No. _____

IN THE

Supreme Court of the United States

TIG INSURANCE COMPANY,
Petitioner,

v.

EXXONMOBIL OIL CORPORATION,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

DANIEL P. GOLDBERG
DANIEL M. SULLIVAN
Counsel of Record
ALISON B. MILLER
HOLWELL SHUSTER
& GOLDBERG LLP
425 Lexington Avenue
14th Floor
New York, NY 10017
(646) 837-5120
dsullivan@hsgllp.com

Counsel for Petitioner

November 10, 2022

QUESTION PRESENTED

In *Liljeberg v. Health Services Acquisition Corporation*, 486 U.S. 847 (1988), this Court set forth a three-factor test to determine whether it is appropriate to vacate a judicial decision because the judge who issued it should have recused himself under 8 U.S.C. § 455(a), which requires disqualification when the judge's "impartiality might reasonably be questioned." Under that test, a court must evaluate whether vacatur is appropriate in light of: "[1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining the public's confidence in the judicial process." 486 U.S. at 864 (brackets added). This Court has not addressed the application of the *Liljeberg* factors to violations of § 455(a) since that decision.

Over the last year, a widely-publicized investigation into federal judicial stockholdings has revealed hundreds of cases in which a judge had a financial interest in one of the parties. As one of the first cases addressing the fallout of this investigation, this petition raises the following question: Is it a proper application of the *Liljeberg* test for a court to automatically decline to vacate a judgment rendered by a judge with a financial interest in the party in whose favor he ruled, in violation of § 455(a), solely because the court concurs with the conflicted judge's ruling on the merits?

PARTIES TO THE PROCEEDING

Petitioner TIG Insurance Company was the respondent in the district court and appellant below.

Respondent ExxonMobil Oil Corporation was the petitioner in the district court and appellee below.

CORPORATE DISCLOSURE STATEMENT

The preferred shares of TIG Insurance Company are owned by The Resolution Group, Inc. The common shares of TIG Insurance Company are owned by Fairfax (US) Inc. Fairfax (US) Inc. is owned both directly and indirectly by Fairfax Financial Holdings Limited, a publicly traded Canadian holding company.

RELATED PROCEEDINGS

- *ExxonMobil Oil Corporation v. TIG Insurance Company*, No. 17–674, U.S. Court of Appeals for the Second Circuit. Appeal withdrawn March 31, 2017.

- *ExxonMobil Oil Corporation v. TIG Insurance Company*, No. 16-cv-9527 (ER), U.S. District Court for the Southern District of New York. Judgment entered May 26, 2020.

- *ExxonMobil Oil Corporation v. TIG Insurance Company*, No. 16-cv-9527 (MKV), U.S. District Court for the Southern District of New York. Judgment entered October 14, 2021.

- *ExxonMobil Oil Corporation v. TIG Insurance Company*, Nos. 20–1946 (L), 21–2658 (Con), U.S. Court of Appeals for the Second Circuit. Judgment entered August 12, 2022.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner TIG Insurance Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Second Circuit is reported at 44 F.4th 163 and reproduced at Appendix ("Pet. App.") 1a. The decision of the Southern District of New York is unreported but available at 2021 WL 4803700 and reproduced at Pet. App. 34a.

JURISDICTION

The Second Circuit filed its published decision on August 12, 2022. Pet. App. 1a. This petition is timely, and the Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 455, titled "Disqualification of a Justice, Judge, or Magistrate Judge," provides in subsection (a):

> Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a).

Federal Rule of Civil Procedure 60(b) provides:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

STATEMENT OF THE CASE

On September 28, 2021, the *Wall Street Journal* (the "*WSJ*") reported that 131 federal judges, including the original district court judge in this case, presided over matters even though they had disqualifying financial conflicts—specifically a financial interest, such as a stock holding, in one of the parties.[1]

This was the lead case profiled. As the article explained, the original district court judge here held stock in Respondent ExxonMobil Oil Corporation ("Mobil") when he sent the parties' dispute to arbitration and later confirmed a $25 million arbitral award in its favor. The judge did not contest the conflict; that is, his stockholding in Mobil indisputably created an "appearance of impropriety" in violation of 28 U.S.C. § 455(a). TIG moved under Federal Rule of Civil Procedure 60(b)(6) to vacate the judgment on the basis of that violation. But a new district court judge and the Second Circuit found the conflict "harmless" because they agreed with the conflicted judge on the merits. Accordingly, they declined to vacate the judgment.

The Second Circuit's ruling misapplied this Court's seminal decision in *Liljeberg v. Health Services Acquisition Corporation*, 486 U.S. 847 (1988), which governs how courts must analyze whether to vacate, under Rule 60(b)(6), an earlier decision affected by a § 455(a) violation. *Liljeberg* held that the situation present

---

[1] This article was cited by the district court below. *See* Pet. App. 38a. The full citation is James V. Grimaldi et al., *131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest*, WALL ST. J., Sept. 28, 2021, *available at* https://www.wsj.com/articles/131-federal-judgesbroke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421.

here—in which a judge unknowingly presides over a matter where he or she holds a financial interest in one of the parties—creates an "appearance of impropriety" in violation of § 455(a). 486 U.S. at 860–61. Regarding whether vacatur is an appropriate remedy, *Liljeberg* directs courts to consider three factors: "[1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining the public's confidence in the judicial process." 486 U.S. at 864 (brackets added).

The courts below did not properly apply *Liljeberg*'s remedial standard. The district court, for its part, did not analyze the *Liljeberg* factors *at all*, denying TIG's motion to vacate simply because it agreed with the conflicted judge's opinions. While the Second Circuit nominally invoked the *Liljeberg* factors, it held that those factors were automatically satisfied—such that vacatur was not appropriate—because the Second Circuit reviewed the merits *de novo*.

The approaches of both courts contravene the principle underlying *Liljeberg*: that "'justice must satisfy the appearance of justice.'" *Liljeberg*, 486 U.S. at 864 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). This principle means that the appropriate remedy for a § 455(a) violation must ensure that the taint caused by a judicial conflict—especially one as severe as a direct financial interest in the party in whose favor the court ruled—is unmistakably cleansed from the perspective of the public.

Here, neither the district court nor the Second Circuit fulfilled this mandate, for their *Liljeberg* analyses skipped straight to the merits and failed entirely to

grapple meaningfully with the conflict—*i.e.*, its severity and its impact on the public's confidence in the judiciary. The taint of an uncontested financial conflict cannot be removed simply because another judge or judges believe the conflicted judge got the decision right. The parties should be permitted to start afresh, ensuring a process beyond reproach. In refusing to afford that relief, the Second Circuit deepened a divide among the circuits regarding whether *de novo* review may cure an uncontested conflict under *Liljeberg*.

A. The Original District Court Judge Rules In Mobil's Favor Even Though, As Later Came To Light, He Owned Stock In Mobil.

This case initially concerned whether an ADR provision in a $25 million excess insurance policy issued by TIG to Mobil mandated arbitration of an insurance coverage dispute. Judge Edgardo Ramos ruled that it did, sent the case to arbitration, and then confirmed the $25 million arbitral award rendered in Mobil's favor and levied prejudgment interest on top of that amount. TIG appealed on the bases that the district court erred in compelling arbitration and imposing interest above the $25 million policy limit.[2]

On July 29, 2021, two months before oral argument in the Second Circuit, the parties received a letter from the Clerk of Court for the Southern District of New York. The letter disclosed that it had been brought to Judge Ramos's attention that he owned stock in Mobil's parent corporation while he presided

[2] TIG had previously sought to appeal from the order compelling arbitration before arbitration commenced but Judge Ramos denied TIG's application and TIG withdrew the notice of appeal it had filed in the Second Circuit.

over the matter. The letter acknowledged the stock ownership "would have required recusal" by Judge Ramos and invited the parties to respond to the disclosure.

TIG promptly moved to vacate Judge Ramos's judgment from which it had appealed, seeking an indicative ruling that the district court would vacate Judge Ramos's orders and judgments if the Second Circuit were to remand for that purpose. *See* Fed. R. Civ. P. 62.1(a)(3). The case was reassigned to Judge Mary Kay Vyskocil to consider the motion. The Second Circuit stayed TIG's appeal so that the district court could decide its motion to vacate.

B. The *Wall Street Journal* Publishes A High-Profile Exposé Revealing Hundreds Of Judicial Financial Conflicts, Triggering Scrutiny By The Public, Congress, And The Judiciary.

On September 28, 2021, the *WSJ* published the results of a sweeping investigation into federal judicial stockholdings that likely prompted the Clerk's July 29 letter. The *WSJ* reported that Judge Ramos and 130 other federal judges had collectively presided over 685 matters in which they had disqualifying financial conflicts. The article specifically profiled Judge Ramos's conflict in this case, noting that Judge Ramos held between $15,001 and $50,000 of Mobil stock while he presided over the matter. The article hyperlinked to TIG's motion to vacate, which was then pending before the district court.

Following this exposé, the judiciary and Congress have publicly taken steps to address the disclosures in the *WSJ*'s investigation. These steps underscore the seriousness of judicial financial conflicts, and include

strategies to reduce the likelihood that, in the future, judges will hear cases in which they have a financial interest.

For example, shortly after the *WSJ* article, Judge Roslynn R. Mauskopf, the Director of the Administrative Office of the United States Courts, issued a memorandum to all federal judges "to reiterate the importance of complying with existing policy and requirements concerning financial interests and conflict screening." Judge Roslynn R. Mauskopf, ADDITIONAL GUIDANCE ON CONFLICT SCREENING (IMPORTANT INFORMATION) (Oct. 13, 2021) (hereinafter "AO MEMORANDUM").[3]

The Chief Justice also addressed the revelations in his 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY (hereinafter "2021 YEAR-END REPORT").[4] The Chief Justice explained that the judicial conflicts uncovered by the *WSJ* were "inconsistent with a federal ethics statute, 28 U.S.C. § 455, which requires that a judge recuse in any matter in which the judge knows of a personal financial interest, no matter how small." 2021 YEAR-END REPORT at 3. Emphasizing that "[d]ecisional independence is essential to due process," *id.* at 1, the Chief Justice declared, "Let me be crystal clear: the Judiciary takes this matter seriously. We expect judges to adhere to the highest standards, and those judges violated an ethics rule," *id.* at 3. He further stressed that the judiciary is "duty-bound to strive for 100% compliance because public trust is es-

---

[3] *Available at* https://aboutblaw.com/Z1Z.

[4] *Available at* https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

sential, not incidental, to our function," and, accordingly, indicated that the judiciary will improve ethics training programs and conflict checking technology and promote a culture of compliance with ethics rules. *Id.* at 3–4.

Congress got involved, too. Both houses held extensive hearings. For example, Congress heard testimony from Judge Jennifer Walker Elrod, a Fifth Circuit Judge and the Chair of the Committee on Codes of Conduct of the Judicial Conference, as well as numerous law professors and non-profit organizations.[5] On May 13, 2022, President Biden signed into law the bipartisan Courthouse Ethics and Transparency Act. The new law requires federal judges to promptly disclose stock trades over $1,000 within 45 days and post financial disclosure forms online in a publicly accessible, searchable database. *See* Courthouse Ethics and Transparency Act, Pub. L. No. 117-125, 136 Stat. 1205 (2022). The database went live on November 7, 2022.[6]

C. The Reassigned District Court Judge Denies TIG's Motion To Vacate.

On October 14, 2021—a few weeks after the *WSJ* article came out—Judge Vyskocil denied TIG's motion

---

[5] *See Hearings, Judicial Ethics and Transparency: The Limits of Existing Statutes and Rules*, U.S. HOUSE SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET (Oct. 26, 2021), *available at* https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4752; *An Ethical Judiciary: Transparency and Accountability for 21st Century Courts*, U.S. Senate Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights (May 3, 2022), *available at* https://www.judiciary.senate.gov/meetings/an-ethical-judiciary-transparency-and-accountability-for-21st-century-courts.

