10-910

United States Court of Appeals
for the
Second Circuit

SCANDINAVIAN REINSURANCE COMPANY LIMITED,
Petitioner / Appellee,

v.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, ST. PAUL REINSURANCE COMPANY, LTD., and ST. PAUL RE (BERMUDA) LTD.,
Respondents / Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK (NO. 1:09-CV-09531-SAS)
(HONORABLE SHIRA A. SCHEINDLIN, JUDGE)

OPENING BRIEF OF APPELLANTS ST. PAUL FIRE & MARINE INSURANCE CO., ET AL.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel of record for the Appellants ST. PAUL FIRE & MARINE INSURANCE COMPANY and ST. PAUL RE (BERMUDA) LTD. certifies that each of these companies is ultimately 100% owned by THE TRAVELERS COMPANIES, INC., which is a publicly traded entity listed on the New York Stock Exchange. Appellant ST. PAUL REINSURANCE COMPANY, LTD. was renamed SPRE Limited on March 12, 2008 and thereafter transferred all of its business to Unionamerica Insurance Company Ltd., which was sold on December 30, 2008 to Royston RunOff Ltd., a special purpose vehicle owned by Enstar Group Ltd. (a public company listed on NASDAQ) and private investors.

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PRELIMINARY STATEMENT

This appeal involves an important and recurring question of law that the District Court misapprehended: under what circumstances may a district court set aside an arbitration award for "evident partiality"? This Court has held repeatedly that the standard of "evident partiality" is less strict than the standard of "appearance of bias" for evaluating judicial conflicts of interest. *E.g., Pitta v. Hotel Ass'n of New York City*, 806 F.2d 419, 423 (2d Cir. 1986) ("[t]he mere appearance of bias that might disqualify a judge will not disqualify an arbitrator.") (citation omitted). Yet, in this case, the District Court turned this principle on its head and set aside an arbitration award in a reinsurance matter for reasons that, by themselves, would never disqualify a judge: two of the arbitrators here served as arbitrators in another reinsurance dispute; one witness testified in both arbitration proceedings; and two of the parties in the first arbitration had a minor business relationship with two *affiliates* of a party in the second. As a matter of law, these kinds of connections are insufficient to demonstrate "evident partiality." Accordingly, the District Court's decision vacating the arbitration award should be reversed.

Under relevant Circuit authority, a court may set aside an arbitration award for "evident partiality" where an arbitrator fails to disclose "a material relationship with a party," meaning, in the Court's words, one that gives rise to a "nontrivial conflict of interest." *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve*

Sanayi A.S., 492 F.3d 132, 137-38 (2d Cir. 2007). Abandoning this standard, and the Court's focus on relationships that create party-related conflicts, the District Court instead adopted a much looser test that inquires broadly whether an arbitrator has failed to disclose a connection of some kind "that is material to *the arbitration at issue.*" SA-33 (emphasis supplied). This was error.

As the phrase "evident *partiality*" itself indicates, the purpose of the standard is to evaluate whether an arbitrator is evidently biased *in favor of a party*. Consistent with this purpose, undisclosed party connections (*e.g.*, close familial or business ties) may satisfy the test if they are substantial. In contrast, non-party connections (*e.g.*, familiarity with the issues, witnesses, or industry practice) cannot satisfy the test because, by themselves, connections of this type do not inherently suggest impermissible bias. On the contrary, they merely reflect a common and beneficial feature of arbitration: the most desirable arbitrators are often the ones with the deepest experience in their respective industries.

The District Court's "material to the arbitration" standard is likewise unsound because, under it, virtually any "connection" may be used to challenge an arbitrator's decision, not simply party connections, thereby encouraging a losing party to search for, and likely find, a "pretext" to overturn an award. *See Lucent Techs. Inc. v. Tatung Co.*, 379 F.3d 24, 29 (2d Cir. 2004) (expressing a clear preference for applying the "evident partiality" standard in a way that avoids encourag-

ing a losing party to search for connections in the hopes of finding "a pretext for invalidating the award") (citation omitted). The District Court's standard is also inconsistent with the "heavy" burden of proof imposed on those challenging arbitral awards, the exceptionally "narrow" nature of judicial review in this context, and an essential purpose of the Federal Arbitration Act: to promote the certainty and finality of arbitration proceedings. Accordingly, the decision below should be reversed.

In addition to misconstruing the governing legal test, the District Court also misapprehended the record and likewise erred in applying its legal standard to the facts. In finding what it believed to be disqualifying connections between the two arbitration proceedings, the court stated that parties in the first proceeding were "related" to a party in the second. None of the parties in the first proceeding, however, were involved in the second, and none were "related" to any of the parties in the second in any traditional sense of significant overlapping corporate ownership. At most, two of the parties in the first proceeding had a minor business relationship with two *affiliates* of a party in the second. Under any standard, this kind of attenuated connection carries no legitimate implication of bias, let alone one sufficient to demonstrate "evident partiality."

The District Court also stated that the issues in the two proceedings were "similar." The two proceedings, however, involved different reinsurance agree-

ments with different parties and provisions. In addition, the first proceeding involved a claim for rescission of a reinsurance contract, whereas the second focused on the operation of a specific kind of reinsurance clause (a "deficit carry forward" provision, explained *infra*) not present in the first agreement. In truth, the two arbitrations were "similar" only in the sense that they both involved reinsurance contracts and, generally, transaction structures and concepts commonplace in reinsurance matters. This kind of attenuated connection likewise carries no legitimate implication of bias, let alone one sufficient to meet the "evident partiality" test.

Finally, although one witness testified in both proceedings, this was only so because, at one point in his career, he happened to have been employed by one of the parties in the first proceeding, and then, at a different time, by a party in the second. Further, the witness's testimony in the first proceeding was peripheral. But even if his testimony had been central, the mere fact that the same witness testified in both proceedings offers no legitimate suggestion of bias, let alone one adequate to demonstrate "evident partiality." Accordingly, the District Court's judgment should be reversed.

JURISDICTIONAL STATEMENT

On February 26, 2010, the District Court granted the petition of appellee Scandinavian Reinsurance Company Limited ("SRe") to vacate an arbitration award, and denied the cross-petition of appellants St. Paul Fire & Marine Insurance

Company, St. Paul Reinsurance Company, Ltd. (UK), and St. Paul Re (Bermuda) Ltd. (collectively "St. Paul") to confirm the award. SA-40-41. The District Court had subject matter jurisdiction pursuant to 9 U.S.C. §§ 9, 10, 203. St. Paul filed its notice of appeal on March 15, 2010. JA-652. This appeal is timely pursuant to Fed. R. App. P. 4(1)(A). The appeal is from a final order "denying confirmation of an [arbitration] award" and "vacating an [arbitration] award." 9 U.S.C. §§ 16(a)(1)(D)-(E). This Court possesses jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

(1) Whether the District Court erred in granting the petition to vacate the arbitration award of Petitioner-Appellee Scandinavian Reinsurance Company Limited?

(2) Whether the District Court erred in denying the Respondents-Appellants St. Paul's petition to confirm the arbitration award?

(3) Whether the District Court properly determined that the circumstances are sufficient to demonstrate "evident partiality"?

(4) Whether the District Court erred in its construction of the record?

(5) Whether the District Court erred in vacating the arbitrators' interim rulings?

STATEMENT OF THE CASE

On August 19, 2009, an arbitration panel comprised of Paul Dassenko ("Dassenko"), Jonathan Rosen ("Rosen"), and Peter Gentile ("Gentile") issued an award (the "Scandinavian Re Award") resolving a reinsurance arbitration dispute between St. Paul and SRe (the "Scandinavian Re Arbitration"). JA-189. On November 16, 2009, SRe filed a petition to vacate the award. JA-24, 335. On December 30, 2009, St. Paul filed a cross-petition to confirm the award. JA-356. St. Paul appeals a judgment of the United States District Court for the Southern District of New York (Scheindlin, J.) entered on February 26, 2010 denying confirmation and vacating the award. JA-652. The decision below is reported at *Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Ins. Co.*, No. 09-cv-9531, 2010 WL 653481 (S.D.N.Y. Feb. 23, 2010); SA-3.

STATEMENT OF FACTS

The District Court vacated the Scandinavian Re Award on the basis of connections it identified between the Scandinavian Re Arbitration and a separate and independent arbitration proceeding (the "Platinum Bda Arbitration") involving different parties and a different reinsurance agreement. The court found these connections relevant because two of the arbitrators in the Scandinavian Re Arbitration (Dassenko and Gentile) also served as arbitrators in the Platinum Bda Arbitration.

A. The Scandinavian Re Arbitration

SRe is a reinsurance company domiciled and located in Bermuda. JA-202.[1] On or about August 21, 1999, SRe and St. Paul entered into a certain Retrocessional Casualty Aggregate Stop Loss Agreement (the "Scandinavian Re Agreement"). JA-62. Under the Scandinavian Re Agreement, St. Paul "ceded" some of its "assumed" reinsurance liabilities to SRe.[2] Specifically, once St. Paul's losses reached a certain level, the agreement passed on to SRe St. Paul's losses under St. Paul's assumed "treaty" casualty business involving reinsurance contracts with effective dates between January 1, 1999 and December 31, 2001. JA-63.[3]

Following SRe's refusal to make a payment under the Scandinavian Re Agreement, St. Paul demanded arbitration in September 2007. JA-94. The Scandinavian Re Agreement provided for arbitration before a three-member panel, with

[1] Reinsurance is insurance for insurance companies and "occurs when one insurer (the 'ceding insurer' or 'reinsured') 'cedes' all or part of the risk it underwrites . . . ." to the reinsurer – another insurance company that is willing to assume the risk. *Unigard Sec. Ins. Co. v. N. River Ins. Co.*, 4 F.3d 1049, 1053 (2d Cir. 1993) (citations omitted). A "retrocessional" agreement is reinsurance for reinsurers. *Can. Life Assur. Co. v. Converium Ruckerversicherung (Deutschland) AG*, 210 F. Supp. 2d 322, 324 (S.D.N.Y. 2002), *aff'd*, 335 F.3d 52 (2d Cir. 2003).

