property and assets outside of China. So there are limits. They do not even . . . have complete authority to do exactly as they wish with all of their [own] property." Prof. Naughton and Col. Stokes

testified that one particular AVIC entity oversees the financing of the subordinate units, and that this fact is acknowledged in credit rating letters from Moody's and Fitch. SASAC must approve all joint venture investments made by AVIC subsidiaries overseas. AVIC HQ assigns employees to specific subsidiaries with no input from the subsidiary to which the employee is assigned, and transfers employees from one subsidiary to another without consulting the employee or the subsidiary. At any given time, multiple employees will have multiple roles with different subsidiaries simultaneously. For example, CAIGA admits that it operates "under the strategic guidance of AVIC," and that it owner-controlled by AVIC HQ as its majority shareholder, and its Chairman, Qu Jingwen, is a career AVIC employee and was concurrently the chairman of AVIC Harbin Aircraft Industry Group, another AVIC HQ subsidiary. As another example, Peng Bo sent emails as a Deputy Director for both AVIC IRE and Ascendant. Thompson states that Tiger Lu was an Ascendant employee but was never on Ascendant's payroll and AVIC IRE employees were assigned to Ascendant. Xu Hang stated that Sherman Zhang, the President of AVIC USA, is paid by AVIC International.

86. Xu Hang stated in an interview that he was the head of a "project group [ ] set up specifically by AVIC Group HQ to take responsibility solely for development of the wind power sector."

87. AVIC HQ's CEO at the time, now Chairman of AVIC HQ (Lin Zuoming), was quoted: "[D]evelopment of non-aviation civilian products is a strategic [decision] for the scientific development of AVIC Group, and wind power will be a focal point for the Group's future development. There are many common-

alities between aviation and wind power technologies, . . . developing wind power sector will draw on all the capabilities of AVIC in order to maintain the development of the entire value chain."

88. Employees of AVIC subsidiaries present themselves as agents of the AVIC Group.

89. AVIC HQ maintains clear ownership control over its subsidiaries, even when it allows other entities to own non-controlling interests. Even in situations where it does not own a controlling interest on its own, AVIC HQ uses subsidiaries to maintain control. As an example, AVIC HQ unilaterally decided that it should own a 25% interest in HT Blade. To make room for AVIC HQ's interest, its subsidiary shareholders, Baoding Huiyang Aviation Propeller Factory and China Aviation Industry Gas Turbine Power (Group) Company, simply relinquished the necessary percentage of their own interests without consideration. Subsequently, even though AVIC HQ was only a 25% owner, it appointed the Chairman of the Board of Directors for HT Blade. AVIC HQ caused HT Blade to pay Baoding Huiyang Aviation Propeller Co., Ltd. (an AVIC subsidiary) $8 million from HT Blade's account without the consent or approval of the shareholders of HT Blade so that Huiyang could meet its payroll.

90. AVIC HQ charges a "service coordination fee" from HT Blade and from its other subsidiaries without any legal basis for doing so, without an agreement authorizing the fee and without offering any consideration in exchange for the fee.

91. AVIC HQ, AVIC International, or AVIC IRE made all the hiring and firing decisions for AVIC IRE's subsidiary Ascendant. AVIC HQ, AVIC International or AVIC IRE presented Thompson, the President of

Ascendant, with a business plan for Ascendant and instructed him to sign it. Thompson stated that he recalled Xu Hang saying that "big AVIC" would decide what opportunities identified by Sherman Zhang would go to which AVIC entity. According to Thompson, "some entity at the very top of the chain decides where they go – or who takes advantage," and Cirrus Aircraft was an example of that. Thompson indicated that he was "waiting around for months" until the [Chinese] government approved the funding of Ascendant. During that time, AVIC International provided Ascendant with U.S. dollars from an AVIC entity in Hong Kong. Xu Hang of AVIC IRE informed Thompson that Mr. Peng and Mr. Lu would work for Ascendant in project development without Thompson's input.

92. Thompson testified in his deposition that AVIC IRE loaned Ascendant $800,000, and that Ascendant was only able to repay AVIC IRE when AVIC IRE bought stock from Ascendant for $1 million. The "leaders" of AVIC IRE decided that Ascendant had to loan AVIC Energy Cambodia $250,000.00 and dictated the terms of the loan for Thompson to include in a resolution from Ascendant. Thompson stated that Ascendant's loan to AVIC Cambodia was a bridge until the "Chinese government" approved funding for that enterprise. On a temporary basis, therefore, AVIC IRE financed AVIC Cambodia using the money in Ascendant's account.