[6] *Available at* https://pub.jefs.uscourts.gov/.

to vacate. The court first found that Judge Ramos's stock ownership in Mobil created an "appearance of impropriety" requiring recusal under 28 U.S.C. § 455(a). Pet. App. 38a. Echoing the Clerk's July 29 letter, and citing certain judicial ethical canons, the court found that "Judge Ramos should have recused himself from this matter upon its assignment to him." Pet. App. 37a. The court reached this conclusion by citing *Liljeberg*'s first holding, which established that a judge's inadvertent stock ownership in a party violates § 455(a) because, in the words of the district court, it "impairs the public confidence in the integrity of the judicial process that [the judicial conflict] rules were put in place to prevent." Pet. App. 38a (citing *Liljeberg*, 486 U.S. at 859).

The court next addressed the remedy for Judge Ramos's § 455(a) violation—that is, whether to vacate the judgment under Rule 60(b)(6). The district court began by declaring that it "d[id] not consider any violation of Section 455(a) to be harmless," stating that integrity of the judicial process is "paramount" and that any "damage from impairment of the public confidence in the judicial process is a serious concern." Pet. App. 38a. Nevertheless, in the very next sentence, the court held that "harmless error review applies to Section 455(a) violations." Pet. App. 38a–39a (citing *Faulkner v. Nat'l Geog. Enters. Inc.*, 409 F.3d 26, 42 n.10 (2005)). According to the district court, "should [it] conclude that Judge Ramos' rulings were correct, [it] may deny the Motion to Vacate because Respondent would not have been harmed as regards the proceeding." Pet. App. 38a. The court applied this "harmless error review" rather than the three-factor balancing test set forth in *Liljeberg*. 486 U.S. at 864.

Having announced its legal standard, the court then briefly summarized each of Judge Ramos's rulings on the merits, including his decisions compelling arbitration and imposing interest on top of the $25 million arbitral award. As to each, the court stated it "concur[red] with Judge Ramos's thorough analysis and reasoning" and concluded that therefore "[TIG] was not harmed by" Judge Ramos's orders. Pet. App. 39a–44a. Based on that reasoning, the court declined to vacate the judgment. Pet. App. 44a.

The court did not specify the standard of deference it paid to Judge Ramos's rulings. It also did not invite any briefing on Judge Ramos's decisions before it ruled.

D. The Second Circuit Denies TIG's Merits And Vacatur Appeals.

On October 20, 2021, TIG appealed from the district court's denial of its motion to vacate, contending principally that the court erred in failing to consider, let alone properly apply, the *Liljeberg* factors. That appeal was consolidated with the appeal on the merits that had been stayed pending resolution of TIG's motion to vacate. Following oral argument, on August 12, 2022, the Second Circuit denied TIG's vacatur appeal and granted in part and denied in part TIG's merits appeal.

The court first addressed TIG's vacatur appeal, and began by considering the appropriate weight to be given the *Liljeberg* factors. It concluded that *Liljeberg* did not set forth a "definitive test," but that it is nevertheless "preferable for a court reviewing a potential violation of § 455(a) to explicitly discuss how the factors from *Liljeberg* apply." Pet. App. 16a (citing

Liljeberg, 486 U.S. 864 (describing factors as "appropriate to consider")). At several turns, it identified shortcomings in the district court's analysis. The Second Circuit observed, for example, that "[t]he decision here could have benefitted from a more detailed discussion," and that "the purposes of § 455 might be better served by a more thorough discussion that addressed each *Liljeberg* factor individually and at a greater length." Pet. App. 16a–17a.

Despite these flaws, the Second Circuit concluded that the district court's analysis adequately "addressed the *Liljeberg* factors" and was not "procedurally deficient." Pet. App. 16a–17a. The court found that Judge Vyskocil's review of Judge Ramos's decisions on the merits addressed the harm-to-the-parties *Liljeberg* factor. Pet. App. 16a. It further found that Judge Vyskocil's recognition that Judge Ramos's conflict impaired the public confidence in the judiciary addressed the public-confidence-in-the-judiciary *Liljeberg* factor, even though Judge Vyskocil made that statement in the context of finding a § 455(a) violation, not assessing the remedy. Pet. App. 17a. That is, the district court's observation that the conflict impaired public confidence in the judiciary was just that—an observation, one which had no discernable impact on the remedy analysis at all.

The Second Circuit next addressed the "substance of TIG's motion to vacate." Pet. App. 17a. In essence, it found that, although Judge Ramos's "failure to recuse himself was indisputably a serious error" that violated § 455(a), "vacatur was not required in light of Judge Vyskocil's *de novo* review" of Judge Ramos's decisions. Pet. App. 17a. Although the court discussed the *Liljeberg* factors, it did so only briefly because, in

its view, Judge Vyskocil's supposedly *de novo* review of the merits disposed of each factor.

First, the court found little "risk of injustice" to TIG absent vacatur because the case presented "purely legal questions" of contractual interpretation subject to *de novo* review and Judge Vyskocil adequately engaged in that review. Pet. App. 18a. *Second*, the court found a "minimal" risk of "harm in future cases" because the conflict was promptly disclosed as soon as Judge Ramos became aware of it and TIG has had "ample opportunity to challenge Judge Ramos's rulings both in the district court and on appeal." Pet. App. 19a.

Third, the court found that declining to vacate the judgment did not risk "undermining the public's confidence in the judicial process." Pet. App. 19a. Although the court again acknowledged that Judge Ramos committed a "significant error," it found any damage to public confidence remedied by the "significant public attention" in the case, and the fact that legal issues been given a "fresh look" by a new, unconflicted judge and the appellate panel. Pet. App. 19a. The court additionally found that the public has "an interest in speedy adjudication of disputes," and that remanding the case would propel the parties into further litigation. Pet. App. 20a.

In short, by considering the fact of *de novo* review dispositive under each *Liljeberg* factor, the Second Circuit effectively collapsed *Liljeberg*'s three-factor test into a single factor not discussed in *Liljeberg* itself.

The Second Circuit then turned to the merits. It affirmed Judge Ramos's ruling that the insurance policy contained a mandatory arbitration clause. Separately, the court found Judge Ramos improperly awarded one component of interest—pre-award pre-judgment interest—and remanded to the district court to recalculate interest and enter judgment.[7]

The parties continue to have a live dispute regarding the proper calculation of interest. On November 2, 2022, a magistrate judge issued a report and recommendation adopting TIG's proposed calculation.

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeals Are Deeply Divided.

Section 455(a) requires a judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a); *accord* CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(C)(1). The provision is designed to "promote public confidence in the judiciary" by guarding against the appearance of impropriety. *Liljeberg*, 486 U.S. at 860. It fulfills the maxim that, for courts "to perform [their] high function in the best way, 'justice must satisfy the appearance of justice.'" *Id.* at 864 (quoting *In re Murchison*, 349 U.S. at 136).

The seminal case in this area is this Court's decision in *Liljeberg*. *Liljeberg* requires courts considering

---

[7] The opinion issued by the Second Circuit on August 12, 2022 contained a typographical error as to the date of the arbitral award. The court issued an errata on September 13, 2022. *See* Errata, No. 20–1946 (2d. Cir. Sept. 13, 2022), Dkt. No. 165. The changes have been implemented in the opinion reproduced at Appendix A.

§ 455(a) violations to proceed in two parts. *First*, courts must assess whether a violation has occurred, which turns on whether a reasonable person would consider there to be a conflict of interest. *Id.* at 860. *Liljeberg* held that § 455(a) requires recusal even where, as here, a judge discovers the conflict after entering judgment. *Id.* at 860–61.

Second, and most relevant here, courts must consider the remedy. *Liljeberg* held that not all § 455(a) violations merit vacating a tainted judgment. *Id.* at 862. The Court recognized that the statute affords "room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance," such as in "large, multidistrict class actions" where judges have "unique difficulties in monitoring any potential interest they may have in the litigation." *Id.* at 862 n.9. But while "[t]he complexity of determining the conflict . . . may have a bearing" on the appropriate remedy, the Court explained, even judges presiding over complex litigations "remain under a duty to stay informed of any personal or fiduciary financial interest they may have in cases over which they preside." *Id.* (citing 28 U.S.C. § 455(c)).

Based on these considerations, the Court outlined three factors "appropriate [for courts] to consider" in fashioning a remedy for a § 455(a) violation: [1] "the risk of injustice to the parties," [2] "the risk of . . . injustice in other cases," and [3] "the risk of undermining the public's confidence in the judicial process." *Id.* at 864 (brackets added). Courts assessing these factors must bear in mind that "[t]he very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Id.* at 865 (citations omitted).

Following *Liljeberg*, the circuits have split over whether its factors are automatically satisfied—and thus vacatur is not appropriate—whenever a court of appeals reviews the merits of the conflicted judge's decision *de novo*. The First, Second, Third, Fifth, Sixth, Seventh, Ninth and Eleventh Circuits, rather than meaningfully weighing each *Liljeberg* factor against the others, instead regard their own *de novo* review of the merits as an automatic cure for a judicial conflict—an analysis typically called "harmless error" review. In those circuits, if it is determined that the district court judge got it right, the court would decline to vacate the ruling just as the district court and Second Circuit did here. On the other hand, the Federal Circuit and Tenth Circuit have held that, under *Liljeberg*, *de novo* review of the merits cannot excuse a serious, undisputed conflict of interest, such as the one that existed in this case.

A. The First, Second, Third, Fifth, Sixth, Seventh, Ninth, And Eleventh Circuits Regard *De Novo* Review As An Automatic Cure For Judicial Conflicts Of Interest.

The Second Circuit below, like the First, Third, Fifth, Sixth, Seventh, Ninth and Eleventh Circuits, conducted a "harmless error" review to determine the remedy for a § 455(a) violation. These courts truncate the *Liljeberg* analysis into a simple consideration: If there is *de novo* review of the merits, then no vacatur can be required, without any further case-specific analysis of the *Liljeberg* factors.

As the district court here recognized, the Second Circuit's approach to § 455(a) violations traces back to a footnote in *Faulkner*, 409 F.3d 26 (2d Cir. 2005). *See*

Pet. App. 38a. In that case, after the district court judge, Judge Kaplan, granted summary judgment to several defendants, certain plaintiffs argued that he should have recused himself based on certain attenuated, alleged conflicts: a former law firm partner of Judge Kaplan served on the board of trustees of a defendant; Judge Kaplan had represented, while in private practice, a subsidiary of a different defendant in an unrelated litigation; and Judge Kaplan was supposedly hostile to the plaintiffs and their attorneys. 409 F.3d at 41. The Second Circuit held that these facts did not give rise to a conflict warranting recusal under § 455(a) in the first place. *Id.* at 42–43. In a footnote, however, the Court added that because it affirmed Judge Kaplan's grant of summary judgment in relevant part, his "denial of the recusal motion was at most harmless error." *Id.* at 42 n.10. This dicta is what the district court relied upon to deny TIG's motion to vacate. *See* Pet. App. 38a.

The Second Circuit and other appellate courts have repeatedly followed a similar approach to *Faulkner*'s "harmless error" dicta and declined to vacate judgments where the courts affirm on the merits. In previous cases, the conflicts alleged were not direct financial conflicts, and many were found not to be conflicts at all.[8] Here, the Second Circuit applied the

---

[8] *See, e.g.*, *Marcus as Tr. of Grace Preferred Litig. Trust v. Smith*, 755 F. App'x 47, 52 (2d Cir. 2018) (judge's former law clerk was counsel for defendants, but was screened from the matter); *Mennella v. Carey*, 253 F. App'x 125, 126–27 (2d Cir. 2007) (district court judge had, while serving as a judge in Nassau County 18 years before, reassigned the plaintiff from one court position to another, *see* Order, No. 04-cv-01901 (E.D.N.Y. July 9, 2004), Dkt. No. 9, a circumstance this Court referred to

"harmless error" approach—essentially an automatic cure rule—to a direct, uncontested financial conflict. This approach not only diverges with the decisions of Federal and Tenth Circuits discussed *infra*, it deepens the divide among the circuits regarding how *de novo* merits review affects the analysis of *Liljeberg*'s three factors.