[2] The term "assumed" refers to liabilities a reinsurer accepts from the original, or "ceding," insurance company; correspondingly, the term "ceded" refers to the liabilities the ceding insurer passes on to its reinsurer. *See Can. Life Assur. Co.*, 210 F. Supp. 2d at 324.

[3] In other words, the agreement ceded from St. Paul to SRe certain risks of loss associated with reinsurance contracts St. Paul Re had written to other insurance companies between January 1, 1999 and December 31, 2001. JA-63. Reinsurance agreements that cover specified classes of a ceding insurer's policies are referred to as "treaties." *Unigard*, 4 F.3d at 1054.

one arbitrator chosen by each party, followed by the selection of a third "umpire" arbitrator. JA-71-72. The agreement provided that "[a]ll arbitrators w[ould] be disinterested active or former executive officers of insurance or reinsurance companies or Underwriters at Lloyd's London." JA-71. SRe appointed Rosen as its party-appointed arbitrator, and St. Paul appointed Gentile. JA-128-39.

On November 14, 2007, Rosen and Gentile disclosed their respective party's list of candidates for the third "umpire" arbitrator. The Scandinavian Re Agreement did not require the use of arbitrators affiliated with any particular arbitration or industry organization, and the parties' lists thus included both "ARIAS" as well as non-ARIAS arbitrators. JA-61-75, 424.[4] Both sides listed Dassenko, and subject to his completing an umpire questionnaire, it was agreed he would serve as the umpire on the panel. JA-124.

1. The Arbitrators' Disclosures

The umpire questionnaire asked Dassenko to make various categories of disclosures. JA-112-20. In conjunction with the category captioned "Potential Conflicts," the questionnaire provided a lengthy list of each party's "subsidiaries, affiliates [and] parent companies," and requested Dassenko to advise whether he had "ever served as an arbitrator, umpire, attorney, or expert witness in a matter involv-

[4] ARIAS refers to the AIDA Reinsurance and Insurance Arbitration Society, a non-profit corporation that promotes improvement of the insurance and reinsurance arbitration process. JA-99.

ing any of the [listed companies or] had any involvement in an insurance or reinsurance transaction or dispute involving any of the [listed companies or] had any involvement in an insurance or reinsurance transaction or dispute involving any of the *specific* claims, policies and/or treaties at issue in [the Scandinavian Re Arbitration]." JA-113-17 (emphasis supplied). Notably, the questionnaire did not ask Dassenko to disclose every issue he had ever faced in any arbitration proceeding, or identify any of the reinsurance contracts he had reviewed in other matters.

On November 21, 2007, Chadbourne and Parke LLP ("Chadbourne"), attorneys for St. Paul, sent the questionnaire to Dassenko, and Dassenko returned it later that evening. JA-123-24. Dassenko's responses indicated that he had served previously on 152 insurance or reinsurance arbitration panels. JA-113. In response to the questionnaire's "Potential Conflicts" section, Dassenko disclosed that he had worked previously for Travelers (St. Paul's parent company) and was currently serving as an arbitrator in two arbitrations involving SRe affiliates American Centennial Insurance Company ("ACIC") and One Beacon. JA-116. Dassenko further disclosed that he had "been a reinsurance facultative underwriter, treaty account exec, broker, employee of a liquidator, and a senior executive of both reinsurance and insurance companies [and therefore] [i]t is likely that in one of those capacities [he had] transacted or sought to transact business with most of the entities listed above, including parties to [the] arbitration." JA-117.

A portion of the questionnaire captioned "Experience With Other Panel Members And Parties' Counsel" inquired whether Dassenko had served on an arbitration panel with Rosen or Gentile, or been involved with any of the parties' counsel in the case. JA-117-19. In response, Dassenko stated: "Jonathan [Rosen] is presently serving as umpire in a matter where I am appointed as party arbitrator . . . [and that] Jonathan and I previously served as party arbitrators in one other matter . . . ." JA-117. Dassenko further represented that he had never served on any other arbitration panel with Gentile, JA-118, which was true as the Platinum Bda Arbitration would not be initiated until June 2, 2008, more than six months later. JA-459.

When the participants in the Scandinavian Re Arbitration held an organizational meeting on February 25, 2008, Dassenko offered both parties the opportunity to ask further questions about the umpire questionnaire. JA-129. Neither side did. JA-129. By this time, SRe had knowledge of a connection between St. Paul and certain Platinum entities. JA-88. Nonetheless, SRe did not at any time request disclosures regarding any relationship between any of the arbitrators and any Platinum entity (or, for that matter, any other insurer or reinsurer who had or might have a connection with the parties or their affiliates).

Rosen and Gentile then proceeded to make their own separate disclosures regarding their involvement with SRe, St. Paul, both parties' counsel, Dassenko,

and each other. JA-129-38. These disclosures were less formal than Dassenko's written responses to the umpire questionnaire; neither Rosen nor Gentile were asked to complete a written questionnaire of their own. JA-129-38, 428.

Rosen began his disclosures by identifying his prior employment at a company that had "certain relationships with St. Paul Fire & Marine Insurance Company" as well as "relationships with members of the White Mountain Group" (SRe is a member of the White Mountain Group). JA-129-30. Rosen confirmed that he and Dassenko were serving concurrently on an arbitration panel involving an affiliate of SRe. JA-130-31. Rosen also disclosed concurrent service as a party-appointed arbitrator for an entity represented by Chadbourne. JA-131. Rosen further acknowledged that Chadbourne had represented a party adverse to his current employer in an arbitration where Rosen was a witness. JA-132.

Gentile disclosed that, over his thirty-five-year career, he worked for various companies, all of which he was "absolutely certain, have relationships and have had relationships with the parties." JA-136. He also disclosed that he was a fact witness in an arbitration between his former employer and an SRe affiliate, ACIC, where Dassenko was an arbitrator. JA-137. SRe asked no follow-up questions after any of the arbitrators' disclosures and expressed no concern over any potential commonality of issues or witnesses in any prior or concurrent proceeding. JA-135-36, 138.

Following the organizational meeting, the arbitrators made further supplemental disclosures, typically on an unsolicited basis because something triggered their memory. *See, e.g.*, JA-145, 270 (Gentile advised parties of potential connection to St. Paul in the very reinsurance transaction in dispute in the Scandinavian Re Arbitration); JA-143-44, 269 (Gentile recalled dispute between former employer and SRe that went to arbitration); JA-126, 269 (Dassenko disclosed connection to Travelers); JA-270 (Dassenko disclosed he reviewed submissions for reinsurance submitted by a St. Paul employee).

There were minor inadvertent omissions that the arbitrators rectified when they recalled them. *See, e.g.*, JA-122-23 (Dassenko inadvertently omitted connection to Chadbourne on questionnaire). The record reveals at least one clear instance where one of the party-appointed arbitrators was reminded of a potential conflict he thought he had disclosed previously concerning a concurrent St. Paul arbitration where he was an arbitrator. JA-167-68. SRe inquired whether this arbitration involved casualty business similar to that reinsured by St. Paul under the Scandinavian Re Agreement, but SRe did not inquire whether the reinsurance contracts, issues, or witnesses in the two proceedings were the same or similar. JA-168. As Dassenko commented during the course of the arbitration, numerous connections to witnesses and other parties "is, of course, what happens in industry arbitrations." JA-153.

In spite of the multitude of disclosures demonstrating each panelist's interrelatedness with his co-panelists, the parties involved, and other proceedings, neither party objected. For example, neither party objected or asked follow-up questions when Dassenko disclosed he had served on matters with affiliates of the companies involved in the Scandinavian Re Arbitration. JA-116. Likewise, neither party objected or asked follow-up questions after Dassenko disclosed he had served with Rosen on other panels. JA-117.

Additionally, neither party objected following disclosures involving panelist connections to witnesses. For example, both Rosen and Gentile disclosed they had prior business relationships with SRe's expert witness, Richard Hershman, with Gentile advising he had known Hershman for thirty-five years and considered him "a friend" whom he "worked with…a long time, and we know each other very, very well." JA-150-53. Gentile further disclosed that, while he was employed at Gerling, one of SRe's witnesses, Jens Juul (SRe's former President and CEO), had appeared as an opposing expert in an arbitration involving Gerling. JA-270. Notably, neither party asked whether common witnesses were involved in any other arbitrations where two panelists had disclosed serving with each other.

2. The Issues in the Scandinavian Re Arbitration and the Course of the Proceeding

SRe's primary contention in the Scandinavian Re Arbitration was that St. Paul had misled SRe at the time it entered into the Scandinavian Re Agreement. JA-90. SRe advised the arbitrators that it was seeking rescission or, alternatively, reformation based on unilateral or mutual mistake. JA-90. Following nearly eighteen months of discovery, SRe maintained its rescission claim. JA-430-40; *see also* JA-438.