93. Baoying Wang, the President of AVIC IRE, directed Thompson as the President of Ascendant to accelerate the registration of AVIC International Canada Enterprises, Inc. so that AVIC IRE could capture a portion of the Canadian market even though the Canadian enterprise was supposed to be a sub-

sidiary of Ascendant. Xu Hang on behalf of AVIC IRE directed Thompson of Ascendant to pay for the attendance of AVIC IRE employees to Canada's Wind Energy Association meeting because "AVIC Canada" had no funds. CX 303. Xu Hang also directed Thompson to sign documents transferring Ascendant's shares in AVIC International Canada Enterprises, Inc. to AVIC International without any compensation to Ascendant.

94. Thompson received a bonus in 2012 of $50,000 even though Ascendant's profits for that year were approximately $5,700. Thompson's employment agreement defined "AVIC" to include "any proprietorship, partnership, limited liability company, or corporation controlled directly or indirectly by it."

95. With regard to SWE, it was directed by both AVIC USA and AVIC International to present proposals for projects under the agreement to Xu Hang at AVIC International rather than Sherman Zhang at AVIC USA. Sherman Zhang stated that a non-specific "team" that includes people in China who are not employees of AVIC USA, who would support AVIC USA and Soaring Wind in carrying out the SWE Agreement. AVIC USA could not agree to finance any SWE projects because its capital was inadequate. Jenevein testified that Sherman Zhang agreed that $700,000 in capital set aside for SWE would never be enough to finance the development of a wind farm. AVIC USA (through SWE) could engage in no wind energy business without the approval of AVIC International, AVIC TED, and later AVIC IRE.

96. Ascendant could do no work without the approval of AVIC IRE. By way of example, Ascendant could not sign a contract with WindTex, a Texas company controlled by Mr. DeWolf, unless both

Thompson and DeWolf travel from Texas to Beijing for the signing.

97. Among the AVIC Respondents, the parents sometimes pay the salaries and expenses of the subordinate units.

98. Further, the timing of events demonstrates the control AVIC HQ wielded over its subsidiaries particularly with regard to the dispute before the panel. In 2007, SASTIND directed AVIC HQ to get involved in alternative energy including wind power. In response, AVIC HQ established a project group designed to take responsibility for wind power development and Xu Hang was the head of that group. As a result, CATIC TED and Tang entered into the MOU. Mr. Rongchun was Vice President of CATIC TED and held no position with AVIC USA. The MOU led to the SWE Agreement signed by CATIC USA and Tang. Shortly thereafter, or about the same time, AVIC HQ began its reorganization. As part of that reorganization, Wu Guangchuan was named the Chairman of AVIC International. Sherman Zhang stated it succinctly: "when leadership change[s], management change[s]," and "the new leaders don't care about the commitments" their predecessors made to their partners. In an apparent shift in strategy, AVIC International created AVIC IRE in 2010. AVIC IRE was created "according to the strategy of AVIC [HQ] to vigorously develop the renewable energy industry." Liu Rongchun, the individual who signed the MOU with Tang, became the founding chairman of AVIC IRE, and was given the mission to explore renewable energy projects throughout the world. AVIC IRE decided to do this without the participation of SWE. In 2011, AVIC IRE created Ascendant to compete with SWE in the wind energy arena. After AVIC HQ set the

strategic goal and AVIC International created AVIC IRE and set its mission, AVIC USA and AVIC TED no longer had authority from AVIC HQ to engage in wind power development on behalf of AVIC. AVIC HQ used it subsidiaries and its control over its subsidiaries to commit a fraud and work an injustice on Claimants. AVIC HQ dominated its subsidiaries in the transactions at issue in this case, namely, directing the establishment of SWE and the subsequent establishment of a new subsidiary (and its Texas-based subsidiary Ascendant) intended to compete directly and effectively against SWE. AVIC HQ and its wholly owned subsidiaries created additional subsidiaries in an attempt to get around its promises made in the SWE Agreement to Claimants.

Damages

99. The Members of SWE bargained for the mutual and exclusive worldwide marketing of wind energy equipment, services and materials related to wind energy including the development of wind farms.

100. By November 3, 2013, AVIC IRE, by its own admission, had invested $50 million in wind power projects in the United States. The evidence establishes that AVIC IRE and/or Ascendant and/or single asset entities created by those entities developed the Ralls Wind Farm, and Cirrus Wind I. In addition, AVIC IRE's web site details a 1.5 megawatt turbine project in Minnesota, 10 sets of 1 megawatt turbines in Lubbock, Texas, and a 1 megawatt turbine in Tooele, Utah. Independent evidence is lacking as to whether the individually identified wind projects are part of the $50 USD million investment by AVIC IRE in wind power projects in the United States.

101. In addition to the United States, AVIC IRE reported on its web site that it developed wind power projects in Bulgaria, Mongolia, Romania, New Zealand, Australia, Canada, Brazil, Chile, and South Africa.