B. The Federal And Tenth Circuits, By Contrast, Undertake a Case-Specific Analysis Of Each *Liljeberg* Factor.

The Federal Circuit and the Tenth Circuit have taken a different tack. When these circuits confront

---

as only a "potential conflict" without further description, *see* 253 F. App'x at 127); *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 490 (1st Cir. 1989) (judge had issued electronic surveillance orders challenged in the case; plaintiffs [the parties seeking recusal] had impugned the judge's character during a hearing; and the judge supported Puerto Rico statehood, whereas plaintiffs did not); *Kendall v. Daily News Pub. Co.*, 716 F.3d 82, 85 (3d Cir. 2013) (Virgin Islands Supreme Court justices hearing appeal had separately initiated a criminal contempt charge against the plaintiff, a former Virgin Islands Superior Court judge); *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 482–86 (5th Cir. 2003) (judge's former law firm partner represented defendant in a prior action brought by one of the plaintiffs against the defendant); *Smith v. ABN AMRO Mortg. Grp. Inc.*, 434 F. App'x 454, 466–67 (6th Cir. 2011) (judge who ruled on enforceability of oral settlement agreement alleged to have participated in parties' settlement negotiations); *Williamson v. Indiana Univ.*, 345 F.3d 459, 462–65 (7th Cir. 2003) (judge's brother appointed to Board of Trustees of defendant during pendency of litigation); *Wolfgram v. El Dorado Cnty.*, 934 F.2d 325, *1 (9th Cir. 1991) (pro se plaintiff argued without elaboration that judge was allegedly biased against him); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524–27 (11th Cir. 1988) (judge's law clerk was the son of a lawyer whose firm represented the defendants in the case).

serious, undisputed § 455(a) violations, they have expressly *refused* to leapfrog the *Liljeberg* analysis by simply evaluating the merits *de novo*. This is the proper approach.

Shell Oil Co. v. United States, 672 F.3d 1283 (Fed. Cir. 2012), illustrates this approach. There, a Court of Claims judge's wife had held stock in the parent company of two of the four plaintiffs, Texaco and Union Oil, when the judge entered summary judgment in favor of all four plaintiff oil companies. 672 F.3d at 1286. To resolve the conflict, the judge recused himself, vacated certain orders and severed the proceedings. *Id.* at 1287–88. The defendant appealed from this decision and the original summary judgment rulings. *Id.* at 1288.

Rather than address the merits of the summary judgment decision, the Federal Circuit applied *Liljeberg* and held that recusal was required with respect to the entire proceeding and vacated the conflicted judge's summary judgment decision. *Id.* at 1290–91, 1294.[9] Importantly, the Federal Circuit emphatically rejected the plaintiffs' contention that, under *Liljeberg*, "the risks of injustice are non-existent because this court will subject the district court's judgment to *de novo* review." *Id.* at 1293 (alterations omitted). As the court explained, "[A] judge's failure to recuse does not automatically constitute harmless error whenever there is *de novo* review on appeal"; nor

[9] The court held recusal was required under § 455(b)(4) rather than § 455(a); however, with respect to the remedial question—whether to vacate—the Federal Circuit held that the *Liljeberg* test applied to both § 455(b) and § 455(a) violations. *See* 672 F.3d at 1291–93.

does *de novo* review "supplant" the court's responsibility to consider the "potential injustice" stemming from a § 455 violation. *Id.* at 1294.

The Tenth Circuit reached a similar conclusion in *Clark v. City of Draper*, 110 F.3d 73 (10th Cir. 1997) (unpublished).[10] There again, the court considered a *de novo* appeal on the merits as well as a decision denying a subsequent motion to vacate based on a § 455(a) violation. 110 F.3d 73, at *1. And there again, the court declined to evaluate the merits and instead vacated the judgment below.

The conflict at issue was that the district court judge who rendered the summary judgment ruling on appeal had been represented during the pendency of the litigation by the same law firm, though not the same lawyers, that represented the defendants in whose favor he ruled. *Id.* After finding that the judge ought to have recused himself before entering judgment, the Tenth Circuit proceeded to consider the proper remedy.

Relying on *Liljeberg*, the Tenth Circuit concluded that it "d[id] not feel that the failure to recuse in this instance c[ould] be considered harmless error." *Id.* at *2. The court flatly rejected defendants' argument that there was "no risk of injustice" in letting the ruling stand because "the grant of summary judgment is reviewed *de novo*." *Id.* It reasoned that "*de novo* review in no way removes the appearance of impropriety," which "would surely undermine the public confi-

[10] Under the Tenth Circuit's local rules, unpublished dispositions, including those issued before 2007, as citable "for their persuasive value." *See* 10th Cir. Local R. 32.1(A), (C).

dence in the judicial system, regardless of our standard of review." *Id.* Accordingly, rather than addressing the merits of the conflicted judge's decision, the court "remand[ed] the case for a fresh look at the defendants' motion for summary judgment" by a "new judge." *Id.* at n.3.

C. District Courts Addressing Motions To Vacate Arising From The *WSJ* Investigation Apply *Liljeberg* Inconsistently.

In the wake of the *WSJ* article, district courts around the country are grappling with the fallout. In doing so, they are reaching divergent conclusions—mirroring the split between the Courts of Appeal outlined above—about how to properly apply *Liljeberg*.

Like the Second Circuit in this case, two decisions from the Southern District of New York have declined to vacate based purely on a merits review. *See Holmes v. Apple Inc.*, No. 17-cv-4557 (RA), 2022 WL 2316373, at *2 (S.D.N.Y. June 27, 2022); *In re SSA Bonds Antitrust Litig.*, No. 16-cv-3711 (VEC), 2022 WL 4774793, at *2 (S.D.N.Y Oct. 3, 2022). Courts in at least two other districts have done the same. *See Waldon v. Wal-Mart Stores Inc. Store No. 1655*, No. 17-cv-03673 (JPH)(MPB), 2022 WL 4552673, at *2 (S.D. Ind. Sept. 29, 2022); *Murry v. Ocwen Loan Servicing, LLC*, No. 16-CV-00991 (JLK), 2022 WL 194481, at *4 (D. Colo. Jan. 21, 2022); *Baker v. Wells Fargo Bank, N.A.*, No. 19-cv-03416 (JLK)(NYW), 2022 WL 159768, at *3 (D. Colo. Jan. 18, 2022); *Obduskey v. Fargo*, No. 15-cv-01734 (JLK), 2022 WL 1128553, at *5 (D. Colo. Apr. 15, 2022).

On the other hand, district courts in California and Louisiana have applied the *Liljeberg* factors in a case-

specific manner without placing dispositive weight on *de novo* review. Some weigh the presence of a *de novo* standard of review in the balance under the "risk of injustice to the parties" prong, *see, e.g.*, *Sengul v. Qualcomm Techs., Inc.*, No. 19-cv-2034 (GPC)(MSB), 2021 WL 4806509, at *2 (S.D. Cal. Oct. 14, 2021; *Roberts v. Wal-Mart Store Stores*, No. 15-cv-00119, 2022 WL 141677 (W.D. La. Jan. 14, 2022), whereas others make no mention of *de novo* review at all when applying *Liljeberg*, *see, e.g.*, *Driscoll v. Metlife Ins.*, No. 15-cv-1162 (CAB), 2021 WL 5323962 (S.D. Cal. Oct. 19, 2021).

In some instances, this Court might prefer to let a debate percolate among the lower courts before weighing in; but the situation here is unique. The stakes are high. The question presented implicates the appropriate analysis that courts should apply to protect perhaps the most fundamental element of an independent judiciary—the public's confidence in the integrity of its decisions. District courts are disagreeing about how best to do that when presented with a highly-publicized series of cases in which judges have had direct financial interests in the parties before them. This Court's intervention is urgently needed to clarify how to determine the appropriate remedy under these challenging circumstances.

II. The Second Circuit's Approach To Determining The Remedy For Judicial Conflicts Wrongly Diminishes The Importance Of Public Confidence In The Judiciary.

The correct application of *Liljeberg* requires courts to pay special heed to preserving the public's confidence in the judiciary in remedying § 455(a). As

Liljeberg put it, courts "must continuously bear in mind that to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Id.* (quoting *Murchison*, 349 U.S. at 136); *see also Joint Anti–Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 n.19 (1951) ("[J]ustice must not only be done but must manifestly be seen to be done.") (Frankfurter, J., concurring). That imperative is especially acute in the wake of the *WSJ* investigation. This petition provides the Court the opportunity to clarify that *de novo* review does not automatically remedy an uncontested conflict such as a direct financial interest in a party.

1. The harmless error approach adopted by the Second Circuit and other circuits fundamentally misconstrues *Liljeberg*. As explained above, *Liljeberg* set forth a three-part test under Rule 60(b)(6) as the proper method to determine whether vacatur is an appropriate remedy for § 455(a) violations. *Liljeberg* did *not* hold—and nothing in either statute would support such a holding—that *de novo* review of the merits of a conflicted judge's decision would automatically cleanse that conflict. And yet that is exactly what the Second Circuit below did, mirroring the approach taken by the First, Third, Fifth, Sixth, Seventh, Ninth and Eleventh Circuits. These courts have, in effect, improperly converted the *Liljeberg* three-part balancing test into a binary, automatic cure rule.

To be sure, *Liljeberg* itself expressed tolerance for certain kinds of "harmless error[s]," but the Court was clear about what it meant. The Court gave as an example of a harmless error an inadvertent conflict caused by the "unique difficulties in monitoring" case dockets, such as in a multi-district litigation. *See*

Liljeberg, 486 U.S. at 862 n.9. Elaborating, the Court pointed out that in such complex litigation the judge must "familiarize himself or herself with the named parties and all the members of the class, which in an extreme case may number in the hundreds or even thousands," an "already difficult task [] compounded by the fact that the precise contours of the class are often not defined until well into the litigation." *Id.* The Second Circuit's "no harm, no foul" approach is far afield from the narrow situation that *Liljeberg* contemplated as a harmless error.

Moreover, in applying the three factors to the circumstances before it, the *Liljeberg* court did not focus on the merits. The Court began with the paramount factor: the risk to public confidence in the judiciary. The Court recognized that the violation there—the judge sat on the Board of Trustees of a university that stood to gain from the transaction the judge's decision ultimately permitted—was "neither insubstantial nor excusable." *Id.* at 867. Further, *Liljeberg* held that "[a]lthough [the judge] did not know of his fiduciary interest in the litigation, he certainly should have known," and his failure in that regard "may well [have] constitute[d] a separate violation of § 455." *Id.* at 867–68 (citing § 455(c), which creates a duty to stay informed of "personal and fiduciary financial interests").

Turning to the other two factors, the Court again looked beyond an evaluation of the merits of the conflicted judge's decision. The Court asserted that "providing relief in cases such as this will not produce injustice in other cases; to the contrary, the Court of Appeals' willingness to enforce § 455 may prevent a

substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." *Id.* at 868. As for the risk of injustice to the parties in the case before it, the Court held there was no such risk because none of the litigants had made "a showing of special hardship by reason of their reliance on the original judgment." *Id.* at 868–69.

In short, nothing in *Liljeberg* justifies the automatic cure rule adopted by the Second Circuit in this case, especially when the conflict is as clear-cut as the financial conflict here. Instead, the *Liljeberg* factors, in design and application, were intended to fulfill "[t]he very purpose" of § 455(a): "promot[ing] confidence in the judiciary by avoiding even the appearance of impropriety wherever possible." *Id.* at 865.

2. *Liljeberg*'s insistence on case-specific analysis that looks to the impact of a potential vacatur on the judicial system as a whole—rather than the automatic cure rule the Second Circuit applied—is both appropriate and prudent.

Rule 60(b)(6)'s plain language inherently calls for a context-sensitive analysis, as it allows (but does not require) a district court to vacate a judgment for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). Section 455(a), the disqualification statute, is similarly broad. A court must therefore tailor its remedial analysis to the circumstances before it.

And the circumstances here demand a meaningful remedy. "Since 1792, federal statutes have compelled district judges to recuse themselves when they have an interest in the suit." *Liteky v. United States*, 510

U.S. 540, 544 (1994) (citing Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278); *see also Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 751 (1973) ("Supreme Court Justices beginning with Justice Livingston [oath taken in 1807] and Chief Justice Marshall [oath taken in 1801] have consistently disqualified themselves under such circumstances [*i.e.*, a financial conflict]. . . . Indeed, even under the early English common law, which rarely required disqualification because, as Blackstone explained, 'the law will not suppose a possibility of bias or favor in a judge who is already sworn to administer impartial justice,' disqualification was required when the judge had a direct pecuniary stake in the outcome."). Direct financial conflicts strike at the heart of our longstanding conception of judicial propriety.