As a peripheral part of the arbitration proceeding, SRe also initially disputed the manner in which a particular part of the agreement operated. The dispute involved the number of "experience accounts" called for under the agreement. JA-421-23.[5] SRe argued there was a single, consolidated experience account for the agreement's entire three-year period. JA-436. St. Paul maintained there were three separate account balances, one for each year. JA-91. SRe first downplayed and then abandoned this issue. In its initial pre-trial hearing brief, SRe sought no relief in connection with the experience accounts and merely discussed them as part of the proceeding's background. JA-436-40. Likewise, SRe made no mention

[5] As used in the Scandinavian Re Agreement, the experience accounts worked as follows. For each of the three years covered by the agreement, St. Paul held in an "experience account" the premiums that it owed SRe under the agreement. Any losses that SRe was obligated to pay St. Paul would be paid first from the experience account, and then by SRe from its own funds after the balance in the experience account was depleted. JA-422.

of the issue during its opening statement. JA-207-08. Further, during closing arguments, SRe acknowledged that the issue was "peripheral." JA-445. Finally, SRe's proposed draft awards submitted at the close of the arbitration hearing made no mention of its experience account claim and sought no relief on it. JA-452-57.

The panel in the Scandinavian Re Arbitration conducted an evidentiary hearing from June 15 through July 2, 2009. Fourteen witnesses testified, including Bart Hedges, a former employee of SRe (Hedges would also testify in the Platinum Bda Arbitration). Hedges acknowledged that, as an employee of SRe, he had no direct involvement with St. Paul in the negotiation of the Scandinavian Re Agreement and was only tangentially involved with the contract itself throughout nearly its entire effective period. JA-309-11. As in all rescission cases, the relevant inquiry was what the parties understood at the time they negotiated their contract. Because Hedges did not participate directly in the negotiations between the parties, and because those who *were* directly involved testified extensively, his credibility as a witness was not directly probative of the principal issues.

3. The Arbitrators' Interim Orders

After the organizational meeting held on February 25, 2008, and prior to the evidentiary hearing commenced on June 15, 2009, the arbitration panel convened several times to address discovery disputes and payment security issues, including St. Paul's previous draw of $13,231,000 from collateral SRe had posted under the

Scandinavian Re Agreement. On July 18, 2008, the panel upheld St. Paul's $13,231,000 draw. There is no evidence that, at the time it issued its interim rulings, Dassenko or Gentile had any knowledge of any connection between St. Paul and Platinum Bda.

4. The Scandinavian Re Award

The arbitration award, issued on August 19, 2009, was divided into five rulings, four of which appear to be unanimous. In the first ruling, a majority of the panel declared the Scandinavian Re Agreement to be valid and enforceable, rejecting SRe's rescission claim. JA-189. In the second ruling, the panel agreed with St. Paul's position regarding the experience accounts. JA-189. The remaining rulings made various determinations regarding SRe's obligations and liabilities. JA-189-90.

B. The Platinum Bda Arbitration

As noted, two of the arbitrators in the Scandinavian Re Arbitration (Dassenko and Gentile) also served as arbitrators in the Platinum Bda Arbitration. The Platinum Bda Arbitration involved a reinsurance dispute between PMA Capital Insurance Company and certain of its affiliates (collectively, "PMA") and Platinum Underwriters Bermuda, Ltd. ("Platinum Bda"). JA-258, 459. Platinum Bda was PMA's reinsurer, and on June 2, 2008, Platinum Bda demanded arbitration against PMA. JA-459. *See PMA Capital Ins. Co. v. Platinum Underwriters Bermuda,*

Ltd., 659 F. Supp. 2d 631, 632-34 (E.D. Pa. 2009).

1. The Arbitrators' Disclosures

The parties in the Platinum Bda Arbitration held their organizational meeting on September 23, 2008. JA-561. The disclosure process was even less formal than the process in the Scandinavian Re Arbitration, as neither the umpire nor either party-appointed arbitrator submitted written disclosures prior to the meeting. JA-561. Instead, each arbitrator provided disclosures at the beginning of the meeting without the benefit of written questions. These disclosures were not precipitated by specific questions from the parties, and neither party asked a single follow-up question to any of the disclosures. JA-561-64. Minor inadvertent omissions were made. *See, e.g.*, JA-562-563.

During the course of the proceedings, Gentile stated "[w]ith respect to the parties, PMA, Platinum, and Platinum's predecessor, St. Paul Re, this is the first matter that I will be serving on an arbitration on." JA-562. The statement is inaccurate in part, and it is unclear what Gentile meant by it. St. Paul Re was not and has never been Platinum's corporate predecessor. JA-318; *see also* Ex. A. In addition, St. Paul Re was not a party in the Platinum Bda Arbitration. It is possible that Gentile mentioned St. Paul Re because St. Paul Re was formerly PMA's reinsurer and issued the *predecessor contract* to the agreement at issue in the PMA reinsurance dispute, prior to St. Paul's cessation of reinsurance operations in 2002. JA-

646. SRe presented no evidence, however, demonstrating that Gentile's misstatement was anything other than inadvertent.[6]

Although the record reveals that Dassenko and Gentile served concurrently on the Platinum Bda Arbitration during a portion of the Scandinavian Re Arbitration, the record is silent as to why they did not disclose the Platinum Bda Arbitration as part of their ad hoc supplemental disclosures in the Scandinavian Re Arbitration. Again, however, SRe presented no evidence that this was anything more than an inadvertent omission. In any event, there is no evidence that either "Dassenko or Gentile had any financial (or other) interest in the outcome of the arbitration," and, accordingly, no evidence that they had any motive to intentionally mislead the parties. SA-32.

2. The Issue in the Platinum Bda Arbitration and the Course of the Proceeding

The focus of the Platinum Bda Arbitration was whether Platinum Bda could take advantage of a "deficit carry forward" provision in its 2003 reinsurance agreement with PMA. A "deficit carry forward" provision allows a reinsurer to carry forward losses from one accounting period to the next so the reinsurer may

[6] In its decision in the PMA case, the District Court for the Eastern District of Pennsylvania stated erroneously that "[i]n 2002, St. Paul divested its reinsurance subsidiary, St. Paul Re, which became Platinum." *PMA*, 659 F. Supp. 2d at 633. As noted below, St. Paul sold certain of its renewal rights and other assets to Platinum Holdings. St. Paul Re did not "become" Platinum, but instead continued in run-off with its separate assets and liabilities. *See* Ex. A.

recover its losses from one period from funds available in a particular experience account covering a different period. *See PMA*, 659 F. Supp. 2d at 633-34, 637-40.

In the Platinum Bda Arbitration, PMA disputed whether Platinum Bda could take advantage of this provision in the parties' reinsurance contract. Platinum argued that, if any funds remained in the 2003 experience account, Platinum was entitled to retain from those funds an amount equal to the losses incurred by the reinsurer that preceded Platinum under the reinsurance agreement in place for the 1991-2001 period. PMA disagreed, although PMA later apparently abandoned this argument. *Id*. at 634. PMA also disputed how losses would be calculated. *Id*. During the course of the Platinum Bda Arbitration, one of several witnesses who testified by videotaped deposition was Bart Hedges, a former employee of Platinum Bda (who, as noted, also testified in the Scandinavian Re Arbitration as an employee of SRe).

As the district court in the Platinum Bda case determined, the "record shows that the gravamen of the Parties' dispute was the Deficit Carry Forward Provision." *Id*. at 639. In contrast, the Scandinavian Re Arbitration did not involve this dispute because, among other reasons, the Scandinavian Re Agreement does not contain a deficit carry forward clause.

3. The Platinum Bda Award

After a two-day hearing, the arbitrators in the Platinum Bda Arbitration, including Dassenko and Gentile, ruled in favor of Platinum Bda (Hedges' former employer) and ordered PMA to pay $6 million to the reinsurer within 30 days. *Id.* at 634. On review, the district court set aside the award on the ground that an immediate payment had not been requested by either party and was not authorized under the parties' agreement prior to final settlement of all amounts owing between the parties. *Id*. at 635-36.

C. The Business Relationship Between St. Paul and Two Affiliates of Platinum Bda

As noted, none of the parties in the Scandinavian Re Arbitration were parties in the subsequent Platinum Bda Arbitration. St. Paul, however, does have a minor business connection with two *affiliates* of Platinum Bda. *See* Ex. A.

The St. Paul appellants in this matter are subsidiaries of The St. Paul Companies, Inc., which merged with Travelers Property Casualty Corporation ("Travelers") in 2003. JA-317. In late 2002, St. Paul decided to cease writing reinsurance and to place its book of reinsurance business in run-off.[7] JA-182. St. Paul sold its rights to renew its reinsurance contracts and related assets to Platinum Underwriters Holdings, Ltd. ("Platinum Holdings") in exchange for common stock,

[7] A reinsurer in "run-off" ceases to underwrite new reinsurance business and exclusively administers its obligations under its previously issued contracts. SRe is also currently in run-off. JA-223.

options to purchase additional stock, and an offer to sit on the Platinum board of directors. JA-182, 282. Travelers – St. Paul's ultimate corporate parent – did not keep these interests for long, however, and sold its Platinum stock, relinquished the seat on Platinum's board, and divested itself of most of its Platinum options several years *prior* to both the Scandinavian Re and Platinum Bda Arbitrations. JA-319-20. The divestment of its limited interests in Platinum Holdings left Travelers with only enough options to purchase less than 1.3% of Platinum Holding's outstanding stock. JA-319; *see also* Ex. A. There is no evidence in the record that these options had any value.

The only other connection that remained between St. Paul and any of the Platinum entities prior to the arbitrations at issue was a contractual relationship for limited administrative services between St. Paul Re and Platinum Underwriters Inc. ("Platinum US"). Platinum US is a subsidiary, through various corporate intermediaries, of Platinum Holdings. JA-280; *see also* Ex. A.[8] Pursuant to this relationship, St. Paul Re has a limited connection to *Platinum US* (not Platinum Bda, the party in the Platinum Bda Arbitration), whereby Travelers Special Services receives roughly $300,000 annually for administrative services on business ceded to

[8] Platinum US is the wholly owned subsidiary of Platinum Finance, a United States intermediate holding company. JA-280. Platinum Finance is the wholly owned subsidiary of Platinum Regency, an Irish intermediate holding company. JA-280. Platinum Regency is the wholly owned subsidiary of Platinum Holdings. JA-280. In addition to a lack of direct corporate connection, "Platinum Bda and Platinum US have separate management teams and staffs." JA-318.

