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)

REPLY BRIEF OF APPELLANTS
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SUMMARY OF ST. PAUL'S REPLY

SRe urges upon the Court the wrong standard of review, the wrong standard of "evident partiality," and a version of the facts that is unsupported in the record. Shorn of SRe's aggressive recharacterizations, this case involves a simple set of circumstances: during the course of the Scandinavian Re Arbitration, two of the arbitrators (Dassenko and Gentile) became involved in a second reinsurance arbitration (the Platinum Bda Arbitration) involving different parties; one witness (Hedges) testified in both arbitrations; and a party in the first arbitration (St. Paul) had a minor business relationship with two entities (Platinum Holdings and Platinum US) that happen to be *affiliates* of a party (Platinum Bda) in the second arbitration. Because these circumstances do not demonstrate "evident partiality," the decision below should be reversed.

SRe does not dispute that the circumstances of this case would never suffice to disqualify a judge for "appearance of bias." Instead, SRe attempts to show that the standard of "evident partiality" is somehow more stringent than the "appearance of bias" test. As this Court has held, however, the opposite is true: "[t]he mere appearance of bias that might disqualify a judge will not disqualify an arbitrator." *Pitta v. Hotel Ass'n of New York City*, 806 F.2d 419, 423 (2d Cir. 1986). Because it is *less* difficult to disqualify a judge for "appearance of bias" than it is to overturn an arbitration award under the "evident partiality" standard, and because

the circumstances of this case would *never* suffice to disqualify a judge, SRe's argument cannot succeed.

Confirming this, there is simply no substance to SRe's claim that (1) participating in more than one arbitration proceeding involving reinsurance issues, (2) hearing a particular witness more than once, or (3) the fact that a party in the first proceeding had a minor business connection with affiliates of one of the parties in the second, demonstrates bias for or against one party or another. As SRe concedes, "evident partiality 'will be found where a reasonable person would *have* to conclude that an arbitrator was *partial to one party* to the arbitration.'" SRe's Opening Brief ("SROB") at 1 (quoting *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) (emphases supplied)). But no reasonable person would ever "have" to conclude from any or all of the circumstances here that any of the arbitrators was "partial to one party." The circumstances simply do not warrant any implicit or explicit taint of partiality, and SRe failed completely to carry its exceptionally heavy burden of proof of demonstrating that Dassenko or Gentile were "evidently partial" to St. Paul.

Perhaps recognizing the defects in its argument, SRe implicitly retreats to the position that the arbitrators' *failure to disclose* their involvement in the Platinum Bda Arbitration is somehow sufficient grounds for overturning the award. But that is also false. The Federal Arbitration Act is not a disclosure statute, and

there is no freestanding duty to investigate or disclose. *See, e.g., Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi A.S.*, 492 F.3d 132, 138 (2d Cir. 2007). There is only the duty to investigate or disclose matters that in and of themselves suggest bias in favor of one party or the other, such as a connection to a party. The arbitrators' failure to disclose their participation in the Platinum Bda Arbitration simply does not rise to that level.

Contrary to SRe's theory, the test for evident partiality, which is one of the very limited grounds for vacatur under the Federal Arbitration Act, 9 U.S.C. § 10(a)(2), occurs against the backdrop of a presumption that arbitration awards will be confirmed, *id.* § 9, and that vacatur will occur only in extremely narrow circumstances. *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 388 (2d Cir. 2003). The accompanying burden of proof, described as "very high," *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006), rests firmly upon SRe's shoulders, *In re Andros Compania Maritima, S.A.*, 579 F.2d 691, 700 (2d Cir. 1978). Because SRe failed to meet its burden below, the District Court's decision should be reversed.

SRe's other positions in this appeal are likewise extreme and erroneous. It argues that "clear error" review should apply not only to factual "findings," but to conclusions of law as well. That is obviously wrong with respect to the District Court's conclusions of law. It is also wrong with respect to the District Court's

characterizations of the record. Where, as here, the District Court does not hold an evidentiary hearing or otherwise "take evidence" in any traditional sense, but merely reviews the cold record before it, no deference to the District Court's factual characterizations is warranted because, in conducting its review, the District Court occupies no better position than this Court in reviewing the same material.