Yet the result of the Second Circuit's automatic cure approach is that the severity of the conflict does not matter. A judge can be conflicted and there is no remedy as long as other judges decide he got it right. That cannot be the law. Instead, the party who lost in front of the conflicted judge should get a fresh start with an unconflicted judge, unburdened by the anchor of the original, tainted decision. Here, because both Judge Vyskocil and the Second Circuit were reviewing Judge Ramos's decisions, TIG was not afforded this opportunity.

However much it may seem efficient to fast-forward to the merits, preserving the integrity of the judiciary demands more. It demands that litigants as well as the public have an unimpeachable belief—that is, one that cannot be reasonably doubted—that the decisionmaker was free from bias. *See Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1111 (5th Cir.

1980) ("[Section 455's] overriding concern with appearances, which also pervades the Code of Judicial Conduct and the ABA Code of Professional Responsibility, stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence."); 5 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 163 (Fletcher Webster, ed., 1903) ("In a government like ours, entirely popular, care should be taken in every part of the system, not only to do right, but to satisfy the community that right is done.").

The alternative—the automatic cure rule—has no logical stopping point. If *de novo* review is enough to cure a fundamental, uncontested § 455(a) violation automatically, would other forms of review for correctness as a matter of law have the same effect? Or would *de novo* review cure a § 455(a) violation where there was direct evidence that the judge consciously ruled as he did to favor his own interests? At what point do circumstances became egregious enough that a court has no choice but to account for them in its analysis? And why *that* point as opposed to some other?

The facts in this case crystallize why *de novo* review of the merits does not, as *Liljeberg* requires, "satisfy the appearance of justice." 486 U.S. at 864 (quotation marks omitted). Consider how this case appears to the public: (1) front page headlines revealed Judge Ramos held stock in a party to whom he awarded a judgment of $25 million plus interest; (2) the case was reassigned to a new judge, but she declined to vacate after reading the opinions of the conflicted judge and stating she agreed with them; and (3) the Second Circuit upheld that judge's decision not

to vacate even though it characterized her analysis as not "thorough" or "preferable." If ever there were a case to vacate a judgment, it would be this one, for the conflict is severe, undisputed, and widely-publicized. And yet, the Second Circuit declined to do so. What is a reasonable, but often skeptical, public to think? *Cf. Liljeberg*, 486 U.S. at 864–65 ("[P]eople who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges.").

III. This Case Presents An Suitable Vehicle For Resolving How Courts Should Determine The Remedy For Decisions Affected By Judicial Conflicts.

1. The time to clarify *Liljeberg* is now. Put simply, the country is watching this case and others highlighted by the *WSJ*'s September 2021 exposé. Since that article came out, the Chief Justice of United States, Congress, the Judicial Conference, and the Administrative Office of the United States Courts have all focused on how to rectify judicial financial conflicts. *See supra*. The Second Circuit seemed to think this widespread attention suffices to restore public confidence in the judiciary. *See* Pet. App. 19a. Although these efforts are certainly an important component of preventing further conflicts going forward, they cannot and do not afford retrospective remedies in particular cases that have already been affected.

At a moment when judicial financial conflicts are in the spotlight, there is unfortunately no consensus over how to remedy them. If courts do not know how

to apply *Liljeberg*, *Liljeberg*—and by extension, § 455(a)—cannot carry out their critical function of upholding public confidence in the judiciary.

2. This case is a suitable vehicle to bring this issue before the Court. As noted above, this case was the lead one profiled in the *WSJ* exposé. As one of the first Court of Appeals cases to address a conflict reported by the *WSJ*, this petition provides an early opportunity to resolve the confusion over the application of *Liljeberg* so that other courts dealing with the fallout have clarity.

Moreover, the question presented was extensively developed below. The Second Circuit ruled squarely that its *de novo* review cured Judge Ramos's uncontested financial interest in Mobil, the prevailing party. Pet. App. 17a ("Applying the principles from *Liljeberg*, we conclude that vacatur was not required in light of Judge Vyskocil's *de novo* review.") It did so while considering the approach taken by Judge Vyskocil, who had also assessed the question presented.

TIG also argued below—both before the district court and Second Circuit—that the three *Liljeberg* factors justified vacatur here. We recount the reasoning in brief. TIG argued that letting Judge Ramos's judgment stand would undermine public confidence in the judiciary because of, among other things, the severity of the conflict, and the publicity afforded this case—and the issue of judicial financial conflicts more broadly—by the *WSJ*, judiciary and Congress, among others. TIG argued that vacating the judgment would benefit litigants in other cases by encouraging judges to monitor their financial holdings. And TIG argued

that vacating the judgment posed no risk of injustice to the parties because this suit concerns monetary damages and the amount on appeal has been bonded. The Second Circuit erred in failing to adequately address these points, and this Court now has an opportunity to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL P. GOLDBERG
DANIEL M. SULLIVAN
Counsel of Record
ALISON B. MILLER
HOLWELL SHUSTER
& GOLDBERG LLP
425 Lexington Avenue
14th Floor
New York, NY 10017
(646) 837-5120
dsullivan@hsgllp.com

Counsel for Petitioner

November 10, 2022

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AUGUST 12, 2022

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2021
Nos. 20-1946 (L), 21-2658 (Con.)

EXXONMOBIL OIL CORPORATION,

Petitioner-Appellee,

v.

TIG INSURANCE COMPANY,

Respondent-Appellant.

On Appeal from the United States District Court
for the Southern District of New York.

May 10, 2022, Argued;
August 12, 2022, Decided

Before: WALKER, NARDINI, and MENASHI, *Circuit Judges.*

WILLIAM J. NARDINI, *Circuit Judge*:

This case involves two distinct issues. First, we consider whether vacatur is required where judgment was

entered by a first district judge who belatedly realized that he had a conflict of interest, and a second non-conflicted judge then reviewed the merits of that decision *de novo*. Second, if vacatur is unwarranted, we determine the existence and scope of an arbitration agreement between the parties.

TIG Insurance Company ("TIG") appeals from a judgment and order of the United States District Court for the Southern District of New York (Edgardo Ramos, *Judge*, and Mary Kay Vyskocil, *Judge*, respectively). TIG asserts that Judge Ramos erred in ordering it to arbitrate a coverage dispute with ExxonMobil Oil Corporation ("Exxon"). Even if it was required to arbitrate, TIG further contends, Judge Ramos erred in awarding Exxon prejudgment interest when confirming the arbitral award.

After entering judgment, and after TIG initially appealed, the district court clerk notified the parties that it had been brought to Judge Ramos's attention that he owned stock in Exxon when he presided over the case. Nothing in the record suggests that Judge Ramos was aware of his conflict at the time he rendered his decisions, and the parties do not suggest otherwise. TIG moved in the district court to vacate the judgment. The case was reassigned to Judge Vyskocil, who denied the motion to vacate. TIG appealed from that denial as well.

We AFFIRM the district court's denial of the motion to vacate. Vacatur was not required because this case presents only questions of law, and a non-conflicted district judge reviewed the case *de novo*. As to the merits, we

AFFIRM the district court's order compelling arbitration and REVERSE in part its decision granting Exxon's request for prejudgment interest and REMAND to the district court for further proceedings consistent with this opinion.

I. Background

A. The TIG insurance policy

TIG issued an excess insurance policy (the "Policy"), insuring Exxon for liability for damages from personal injury or property damage resulting from the use of Exxon's products.[1] The coverage was limited to $25 million.

The Policy states that it should be "construed in an evenhanded fashion as between the Insured and the Company; without limitation, where the language of this Policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant provisions, stipulations, exclusions and conditions (without regard to authorship of the language, without any presumption or arbitrary interpretation or construction in favor of either the Insured or the Company and without reference to parol evidence)." Joint App'x at 38.

---

1. The Policy was initially issued to Mobil Corporation, which was later acquired by Exxon Corporation, becoming the ExxonMobil Oil Corporation. For convenience, we refer to the insured party as "Exxon."

Appendix A

The Policy contained customized language regarding arbitration. The parties deleted a provision in the original Policy form that would have clearly constituted a binding arbitration agreement, which stated that "[a]ny dispute arising under this Policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act of 1950." *Id.* at 37. Instead of this stock provision, the parties added Endorsement No. 11—"Alternative Dispute Resolution Endorsement" (the "ADR Endorsement"). *Id.* at 60. Because the ADR Endorsement is the crux of the dispute on appeal, we set it out in full below:

ALTERNATIVE DISPUTE RESOLUTION ENDORSEMENT

If the Company and the Insured disagree, after making a good faith effort to reach an agreement on an issue concerning this policy, either party may request that the following procedure be used to settle such disagreement:

1. The Company or the Insured may request of the other in writing that the dispute be settled by an alternative dispute resolution ("ADR") process, selected according to the procedures described herein.

2. If the Company and the Insured agree to so proceed, they will jointly select an ADR process for settlement of the dispute.

3. ADR processes which may be used may include but are not limited to mediation, neutral fact-finding and binding arbitration (as described in paragraph (4)). By agreement of the parties, the services of the American Arbitration Association, Judicial Arbitration & Mediation Services Inc., Endispute Inc., or the Center for Public Resources Inc. may be used to design or to implement any ADR process.

4. If the parties cannot agree on an ADR process within 90 days of the written request described in paragraph (1), the parties shall use binding arbitration. The arbitration shall be conducted by a mutually acceptable arbitrator to be chosen by the parties. Neither party may unreasonably withhold consent to the selection of an arbitrator; however, if the parties cannot select an arbitrator within 45 days after binding arbitration is selected under paragraph (2) or is [sic] the ADR process because of this paragraph, the selection of the arbitrator shall be made by one of the consultants listed in paragraph (3). The arbitration proceeding shall take place in or in the vicinity of New York and will be governed by such rules as the parties may agree. The parties expressly waive any pre-hearing discovery about the dispute, including examination of documents and

witnesses. It is expressly agreed that the result of such binding arbitration shall not be subject to appeal by either party.

5. All expenses of the ADR process will be shared equally by both parties.

6. It is expressly agreed that any decision, award, or agreed settlement made as a result of an ADR process shall be limited to the limits of liability of this Policy.

7. Any statutes of limitations which may be applicable to the dispute shall be tolled, from the date that the Company and the Insured agree to follow the selection procedures described herein with respect to such dispute, until and including the date that such ADR process is concluded.

Id.

B. Procedural history

In the 1990s, Exxon faced a series of lawsuits related to its use of methyl tertiary-butyl ether (MTBE) as a gasoline additive. As a result of these suits, by 2019, Exxon had paid $46 million in settlements and faced judgments totaling over an additional $269 million. It sought indemnification from TIG under the Policy, but TIG disputed that the Policy covered the MTBE suits. The parties engaged in settlement discussions, which

ended on November 30, 2016, when TIG filed suit in the New York Supreme Court seeking a declaration that the Policy did not cover the MTBE-related losses. Nine days later, Exxon sent a letter "formally invok[ing] its contractual right under the Policy and Federal law to settle the parties' disagreement over coverage under the Policy for Exxon[]'s MTBE insurance claim by binding arbitration." Joint App'x at 82. Exxon filed a petition to compel arbitration in federal district court the same day. Exxon also asked the court to enjoin TIG from pursuing its New York declaratory judgment action.

1. The district court grants the petition to compel arbitration

In support of its petition to compel arbitration, Exxon argued—and the district court (Judge Ramos) agreed—that the ADR Endorsement amounted to a binding arbitration agreement. The court focused on the first clause in paragraph 2 of the ADR Endorsement: "If the [C]ompany and the [I]nsured agree to so proceed, they will jointly select an ADR process for settlement of the dispute." Spec. App'x at 24; *see* Joint App'x at 60. It concluded that the conditional introductory phrase ("If the Company and the Insured agree . . .") referred only to the second clause in that sentence ("they will jointly select. . . . ."). Spec. App'x at 24. Thus, the ADR Endorsement would allow the parties to use any ADR procedure on which they jointly agreed. If one party requested ADR and the parties could not jointly agree on the ADR process, however, the ADR Endorsement "defaults to binding arbitrations." Spec. App'x at 25.