Platinum US by St. Paul. JA-318-19; *see also* Ex. A. This connection, which generates a gross annual income of roughly $300,000, represents less than .0001% of Travelers' *net* income in 2008 of $2.924 billion. JA-319. St. Paul has *no* connection or relationship with the separate and distinct Platinum Bda entity, and never has. JA-318; *see also* Ex. A.

Pursuant to St. Paul's plan to place its reinsurance business in run-off, neither Platinum Holdings, nor any of its subsidiaries, assumed any of St. Paul's pre-January 1, 2002 reinsurance liabilities as part of Platinum Holding's acquisition of St. Paul's reinsurance renewal rights. JA-182. St. Paul retained the pre-2002 liabilities and related reserves for reinsurance contracts underwritten by St. Paul Re, which included the entirety of the business and transaction at issue in the Scandinavian Re Arbitration. JA-182, 189. Accordingly, the Platinum entities have no connection to the transaction in the Scandinavian Re Arbitration.

D. The District Court's Vacatur of the Scandinavian Re Award

SRe filed its petition to vacate the Scandinavian Re Award on November 16, 2009. On December 30, 2009, St. Paul filed its response and cross-petition to confirm the award. On February 26, 2010, the District Court vacated the $187 million Scandinavian Re Award for "evident partiality," and remanded the matter for arbitration before a new arbitral panel. SA-40-41.[9] The District Court held that vaca-

[9] The court did not hold oral argument or conduct an evidentiary hearing.

tur was appropriate because "the Scandinavian Re Arbitration and the Platinum Bda Arbitration were presided over by two common arbitrators, overlapped in time, shared similar issues, involved related parties, [and] included Hedges as a common witness." SA-33-34. In addition to vacating the award, the court also vacated the panel's interim rulings, including their decision upholding St. Paul's $13,231,000 draw from collateral SRe had posted under the Scandinavian Re Agreement. SA-40-41. This appeal followed.

SUMMARY OF THE ARGUMENT

This case does not involve any claim that the arbitrators below exhibited actual disqualifying bias in performing their duties. Rather, this case involves SRe's contention that two of the arbitrators failed to disclose their involvement with a second arbitration (the Platinum Bda Arbitration) and, on that basis, the Scandinavian Re Award should be set aside as impliedly biased under the "evident partiality" standard. The District Court agreed with SRe, but its decision is contrary to applicable law and should be reversed.

First, in order to demonstrate "evident partiality," SRe carries the heavy burden of proving sufficient facts such that "a reasonable person would have to conclude that an arbitrator was *partial to one party* to the arbitration." *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) (emphasis supplied). Under this standard, an arbitrator "who

knows of a material relationship *with a party* and fails to disclose it meets [the] 'evident partiality standard.'" *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi A.S.*, 492 F.3d 132, 137 (2d Cir. 2007) (emphasis supplied). It bears emphasis that, under this standard, the arbitrator's duty to disclose is triggered only if there is a material relationship indicating bias in favor of *a party* – in the Court's words, a "non-trivial conflict of interest" – such as a familial relationship or an employment or other business connection. *See, e.g., id.* at 137-38; *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278, 283 (5th Cir. 2007). In this case, there were no undisclosed relationships *with a party*, and none even remotely suggesting bias. The Platinum Bda Arbitration did not involve any of the parties in the Scandinavian Re Arbitration, and the fact that (1) the two proceedings involved reinsurance issues, (2) Hedges testified in both, and (3) St. Paul has a business connection with two affiliates of Platinum Bda does not demonstrate a disqualifying *party* connection with an arbitrator requiring disclosure, let alone any other connection suggesting implied bias sufficient to satisfy the "evident partiality" test.

In concluding otherwise, the District Court dramatically expanded the governing standard, changing this Court's "material relationship with a party" test into a far more relaxed inquiry into "whether a relationship is material to the arbitration at issue," SA-33 – an inquiry so broad that it could pull into the analysis virtually

any connection related to an arbitration, no matter how attenuated or unrelated to any meaningful demonstration of bias on the part of an arbitrator. In doing so, the District Court misapplied *Applied Industrial* in conflict with established Supreme Court and Circuit precedent. *See, e.g., Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 150-52 (1968); *Morelite*, 748 F.2d at 84; *Applied Indus.*, 492 F.3d at 137. Contrary to the District Court's analysis, the standard is one of "evident *partiality*," not "evident connection." Nor is there any freestanding duty of disclosure – disclosure is only required in this context if there exists a connection that rises to the level of a "nontrivial conflict of interest." Additionally, the District Court's looser standard does not comport with the heavy burden of proof imposed on a party challenging an arbitration award, the extremely narrow form of judicial review applicable in cases of this kind, or the strong federal policy favoring arbitration.

Further, if left standing, the consequences of the District Court's decision are serious and severe. Experienced arbitrators in a particular industry such as reinsurance often hear similar issues over and over again, commonly hear from the same witnesses in different proceedings, and often preside over disputes between parties that have business connections of one kind or another with parties in other proceedings. Under the District Court's relaxed analysis, virtually all arbitral awards would be subject to challenge if an arbitrator happened to miss one or more of

these connections in making his or her disclosures, dramatically unsettling long-standing industry expectations and injecting great uncertainty into the process. In this case, the District Court far too easily swept aside the parties' and the arbitrators' enormous expenditure of time and resources for reasons that would never justify setting aside a court's judgment on grounds of "appearance of bias." Because the "evident partiality" standard is even more forgiving than the "appearance of bias" test, this Court should reverse the District Court's judgment.

Second, even assuming *arguendo* that the District Court's novel legal standard were correct, the court misapprehended the relevant facts in order to arrive at its conclusion. For example, the two arbitrations did not involve truly related parties, JA-318-20, *see infra* p. 49, and the record does not support the District Court's assessment that the issues in the two arbitrations were meaningfully similar, *see infra* p. 50-51. In addition, although Hedges testified in both proceedings, there is no substantial connection between his testimony in one proceeding and his testimony in the other, and, in any event, his testimony was peripheral in the Scandinavian Re Arbitration, *see infra* pp. 51-52. Further, the District Court confused the overlap in time between the two arbitrations and inappropriately insinuated improper conduct on the part of the arbitrators as a result, *see infra* pp. 54-55.

Third, even assuming *arguendo* that the District Court's novel legal standard were correct and it correctly characterized the facts, it still erred in finding "evident

partiality." The facts simply do not carry with them any inherent suggestion of impermissible bias – unless one is willing to go so far as to believe that impermissible bias arises merely through ordinary exposure to an issue, a witness, or participants in a particular industry. That, of course, cannot be right.

In addition, the District Court erred in setting aside the arbitrators' interim rulings, including their validation of St. Paul's draw of $13,231,000 from collateral SRe had posted under the Scandinavian Re Agreement. There is no evidence in the record that Dassenko or Gentile had any knowledge of any connection between St. Paul and Platinum Bda at the time they issued these rulings. Accordingly, even under the District Court's analysis, there is no basis to conclude that, in issuing their interim decisions, any of the arbitrators had acted with "evident partiality."

Because the District Court erred on both the law and the facts, and likewise erred on its application of the law to the facts, its decision granting SRe's petition to vacate the arbitration award and its denial of St. Paul's petition to confirm the award should be reversed.

STANDARD OF REVIEW

When reviewing a district court's decision to vacate an arbitration award, the court of appeals must review findings of fact for clear error and questions of law *de novo*. *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 136 (2d Cir. 2007). The court also reviews *de novo* the district

court's application of the law to the facts. *Peconic Bay Keeper, Inc. v. Suffolk County*, 600 F.3d 180, 185 (2d Cir. 2010).

ARGUMENT

The parties' respective motions to confirm and vacate the Scandinavian Re Award are governed by section 207 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention").[10] Section 207 provides that a court "shall" confirm an award falling under the Convention unless it falls within one of the very limited exceptions enumerated in the Convention. 9 U.S.C. § 207. An award governed by the Convention that is issued in the United States may also be vacated under the domestic provisions of the FAA. *Zeiler v. Deitsch*, 500 F.3d 157, 164 (2d Cir. 2007). The grounds for vacatur under those FAA provisions are equally limited. SRe's arguments are based on one of the FAA's statutory grounds for vacatur, specifically "evident partiality" of the arbitrators under 9 U.S.C. § 10(a)(2).

I. The Federal Arbitration Act and "Evident Partiality"

Congress's purpose in enacting the Federal Arbitration Act ("FAA") was "to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.'" *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) (quoting *Buckeye*

[10] On December 29, 1970, the United States adopted the Convention as part of the Federal Arbitration Act, 9 U.S.C. §§ 201-08.

Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)). In addition, Congress intended "to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation." *O.R. Secs., Inc. v. Prof'l Planning Assocs., Inc.*, 857 F.2d 742, 745 (11th Cir. 1988) (internal quotations omitted). Under section 9 of the FAA, district courts "must" confirm an arbitration award "unless it is vacated, modified or corrected as prescribed in [sections] 10 and 11." *Hall*, 552 U.S. at 582 (internal quotation marks omitted). As is relevant here, section 10(a) of the FAA provides:

> [i]n any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--…(2) where there was evident partiality or corruption in the arbitrators, or either of them;….