SRe likewise mischaracterizes the facts in ways too numerous to list, although St. Paul does its best to point them out where relevant. Unfortunately, SRe's presentation apparently misled the District Judge. This Court, however, should not be misled, particularly given the solid bank of precedent establishing the exceptionally heavy burden of proof required to overturn an arbitration award and the proper application of the "evident partiality" test following Justice White's concurrence in *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 150 (1968). That bank of precedent holds firmly that the "evident partiality" standard is satisfied only by a material relationship indicating that an arbitrator is biased in favor of a party. *E.g.*, *Applied*, 492 F.3d at 137 ("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 . . . would *have* to conclude that an arbitrator was partial to one side.") (internal quotation marks and citations omitted). Because the District Court departed sharply from those binding precedents, its decision is erroneous.

Moreover, SRe's contrary theory, adopted by the District Court, creates disturbing incentives. This Court has long counseled against any approach that encourages losing parties to comb outside sources for a "fact" that could serve as a pretext for invalidating an arbitration award. *E.g.*, *Lucent Techs. v. Tatung Co.*, 379 F.3d 24, 29 (2d Cir. 2004). The loose standard the District Court applied in this case would actively promote such conduct. Under the District Court's analysis, any and all connections with issues and witnesses can be thrown into the mix – regardless of whether they inherently suggest bias – requiring a searching review of the record and resulting in the very kind of judicial scrutiny and delay that parties contracting for arbitration seek intentionally to avoid. This makes no sense.

In sum, SRe argues for the wrong standard of review; the District Court applied the wrong standard of law; SRe failed to carry its burden; and SRe continues to mischaracterize the relevant facts. Because the circumstances of this case do not demonstrate "evident partiality," the District Court's judgment should be reversed.

ARGUMENT

I. The Proper Standard of Review is *De Novo*.

It is axiomatic that, in general, the Court reviews a district court's decision to vacate an arbitration award *de novo*, except for findings of fact, which are reviewed for clear error. *Applied*, 492 F.3d at 136. In contrast, SRe asserts that only clear error review is appropriate for the entirety of the District Court's analysis on

the theory that the District Court's application of the evident partiality test is a mixed question of law and fact, and this matter involves "predominantly a factual inquiry." SROB-20-21, 45. As support, SRe cites inapposite decisions dealing with administrative agency review, the review of advisory Sentencing Guideline determinations, and the review of a Tax Court's determination of reasonable compensation. *See, e.g.*, *Service Employees Int'l, Inc. v. Director, Office of Workers Compensation Program*, 595 F.3d 447, 455 (2d Cir. 2010) (discussing applicable standard of review of a decision of the Benefits Review Board of the Department of Labor); *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 143 (2d Cir. 2005) (same); *United States v. Selioutsky*, 409 F.3d 114, 115, 119 (2d Cir. 2005) (discussing applicable standard of review of an advisory Sentencing Guideline determination); *United States v. Vasquez*, 389 F.3d 65, 75 (2d Cir. 2004) (same); *Rapco, Inc. v. Comm'r*, 85 F.3d 950, 954 (2d Cir. 1996) (discussing applicable standard of review of Tax Court's reasonable compensation determination).

SRe does cite one "evident partiality" case, SROB-21, which states that "[a]n integral part of the reasonable person [evident partiality] test is an assessment of the facts established by the party alleging bias," *United States v. Int'l Bhd. of Teamsters*, 170 F.3d 136, 147 (2d Cir. 1999). But that statement does not transform the legal issues presented in this case into "*predominantly* a factual question." SROB-21 (emphasis supplied). Where, as here, the District Court misapprehended

(and dramatically loosened) the governing legal standard, the primary question presented is legal in nature, necessitating *de novo* review.

Moreover, if the Court were to examine review standards in other areas of the law, as SRe requests, and chooses to view the questions presented as mixed questions of fact and law, it will still find many better reasoned cases using *de novo* review in that context as well. *See, e.g., Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435-36 (2001) (". . . trial judges' determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. . . . First . . . the precise meaning of concepts like 'reasonable suspicion' and 'probable cause' [and, by extension, 'evident partiality'] cannot be articulated with precision; they are fluid concepts that take their substantive content from the particular contexts in which they are being assessed. . . . Second, the legal rules . . . acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles. . . . [T]hey will acquire more meaningful content through case-by-case application at the appellate level. Finally, *de novo* review tends to unify precedent and stabilize the law.") (citations and internal quotation marks omitted); *Bose v. Consumers Union of United States, Inc.*, 466 U.S. 485, 500-02 (1984) (holding that "Rule 52(a) does not inhibit an appellate court's power to correct errors of law . . . infect[ing] a so-called mixed finding of law and fact, or a finding of fact that is predicated on a