In so ruling, the district court rejected TIG's argument that the introductory clause in paragraph 2 meant that the entire ADR Endorsement procedure (not just the joint selection process) is triggered only if the parties agree to settle their dispute via ADR. The district court reasoned that New York courts read contracts to "give force and effect to all of [their] provisions," and reading the introductory clause as TIG urged would mean the ADR Endorsement would not "have any binding effect absent some further agreement." Spec. App'x at 25 (citing *Trump-Equitable Fifth Ave. Co. v. HRH Constr. Corp.*, 106 A.D.2d 242, 485 N.Y.S.2d 65 (1st Dep't), *aff'd*, 66 N.Y.2d 779, 488 N.E.2d 115, 497 N.Y.S.2d 369 (1985)). The ADR Endorsement would be "an unenforceable and superfluous agreement to agree, under which neither party could require any form of ADR absent some further agreement." *Id.* The court also noted that its interpretation was "consistent with the federal policy in favor of construing arbitration clauses broadly." Spec. App'x at 25-26. The court thus granted the petition to compel arbitration, stayed all proceedings in the case, and retained jurisdiction to address other issues that might arise after the arbitrators rendered any awards. *Id.*

2. The arbitral tribunal rules in favor of Exxon

In August of 2019, the arbitral tribunal ruled in favor of Exxon. It held that Exxon's total liability exceeded $350 million, therefore reaching and exhausting TIG's excess layer of liability coverage. It thus awarded Exxon

the full $25 million allowed under the Policy. Before the tribunal, Exxon also sought prejudgment interest. The tribunal held that it lacked jurisdiction to grant Exxon's request. It explained that "[a]n arbitral award is [an] all-inclusive term" that includes "damages, interest, costs and legal fees that a panel may determine is owing on a claim." Joint App'x at 164. The ADR Endorsement stated "that any decision, award, or agreed settlement made as a result of an ADR process shall be limited to the limits of liability of this Policy." Joint App'x at 60. Accordingly, the tribunal concluded it was "foreclosed from awarding more than [the] limit of liability in the TIG's policy of $25 million." Joint App'x at 164. It explained in a footnote, though, that one New York Appellate Division opinion "seem[ed] to imply that where the arbitrator would lack jurisdiction or be prohibited from making an award of prejudgment interest and the claimant could not have sought an award of interest, the claimant is not foreclosed from seeking such prejudgment interest in a subsequent court proceeding to confirm an award." Joint App'x at 165 n.4 (citing *Levin & Glasser, P.C. v. Kenmore Prop., LLC*, 70 A.D.3d 443, 445-46, 896 N.Y.S.2d 311 (1st Dep't 2010)).

3. The district court confirms the arbitral award and grants prejudgment interest

On November 21, 2019, Exxon moved in the district court to confirm the arbitral award and sought prejudgment interest. TIG cross-moved to vacate the award. The district court (Judge Ramos) granted Exxon's motion and denied TIG's on May 18, 2020. *ExxonMobil Oil Corp. v. TIG Ins. Co.*, No. 16-9527, 2020 U.S. Dist.

LEXIS 87407, 2020 WL 2539063 (S.D.N.Y. May 18, 2020) (*Exxon I*).[2]

The district court held that it had authority to award prejudgment interest where the arbitral tribunal had not. Under New York law, the district court explained, prejudgment interest is ordinarily mandatory on damages awarded as a result of a breach of performance of a contract. Although parties may contract around the requirement, courts apply a clear-statement rule for contracts purporting to waive that mandatory requirement. The district court ultimately concluded that paragraph 6 of the ADR Endorsement was not sufficiently clear to infer that the parties intended to waive their right to prejudgment interest. The court explained that "a reasonable businessperson considering whether to agree to the Policy would likely have read the ADR Endorsement not to prevent a court from awarding interest if TIG were found to owe the entire policy limit in damages." *Id.* at *9. Accordingly, the court awarded Exxon 9% *per annum* interest for the period between TIG's breach of contract and the date of the arbitral award. The court also awarded Exxon 9% *per annum* interest from the date of the award through the date of the court's judgment. The court directed the parties to submit a proposed judgment reflecting this calculation. On May 26, 2020, the court entered judgment against TIG "in the amount of $33,010,245.90, representing the $25,000,000 awarded in the Award, plus prejudgment interest on that

2. TIG does not challenge the portion of the district court's opinion confirming the arbitral award.

amount . . . at the rate of 9% per annum in the amount of $8,010,245.90." Spec. App'x at 49.

On June 19, 2020, TIG filed a notice of appeal. It stated that it was appealing from (1) the order of the district court compelling arbitration; and (2) the district court's order granting Exxon's motion to confirm the arbitral award, denying TIG's motion to vacate the arbitral award, and granting Exxon prejudgment interest. In its opening brief, TIG dropped its challenge to the portion of the district court's decision granting Exxon's motion to confirm the arbitral award and denying TIG's motion to vacate the award.

4. The district court discloses Judge Ramos's conflict of interest

On July 29, 2021, the Clerk of Court for the Southern District of New York sent the parties a letter disclosing that it had been brought to Judge Ramos's attention that he had owned stock in ExxonMobil Corporation while the case was pending before him. Although he reported that his stock ownership did not affect his decisions in the case, he recognized that such ownership would have required his recusal. Accordingly, Judge Ramos directed the Clerk to notify the parties of the conflict. Citing Advisory Opinion 71 from the Judicial Conference Codes of Conduct Committee, which deals with disqualification that is not discovered until after a judge has participated in a case, the letter invited the parties "to respond to Judge Ramos' disclosure of a conflict in this case." Vacatur App'x at 11. In response, TIG filed a motion in the district court to vacate

the judgment. We held TIG's original appeal in abeyance pending the district court decision as to whether to deny the motion or issue an indicative ruling stating that the district court would grant the motion if we remanded for that purpose.[3]

On September 28, the Wall Street Journal published an article reporting that "[m]ore than 130 federal judges ha[d] violated U.S. law and judicial ethics by overseeing court cases involving companies in which they or their family owned stock." James V. Grimaldi, Coulter Jones & Joe Palazzolo, *131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest*, Wall St. J., Sept. 28, 2021. The article reported that Judge Ramos had held "between $15,001 and $50,000 of Exxon stock" when he ruled in Exxon's favor. *Id.* The article reported that the Clerk of Court notified the parties in this case of the conflict after the newspaper had contacted Judge Ramos to ask about the apparent conflict.

The district court clerk reassigned the case to Judge Mary Kay Vyskocil, who reviewed the merits of the case

3. If a party files a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) after filing a notice of appeal, but within 28 days of the entry of judgment, the motion suspends the effect of the notice of appeal until the district court rules on the post-judgment motion. Fed. R. App. P. 4(a)(4)(B)(i). If such a motion is filed more than 28 days after judgment is entered, the district court is without jurisdiction to grant the motion while the appeal is pending. Under Rule 62.1, a district court may nevertheless "(1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue."

de novo and denied TIG's motion to vacate on October 14, 2021. *ExxonMobil Oil Corp. v. TIG Ins. Co.*, No. 16-9527, 2021 U.S. Dist. LEXIS 198589, 2021 WL 4803700, at *4 (S.D.N.Y. Oct. 14, 2021) (*Exxon II*). Judge Vyskocil acknowledged that Judge Ramos "should have recused himself from this matter upon its assignment to him" under both 28 U.S.C. § 455(a) and the Code of Conduct for United States Judges, Cannons 2(A) and 3(C)(1)-(2). *Id.* at *2. She explained that harmless error review applies to violations of § 455(a). *Id.* Thus, Judge Vyskocil explained that she would deny the motion to vacate if she agreed that Judge Ramos's rulings were correct "because Respondent would not have been harmed as regards this proceeding." *Id.*

After reviewing all of the relevant court documents, Judge Vyskocil agreed with Judge Ramos's reasoning and denied the motion to vacate. She adopted Judge Ramos's orders granting Exxon's motion to compel and awarding prejudgment interest. TIG filed a new notice of appeal from Judge Vyskocil's decision.

II. Discussion

We consider first whether Judge Ramos's conflict of interest required Judge Vyskocil to vacate the judgment and restart the entire case anew. Because we conclude that it did not, we then consider whether the district court erred in compelling arbitration and awarding prejudgment interest.

A. Remedy for the violation of 28 U.S.C. § 455(a)

TIG argues that we need not consider the merits of its original appeal because we must vacate the district court's judgment in light of Judge Ramos's financial interest in Exxon. We disagree.

Both statutes and court rules govern questions of judicial recusal when a disqualifying conflict is discovered after a judge enters a ruling. The baseline rule is provided by 28 U.S.C. § 455(a), which states that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The Supreme Court has explained that "Section 455 does not, on its own, authorize the reopening of closed litigation" but "Federal Rule[] of Civil Procedure 60(b) provides a procedure whereby, in appropriate cases, a party may be relieved of a final judgment." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988). "We review a district court's decision on a Rule 60(b) motion for abuse of discretion. A court abuses its discretion when (1) its decision rests on an error of law or a clearly erroneous factual finding; or (2) cannot be found within the range of permissible decisions." *In re Terrorist Attacks on Sept. 11, 2001*, 741 F.3d 353, 357 (2d Cir. 2013) (cleaned up).

Although a judge must recuse when there is a disqualifying conflict, the proper remedy varies when such a conflict is discovered after the judge's ruling. In *Liljeberg*, a district court judge ruled after a bench trial

in favor of a party to a real estate transaction in a manner that benefited a private university. Although the university was not a party to the suit, it had negotiated with one of the parties and maintained an interest in the transaction at issue. The losing party subsequently learned that the district judge had been on the board of trustees for the university when he presided over the case. It moved to vacate the judgment under Rule 60(b)(6)—which permits relief for "any other reason that justifies" it—on the basis that the judge was disqualified under § 455(a). The Fifth Circuit held that the judge's conflict created an appearance of impropriety and that the appropriate remedy was to vacate his decision.

The Supreme Court agreed that disqualification was required, and that vacatur was justified in light of several factors. The Court emphasized first that "[s]cienter is not an element of a violation of § 455(a)." *Liljeberg*, 486 U.S. at 859. Section 455(a) is intended to "avoid even the *appearance* of partiality," so "recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge." *Id.* at 860-61 (emphasis added) (quoting *Health Servs. Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986)). When a judge violates § 455, a new, unconflicted judge may, but is not required to, vacate the judgment or any decisions rendered by the conflicted judge. *Liljeberg*, 486 U.S. at 863-64. Whether vacatur is appropriate must be evaluated on a case-by-case basis:

> [I]n determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.

Id. at 864.

TIG contends that Judge Vyskocil erred by failing to explicitly consider the factors that the Supreme Court laid out in *Liljeberg*. As we have emphasized, § 455(a) "deals exclusively with appearances." *United States v. Amico*, 486 F.3d 764, 775 (2d Cir. 2007). "Its purpose is the protection of the public's confidence in the impartiality of the judiciary." *Id.* Although the Supreme Court in *Liljeberg* did not set forth a definitive test for assessing when vacatur is required, *see Liljeberg*, 486 U.S. at 864 (describing the factors as "*appropriate* to consider" (emphasis added)), it is preferable for a court reviewing a potential violation of § 455(a) to explicitly discuss how the factors from *Liljeberg* apply.

The decision here could have benefited from a more detailed discussion, but Judge Vyskocil's analysis addressed the *Liljeberg* factors. Judge Vyskocil explicitly weighed the likelihood of harm to the parties as a result of Judge Ramos's conflict, including reconsidering portions of Judge Ramos's decisions that TIG had not challenged on appeal. *See, e.g., Exxon II*, 2021 U.S. Dist. LEXIS 198589, 2021 WL 4803700, at *3 ("[T]he Court

concludes that Respondent was not harmed by Judge Ramos' Order granting Petitioner's Motion to Confirm the Arbitration Award."). She also directly addressed the public's perception of the court. *2021 U.S. Dist. LEXIS 198589*, [WL] *2. While the purposes of § 455 might be better served by a more thorough discussion that addressed each *Liljeberg* factor individually and at greater length, we cannot conclude Judge Vyskocil's decision was procedurally deficient.