9 U.S.C. § 10(a).

Under the FAA, a district court may only vacate an arbitration award "in extremely narrow circumstances." *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1311 (11th Cir. 1998); *see also Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 388 (2d Cir. 2003) ("A party petitioning a federal court to vacate an arbitral award bears the heavy burden of showing that the award falls within a very narrow set of circumstances"). Indeed, because the FAA expresses a presumption that arbitration awards will be confirmed, 9 U.S.C. § 9, courts have described the standard of review of an arbitra-

tor's decision as "one of the narrowest standards of judicial review in all of American jurisprudence." *Lattimer-Stevens Co. v. United Steelworkers*, 913 F.2d 1166, 1169 (6th Cir. 1990); *see also In re Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 700 (2d Cir. 1978) ("we have not been quick to set aside the results of an arbitration because of an arbitrator's alleged failure to disclose information."). Vacatur is viewed as a "draconian remedy," *Positive Software Solutions v. New Century Mortgage Co.*, 476 F.3d 278, 286 (5th Cir. 2007), and a disposition reached only with reluctance, *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 682 (7th Cir. 1983) (Posner, J.) (citing cases). Based on the federal policy favoring arbitration and the fact that judicial review of arbitration awards is "extremely limited," the "evident partiality" exception in section 10(a) "is to be strictly construed." *Gianelli*, 146 F.3d at 1312.

Consistent with these foundational principles, the party challenging an award (here SRe) bears the burden of demonstrating partiality, "and the showing required to avoid confirmation is very high." *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006); *see also Andros*, 579 F.2d at 700 ("the burden of proof…rests upon the party asserting bias") (internal quotation marks omitted). Courts properly have demanded that a party complaining of "evident partiality" carry its burden of proof by offering evidence of favoritism that is "direct, definite and capable of demonstration rather than remote, uncertain or speculative." *Harter*

v. Iowa Grain Co., 220 F.3d 544, 553 (7th Cir. 2000) (internal quotation marks omitted); *see also Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 707-08 (2d Cir. 1985). SRe has failed to meet its burden in this case, and the District Court's judgment to the contrary misapprehends the relevant governing law.

II. The "Evident Partiality" Standard Is Satisfied Only by Material Relationships Indicating an Arbitrator Is Biased in Favor of a Party, and the Requirements of the Standard Have Not Been Met Here.

As noted, this case does not involve any contention that the arbitrators below exhibited any actual disqualifying bias in performing their duties. For example, there are no statements in the record suggesting that any arbitrator held an inappropriate view of any party, and SRe did not argue below that it has any evidence of actual bias. Likewise, there is no evidence that any of the arbitrators had any undisclosed, nontrivial business relationships with St. Paul. Instead, this case involves SRe's contention that "evident partiality" exists because two of the arbitrators failed to disclose that, during the course of the Scandinavian Re Arbitration, they were also selected to serve on a second arbitration panel that also involved reinsurance, a witness (Hedges) who testified in both proceedings, and a party (Platinum Bda) that is an affiliate of two entities (Platinum Holdings and Platinum US) that did business with St. Paul. At bottom, SRe's position is that "evident partiality" should be presumed from these circumstances. SRe is wrong, and the District Court erred in accepting SRe's contention.

It is clear that, in interpreting and applying the "evident partiality" standard, the Second Circuit has rejected as inappropriately restrictive the "actual partiality" or "appearance of bias" approaches governing judicial disqualifications. *See, e.g.*, *United States v. International Bhd. of Teamsters*, 170 F.3d 136, 146-47 (2d Cir. 1999) (discussing difference between "actual partiality" standard applicable to Article III judges, 28 U.S.C. § 455(a), and "lower" standard of "evident partiality"); *Pitta v. Hotel Assn. of New York City*, 806 F.2d 419, 423 (2d Cir. 1986) ("The mere appearance of bias that might disqualify a judge will not disqualify an arbitrator.") (internal quotation marks omitted); *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 83-84 (2d Cir. 1984). In this instance, the District Court inverted this principle by applying a standard more stringent than "appearance of bias," and setting aside the Scandinavian Re Award for reasons that would *never* disqualify a judge. The fact that a federal judge has presided over another case with the same or similar issues, has heard or will hear from the same witness in multiple proceedings, and has presided or will preside over a dispute involving parties connected by a business relationship would never require judicial disqualification for "appearance of bias." *A fortiori*, these considerations are insufficient to satisfy the more relaxed standard of "evident partiality."

There is a compelling reason why the "evident partiality" standard is less exacting than the "appearance of bias" test and permits without question many

kinds of connections that might serve to disqualify a judge. If parties wanted their disputes resolved by an Article III judge, they would not have inserted an arbitration clause in their contract. Those who do so "want[] dispute resolution by experts in the…industry." *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 645 n.8 (6th Cir. 2005). Accordingly, those parties "choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen." *Id.* (internal quotation marks omitted); *see generally Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983) ("[P]eople who arbitrate do so because they prefer a tribunal knowledgeable about the subject matter of their dispute to a generalist court with its austere impartiality but limited knowledge of subject matter.").

In this case, both parties chose arbitration and, specifically, arbitrators with deep connections to their industry. *See* JA-71. In challenging the Scandinavian Re Award, SRe basically repudiated the essential attributes of its own bargain. Although it initially agreed that businesspersons with familiarity and experience in the reinsurance industry would arbitrate its dispute, it sought to jettison the Scandinavian Re Award based on the inevitable consequence of the very quality that made the arbitrators here so desirable: the breadth of their experience and, with it, the likelihood that they would be involved in other reinsurance disputes, hear overlapping witnesses, and generally interact with numerous participants in the indus-

try. Apart from being deeply inequitable, SRe's position is also contrary to law.

In the seminal case *Commonwealth Coatings Corp. v. Continental Cas. Co.*, the Supreme Court examined the meaning of "evident partiality." 393 U.S. 145 (1968). Justice Black wrote the plurality opinion, representing the position of four justices, equating the ethical standards required of Article III judges with those required of arbitrators. *Morelite*, 748 F.2d at 82. Specifically, Justice Black wrote that "[w]e can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties *any dealings that might create an impression of possible bias*." *Commonwealth*, 393 U.S. at 149 (emphasis supplied). As this Court has noted, however, "[f]our justices…do not constitute a majority of the Supreme Court," *Morelite*, 748 F.2d at 82, and Justice Black's analysis has not carried the day.

The opinion embraced by this and virtually all other circuits is Justice White's concurrence in *Commonwealth*, which sets forth a very different standard. "The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges," he wrote. *Commonwealth*, 393 U.S. at 150. He continued, "[i]t is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function." *Id.* Accordingly, "arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in ad-

vance, or if they are unaware of the facts but the relationship is trivial." *Id*.

In *Morelite*, this Court examined at length both the Black plurality opinion, concluding that much of it "must be read as dicta," 748 F.2d at 83, and the White concurrence. The Court determined that "evident partiality" is found "where a reasonable person would have to conclude that an arbitrator was partial to *one party* to the arbitration." *Id.* at 84 (emphasis supplied); *see also Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi A.S.*, 492 F.3d 132, 137 (2d Cir. 2007) ("Unlike a judge, who can be disqualified in any proceeding in which his impartiality *might* reasonably be questioned, an arbitrator is disqualified only when a reasonable person, considering all of the circumstances, would *have* to conclude that an arbitrator was partial to one side.") (internal quotation marks and citations omitted). In *Applied Industrial*, the Court further reasoned that "an arbitrator who knows of a *material* relationship *with a party*" – meaning, in the Court's words, a relationship involving a "nontrivial conflict of interest" – and "fails to disclose it meets *Morelite*'s 'evident partiality' standard." 492 F.3d at 137-38 (emphasis supplied).[11]

[11] The Fourth Circuit has applied a standard even more difficult for losing parties such as SRe, holding that "nondisclosure, even [of material and relevant facts that would demonstrate an arbitrator's evident partiality], has no independent legal significance and does not in itself constitute grounds for vacating an award." *ANR Coal Co. v. Cogentrix of N. Carolina, Inc.*, 173 F.3d 493, 499 (4th Cir. 1999). The Eighth Circuit has also held that, even if evident partiality existed, the party complaining of such partiality also "has the burden…to show that this partiality had a

It bears emphasis that, in order to trigger the disclosure requirement addressed above, the relevant relationship must be one that indicates bias in favor of a *party*. *See, e.g.*, *Commonwealth*, 393 U.S. at 150 (White, J., concurring) (discussing arbitrators' relationship "with the parties before them"); *Local 814 v. J&B Sys. Installers & Moving, Inc.*, 878 F.2d 38, 40 (2d Cir. 1989) (identifying father-son relationship with respect to "evident partiality" as too attenuated where it did not involve a direct relationship between a party and the arbitrator); *accord Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278, 283 (5th Cir. 2007) (discussing relationship between the arbitrator and the parties); *ANR Coal Co. v. Cogentrix of N. Carolina, Inc.*, 173 F.3d 493, 501 (4th Cir. 1999) ("ANR has not demonstrated that…representation [by arbitrator's law firm] of Carolina Power [an entity with whom party had a contract] evidences any 'direct relationship' between [the arbitrator] and [the party]. Carolina Power was not a party to the arbitration; [the law firm's] representation of the utility is thus a step

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prejudicial impact on the arbitration award." *Winfrey v. Simmons Foods, Inc.*, 495 F.3d 549, 552-53 (8th Cir. 2007) ("The mere possibility of prejudice is insufficient to justify setting aside the award."). Given the strong federal policy favoring arbitration, and the need to avoid encouraging losing parties to search the record for any "pretext" to overturn an arbitration award, these more exacting requirements are correct. The Court need not reach this disagreement among the courts of appeals, however, because the District Court's decision in this case does not pass muster under this Court's standard. In the unlikely event the Court were to consider affirming the District Court's decision, St. Paul respectfully suggests that the Court should also consider whether the more exacting requirements of its sister circuits are warranted.

removed from the arbitration proceeding."); *Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 434 (11th Cir. 1995) (holding failure to disclose did not meet "evident partiality" standard and noting "[t]he incident did *not* involve any of the parties to the arbitration hearing"); *Lozano v. Maryland Cas. Co.*, 850 F.2d 1470, 1472 (11th Cir. 1988) ("Unlike *Commonwealth*…, here there was no direct financial relationship between the neutral arbitrator *and a party*.") (emphasis in original).