102. Other than identifying a project in 2012 in Bulgaria named "Somovit," describing an installed capacity of 4.5 megawatts, AVIC IRE's web site's reference to wind projects in countries other than the United States does not set forth any specifics. Further, Claimants were unable to present evidence of specific wind power projects undertaken by AVIC IRE outside of the United States other than the Bulgaria project.

103. AVIC IRE considered 15% to be its minimum anticipated return on investment before it would undertake any given project if financing is the sole measure of profitability. AVIC IRE would not finance a wind power project unless it anticipated a 15% return on its investment.

104. 9.25%, determined based upon the Buildup Method, is an appropriate discount rate for AVIC IRE's $50 USD million investment in wind power projects in the United States to calculate the present value of future damages. In addition, the Buildup Method for determining an appropriate discount rate is generally accepted and recognized methodology for determining the discount rate to be applied.

105. The lifespan of wind farm development projects that come to fruition is anywhere from 25 to 30 years. Although the lifespan of wind farms is anywhere from 25 to 30 years, there is very little evidence in the record as to the time that investors maintain their equity position in any given wind farm development.

106. The present value of cumulative potential return on $50 USD million in capital investment using the 15% minimum return on investment and a discount rate of 9.25%, after deducting the initial $50 USD million investment, is $62.9 USD million after 10 years, $94.7 USD million after 15 years, $131 USD million after 20 years, and $174.8 USD million after 25 years. The present value of the return on the $50 USD million investment is what Claimants bargained for and only an award of some amount of these lost profits will put Claimants in the same position they would have occupied had the SWE Agreement not been breached by AVIC USA and its Affiliates.

107. Claimants contend that they expended significant capital in reliance on the promises made by AVIC USA in the SWE Agreement. A portion of the reliance damages sought by Claimants relates to the Flat Water and Corpus Christi projects. The evidence shows that Claimants presented those projects to AVIC USA and AVIC USA, either directly or through non-action, chose not to participate in those projects. If Claimants chose to pursue those projects further, they did so on their own because the SWE Agreement did not require AVIC USA to participate in particular projects. In addition, in terms of the operating expenses allegedly funded by the Claimants for the benefit of SWE, Claimants failed to show the allocation of those expenses and whether Claimants would have incurred those expenses absent the existence of the SWE Agreement.

108. Section 9.1 of the SWE Agreement provides in part that "[1]f a Member is in Default, the other Members and the Company shall have all rights and remedies available at law and in equity with respect to such breach, including the remedies of specific

performance and injunctive relief." AVIC USA's breaches of the SWE Agreement constitute a default of the agreement making it no longer reasonably practicable for the Members to carry on the business of SWE in conformity with the SWE Agreement.

109. The lost profits set forth in this award are due to SWE for distribution to the Claimants through their percentages set forth in the SWE Agreement. However, in order to prevent AVIC USA and Thompson from profiting from their breaches of the SWE Agreement, they should be prohibited from receiving any profit from any award to SWE. This is true with respect to Thomson even though we are not ordering him to pay any damages. On the other hand, AVIC USA contributed $350,000.00 USD as an initial capital contribution to SWE. Thompson made no capital contribution to SWE. AVIC USA and Thompson's equity interest in SWE should be divested, but AVIC USA should receive a credit for its capital contribution to SWE.

Attorney's Fees and Arbitration Expenses

110. Paragraph 13.4 of the SWE Agreement provides that the prevailing Members in any arbitration or litigation are entitled to recover "all court costs, fees and expenses of such arbitration (or litigation), including reasonable attorneys' fees."

111. Claimants are the prevailing Members in this arbitration.

112. The administrative fees of the AAA/ICDR amount to $85,800.00 USD. The arbitrator compensation totals $900,893.85 USD. Claimants have incurred a total of $897,730.72 USD for fees paid directly to the AAA/ICDR for administrative fees and arbitrator compensation.

113. Tang paid or agreed to pay the reasonable attorney's fees and expenses of the other Claimants. For all Claimants, Tang has incurred a total of $3,719,533.23 USD in reasonable attorneys' fees and expenses as of the issuance of this Final Award.

114. In the event Claimants are required to obtain a judgment confirming this Final Award and effect service on multiple defendants through the Hague Convention, we find Claimants will reasonably incur a total of another $1,200,000.00 USD in legal fees and expenses.

115. In the event Claimants are required to collect a judgment, we find Claimants will reasonably incur a total of another $500,000.00 USD in legal fees and expenses.

116. In the event Claimants are required to successfully prosecute or defend against an appeal of the District Court's judgment to the Fifth Circuit or any other circuit court of appeals, we find Claimants will reasonably incur a total of another $250,000.00 USD in legal fees and expenses for that appeal. In the event Claimants are required to prosecute or defend against a petition for review to the United States Supreme Court, Claimants will reasonably incur a total of $50,000.00 USD in legal fees and expenses. In the event the United States Supreme Court grants review of any appeal, we find that Claimants will reasonably incur an additional $150,000.00 USD in legal fees and expenses.