misunderstanding of the governing rules of law") ("[T]he presumption of correctness that attaches to factual findings is stronger in some cases than in others. The same 'clearly erroneous' standard applies to findings based on documentary evidence [as in this case] as to those based entirely on oral testimony, but the presumption has lesser force in the former situation than in the latter.") (citation omitted); *AT&T v. NLRB*, 67 F.3d 446, 451 (2d Cir. 1995) ("While a determination of joint employer status is basically a finding of fact when the correct legal standards have been applied, where the wrong legal standards are applied, the Board's determination is an application of law to the facts which is reviewable *de novo*.") (citation omitted); *Jacobson v. Comm'r*, 915 F.2d 832, 837 (2d Cir. 1990) ("While the Tax Court's conclusion that the acquisition . . . lacked economic substance is a finding of fact to be reviewed for clear error, the legal standard applied by the Tax Court in making this determination is reviewed *de novo*.").

Equally important, the District Court did not conduct an evidentiary hearing in this matter. Rather, the District Court merely reviewed limited portions of the record from the arbitration proceedings. Under the circumstances, deference is unwarranted, and the correct standard of review is *de novo*.

II. The District Court Misapprehended the Relevant Legal Standard and SRe Mischaracterizes St. Paul's Argument.

A. SRe Urges, and the District Court Applied, the Wrong Legal Standard.

In spite of settled authority rejecting the "appearance of bias" standard for arbitrators, *Commonwealth*, 393 U.S. at 150 (White, J., concurring), and this Court's conclusion that the evident partiality standard is less strict than the "appearance of bias" test, *Morelite*, 748 F.2d at 83-84 ("It comes as no surprise . . . that the standards for disqualification of arbitrators have been held to be less stringent than those for federal judges."), SRe nevertheless argues that the "evident partiality" test either tracks or is more stringent than the standard for disqualification of federal judges. As support for its position, SRe contrasts the role of federal judges and arbitrators, arguing that judges are "professional decision-makers, chosen at random via an objectively neutral system, who are subject to a panoply of procedures and ethical canons designed to ensure their impartiality," whereas arbitrators, "by contrast, are private individuals . . . selected to serve on a particular arbitration by parties who may have incomplete or unequal knowledge of their backgrounds." SROB-24-25. SRe then asserts that "parties to a court proceeding can easily research the presiding judge's background," whereas "parties to an arbitration have no such recourse." SROB-25. This line of reasoning, however, is both counterfactual and irrelevant.

To begin with, parties can and frequently do research the backgrounds of potential arbitrators extensively and then cull candidates from their respective lists based on their research. Moreover, parties generally have access to more information about arbitrators than they ever could obtain about judges – among other things, the parties often present arbitrators with detailed factual questionnaires that are never used in judicial proceedings. In any event, consistent with *Commonwealth* and *Morelite*, settled law establishes that it is much easier to disqualify a judge for "appearance of bias" than it is to disqualify an arbitrator for "evident partiality." Because the circumstances of this case would never support disqualifying a judge, *a fortiori* they do not satisfy the evident partiality standard and SRe failed to meet its exceptionally heavy burden of proof.

Compounding its error, SRe cites *Commonwealth* for the proposition that the "parties' disclosure guidelines are 'highly significant' to the evident partiality analysis." SROB-35 (citing *Commonwealth*, 393 U.S. at 149). But that citation comes from Justice Black's plurality opinion, which has been widely recognized as dicta (including by SRe, SROB-23 n.7), rather than Justice White's concurring opinion, which this Court, as well as other courts, have long recognized as the relevant binding authority. Indeed, SRe's citation comes from *the very section* of Justice Black's opinion articulating the repudiated "appearance of bias" standard applicable to federal judges, but not arbitrators, 393 U.S. at 148-49 (Black, J.).

In further support of its position, SRe quotes Section 18 of the Rules of the American Arbitration Association. Justice Black likewise deemed Section 18 "highly significant," as well as the 33d Canon of Judicial Ethics, which he described as "based on the same principle as this Arbitration Association Rule" and as requiring that "any tribunal permitted by law to try cases and controversies not only must be unbiased *but also must avoid even the appearance of bias.*" *Id.* at 149-50 (emphasis supplied). Again, however, Justice Black's view did not carry the day and his articulation of the matter is not the relevant standard. *Morelite*, 748 F.2d at 82 ("Justice Black, writing for a plurality of four justices, appeared to impose upon arbitrators the same lofty ethical standards required of Article III judges. . . . Four justices, however, do not constitute a majority of the Supreme Court. . . . Accordingly, much of Justice Black's opinion must be read as dicta."); *see generally Marks v. United States*, 430 U.S. 188, 193 (1977) (in the absence of a majority opinion, the Court's holding is "that position taken by those Members who concurred in the judgments on the narrowest grounds").