We turn, then, to the substance of TIG's motion to vacate. Judge Ramos held between $15,001 and $50,000 in stock in Exxon's parent company when he issued his decisions in this case. His failure to recuse himself was indisputably a serious error. As Judge Vyskocil recognized, violations of § 455(a) are harmful because "the integrity of the judicial process is paramount and the potential damage from impairment of the public confidence in the judicial process is a serious concern." *Id.* Once such an error occurs, the analysis that we carry out is an exercise in mitigation aimed at restoring the public's confidence in the courts and protecting litigants' access to fair, efficient, and unbiased adjudication. Applying the principles from *Liljeberg*, we conclude that vacatur was not required in light of Judge Vyskocil's *de novo* review.[4]

---

4. TIG argues that Judge Vyskocil's review was not truly *de novo*, and that she afforded some unspecified measure of deference to Judge Ramos's decision. But Judge Vyskocil explained that she had "reviewed the Petition to Compel Arbitration, the Motions, and relevant filings in this proceeding, as well as the Orders and Opinions issued by Judge Ramos." *Exxon II*, 2021 U.S. Dist. LEXIS 198589, 2021 WL 4803700, at *2. We discern nothing in Judge

First, there is little "risk of injustice" to TIG absent vacatur. *Liljeberg*, 486 U.S. at 864. This case presents purely legal questions of contract interpretation: whether the Policy includes a binding arbitration agreement, and whether the language of the Policy waives the parties' rights to prejudgment interest. Judge Vyskocil considered the issues afresh and rendered an independent decision after reviewing the record. TIG offers no basis to conclude that Judge Vyskocil's opinion was in any way tainted by Judge Ramos's conflict, nor does it identify any argument that it was unable to make as a result of the procedure used in this case. There is no reason to force the parties to relitigate the entire case, likely causing significant delay, in the absence of any basis to conclude that doing so would lead to a more just outcome.

Next, TIG argues that denying its request to vacate the judgment would produce injustice in other cases because litigants would be disincentivized from examining grounds for disqualifying conflicted judges if they thought courts would not take such motions seriously. *See id.* at 868 ("[P]roviding relief in cases such as this will not produce injustice in other cases; to the contrary, the Court of Appeals' willingness to enforce § 455 may prevent a

---

Vyskocil's opinion suggesting that she gave any weight—let alone undue or conclusive weight—to Judge Ramos's reasoning. We reject the contention that a district court must turn a blind eye to the proceedings that occurred in a case before a potentially conflicted judge. Appellate courts routinely consider district courts' decisions in the course of conducting *de novo* review. Judge Vyskocil did not err in framing her opinion in the context of Judge Ramos's earlier decisions.

substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered."). The risk of harm in future cases is minimal here, though, because the district court disclosed the conflict as soon as Judge Ramos became aware of it, and because TIG has had ample opportunity to challenge Judge Ramos's rulings both in the district court and on appeal.

Finally, declining to vacate the judgment here does not risk further "undermining the public's confidence in the judicial process." *Id.* at 864. To be sure, this case has already drawn significant public attention, *see* Grimaldi et al., *supra* p. 17, and Judge Ramos's failure to recuse himself before ruling was a significant error. Our task now is to determine how best to move forward and preserve the public's confidence in our federal courts. As noted earlier, this case presents pure questions of law; the district court was tasked with determining what the language in the parties' contract means. Although Judge Ramos addressed that question while conflicted, an unconflicted district judge then gave the case a fresh look—that is, she reviewed his decision *de novo*.[5] Now, on appeal, three more unconflicted judges review the parties' arguments—again *de novo*—to decide what the contract

5. We note that nothing in the record suggests that Judge Ramos was aware of his conflict at the time he rendered his decisions, and the parties do not suggest otherwise. It was nonetheless appropriate for a second district judge to review the case *de novo* because § 455 is designed to "avoid even the *appearance* of partiality." *Liljeberg*, 486 U.S. at 860 (emphasis added).

means. This procedure assures that the final disposition of the case is not affected by any conflict of interest. Indeed, the questions have now been reviewed by four disinterested judges. The public also has an interest in speedy adjudication of disputes, an interest that would not be furthered by forcing the parties to re-brief the same issues for a third time. We therefore conclude that declining to vacate the judgment poses little additional risk to the public's confidence in the judiciary.

In sum, the *Liljeberg* factors weigh against vacatur. This case presents purely legal questions which were reviewed completely afresh by a district judge who had no conflicts. Vacating the judgment would delay the case for months or longer, all to no benefit. We are satisfied that Judge Ramos's conflict did not influence Judge Vyskocil's decision, nor will it affect our disposition of this case. Accordingly, we affirm Judge Vyskocil's denial of TIG's motion to vacate the judgment and turn to the merits of the appeal.

B. The ADR Endorsement

Exxon argues, and the district court agreed, that the ADR Endorsement is a binding arbitration agreement. TIG contends that the ADR Endorsement simply reflects those procedures that govern if one party requests ADR and the counterparty agrees. Neither party's interpretation is entirely satisfactory. But where Exxon's reading is strained, TIG's directly contradicts the language of the ADR Endorsement. And "when you have eliminated the impossible, whatever remains, however improbable, must

be the truth." Arthur Conan Doyle, The Sign of Four 93 (1890) (emphasis omitted). Accordingly, we conclude that the ADR Endorsement is a binding arbitration agreement and affirm the district court's order compelling arbitration.

"We review *de novo* the grant of a motion to compel arbitration." *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173, 180 (2d Cir. 2021); *see Harrington v. Atl. Sounding Co.*, 602 F.3d 113, 119 (2d Cir. 2010) ("The determination of whether parties have contractually bound themselves to arbitrate a dispute is a determination involving interpretation of state law and hence a legal conclusion also subject to *de novo* review." (cleaned up)). "In deciding a motion to compel arbitration, courts apply a standard similar to that applicable for a motion for summary judgment. Courts must consider all relevant, admissible evidence submitted by the parties and contained in pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, and must draw all reasonable inferences in favor of the non-moving party." *Cooper*, 990 F.3d at 179-80 (cleaned up).

Although "the Federal Arbitration Act ('FAA') embodies a national policy favoring arbitration[,] . . . a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*." *Id.* at 179 (cleaned up). "Courts consider two factors when deciding if a dispute is arbitrable: (1) whether the parties agreed to arbitrate, and, if so, (2) whether the scope of that agreement encompasses the claims at issue." *Id.* (internal quotation marks omitted).

Because "arbitration is simply a matter of contract between the parties . . . [t]he threshold question of whether the parties indeed agreed to arbitrate is determined by state contract law principles." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 229 (2d Cir. 2016) (cleaned up). The Policy here provides that it is "governed by and construed in accordance with the internal laws of the State of New York." Joint App'x at 38. The key question is whether the parties agreed to arbitrate at all.

Under New York law, "insurance contracts must be interpreted according to common speech and consistent with the reasonable expectation of the average insured." *Dean v. Tower Ins. Co. of N.Y.*, 19 N.Y.3d 704, 708, 979 N.E.2d 1143, 955 N.Y.S.2d 817 (2012). Courts in New York avoid construing contracts in ways that "would leave contractual clauses meaningless." *Two Guys from Harrison-NY, Inc. v. S.F.R. Realty Assocs.*, 63 N.Y.2d 396, 403, 472 N.E.2d 315, 482 N.Y.S.2d 465 (1984).

Ordinarily, "ambiguities in an insurance policy are to be construed against the insurer." *Dean*, 19 N.Y.3d at 708 (cleaned up). Here, though, the Policy expressly states that it should be "construed in an evenhanded fashion" and ambiguities must be resolved "in the manner most consistent with the relevant provisions, stipulations, exclusions and conditions (without regard to authorship of the language, without any presumption or arbitrary interpretation or construction in favor of either the Insured or the Company and without reference to parol evidence)." Joint App'x at 38.

1. TIG's view

TIG argues that the ADR Endorsement creates a three-step procedure for ADR that permits, but does not require, arbitration.

First, the preamble and paragraph 1 of the ADR Endorsement state that, in the event of a dispute, either party "may request" to settle the dispute via ADR "in writing." Joint App'x at 60. Second, the introductory phrase in paragraph two ("If the Company and the Insured agree to so proceed") means that the remaining procedures apply only if the requestee agrees to the settle the dispute via ADR. *See id.* ¶ 2. Finally, if the parties agree to ADR but cannot agree on the format within 90 days, then paragraph 4 dictates that the parties "shall use binding arbitration." *Id.* ¶ 4.

TIG notes that we have recognized the validity of contracts that permit arbitration only if both parties agree to arbitrate a given dispute. In *Gangemi v. General Electric Company*, an arbitration agreement between a company and union provided that a dispute about the "interpretation and application" of the contract "may be submitted to arbitration only after it has been properly processed in accordance with the provisions of Article III and with prior written mutual agreement" of the parties. 532 F.2d 861, 863 n.2 (2d Cir. 1976). In contrast to that provision, the contract specified that a grievance "involving a disciplinary penalty . . . may be submitted to arbitration" if it remains disputed after it is processed through an administrative procedure. *Id.* The union

moved to compel arbitration on nondisciplinary topics to which the company would not agree. The district court held that the language of the contract made arbitration mandatory and granted the motion to compel. *Id.* at 864. We reversed. We explained that the arbitration clause did not include the "'broad' or 'standard' mandatory arbitration clause common to many collective bargaining agreements." *Id.* at 865. Because the parties' dispute was not a disciplinary grievance, for which arbitration would have been "concededly mandatory," it was subject to arbitration "only by consent" of both parties. *Id.* at 866. "[C]ourts are powerless, absent such consent, to compel arbitration." *Id.*

2. Exxon's view

In Exxon's view the parties are set inexorably on the path to arbitration once either party requests to settle a dispute by ADR, unless the parties jointly adopt another ADR procedure. Exxon contends that the introductory clause of paragraph 2 ("If the Company and the Insured agree to so proceed") applies to the second clause in that paragraph ("they will jointly select an ADR process for settlement of the dispute") rather than what came before. Joint App'x at 60. Thus, on Exxon's read, paragraph 2 means that the parties *may* select an ADR procedure other than arbitration if they agree on an alternative.

If they do not "agree to so proceed"—i.e., to select an alternative—then paragraph 4 clarifies that the default is arbitration. The first sentence of that paragraph provides: "If the parties cannot agree on an ADR process within 90

days of the written request described in paragraph (1), the parties shall use binding arbitration." *Id.* Exxon argues that TIG's interpretation would render this sentence mere surplusage. Under TIG's reading, Exxon contends, a party could always avoid binding arbitration by withholding its consent to engage in the ADR selection procedure at all unless the counterparty agreed to something other than arbitration.

3. Exxon's view is a permissible interpretation of the Policy

Ultimately, neither party's read is without flaw. For its part, Exxon struggles to contend with the ostensibly permissive language in the Preamble and paragraph 1 of the ADR Endorsement. Joint App'x at 60. Exxon asserts that this language is consistent with the parties' intention to enter a binding arbitration agreement, relying on *Loc. 771, I.A.T.S.E., AFL-CIO v. RKO Gen., Inc., WOR Div.*, 546 F.2d 1107, 1116 (2d Cir. 1977). There, we noted that an arbitration clause stating that a dispute "may be submitted to arbitration . . . [is] the standard form for the submission of all disputes to an arbitrator." *Id.* (cleaned up). But the word "may" means "ha[s] permission to." *May*, Merriam-Webster Unabridged Dictionary, https://unabridged.merriam-webster.com/unabridged/may. In the "standard form" of a mandatory arbitration agreement we considered in *Local 771*, the "may" preceded *submit*. 546 F.2d at 1115. Thus, one party had "permission to" submit a claim to arbitration unilaterally. In contrast, here, the "may" precedes *request*. One party "has permission to" ask the other party to proceed via ADR.