117. In addition, Tang has incurred additional expenses directly related to this arbitration in the amount of $1,875,264.71 USD, including without limitation, experts' fees and expenses, all costs associated

with depositions, mediation, arranging facilities, graphics, and trial consultation.

118. We find that AVIC USA and Thompson are not prevailing Members under the SWE Agreement and that no factual circumstances exists which would compel the panel to award them attorney's fees or expenses.

Jurisdiction and Composition of the Panel

119. The Members of SWE agreed that "any controversy, dispute, or claim arising under or related to this Agreement (whether arising in contract, tort or otherwise, and whether arising at law or in equity), including (a) any dispute regarding the construction, interpretation, performance, validity or enforceability of any provision of this Agreement, and (b) the applicability of this Article XIII to a particular dispute" would be submitted to binding arbitration. All of the claims raised by all of the parties in this arbitration come within the scope of this agreed arbitration provision.

120. Claimants sent notice of its claims to Respondents on May 14, 2014, describing the matters in dispute between Claimants and AVIC USA and its affiliates. The notice complied with section 13.2 of the SWE Agreement insofar as Claimants' allegations against all Respondents other than Thompson.

121. Claimants notice failed to describe the "matter in dispute" with regard to Thompson. Although the notice letter complained of "AVIC's" hiring of Thompson, a member of SWE, it failed to set forth complaints about Thompson's actions as opposed to AVIC's actions.

122. Claimants initiated this arbitration on June 13, 2014, by filing the Demand with the AAA/ICDR.

123. The Members of SWE agreed to arbitrate the disputes before the panel in accordance with the AAA Commercial Arbitration Rules.

124. The Members appointed the arbitrators in accordance with the terms of the SWE Agreement and AAA Commercial Arbitration Rules without a lapse in that process.

125. The composition of the panel is in accord with the SWE Agreement.[11]

126. The Members agreed that the arbitrators would have the power to rule on panel's jurisdiction, including the arbitrability of any claim or defense by incorporating Section R-7 of the AAA Commercial Arbitration Rules.

127. The Non-Signatories were properly served with the Arbitration Demand in this matter and have had due notice of all proceedings before the panel. Despite this, the Non-Signatories chose to not participate directly. It is clear to the panel that the Non-Signatories participated in some respects in this arbitration through its subsidiary AVIC USA and to an extent through Thompson. AVIC USA and Thompson claimed in response to many discovery requests by Claimants that they did not have possession, custody or control over documents and witnesses relevant to these proceedings. Despite these claims, Ms. Wu Lili, the current President of AVIC IRE, wrote a letter responding to certain questions presented to her by counsel for Thompson. In addition,

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[11] Although not binding in a "law of the case" sense, the panel notes that its reading of the SWE Agreement with respect to the appointment of arbitrators is consistent with the opinion of Judge Kinkeade in 3:14-cv-2815 and a panel of the Fifth Circuit, 15-10190.

Xu Hang, Vice President of AVIC IRE, testified "voluntarily" when asked by Thompson after Claimant's served their damage report in May of 2015. Prior to that time, Claimants sought to depose Xu Hang without success. At his deposition, Xu Hang claimed he was represented in the deposition by Thompson's counsel and refused to testify, on counsel's advice, whether he was aware that Claimants sought his deposition. Even so, Xu Hang admitted that his attorney's fees for his voluntary deposition where being paid by AVIC IRE. In addition, Xu Hang made himself available to speak with AVIC USA's damages expert who testified at the hearing.

128. Further, the Non-Signatories refusal to produce documents in this case to Claimants is in contravention of Orders from the panel. Section R-23 of the AAA Commercial Arbitration permits the panel, in an effort to achieve a fair, efficient and economical resolution of the case, in the case of willful noncompliance with any order issued by the panel, to draw adverse inferences, exclude evidence and other submissions, and/or make special allocations of costs or an interim award of costs arising from such noncompliance. In addition, the SWE Agreement, section 13.3 (f), permits the panel to consider discovery noncompliance into account in reaching a decision. In a typical case, Claimants would be able to discover the factual basis for its claims that Respondents breached the agreement by entering into X agreement, or financing Y wind project, or making Z equity investment. Respondents' refusal to participate in discovery, except when Respondents felt it was to their benefit, prevented Claimants from getting the information to prove X, Y, and/or Z. As a result, the panel has opted to infer that Xu Hang's statement in CX 330 that AVIC International has invested $50 USD million in wind

power projects in the United States is accurate without any additional evidence.