SRe errs further with a hypothetical illustration. SRe urges consideration of the example of an arbitrator who fails to disclose that he is about to publish a book taking a position on an issue involved in a pending arbitration proceeding. SROB-32. SRe contends that "such self-interest would plainly compromise fair process," and then cites a case involving, once again, a judge. SROB-32. This is erroneous.

Many federal judges write books and treatises on substantive legal issues and cases, including Justice Scalia's essays in "*A Matter of Interpretation*" and Justice Breyer's books "*Active Liberty*" and "*Making Democracy Work: A Judge's View*," which examine in detail how they decide cases and include criticisms of specific decisions. According to SRe, judges should stop these activities immediately. The District Judge herself published an article highly critical of arbitration a few weeks before rendering her decision in this case. *See* Shira A. Scheindlin, *The Future of Litigation*, N.Y.L.J. (Feb. 5, 2010), *available at* http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202442007074&slreturn=1&hbxlogin=1 ("[T]he absence of a public hearing, a transparent process, is detrimental to society. I am concerned that the courts will hear only criminal cases, family court cases and pro se cases, while most commercial cases will be heard by private quasi-judicial actors behind closed doors. This is not a good thing.") (footnote omitted). Under SRe's theory, the District Judge should have recused herself. But SRe is wrong, and its hypothetical falls of its own weight.

In fact, as discussed in prior briefing, SRe's extreme position, which the District Court adopted, urges a standard that is *even more* stringent than the "appearance of bias" test, as SRe argues that facts that would never disqualify a judge nonetheless require setting aside the Scandinavian Re Award. At bottom, SRe argues for an unworkable approach that the Supreme Court and this Court have re-

jected. *Commonwealth*, 393 U.S. at 150; *Applied*, 492 F.3d at 137 ("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.") (citation omitted); *Morelite*, 748 F.2d at 83-84; *see also Pitta*, 806 F.2d at 423 ("[t]he mere appearance of bias that might disqualify a judge will not disqualify an arbitrator.") (citation omitted). SRe's and the District Court's "material to the arbitration" standard, which is really a beefed-up "appearance of bias" approach, constitutes an unwarranted loosening of the relevant law of "evident partiality." Adopting it, the District Court applied the wrong legal standard and permitted SRe to evade its exceptionally heavy burden of proof. Accordingly, the District Court's decision should be reversed.

B. SRe Misstates St. Paul's Analysis of "Evident Partiality."

SRe further compounds its error by misstating St. Paul's discussion of the "evident partiality" test, contending that St. Paul's argument constitutes a "party relationship only" rule. SROB-29, 33. This is an insupportable exaggeration. Although the relevant cases speak in terms of a "party," *e.g.*, *Applied*, 492 F.3d at 137 ("material relationship with a party"), and St. Paul emphasized that language at places in its Opening Brief in order to illustrate the type of material relationship necessary to satisfy the "evident partiality" standard, St. Paul did not argue that a

relationship with a party was an exclusive predicate to a finding of "evident partiality." *E.g.*, St. Paul's Opening Brief ("OB") at 24 ("In this case there were no undisclosed relationships with a party, *and none even remotely suggesting bias*.") (emphases deleted and supplied); OB-24 (discussing facts that did 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*.") (emphases deleted and supplied).

St. Paul's nonexclusive focus on connections with a party is appropriate precisely because a nontrivial relationship *with* a party is the one most likely to demonstrate bias *in favor of* a party. But St. Paul's consistent point was that, whether or not the particular connection is a relationship with a party, the connection must nonetheless be one that demonstrates a true, non-speculative bias in favor of a party, not just some vague, free-floating knowledge or connection that could cut either way. The circumstances of this case do not rise to this standard. As stated in prior briefing, "[t]he 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." OB-38.

C. The Legal Standard that the District Court Adopted Encourages Parties to Search for Pretextual Reasons to Vacate an Arbitration Award.

In its brief, SRe ignores the problem that the District Court's "material to the arbitration" standard, SA-33, encourages parties to search for pretextual reasons to challenge an arbitration award. The District Court's novel legal test transforms the settled "evident partiality" standard from one that focuses on whether an arbitrator has a relationship (typically one with a party) that reveals bias in favor of one party or the other into a freewheeling inquiry into "whether a relationship is material to the arbitration at issue." SA-33. But this is a patent invitation to disgruntled parties to seek pretextual reasons to invalidate an award in the face of any number of "relationships," whether or not those relationships result in or reflect partiality towards a party. SRe describes this expanded standard as "material information about [the arbitrator's] relationship to the parties, the witnesses, or the issues presented," SROB-25, but there is no support in authority or common sense for such a sweeping inquiry.