In this case, the undisclosed connections the District Court found to be disqualifying do not involve any relationship between the two arbitrators (Dassenko and Gentile) and St. Paul. They involve connections between the two arbitrators and another arbitration that involved different parties (PMA and Platinum Bda). Because these connections do not involve any relationship between the two arbitrators and St. Paul, as a matter of law they cannot give rise to a "conflict of interest" demonstrating "evident partiality." There is simply nothing in the connections that inherently suggests (let alone proves) that either of the two arbitrators held any impermissible bias in favor of St. Paul.

In addition, even if an undisclosed connection with a party existed in this case (which it does not), the relevant connection must also be *material – i.e.*, must rise to the level of a "nontrivial conflict of interest" – for example, "where the arbitrator has a *substantial* interest in a firm which has done more than *trivial* business with a party." *Commonwealth*, 393 U.S. at 151-52 (emphasis supplied); *see also*

Positive Software, 476 F.3d at 283 ("in nondisclosure cases, an award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding."). Consistent with this requirement, not every conceivable connection is relevant to the analysis. Far from it. As Justice White pointed out, an arbitrator "cannot be expected to provide the parties with his complete and unexpurgated business biography." *Commonwealth*, 393 U.S. at 151. Following Justice White's approach, this Court has explained that, where an arbitrator "has reason to believe that a *nontrivial* conflict of interest [i.e., material relationship with a party] might exist, he must (1) investigate the conflict (which may reveal information that must be disclosed under *Commonwealth Coatings*) or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate." *Applied Indus.*, 492 F.3d at 138.

In this case, the undisclosed connections the District Court relied on in setting aside the Scandinavian Re Award cannot be "material" because they do not suggest by their nature that the two arbitrators had any reason to *favor* St. Paul in the Scandinavian Re Arbitration. The bare fact that the two arbitrations involved reinsurance issues and a witness who testified in both proceedings does not inherently imply favoritism in the arbitration context any more than it would in the context of litigation before a federal judge. Because these kinds of connections do not

inherently suggest bias, they are simply immaterial.[12]

[12] Even for more relevant connections, the standard of materiality is exceedingly high. For example, where there are connections between an arbitrator and a party, or connections between an arbitrator and other proceedings involving a party or its counsel, it is still exceedingly difficult for a losing party to demonstrate the connections are significant enough to establish "evident partiality," and courts routinely reject such claims. *See, e.g., Uhl v. Komatsu Forklife Co., Ltd.*, 512 F.3d 294, 306 (6th Cir. 2008) (no evident partiality even though party's attorney and arbitrator were co-counsel on two cases, and on six other cases arbitrator represented the plaintiff while party's attorney represented the intervening plaintiff); *Nationwide*, 429 F.3d at 647-68 (no evident partiality even though arbitrator served as arbitrator for one defendant six times and as an arbitrator for another defendant over twenty times); *JCI Commc'ns, Inc. v. International Bhd. of Elec. Workers*, 324 F.3d 42, 52 (1st Cir. 2003) (no evident partiality even though arbitral panel included business rivals of one party); *Sphere Drake Ins. Ltd. v. All American Life Ins. Co.*, 307 F.3d 617, 621 (7th Cir. 2002) (no evident partiality even though arbitrator was engaged by Bermuda subsidiary of party as counsel on an unrelated matter involved in a different arbitration, and where he sent letter that did not reveal that Sphere Drake (U.K.), the parent corporation, was the real party in interest in that different arbitration); *Montez v. Prudential Sec., Inc.*, 260 F.3d 980, 982, 984 (8th Cir. 2001) (no evident partiality even though arbitrator, as general counsel for a company, had employed 68 attorneys, paying them $2.8 million in fees, from the law firm representing one of the parties in the arbitration); *ANR*, 173 F.3d at 495-96, 501-02 (no evident partiality even though arbitrator's law firm represented company that indirectly caused the dispute in the arbitration by buying less from the defendant, who in turn sought to buy less from the plaintiff); *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 682 (D.C. Cir. 1996) (no evident partiality even though arbitrator's former law firm represented party to the arbitration on unrelated matters); *Lifecare*, 68 F.3d at 432-34 & n.3 (no evident partiality even though arbitrator had dispute with an attorney from the law firm representing one of the parties); *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1255, 1264 (7th Cir. 1992) (no evident partiality even though arbitrator knew one of the parties, had worked in the same office with him 20 years ago, and saw him about once a year since); *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1360 (6th Cir. 1989) (no evident partiality even though arbitrator adjudicated a case involving his former law partners); *Local 814*, 878 F.2d at 40-41 (no evident partiality even though father of president of party was indicted in a grand jury investigation, and arbitrator refused to cooperate when called to testify against the father before the grand jury); *Merit*,

Critically, the "evident partiality" provision of section 10(a) is not a disclosure statute. It does not expressly require any particular disclosure, nor does it prescribe any particular sanction for nondisclosure. Consistent with this premise, this Court has not created and does not recognize a "freestanding duty" to investigate or disclose. *Applied Indus.*, 492 F.3d at 138. Rather, the duty to investigate and disclose, or disclose an intention not to investigate, is triggered only where there is a material connection that suggests bias in favor of one of the parties – i.e., a "nontrivial conflict of interest." *Id.*; *see also Commonwealth*, 393 U.S. at 152; *accord Uhl v. Komatsu Forklife Co., Ltd.*, 512 F.3d 294, 306 (6th Cir. 2008) ("Justice White's 'opinion fully envisions upholding awards when arbitrators fail to disclose insubstantial relationships.'") (quoting *Positive Software*, 476 F.3d at 281-82). As Justice White's "more nuanced view" recognized, "not every nondisclosure violates the FAA." *Uhl*, 512 F.3d at 306; *see also Andros*, 579 F.2d at 700 ("It is cer-

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714 F.2d at 677, 680 (no evident partiality even though arbitrator had worked directly under the president and principal stockholder of party for two years); *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1150 (10th Cir. 1982) (no evident partiality even though arbitrator and law firm representing a party had clients in common); *International Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 551 (2d Cir. 1981) (no evident partiality even though arbitrator, during the arbitration, was a witness in another arbitration between the same law firms that were trying the arbitration matter before him); *United States Wrestling Fed'n v. Wrestling Div. of the AAU, Inc.*, 605 F.2d 313, 315-16 (7th Cir. 1979) (no evident partiality even though arbitrator failed to disclose that his law firm had represented one of the parties on a regular basis); *Andros*, 579 F.2d at 701 (no evident partiality even though arbitrator had not disclosed he sat on 19 arbitration panels with the president of an agent of one of the parties, and in 12 of those panels, the president had been one of the arbitrators who had selected the arbitrator to be the neutral).

tainly fair to say that we have not been quick to set aside the results of an arbitration because of an arbitrator's alleged failure to disclose information."); *accord Sphere Drake Ins. Ltd. v. All American Life Ins. Co.*, 307 F.3d 617, 622-23 (7th Cir. 2002) ("*Commonwealth*…did not hold, as All American would have it, that disclosure is compulsory for its own sake, and its absence fatal….) ("The district court treated candid and complete disclosure as a requirement in addition to disinterest. Yet that position has no purchase in the language of [section] 10(a)(2) – or for that matter in judicial practice.") (Posner, J.).

Thus, the mere failure to disclose something cannot by itself be trumped up as a sufficient reason to set aside an award. There must be more. In cases such as this one where the alleged nondisclosure (participation in another arbitration) fails to demonstrate the existence of an implied predisposition to favor one party or another, the mere fact of nondisclosure is simply irrelevant.

As courts have recognized, awarding vacatur on the basis of less-than-material connections with the prevailing party would "seriously jeopardize the finality of arbitration," because "losing parties would have an incentive to conduct intensive, after-the-fact investigations to discover the most trivial of relationships, most of which they likely would not have objected to if disclosure had been made." *Positive Software*, 476 F.3d at 285; *see also Merit*, 714 F.2d at 683 ("We do not want to encourage the losing party to every arbitration to conduct a background in-

vestigation of each of the arbitrators in an effort to uncover evidence of a former relationship with the adversary."); *Andros*, 579 F.2d at 700 (noting "obvious possibility, alluded to by Justice White in *Commonwealth*…that 'a suspicious or disgruntled party can seize' upon an undisclosed relationship 'as a pretext for invalidating the award.'"). In this case, however, the District Court's vacatur of the Scandinavian Re Award can only encourage exactly what this and other courts have expressly hoped to avoid: the application of a standard that rewards parties like SRe who, after losing, search for and identify undisclosed, immaterial "connections" with the hope of unraveling the proceedings.