Defenses Limitations

129. Claimants did not discover facts constituting the basis of their claims in this case sufficient to put a person of ordinary intelligence and prudence on inquiry prior to May 14, 2011.

130. The facts constituting the basis of Claimant's causes of action were concealed by Respondents and were not inherently discoverable by Claimants.

Standing

131. To the extent AVIC USA contends that SWE is not a proper party to this arbitration, the panel determines that SWE is a proper Claimant. The management committee of SWE took action in accordance with article VI of the SWE Agreement authorizing SWE's claims.

Estoppel, Unclean Hands, Forgery, Waiver, Latches, Duress, Forgery

132. Tang offered the Members investment in Tang wind farm development projects known as Flat Water and Corpus Christi. AVIC USA chose not to participate in those projects through its silence when the opportunity was presented.

133. Respondents failed to present any evidence that Claimants intentionally waived a known right to proceed against Respondents.

134. Respondents failed to present any evidence that any Claimant executed a written waiver of any part of the SWE Agreement as required by section 17.12 of the Agreement.

135. Respondents failed to present any evidence that Claimants unreasonably delayed asserting their claims, or that Respondents changed their course of action in a detrimental way in reliance on Claimants' delays in action.

136. Respondents failed to present any evidence that any Respondent signed the SWE Agreement against his or her will.

137. The limitations on conducting the business of SWE placed upon Members of SWE are not restrictions on former employees of SWE in their professional mobility and do not restrict former employees from soliciting SWE's customers. Sections 6.10, 6.11, and 6.12 by their terms relate to Members and their Representatives and Affiliates. As a result, the provisions are not covenants not to compete.

Counterclaims

138. AVIC USA contends that Tang breached the SWE Agreement by continuing to receive distributions related to its equity investment in HT Blade. HT Blade was created in 2001, and was an impetus for the parties to create SWE. Tang Energy Hong Kong is the owner of the 25% interest in HT Blade. As a result, the claim could only be made that Tang violated the agreement through an affiliate. However, the same would be true for AVIC because AVIC HQ and two of its subsidiaries also hold interests in HT Blade. If the parties to the SWE Agreement intended for their investments in HT Blade to be part of the pooling of interest reflected in the SWE Agreement, they would have explicitly said so.

139. AVIC USA is not a prevailing party under the SWE Agreement.

140. Thompson is not a prevailing party under the SWE Agreement.

CONCLUSIONS OF LAW

1. Article XIII of the SWE Agreement is unambiguous and may be construed as a matter of law.

2. Article XIII of the SWE Agreement relevant to this arbitration is not fairly susceptible to different interpretations.

3. The arbitration panel is composed in the manner provided by the unambiguous agreement of the parties as set forth in Article XIII of the SWE Agreement.

4. The arbitration panel has the power to decide the disputes raised in this arbitration by virtue of Article XIII of the SWE Agreement.

5. The SWE Members clearly and unmistakably empowered this panel to determine whether this arbitration involves a controversy, dispute, or claim arising under or related to the SWE Agreement (whether arising in contract, tort or otherwise, and whether arising at law or in equity), including any dispute regarding the construction, interpretation, performance, validity or enforceability of any provision of the SWE Agreement

6. Extrinsic evidence may not be used to interpret the intent of the parties or vary the terms of an unambiguous provision of a contract. *Eagle Industries v. DeVilbiss Health Care*, 702 A.2d 1228, 1232 (Del. 1997).

7. A contract is not ambiguous simply because the parties disagree concerning its intended construction. *Eagle Industries v. DeVilbiss Health Care*, 702 A.2d 1228, 1232 n. 8 (Del. 1997).

8. The "Business" of Soaring Wind as set forth in paragraph 2.3 of the SWE Agreement is unambiguous and may be construed as a matter of law. The definition of the "Business" of SWE is worldwide marketing of wind energy equipment, services and materials related to wind energy and includes development of wind farms.

9. The MOU is a preliminary agreement to agree between CATIC T.E.D. and Tang. *See* AVIC USA HRG EXH 169; *See, e.g.*, *Aveta Inc. v. Bengoa*, 986 A.2d 1166, 1186 (Del. Ch. 2009) (agreement lacking material terms is unenforceable); *Tractebel Energy Marketing, Inc. v. AEP Power Marketing, Inc.*, 487 F.3d 89, 95 (2d Cir. 2007) ("[A] mere agreement to agree, in which a material term is left for future negotiations, is unenforceable."). "[O]ne of the central tenets of contract law is that a contract must be reasonably definite in its terms to be enforceable." *Scarborough v. State*, 945 A.2d 1103, 1112 (Del. 2008).

10. Delaware's three-year statute of limitations applies to all Claimants' causes of action against Thompson and AVIC USA.

11. The parol evidence rule bars "evidence of additional terms to a written contract, when that contract is a complete integration of the agreement of the parties."