The introductory paragraphs of the ADR Endorsement, standing alone, suggest that either party may request arbitration, but neither party can require it.

But we cannot read the introductory paragraphs of the ADR Endorsement in isolation, and the problems for TIG arise in the first sentence of paragraph 4: "If the parties cannot agree on an ADR process within 90 days *of the written request* described in paragraph (1), the parties shall use binding arbitration." Joint App'x at 60 (emphasis added). The natural meaning of this sentence is that the clock on arbitration starts ticking when one party requests ADR, regardless of whether the counterparty accedes to that request.

Exxon's reading of the ADR Endorsement may have its challenges, but TIG's directly contradicts the plain language of paragraph 4. Faced with a choice between an interpretation that is difficult and another that is precluded by the text of the contract, we must adopt the former. We therefore hold that the ADR Endorsement functions as a binding arbitration agreement. When one party requests to settle a dispute via ADR, the parties have 90 days to choose the format. If they fail to do so, they must arbitrate.

TIG points to two features of the contract that it says support its view that the ADR Endorsement is permissive. While both are arguably in tension with the conclusion that the ADR Endorsement is mandatory, neither is irreconcilable. First, TIG notes that, under the ADR Endorsement, applicable statutes of limitations are

tolled "from the date that the Company and the Insured agree to follow the selection procedures." Joint App'x at 60. Because the provision ties the tolling of any statutes of limitations to the *agreement* between the parties, TIG contends, such an agreement must be necessary to trigger the procedures described in the ADR Endorsement. *Id.* TIG presupposes that the parties intended to toll applicable statutes of limitations in every case where ADR would be used, but it cites no evidence to support that assumption. We conclude that paragraph 7 applies only when the parties reach an agreement to select an ADR procedure under paragraphs 2 and 3. *Id.* If the parties fail to reach an agreement, thereby defaulting to arbitration, then any applicable statutes of limitations continue to run.

Second, TIG argues that the parties' decision to delete a form mandatory arbitration clause suggests that they intended the ADR Endorsement to be different and therefore permissive. The Policy form originally contained a provision stating that "[a]ny dispute arising under this Policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act of 1950." Joint App'x at 37. The parties agreed to delete that arbitration provision and replace it with the ADR Endorsement. Although the parties may have intended to adopt something other than a binding arbitration agreement, that is not the only inference—or even the strongest inference—that the change would support. For example, the change may have been due to a shift in the parties' venue preference (the ADR Endorsement moved the venue for arbitration from London to New York), the desire for more efficient dispute resolution (the

ADR Endorsement waives the parties' right to any pre-hearing discovery), or a change in the parties' preference for the rules that would apply to the arbitration (the ADR Endorsement eliminated any reference to the English Arbitration Act, instead specifying that the parties would agree on the rules that applied). We cannot conclude that the parties' decision to adopt the ADR Endorsement implies that they intended to enter something other than a mandatory arbitration agreement.

In sum, while Exxon's reading of the ADR Endorsement is difficult in some respects, it is reconcilable with the provision's text. TIG's is not. We hold that the ADR Endorsement amounts to a mandatory arbitration agreement, and that the district court did not err in granting Exxon's motion to compel arbitration.

C. Prejudgment interest

TIG next argues that, even if the district court properly granted Exxon's motion to compel arbitration, it erred in granting pre-award interest beyond the Policy limit of $25 million when it confirmed that award. "The award of interest is generally within the discretion of the district court and will not be overturned on appeal absent an abuse of discretion." *New England Ins. Co. v. Healthcare Underwriters Mut. Ins. Co.*, 352 F.3d 599, 602-03 (2d Cir. 2003).

In New York, by statute, the default rule is that pre-award interest "shall be recovered upon a sum awarded because of a breach of performance of a contract." N.Y.

C.P.L.R. § 5001(a). Interest accrues "from the earliest ascertainable date the cause of action existed," *id.* § 5001(b), and is generally mandatory. *J. D'Addario & Co. v. Embassy Indus., Inc.*, 20 N.Y.3d 113, 117, 980 N.E.2d 940, 957 N.Y.S.2d 275 (2012); *see also New England Ins. Co.*, 352 F.3d at 603. Pre-award interest "is not a penalty," and is intended to "compensate the wronged party for the loss of use of the money." *J. D'Addario & Co.*, 20 N.Y.3d at 117-18.

Statutory pre-award interest is not required or available, however, where the parties' contract is "sufficiently clear" that statutory interest was not "contemplated by the parties at the time the contract was formed." *Id.* at 118. In *J. D'Addario*, for example, a real estate buyer placed a down payment in escrow before closing. *Id.* at 116. The buyer then breached the contract and failed to attend the closing. *Id.* at 117. The contract specified that, in the event of a breach, liquidated damages was the "sole remedy" and "sole obligation," and that each party had "no further rights" beyond bank interest on the down payment in escrow. *Id.* at 118. The New York Court of Appeals held that this language was "sufficiently clear" to establish that the parties intended to waive their rights to statutory pre-award interest. *Id.* The court rejected the plaintiff's "contention that the contract never expressly mentioned statutory interest, and that therefore their right thereto was not waived." *Id.*

Here, paragraph 6 is a "sufficiently clear" statement of the parties' intent to waive their right to statutory interest in arbitration to the extent that the interest plus

the principal award would exceed the Policy limit of $25 million. That paragraph provides:

> It is expressly agreed that any decision, award, or agreed settlement made as a result of an ADR process shall be limited to the limits of liability of this Policy.

Joint App'x at 60. Exxon acknowledges that the phrase "any decision, award, or agreed settlement" includes the principal amount of $25 million that it won in arbitration. The arbitral panel concluded that "[b]ased on the insurance contract to which the parties entered . . . [it] lack[ed] the jurisdiction to make an award that exceeds the limits of the TIG policy." Joint App'x at 163-64 ¶ 137. The panel explained that "[a]rbitral award is an all-inclusive term" and that a reasonable business person would understand it includes not only damages, but "interest, costs and legal fees." *Id.* at 164 ¶ 139. We agree with the panel's analysis and conclude that the language of the ADR Endorsement clearly waived the parties' rights to obtain pre-award interest in the arbitral proceeding.

Exxon argues that the arbitral panel declined to grant pre-award interest because it determined that it lacked jurisdiction to do so, not because it concluded that the parties waived their rights to pre-award interest entirely, and so the district court could award it. But under the language of the Policy, that is a distinction without a difference. "The scope of [an] arbitrator's authority must be determined from the language of the agreement, using accepted rules of contract law." *CBA Indus., Inc.*

v. Circulation Mgmt., Inc., 179 A.D.2d 615, 578 N.Y.S.2d 234, 237 (2d Dep't 1992). Here, the contract limited the recovery available "as a result of an ADR process" to the Policy limit, thereby restricting the arbitral panel's authority to grant any award beyond that amount. But a proceeding to confirm an arbitral award "ordinarily is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court." *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126, 132 (2d Cir. 2015) (cleaned up). We hold that paragraph 6 of the ADR Endorsement waives the parties' rights to pre-award interest beyond the Policy limit under N.Y. C.P.L.R. § 5001(a), either in the arbitration itself or in the subsequent proceeding to confirm the award. Accordingly, we reverse the judgment of the district court to the extent that it granted interest through the date that the arbitral panel entered its award.

We reach a different conclusion with respect to interest accruing after the arbitral panel entered its award. New York recognizes two distinct periods of "prejudgment interest." First, interest accrues under N.Y. C.P.L.R. § 5001(b) "from the earliest ascertainable date the cause of action existed" until the date the award is granted. Once the award is entered, interest accrues "upon the total sum awarded . . . from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment." *Id.* § 5002. The arbitral panel's award was a "report or decision" within the meaning of the statute. *See E. India Trading Co. v. Dada Haji Ebrahim Halari*, 280 A.D. 420, 421, 114 N.Y.S.2d 93 (1st Dep't 1952), *aff'd*, 305 N.Y. 866, 114 N.E.2d 213 (1953);

Durant v. Motor Vehicle Accident Indemnification Corp., 20 A.D.2d 242, 249, 246 N.Y.S.2d 548 (2d Dep't 1964), *modified on other grounds*, 15 N.Y.2d 408, 207 N.E.2d 600, 260 N.Y.S.2d 1 (1965). "Under New York law, post-verdict prejudgment interest is mandatory." *Adrian v. Town of Yorktown*, 620 F.3d 104, 107 (2d Cir. 2010). Unlike the arbitral award, which was plainly a "decision, award, or agreed settlement made as a result of an ADR process," Joint App'x at 60 ¶ 6, post-award prejudgment interest is a statutory requirement that falls inherently outside an arbitrator's authority and within the authority of the courts. The ADR Endorsement does not clearly waive the parties' rights to interest accruing after the arbitral panel issued its decision.[6] Accordingly, we remand to the district court to calculate the interest accrued through the date of judgment.

III. Conclusion

In sum, we hold as follows:

(1) The district court did not err in denying TIG's motion to vacate the judgment in light of Judge Ramos's conflict;

(2) Because the parties' ADR Endorsement amounts to a binding arbitration agreement, the district court did not err in compelling arbitration; and

6. Nor does it waive the parties' rights to post-judgment interest. *See* 28 U.S.C. § 1961(a).

(3) The district court erred in ordering TIG to pay pre-arbitral-award interest, but properly required TIG to pay interest for the period between the arbitral panel's award and the entry of judgment in the district court.

We therefore AFFIRM the district court's denial of the motion to vacate and the district court's order compelling arbitration, REVERSE in part its decision granting Exxon's request for prejudgment interest, and REMAND to the district court for further proceedings consistent with this opinion.

ERRATA

PAGE	LINE	DELETE	INSERT
12	Line 4	On August 7, 2019,	In August of 2019,
47	Line 4-5	accruing from August 7, 2019, the date on which the arbitral panel rendered its decision,	accrued

So Ordered:

/s/ WJN
William J. Nardini, Circuit Judge
September 13, 2020

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED OCTOBER 14, 2021

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

16 Cv. 9527 (MKV)

EXXONMOBIL OIL CORPORATION,

Petitioner,

-v.-

TIG INSURANCE COMPANY,

Respondent.

October 14, 2021, Decided
October 14, 2021, Filed

ORDER DENYING MOTION TO VACATE

MARY KAY VYSKOCIL, District Judge:

This matter is before the Court on the Motion of Respondent TIG Insurance Company for an "indicative ruling" under Fed. R. Civ. P 62.1(a)(3) stating either that the Court will grant Respondent's Motion to Vacate (1) the Court's Order compelling arbitration [ECF No. 21]; (2) the Court's Order confirming the arbitral award and imposing pre-judgment interest [ECF No. 49]; and (3) the final

judgment [ECF No. 52] in this matter should the Second Circuit remand for that purpose; or that that Motion at least raises a substantial issue regarding the justification for vacatur. [ECF No. 58]. This case was reassigned to me on August 17, 2021, after Judge Ramos was conflicted out of presiding over the case. For the reasons discussed below, the Court denies the Motion to Vacate.

BACKGROUND

This case concerns an insurance policy dispute between Petitioner ExxonMobil Oil Corporation ("Petitioner" or "Exxon") and TIG Insurance Company ("Respondent" or "TIG") regarding an Excess Liability Insurance Policy. The Policy covers Petitioner and provides for third-party liability insurance coverage subject to a $25 million limit. (Declaration of Donald W. Brown (Brown Decl.) Ex. A (Award) [ECF No. 38-1] ¶ 1). Beginning in the late 1990s, lawsuits seeking damages for groundwater and drinking water well contamination involving methyl tertiary butyl ether (MTBE) were filed against Exxon.[1] (Award ¶¶ 11-13). Exxon's liabilities in the MTBE lawsuits exceeded $325 million and implicated the full $25 million TIG Policy Limit. (Award ¶¶ 142-146).

In September 2015, Exxon made a formal demand to TIG for coverage. (Petition to Compel Arbitration (Pet.) [ECF No. 1] ¶ 10). After engaging in discussions regarding

1. MTBE is a gasoline additive used as an octane enhancer and as an oxygenator to reduce air pollution as required by federal mandates under the Clean Air Act. (Award ¶¶ 8-10).