Indeed, the record demonstrates the makeweight nature of SRe's arguments in precisely this way. Throughout the course of the arbitration proceeding, SRe was unconcerned about the myriad significant party and witness relationships that the arbitrators disclosed. Time and again, SRe had no objection when Dassenko and Gentile revealed numerous connections to other arbitrations, the actual parties in the dispute or their affiliates, the witnesses, and counsel. It was only after SRe lost that it searched for some undisclosed relationship it could exploit for purposes of overturning the award, ultimately settling on connections that are entirely insubstantial, particularly as compared to the substantial and direct *party* connections SRe found to be unobjectionable during the course of the proceeding. It is precisely this kind of *ex post* revisitation that this Court has condemned. *See Andros*,

579 F.2d at 702. The District Court erred in indulging and rewarding SRe's tactics, and this Court should reverse the District Court's judgment.[13]

III. The District Court Erred in Dramatically Expanding the "Evident Partiality" Standard.

In abandoning the "material relationship with a party" requirement, and instead crafting and applying its "material relationship to the arbitration" approach, the District Court cited as authority this Court's decision in *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi A.S.*, 492 F.3d 132 (2d Cir. 2007). SA-23, 30-37. Neither the facts nor the reasoning in *Applied Industrial*, however, support the District Court's overbroad analysis.

The arbitration at issue in *Applied Industrial* involved a contract dispute between two commercial parties: Ovalar and AIMCOR. One of the three arbitrators presiding over the proceeding, Charles Fabrikant, was the Chairman, President and

[13] In its analysis, the District Court also cited to the ARIAS disclosure guidelines that favor broad disclosure of any interest or relationship that might affect an arbitrator's judgment. SA-7-8. SRe will likely argue that the arbitrators in this case failed to adhere to these guidelines. Once again, however, this issue is irrelevant. As courts have recognized, an error in compliance with industry rules does not constitute "evident partiality." As one court has aptly explained, such an error "would not, by itself, require *or even permit* a court to nullify an arbitration award." *Montez v. Prudential Secs., Inc.*, 260 F.3d 980, 984 (8th Cir. 2001) (emphasis supplied); *see also Merit*, 714 F.2d at 680-81. Consistent with these principles, the introductory passage of the ARIAS Code specifically provides that "[n]othing in these Guidelines is intended to or should be deemed to establish new or additional grounds for judicial review of…arbitration awards nor establish any substantive legal duty on the part of arbitrators." JA-103. SRe acknowledged below that "violations of these standards do not alone establish evident partiality…" JA-542.

CEO of Seacor Holdings. *Applied Indus.*, 492 F.3d at 135. Before the arbitration proceeding began, the arbitrators were advised that one of the parties, AIMCOR, was being sold to Oxbow Industries. Accordingly, Fabrikant was alerted to the need to disclose any nontrivial business connections between his company, Seacor, and Oxbow, the purchaser of AIMCOR. Fabrikant, however, purposefully undertook to remain ignorant of any such connections.

Well into the arbitration, Fabrikant nonetheless became aware that Seacor was doing business with Oxbow through a division of Seacor called SCF, and he sent an email to the parties alerting them to his awareness of this fact. He stated that he had no knowledge of this relationship "prior to the past week" and "d[id] not participate in contract negotiations or get involved in day to day operations of SCF." *Id.* He added that he did not feel that his ability to decide the case on the merits was impaired. *Id.* Subsequently, the arbitral panel (in a 2-1 partial award on liability in which Fabrikant, as the neutral umpire, cast the deciding vote) found Ovalar liable to AIMCOR for breach of contract.

Ovalar then conducted an investigation, concluding that a "previously existing, inadequately disclosed commercial relationship existed between SCF, a division of Fabrikant's company, and Oxbow, the parent of AIMCOR." *Id.* Ovalar demanded that Fabrikant withdraw. Fabrikant, however, refused, stating that he saw no reason to do so because, during the course of the arbitration, he had erected

an internal "Chinese wall" within Seacor to prevent his learning of any commercial dealings between his company and Oxbow. *Id.* at 135-36. Notably, Fabrikant had not disclosed his "Chinese Wall" arrangement at the outset of the arbitration.

Following Fabrikant's refusal to withdraw, Ovalar moved to vacate the award. *Id.* at 136. On review, the district court held that "by insulating himself from learning about [any contractual relationship between Seacor and Oxbow], Fabrikant created an 'appearance of partiality' when a nontrivial commercial relationship surfaced." *Id.* On appeal, this Court affirmed.

In reaching its decision, this Court stated that, following *Morelite*, "evident partiality" will be found "where a reasonable person would have to conclude that an arbitrator was partial to one *party* to the arbitration….[A]n arbitrator is disqualified only when a reasonable person, considering all of the circumstances, would *have* to conclude that an arbitrator was partial to one side." *Id.* at 137 (first emphasis supplied) (internal quotation marks and citation omitted). The Court added that "[a]n arbitrator who knows of a *material* relationship *with a party* and fails to disclose it" meets this standard. *Id.* (emphasis supplied). Fabrikant, of course, claimed not to have known about the relationship until well into the arbitration, owing to his creation of a "Chinese Wall," but this Court found that not to be an adequate excuse. In light of his obligation to disclose nontrivial commercial relationships between his firm and either of the parties, Fabrikant should either have

kept himself apprised of his firm's business dealings with any of the parties, or at least disclosed from the beginning he had purposefully "walled himself off from learning more." *Id.* at 134.

In reaching its conclusion, the Court also took pains to explain that the relevant standard was not as strict as the "appearance of bias" test. Specifically, the Court recounted Justice White's statement that "arbitrators are not automatically disqualified by a business relationship *with the parties before them* if both parties are informed of the relationship in advance, *or if they are unaware of the facts but the relationship is trivial*." *Id.* at 138 (emphasis supplied) (quoting *Commonwealth*, 393 U.S. at 150). Rather, the Court explained that, "where an arbitrator has reason to believe that a *nontrivial* conflict of interest exists [i.e., a nontrivial relationship with a party], he must (1) investigate the conflict (which may reveal information that must be disclosed under *Commonwealth Coatings*) or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate." *Id.* (emphasis supplied).

Critically, the Court stated that "[w]e emphasize that we are *not* creating a freestanding duty to investigate." *Id.* at 138 (emphasis in original). On the contrary, the Court's decision illustrates only that when the arbitrator knows or should know of a *material* relationship *with a party*, he has a duty either to investigate and disclose the existence of any such relationship, or to disclose his intention not to

investigate.

In this case, the District Court misconstrued *Applied Industrial* to reach a conclusion at war with its reasoning. The District Court began by accurately recounting the *Morelite* standard, as well as the point that an arbitrator who knows of a *material* relationship *with a party* and fails to disclose it meets the *Morelite* evident partiality test. SA-23. The court, however, then cited *Applied Industrial* to support its overbroad "material relationship to the arbitration" approach, displacing the traditional "material relationship with a party" standard – a move *Applied Industrial* does not condone.

To begin with, the District Court quoted language in *Applied Industrial*, adding an emphasis that did not appear in this Court's opinion ("[when] an arbitrator has reason to believe that a nontrivial conflict *might* exist"), and then misapprehended the point that the "nontrivial conflict" the Court was discussing in the preceding sentence was a "relationship with the parties," 492 F.3d at 138, that was "material," *id.* at 137, not something less. SA-23. The District Court in this case then substituted the "material relationship with a party" requirement with its own more relaxed inquiry into "whether a relationship is material to the arbitration at issue." SA-33. The court then stated that, in applying its criterion, "*all* of the circumstances must be considered, including the timing of the arbitrators' relationship with each other, and with witnesses to the arbitration." SA-33.

By combining its "all of the circumstances" criterion with its broad "material relation to the arbitration" standard, the District Court essentially fashioned a new test for "evident partiality" unhinged from its purpose, which is to show that an arbitrator may be biased toward a party. The court's improper articulation of the "evident partiality" standard resembles nothing so much as Justice Black's repudiated plurality opinion in *Commonwealth*, 393 U.S. at 149 (articulating "the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias"). Moreover, on its facts, *Applied Industrial* concerned "a potential business relationship between [the arbitrator's] corporation and *one of the parties*," 492 F.3d at 134 (emphasis supplied); it simply does not support the District Court's more expansive analysis.

Further, the District Court's position is impossible to reconcile with the extremely narrow standard of judicial review applicable to arbitrators' decisions, or the requirement that the "evident partiality" exception be strictly construed. *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1311-12 (11th Cir. 1998). It is likewise impossible to reconcile with the requirement that the showing a party must make to avoid confirmation is "very high." *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006). Likewise, it is difficult to envision a standard more likely to serve as an invitation to all "suspicious or disgruntled part[ies]" to seize upon trivial, innocuous, or ir-

relevant relationships "as a pretext for invalidating the award." *Andros*, 579 F.2d at 700 (quoting *Commonwealth*, 393 U.S. 151 (White, J., concurring)). The District Court's novel standard is not only incorrect, it is profoundly unsettling and must be set aside.

IV. The District Court Misconstrued the Record in Characterizing the Facts and Misapplied Its Standard to the Facts.

The District Court held that vacatur was appropriate because "the Scandinavian Re Arbitration and the Platinum Bda Arbitration were presided over by two common arbitrators, overlapped in time, shared similar issues, involved related parties, [and] included Hedges as a common witness that supported interpreting the Platinum Bda Agreement *as written* but interpreting the Scandinavian Re Agreement in light of Scandinavian Re's *intent* at the time it entered into the agreement." SA-34. The actual facts, however, cannot bear the weight of these characterizations and, in truth, the connections between the two arbitration proceedings are far more attenuated than the District Court recognized.

First, although Dassenko and Gentile presided over both the Scandinavian Re and the Platinum Bda Arbitrations, the record is clear that the two arbitrations did not involve truly related parties. As explained above, none of the St. Paul entities had any direct or substantial connection with Platinum Bda. JA-318; *see also*

Ex. A.[14]

Second, the record does not support the District Court's assessment that the issues in the Scandinavian Re and Platinum Bda Arbitrations were "similar." The District Court opined that

> [a]lthough the issues involved in the Scandinavian Re Arbitration and the Platinum Bda Arbitration were not identical, both arbitrations required the arbitrators to (1) consider whether a finite retrocessional agreement should be enforced according to the express terms of the agreement or whether the agreement should be interpreted in light of the parties' intentions at the formation of the agreement and (2) interpret contract language regarding the creation of experience accounts.