12. The SWE Agreement is an integrated agreement.

13. The determination of whether one entity is the alter ego of another under federal common law requires a finding that (1) the non-signatory exercised complete control over the signatory with respect to the transaction at issue, and (2) such control was used to commit a fraud or wrong that injured the claimants.

Bridas S.A.P.I.C. v. Gov't of Turkmenistan, 345 F.3d 347, 359 (5th Cir. 2003) (*Bridas I*). The elements of alter ego under Delaware law is substantially the same as the elements under federal common law.

14. This panel concludes (1) that AVIC HQ used related entities in the form of its subsidiaries and their subsidiaries to pursue its interests in renewable energy for the benefit of itself and those related entities, and (2) that it would be unjust to require Claimants to treat them other than as one entity; and we conclude that AVIC HQ, AVIC International, AVIC IRE, AVIC TED, CAIGA, and Ascendant are the alter egos of AVIC USA with respect to the SWE Agreement. In this case, we conclude that AVIC IRE was bound by the agreements of AVIC IHC and AVIC USA, and it follows that AVIC USA and AVIC IHC and AVIC HQ are liable for any conduct of AVIC IRE (or any other AVIC affiliate) that breached those agreements.

15. The panel concludes that (1) AVIC HQ exercises such complete dominion and control over the other AVIC Respondents that they all operate as a single economic entity, and (2) AVIC HQ used its control over its subsidiaries to commit a fraud or injustice against Claimants, and there was an overall element of injustice that injured Claimants.

16. We further conclude that based on AVIC HQ's role in its subsidiaries' conduct, the local, relevant activities of CAIGA, AVIC IHC, AVIC USA, CATIC TED, AVIC IRE and Ascendant, including the execution of the MOU, the SWE Agreement, and the Chicago Agreement, as well as all of AVIC IRE's and Ascendant's activities in the wind farm development business are properly attributed to AVIC HQ and to its affiliates because they are the same legal entity.

17. The panel concludes that AVIC HQ and the other Non-Signatories are properly before this Panel on theories of alter ego, attribution and merger, and that they all may be charged with the obligations of AVIC USA, including the obligation to arbitrate pursuant to Article XIII of the SWE Agreement.

18. As a result of the panel's determination that the Non-Signatories are alter egos of AVIC USA, we conclude that the merger clause of the SWE Agreement supersedes the MOU. As a result, we conclude that no damages are warranted based upon the MOU.

19. We conclude that all Respondents, other than Thompson, are liable for damages for the breach of the SWE Agreement. As a result of Respondents engaging in "Business" activities in violation of the Soaring Wind Agreement, Claimants are entitled to damages as well as disgorgement of Respondents profit interest in SWE.

20. We conclude that while Thompson breached the SWE Agreement, Claimants failed to give him notice of their claims in that regard which is a condition precedent to liability under section 13.2 of the SWE Agreement.

21. We conclude that the Chicago Agreement is preliminary agreement to agree between CATIC T.E.D. and Tang and therefore unenforceable as a breach of contract.

22. We conclude that Respondents are not liable to Claimants for theft of trade secrets.

23. We conclude that Respondents did not tortuously interfere with Claimants' prospective contractual relations with Wind Tex Energy related to the Cirrus Wind Project.

24. We conclude that the SWE Agreement specifically disclaims the existence of a fiduciary duty between the Members of SWE or the Members and SWE. Therefore, we conclude that no fiduciary relationship existed between Claimants and Respondents.

25. We conclude that because a contract exists which controls the relationship between Claimants and Respondents; unjust enrichment is not available as a remedy to Claimants.

26. We conclude that Claimants have stated a claim entitling them to relief.

27. We conclude that Soaring Wind has properly intervened to assert its own claims for damages resulting from the conduct of Respondents. We conclude the individual Claimants – the members of Soaring Wind other than Thompson and AVIC USA – have rightfully sought the divestiture of Thompson's and AVIC USA's interests in Soaring Wind. Accordingly, the defense fails.

28. We conclude that the evidence does not support the defense of unclean hands.

29. We conclude that the evidence does not support a defense of estoppel.

30. We conclude that Thompson agreed to all of the material terms of the SWE Agreement and was a Class B Member of SWE.

31. We conclude that the evidence does not support a defense of waiver.

32. We conclude that the evidence does not support a defense of laches.

33. We conclude that the evidence does not support a defense of duress.

34. We conclude that the contractual restrictions on Members set forth in the SWE Agreement are not covenants not to compete.

35. We conclude that the evidence does not support AVIC USA's counterclaim for breach of the SWE Agreement.

36. We conclude that the evidence does not support a counterclaim of unreasonable restriction on competition.

37. As a result of Respondent's breach of the SWE Agreement, we conclude that, in equity, the Soaring Wind interests that belong to Thompson and AVIC USA should be divested, and that AVIC USA should have its initial capital investment of $350,000.00 USD offset against the award against Respondents.