Exxon's claim, (Pet. ¶ 10), TIG filed suit in New York County Supreme Court asking for a judicial declaration that TIG owes no coverage under the Policy for Exxon's liabilities, (Pet. ¶ 11). On December 9, 2016, Exxon filed in federal court a Petition to Compel Arbitration under the terms of the Policy. (*See* Pet.)

Shortly thereafter, this case was assigned to Judge Ramos. After briefing and oral argument, Judge Ramos issued an order granting Exxon's petition to compel TIG to submit to arbitration and to enjoin TIG from proceeding in the New York Supreme Court action. [ECF No. 21]. TIG filed a notice of appeal from the order [ECF No. 27], but then filed a motion to dismiss the appeal, which the Second Circuit granted, [ECF No. 30]. The parties proceeded to arbitration and on August 14, 2019, the arbitral Tribunal issued a decision awarding Exxon the full $25 million claim. (Award ¶147).

On November 21, 2019, Exxon filed a Motion to Confirm Arbitration Award and for Entry of Final Judgment including Pre-judgment Interest, [ECF No. 36], which the Court granted, [ECF No. 49]. Final Judgment was entered on May 26, 2020, [ECF No. 52], and TIG appealed on June 19, 2020, [ECF No. 53].

After the notice of appeal was filed, the Clerk of this Court issued a letter to the parties on July 29, 2021 explaining that Judge Ramos had been informed that "while he presided over the case he owned stock in ExxonMobil Corporation." [ECF No. 56]. Although the letter states that this ownership "neither affected nor

impacted his decisions in this case," it noted that "his stock ownership would have required recusal under the Code of Conduct for United States Judges." [ECF No. 56]. Subsequent to the receipt of this letter, Respondent filed in this Court the Motion to Vacate at issue here, [ECF No. 58], and moved to stay its appeal, [Motion to Hold Appeal in Abeyance, *ExxonMobil Oil Corporation v. TIG Insurance Company*, No. 20-1946 (2d Cir. 2021), ECF No. 74]. On August 30, 2021, the U.S. Court of Appeals for the Second Circuit granted Respondent's motion to hold the appeal in abeyance pending the resolution of its Motion to Vacate. [ECF No. 63]. The Appellate Court directed the parties to notify it when this Court issues a ruling pursuant to Respondent's Fed. R. Civ. P. 62.1 Motion, and in any event, no later than October 15, 2021. [ECF No. 63].

DISCUSSION

I. The Motion to Vacate Is Denied

As a threshold matter, Judge Ramos should have recused himself from this matter upon its assignment to him. Under the Code of Conduct for United States Judges, "[a] judge should . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Code of Conduct for United States Judges, Canon 2(A).

The law requires that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a); Code of

Conduct for United States Judges, Canon 3(C) (1). In furtherance of this objective, "[a] judge should inform himself about his personal and fiduciary financial interests." 28 U.S.C. § 455(a); Code of Conduct for United States Judges, Canon 3(C)(2).

Judge Ramos' ownership of stock in a party to this proceeding, and specifically in the party for which he has ruled in favor, impairs the public confidence in the integrity of the judicial process that these rules were put in place to prevent. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988); *see also* James V. Grimaldi, et al., *131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest*, Wall Street Journal, Sept. 28, 2021, https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421.

The Second Circuit has held that harmless error review applies to Section 455(a) violations. *See Faulkner v. Nat'l Geographic Enterprises Inc.*, 409 F.3d 26, 42 (2d Cir. 2005). The Court does not consider any violation of Section 455(a) to be harmless since the integrity of the judicial process is paramount and the potential damage from impairment of the public confidence in the judicial process is a serious concern. However, should the Court conclude that Judge Ramos' rulings were correct, the Court may deny the Motion to Vacate because Respondent would not have been harmed as regards this proceeding.

Appendix B

The Court has reviewed the Petition to Compel Arbitration, the Motions, and relevant filings in this proceeding, as well as the Orders and Opinions issued by Judge Ramos. For the below reasons, the Court concurs with Judge Ramos' thorough analysis and reasoning, and each of his orders. Accordingly, the Motion to Vacate the Court's prior Orders is denied.

A. Motion To Compel Arbitration

The Court adopts Judge Ramos' Order granting Petitioner's Motion to Compel Arbitration. [ECF No. 21]. The Policy between Petitioner and Respondent included Endorsement 11 [ECF No. 1-1, at 46], which sets out the ADR procedures for issues arising under the Policy. Under a plain reading of that contract term, if a party requests ADR under paragraph 1, but the parties cannot agree on the type of ADR to pursue in 90 days, the parties proceed to arbitration under paragraph 4. This is exactly how Judge Ramos read the provision. [ECF No. 22].

Respondent's sole argument on this motion is that Endorsement 11 should be read so that paragraph 4 is only triggered if the parties *actually agree* to ADR under paragraph 2 of Endorsement 11. [ECF No. 15]. However, Judge Ramos' reading is correct. Paragraph 4 specifically cites to paragraph 1 as the predicate for triggering arbitration. As such, the Court adopts Judge Ramos' reasoning and concludes that Respondent was not harmed by Judge Ramos' Order granting Petitioner's Motion to Compel Arbitration.

Appendix B

B. Motion To Confirm Arbitration

After Petitioner won in arbitration, it moved to confirm the arbitral award. [ECF No. 36]. TIG opposed the Motion to Confirm and cross-moved to vacate the arbitral award. [ECF Nos. 39, 41, 42]. Judge Ramos granted the Motion to Confirm. [ECF No. 49]. TIG now seeks vacatur of the Order. [ECF No. 58].

The Federal Arbitration Act delineates very narrow grounds for challenging an arbitration award. 9 U.S.C. §§ 9, 10(a). The party challenging an arbitral award bears a heavy burden. *See Leeward Constr. Co. v. American Univ. of Antigua-Coll. of Med.*, 826 F.3d 634, 638 (2d Cir. 2016). Respondent's sole argument in opposition to the confirmation of the Award was that it "manifestly disregarded the law." [ECF No. 41, at 8]. Respondent cited to the statement from the Tribunal that its analysis in interpreting provisions in the Policy was "guided by applying common speech and the reasonable expectation and purpose of the ordinary businessman." ([ECF No. 41, at 10] (citing Declaration of Donald W. Brown (Brown Decl.) Ex. A (Award) [ECF No. 38-1] ¶ 97). Respondent asserts that the language that the Tribunal used came from the decision in *Ace Wire & Cable Company v. Aetna Casualty & Surety Company*, 60 N.Y.2d 390, 457 N.E.2d 761, 469 N.Y.S.2d 655 (1983), which adopted *contra proferentum* as a means of interpreting ambiguous language in a contract. [ECF No. 41, at 10]. Respondent asserts that in applying the contract interpretation principles from *Ace Wire*, the Tribunal violated the Policy's provision that it be interpreted "in an even-handed fashion." [ECF No. 38-2 at V(q)].

Appendix B

The relevant provision of *Ace Wire* states:

> The tests to be applied in construing an insurance policy are common speech (*Lewis v. Ocean Acci. & Guarantee Corp.*, 224 N.Y. 18, 21, 120 N.E. 56) and the reasonable expectation and purpose of the ordinary businessman (*Bird v. St. Paul Fire & Mar. Ins. Co.*, 224 N.Y. 47, 51, 120 N.E. 86 (1918). The ambiguities in an insurance policy are, moreover, to be construed against the insurer, particularly when found in an exclusionary clause (*see Breed v. Insurance Co.*, 46 N.Y.2d 351, 353, 413 N.Y.S.2d 352, 385 N.E.2d 1280).

60 N.Y.2d at 398.

Judge Ramos concluded that the two interpretive principles laid out in *Ace Wire* are separate and that the Tribunal's use of one did not mean it had employed the other. [ECF No. 49, at 9-10]. Judge Ramos correctly concluded that "[t]here is no basis to conclude that interpreting a contract 'by applying common speech and the reasonable expectation and purpose of the ordinary businessman' is anything other than an evenhanded interpretive method." [ECF No. 49, at 8]. Further, Judge Ramos concluded that the Tribunal did use an even-handed interpretation of the Policy because it rejected both parties' interpretation of a term in the Policy, the meaning of which was disputed by the parties, and instead the Tribunal fashioned its own interpretation. Further, the Tribunal made clear that had it used the interpretation

of this term for which Respondent advocated, it still would have ruled for Petitioner. [ECF No. 49, at 10]. The Court concurs with Judge Ramos and adopts his reasoning. As such, the Court concludes that Respondent was not harmed by Judge Ramos' Order granting Petitioner's Motion to Confirm the Arbitration Award.

C. Imposition of Pre-Judgment Interest

Judge Ramos also granted Petitioner's request [ECF No. 37, at 15-22] that the judgment in the case include post-breach interest, consisting of both pre-and post-Award interest. [ECF No. 49]. The Court again concurs with and adopts Judge Ramos' reasoning.

First, the Tribunal did not choose to deny pre-judgment interest after concluding that it had authority to do so, which would have precluded the Court from granting Petitioner's request. *See Finger Lakes Bottling Co. v. Coors Brewing Co.*, 748 F. Supp. 2d 286, 289 (S.D.N.Y. 2010). The Tribunal merely concluded that it lacked jurisdiction to award interest since it found Respondent liable for the full $25 million Policy and the Policy states that any ADR award was limited to $25 million. (Award ¶¶ 137, 139, 140-141). Therefore, Judge Ramos correctly concluded that he could rule on this issue. [ECF No. 49, at 14].

As to the issue of interest itself, the law is clear, that "prejudgment interest is normally recoverable as a matter of right in an action at law for breach of contract." *New England Ins. Co. v. Healthcare Underwriters Mut. Ins.*

Co., 352 F.3d 599, 606 (2d Cir. 2003) (quoting *Graham v. James*, 144 F.3d 229, 239 (2d Cir. 1998)); *see also West Virginia v. United States*, 479 U.S. 305, 310, 107 S. Ct. 702, 93 L. Ed. 2d 639 (1987). And post award interest on an arbitration award is available as of right under New York law. *New York Hotel & Motel Trades Council v. Stanford N.Y.*, No. 21 CIV. 2012 (PAE), 2021 U.S. Dist. LEXIS 88832, 2021 WL 1851998, at *5 (S.D.N.Y. May 10, 2021); *Westchester Fire In. Co. v. Massamont Ins. Agency, Inc.*, 420 F. Supp. 2d 223, 226 (S.D.N.Y. 2005) (Chin, J.).

Respondent relies on the language of Endorsement 11 that states that "[A]ny decision, award, or agreed settlement made as a result of an ADR process shall be limited to the limits of this Policy [*ie.* $25 million]." [ECF No. 38-2, at 46]. Respondent's argument in opposition to Petitioner's motion was that this language precludes an imposition of interest that would result in judgment for damages exceeding $25 million. [ECF No. 41, at 20]. However, Judge Ramos correctly concluded that the language of this provision referring only to "decisions" and "awards" means that it only refers to decisions or awards by ADR bodies. [ECF No. 49, at 17]. Endorsement 11 does not refer to "orders" or "judgments," which are the product of judicial proceedings. Moreover, adopting Respondent's interpretation would preclude both pre-judgment and post-judgment interest and would create perverse incentives for the losing party to simply delay payment after judgment. *See Bank of New York v. Amoco Oil Co.*, 35 F.3d 643, 662 (2d Cir. 1994) ("[C]ourts should not interpret the settlement agreement so as to create incentives for the defendant to delay while enjoying the

free use of the plaintiff's money."). The Court concurs with Judge Ramos and adopts his reasoning. As such, the Court concludes that Respondent was not harmed by Judge Ramos' imposition of pre-judgment interest on Respondent and therefore declines to vacate that Order.

CONCLUSION

Respondent's Motion for an indicative ruling [ECF No. 58] is DENIED. The challenged Orders are legally correct, and the Court denies the request that they be vacated.

Dated: October 14, 2021
New York, New York

/s/ Mary Kay Vyskocil
MARY KAY VYSKOCIL
United States District Judge