SA-34 n.118. This statement, however, is overly broad. In fact, whereas the Scandinavian Re Arbitration involved a claim principally for rescission, the Platinum Bda Arbitration involved the construction of a "deficit carry forward" clause – a provision not even present in the Scandinavian Re Agreement. Moreover, although both arbitrations involved "experience accounts," this was only a peripheral issue in the Scandinavian Re Arbitration, and the wording of the "experience ac-

[14] The District Court opinion characterizes paragraph 4 of the affidavit of Ronald H. Smillie, Vice President of Travelers Special Services, as merely stating that Smillie's "'understanding' is that "St. Paul has not had any corporate interrelationships with Platinum Bda.'" SA-19. The record reveals, however, that paragraph 3 of that same affidavit unequivocally states that "SRe contends that there are 'corporate interrelationships between St. Paul Re and Platinum [referring, I believe, to Platinum Underwriters Bermuda Ltd.]' SRe is mistaken. *There are no interrelationships between these two companies at this time and there never were any.*" JA-318 (emphasis supplied) (citation omitted). Indeed, even paragraph 4 is not equivocal, as the use of the "understanding" qualifier is used solely in connection with Smillie's statements about the Platinum corporate structure. *See* JA-318.

count" provisions in the two reinsurance contracts was entirely different. *Compare* JA-65-66 *with* JA-468-70.

The District Court attached significance to SRe's contention that SRe would have adjusted its arbitration strategy if it had known of Dassenko and Gentile's involvement in the Platinum Bda Arbitration. SA-35. But this is difficult to justify given that the two proceedings involved such different disputes and is far too slender a reed to support any thought that Dassenko and Gentile were biased as a result. It is also difficult to justify because, by its nature, it involves speculation and conjecture. Further, this cannot be a legitimate factor weighing in SRe's favor, inasmuch as the same can be said of almost *any* connection between different proceedings involving the same arbitrators, no matter how trivial. By analogy, parties in litigation before a particular judge would generally benefit strategically from knowing if the judge had dealt, or would be dealing, with a particular issue in another case, but the fact that this information remains unknown to them (as it often does) cannot support a claim for bias.

Third, the involvement of Hedges as a witness in the two unrelated arbitrations is likewise irrelevant. *See International Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 551 (2d Cir. 1981) (no evident partiality where arbitrator, during the arbitration, was a witness in another arbitration between the same law firms that were trying the arbitration matter before him). Hedges testified in both proceed-

ings because it happened that, at one point in his career, he was employed by Platinum and, at another point, by SRe. Moreover, although Hedges may have been an overlapping witness in the two proceedings, there is no evidence that his *testimony* was overlapping in any significant way. There is likewise no evidence that any of the arbitrators formed a negative view of Hedges, let alone a negative view of any of the parties as a result of Hedges' testimony. On the contrary, if any conclusion can be drawn about Dassenko's and Gentile's views on Hedges (who served as a witness for SRe), it would be that they must have found him generally credible inasmuch as they ruled in favor of the party for whom Hedges testified in the Platinum Bda Arbitration. Further, Hedges' testimony in the Scandinavian Re Arbitration was merely peripheral, and, again, his involvement in both proceedings is far too insubstantial to support any notion that Dassenko and Gentile were biased in favor of St. Paul.[15]

The District Court contended that "[b]y participating in both [arbitrations], Dassenko and Gentile placed themselves in a position where they *could* receive *ex parte* information about the kind of reinsurance business at issue in the Scandina-

[15] The District Court also noted that another witness, Elizabeth Mitchell, "was employed by Platinum US at the time she appeared as a witness in the Scandinavian Re Arbitration." SA-34. But this is likewise insignificant, inasmuch as there is no indication in the record that Mitchell was in any way involved in the Platinum Bda Arbitration, and it defies credulity to suggest that Dassenko and Gentile must have been impliedly biased in favor of St. Paul because a witness who was in the Scandinavian Re Arbitration was employed by an affiliate of a party in the Platinum Bda Arbitration.

vian Re Arbitration, be influenced by recent credibility determinations they made as a result of Hedges's testimony in the Platinum Bda Arbitration, and influence each other's thinking on issues relevant to the Scandinavian Re Arbitration." SA-34-35 (emphasis supplied). This is also legally irrelevant. *See Andros*, 579 F.3d at 695-96, 701-02 (failure to disclose service on other arbitration panels with a fellow panelist insufficient to demonstrate evident partiality). Moreover, the District Court's speculation as to what Dassenko and Gentile "could" have received or how they "could" have been influenced further demonstrates that SRe has not carried its burden of proof by showing evidence that is "direct, definite and capable of demonstration rather than remote, uncertain or speculative." *Harter v. Iowa Grain Co.*, 220 F.3d 544, 553 (7th Cir. 2000) (internal quotation marks and citation omitted); *see also Nationwide*, 429 F.3d at 645 (same) (internal quotations & citation omitted); *Lifecare*, 68 F.3d at 435 (same); *Consolidation Coal Co. v. Local 1643*, 48 F.3d 125, 129 (4th Cir. 1995) (same); *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1147 (10th Cir. 1982).

In any event, the makeweight nature of this contention is underscored by the fact that SRe did not object to similar connections, despite numerous disclosures that the arbitrators had relationships with other witnesses. For example, SRe did not object when Gentile disclosed he was a fact witness in an arbitration where Dassenko was an arbitrator. Likewise, SRe did not object when Gentile disclosed

that, when he worked at Gerling, Jens Juul, a key SRe witness, had appeared as an opposing expert in an arbitration involving Gerling. *See* JA-269-70.

Additionally, although the Scandinavian Re and Platinum Bda Arbitrations overlapped in time, the record is clear that the overlap did not begin until at least June 2, 2008 (many months after the commencement of the Scandinavian Re Arbitration) when the arbitration demand in the Platinum Bda Arbitration was issued, and it is likely that Dassenko and Gentile were not involved until much later inasmuch as it would have taken time for the parties to choose and assemble the arbitral panel. *See* JA-459. Nevertheless, the District Court inappropriately insinuated improper conduct on the part of Dassenko and Gentile on the basis, *inter alia*, of disclosures made *prior* to the Platinum Bda Arbitration. For example, when discussing the questionnaire that Dassenko filled out on November 21, 2007, JA-123, the District Court stated without qualification that "Dassenko did not mention working with Gentile on any arbitration nor did he disclose any relationship with Platinum." SA-9. The record is clear, however, that Dassenko could not have been involved in the Platinum Bda Arbitration at that point in time (November 21, 2007), inasmuch as the June 2, 2008 arbitration demand in the Platinum Bda Arbitration had not yet been made. *See* JA-459. There was thus no connection for Dassenko to "mention" at that juncture. In fact, the organizational meeting in the Platinum Bda arbitration did not take place until September 23, 2008, and, again, it

is highly likely that there was a substantial period of time between June 2, 2008 and September 23, 2008 during which Dassenko and Gentile were not involved in the Platinum Bda Arbitration. *See* JA-561. This is significant, as the bulk of the disclosures, including the more formal initial disclosures, were made in the Scandinavian Re Arbitration at a time when Dassenko and Gentile had nothing to disclose with respect to the Platinum Bda Arbitration. *See, e.g.*, JA-268-69. The District Court may have been confused on this point, inasmuch as SRe confused the issue by claiming below that Dassenko and Gentile had inappropriately "said nothing about the *simultaneously-occurring* Platinum arbitration." JA-39 (emphasis supplied). In fact, the proceedings were not simultaneous, but merely overlapping.

Finally, even if the District Court's "material relationship to the arbitration" standard were correct (which it is not), and even if the court had not misapprehended the facts (which it did), the court also erred by misapplying its legal standard to the facts. None of the connections the court found significant, whether taken singly or as a whole, actually suggest, let alone prove, that Dassenko or Gentile harbored any taint of impermissible bias in favor of St. Paul – that is, unless one is willing to accept that impermissible bias may be presumed from the ordinary, everyday relationships that skilled arbitrators unavoidably experience. Of course, that is not and cannot be correct because, if it were, virtually every arbitration award would be subject to vacatur.

In sum, the facts the District Court relied on in making its determination do not bear the weight of the District Court's characterizations. Further, SRe has not even come close to carrying its "onerous" burden of demonstrating an adequate factual foundation for its claim of "evident partiality." In addition, the District Court erred in applying its legal standard to the facts. Accordingly, its judgment should be reversed.

V. In Any Event, the District Court Erred in Setting Aside the Arbitrators' Interim Rulings.

On July 18, 2008, the arbitration panel in the SRe Arbitration upheld St. Paul's draw down of $13,231,000 from collateral posted by SRe. There is no evidence that Gentile or Dassenko had been appointed to serve in the Platinum Bda Arbitration as of that date, as the Platinum Bda Arbitration demand had only been issued a month before on June 2, 2008, and the first organizational meeting did not take place until September 23, 2008. *See* JA-459, 561. There is thus no basis to conclude that Dassenko and Gentile had acted with "evident partiality" in upholding the draw. Accordingly, the District Court also erred in setting aside the panel's interim rulings.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's granting of SRe's petition to vacate the arbitration award and the District Court's denial of St. Paul's petition to confirm the arbitration award.

Respectfully submitted,

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/s/ Collin O'Connor Udell
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I hereby certify that on July 22, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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