38. We conclude that SWE is the owner of the claims asserted by Claimants against Respondents for breach of the SWE Agreement.

39. We conclude that the claims for equitable divesture of Thompson's and AVIC USA's interests in Soaring Wind belong to Tang, JFI, Nolan, Carter and Young in proportion to their ownership interests in SWE.

40. We conclude that all Respondents other than Thompson are jointly and severally liable to SWE in the amount of $62.9 USD million for breach of the SWE Agreement.

41. We conclude that all Respondents other than Thompson, who shall bear its own administrative fees and arbitrator compensation incurred, are jointly and severally liable to Claimants for $897,730.72 USD for fees paid directly to the AAA/ICDR for administrative fees and arbitrator compensation; $3,719,533.23 USD

in reasonable attorneys' fees and expenses as of the issuance of this Final Award; $1,200,000.00 USD in legal fees and expenses Claimants will reasonably incur in the event Claimants are required to obtain a judgment confirming this Final Award and effect service on multiple defendants through the Hague Convention; $500,000.00 USD in legal fees and expenses in the event Claimants are required to attempt collection of this award; $250,000.00 USD in legal fees and expenses in the event Claimants are successful in any appeal of a District Court's judgment confirming this award; $50,000.00 USD in legal fees and expenses in the event Claimants are required to respond to a petition for writ of certiorari to the United States Supreme Court; $150,000.00 USD in legal fees and expenses in the event the United States Supreme Court grants review and Claimants are successful; and $1,875,264.71, USD for Tang's arbitration expenses including without limitation, experts' fees and expenses, all costs associated with depositions, mediation, arranging facilities, graphics, and trial consultation.

THEREFORE, the PANEL hereby makes an award as follows:

1. SOARING WIND ENERGY, LLC is awarded its damages against all Respondents, other than Paul Thompson, jointly and severally, in the total amount of $62,900,000.00, USD, less AVIC USA's capital contribution in SWE, plus post judgment interest at the rate of 5% per year, beginning from the date of this Award.

2. Tang Energy Group, Ltd., is awarded against Respondents, other than Paul Thompson, jointly and severally, $897,730.72 USD for fees paid directly to the AAA/ICDR for administrative fees and arbitrator

compensation. Thompson shall bear its costs as incurred.

3. Tang Energy Group, Ltd., is awarded against Respondents, other than Paul Thompson, jointly and severally, $3,719,533.23 USD in reasonable attorneys' fees and expenses as of the issuance of this Award.

4. Tang Energy Group, Ltd., is awarded against Respondents, other than Paul Thompson, jointly and severally, $1,200,000.00 USD in legal fees and expenses Claimants will reasonably incur in the event Claimants are required to obtain a judgment confirming this Final Award and effect service on multiple defendants through the Hague Convention.

5. Tang Energy Group, Ltd., is awarded against Respondents, other than Paul Thompson, jointly and severally, $500,000.00 USD in legal fees and expenses that Claimants will reasonably incur if they are required to attempt collection of this award.

6. Tang Energy Group, Ltd., is awarded against Respondents, other than Paul Thompson, jointly and severally, $250,000.00 USD in legal fees and expenses in the event Claimants are successful in any appeal of a District Court's judgment confirming this award.

7. Tang Energy Group, Ltd., is awarded against Respondents, other than Paul Thompson, jointly and severally, $50,000.00 USD in legal fees and expenses in the event Claimants are required to respond to a petition for writ of certiorari to the United States Supreme Court.

8. Tang Energy Group, Ltd., is awarded against Respondents, other than Paul Thompson, jointly and severally, $150,000.00 USD in legal fees and expenses

in the event the United States Supreme Court grants review and Claimants are successful.

9. Tang Energy Group, Ltd., is awarded against Respondents, other than Paul Thompson, jointly and severally, $1,875,264.71, USD, for Tang's arbitration expenses including without limitation, experts' fees and expenses, all costs associated with depositions, mediation, arranging facilities, graphics, and trial consultation.

10. Thompson's membership interest in SWE divested and belongs to Tang, JFI, Nolan, Carter and Young in proportion to their ownership interests in SWE.

11. AVIC USA's membership interest in SWE divested and belongs to Tang, JFI, Nolan, Carter and Young in proportion to their ownership interests in SWE.

12. All relief requested and not granted in this Final Award is denied.

We hereby certify that, for the purposes of Article I of the New York Convention of 1958, on the Recognition and Enforcement of Foreign Arbitral Awards, this Final Award was made, as a majority decision, in Dallas, Texas, U.S.A.

SIGNED this 21st day of December, 2015.

I, Steven E. Aldous, do hereby affirm upon my oath as Arbitrator that I and the individual described in and who executed this instrument, which is our Final Award.

/s/ Steven E. Aldous
Steven E. Aldous, Arbitrator

State of Texas)
)
County of Dallas)

On this 21st day of December, 2015, before me personally came and appeared Steven E. Aldous, known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

SARAH M. IRISH	/s/ Sarah M. Irish
Notary Public	Notary Public within
State of Texas	and for the State of Texas
My Commission Expires	My Commission Expires:
July 15, 2017	7-15-17

I, John M. Marshall, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is our Final Award.

____
John M. Marshall, Arbitrator

State of Texas)
)
County of Dallas)

On this ______ day of _____, 2015, before me personally came and appeared John M. Marshall, known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

____
Notary Public within and
for the State of Texas
My Commission Expires:__________

SIGNED this 21st day of December, 2015.

I, Steven E. Aldous, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is our Final Award.

____
Steven E. Aldous, Arbitrator

State of Texas)
)
County of Dallas)

On this _______ day of _____, 2015, before me personally came and appeared Steven E. Aldous, known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

____
Notary Public within and
for the State of Texas
My Commission Expires:___________

I, John M. Marshall, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is our Final Award.

/s/ John M. Marshall
John M. Marshall, Arbitrator

State of Texas)
)
County of Dallas)

On this 21st day of December, 2015, before me personally came and appeared William Toles, known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

JOSE J. DURAN Notary Public State of Texas My Commission Expires May 07, 2017	/s/ Jose J. Duran Notary Public within and for the State of Texas My Commission Expires: 05/07/17

I, William Toles, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is our Final Award.

/s/ William Toles
William Toles, Arbitrator

State of Texas)
)
County of Dallas)

On this 21st day of December, 2015, before me personally came and appeared William Toles, known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

LINDA S. HAMMON Notary Public State of Texas My Commission Expires January 17, 2018	/s/ Linda S. Hammon Notary Public within and for the State of Texas My Commission Expires: 01/17/18

I, Richard Capshaw, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is our Final Award.

____
Richard Capshaw, Arbitrator

State of Texas)
)
County of Dallas)

On this ______ day of _____, 2015, before me personally came and appeared John M. Marshall, known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

____
Notary Public within and
for the State of Texas
My Commission Expires:__________

I, William Toles, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is our Final Award.

____
William Toles, Arbitrator

State of Texas)
)
County of Dallas)

On this ______ day of _____, 2015, before me personally came and appeared John M. Marshall, known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

____
Notary Public within and
for the State of Texas
My Commission Expires:__________

I, Richard Capshaw, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is our Final Award.

/s/ Richard Capshaw
Richard Capshaw, Arbitrator

State of Texas)
)
County of Dallas)

On this 21st day of December, 2015, before me personally came and appeared Richard Capshaw, known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

ANNA B. NEWTON	/s/ Anna B. Newton
Notary Public	Notary Public within
State of Texas	and for the State of Texas
My Commission Expires	My Commission Expires:
August 15, 2016	08/15/16

I, Gregory Shamoun, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is our Final Award.

/s/ Gregory Shamoun
Gregory Shamoun, Arbitrator

State of Texas)
)
County of Dallas)

On this 21st day of December, 2015, before me personally came and appeared Gregory Shamoun, known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

IRENE FLORES RIVERA	/s/ Irene Flores Rivera
Notary Public	Notary Public within
State of Texas	and for the State of Texas
My Commission Expires	My Commission Expires:
October 31, 2018	08/15/18

I, Joseph Byrne, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrumented, which is our Final Award.

____
Joseph Byrne, Arbitrator

State of Texas)
)
County of Dallas)

On this ______ day of _____, 2015, before me personally came and appeared Steven E. Aldous, known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

____
Notary Public within and
for the State of Texas
My Commission Expires:___________

I, Gregory Shamoun, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is our Final Award.

____
Gregory Shamoun, Arbitrator

State of Texas)
)
County of Dallas)

On this ______ day of _____, 2015, before me personally came and appeared Gregory Shamoun, known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

____
Notary Public within and
for the State of Texas
My Commission Expires:__________

I, Joseph Byrne, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrumented, which is our Final Award.

/s/ Joseph Byrne
Joseph Byrne, Arbitrator

State of Texas)
)
County of Dallas)

On this 21st day of December, 2015, before me personally came and appeared Joseph Byrne, known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

MICHAEL J. ALEMAN
Notary Public
State of Texas
My Comm. Exp. 03-07-16

/s/ Michael J. Aleman
Notary Public within
and for the State of Texas
My Commission
Expires:3/7/16

The following arbitrators dissent to this Final Award:

- Hon. Glen Ashworth
- Hon. Jeff Kaplan
- Hon. Mark Whittington