Where would the inquiry stop? Would we require an arbitrator to list all the issues that have ever been before him or her in all the arbitrations he or she has ever been involved in – when the familiarity with those issues is one of the very reasons the arbitrator was chosen? Certainly, a federal judge cannot decline to sit on a Title VII case simply because he or she has sat on other Title VII cases. Cer-

tain expert witnesses, such as top forensic experts, may appear many times before the same federal judge in multiple cases, and no judge could decline to sit on a case simply because that witness would testify. Inasmuch as the standard governing the disqualification of federal judges is stricter than that governing arbitrators, SRe's arguments in this regard make no sense.[1]

Unavoidably, the test that SRe urges conveniently relaxes its evidentiary burden and casts the federal court in the role of a roving court of equity, free to overturn arbitration awards on the basis of a loose, totality-of-the-circumstances analysis vulnerable to the piling of inferences upon inferences and speculation upon speculation. Both the Supreme Court and this Court, however, have warned against this. *Commonwealth*, 393 U.S. at 151; *see also Lucent*, 379 F.3d at 29; *Andros*, 579 F.2d at 700; *accord ANR Coal Co. v. Cogentrix of N. Carolina, Inc.*, 173

[1] In addition, even if Dassenko and Gentile had disclosed their service in the Platinum Bda Arbitration, they would not have disclosed the information which now forms the crux of SRe's argument. A review of the record shows that whenever one of the arbitrators in the Scandinavian Re Arbitration disclosed that he was serving or had served on an arbitration panel with a co-arbitrator, he did *not* provide the identity of the parties to the disclosed arbitration *unless* one of the parties was also a party (or an affiliate of a party) to the Scandinavian Re Arbitration. Thus, even if Dassenko and Gentile had disclosed that they had been appointed as arbitrators in a separate arbitration, it is doubtful that they would have volunteered the names of the parties because neither Platinum Bda nor PMA were parties to the Scandinavian Re Arbitration. Additionally, Dassenko and Gentile may have felt it inappropriate to disclose such information in light of the confidentiality agreement in place in the Platinum Bda Arbitration, JA 629 – SRe should have anticipated that such information would remain confidential inasmuch as a confidentiality agreement was likewise in place in the Scandinavian Re Arbitration, JA 19-20, and such agreements are standard industry practice.

F.3d 493, 500 (4th Cir. 1999) ("Under such a rule, an arbitration award could be vacated due to an arbitrator's failure to disclose a trivial fact even though that fact, if known prior to the arbitration, would not have enabled the losing party to have the arbitrator removed for cause. Such a system would undermine the parties' faith in commercial arbitration and make the task of finding qualified arbitrators 'exceedingly burdensome.'"). This warning applies with compelling force in this case. If the expanded standard that the District Court used is allowed to become the law, endless fishing expeditions by disgruntled parties would ensue – and would be fruitful, because it will always be easy to find something "material" when the definition is as broad as SRe casts it. Challenge after challenge to arbitration awards would find their way into the federal courthouse, fueled by the "material to the arbitration" standard, defeating the very purpose of arbitration in the first instance – to offer the litigants a speedy, efficient *alternative* to the courthouse. This cannot be, is not, and should not become the law. The District Court's decision should be reversed.

III. SRe Has Badly Mischaracterized and Sensationalized the Facts.

Beginning on page two of its brief, SRe attempts to paint the facts as establishing a grand conspiracy. SRe contends that Dassenko and Gentile "*selectively withheld* from Scandinavian the fact that, for nearly a year, they were simultaneously serving together as panelists in an arbitration that involved St. Paul's succes-

sor, Platinum, similar legal issues, and a common witness whose testimony was important in resolving those issues." SROB-2 (emphasis supplied). Apart from the reality that this statement is rife with misleading and inaccurate assertions (e.g., Platinum Bda is not St. Paul's "successor"; SRe improperly lumps together all the Platinum entities; the issues were not "similar" in the two arbitration proceedings in any truly meaningful way; and the testimony of the "common witness," Hedges, was not significant in the Scandinavian Re Arbitration), the direct implication of the quoted statement is *ad hominem* – that Dassenko and Gentile actively intended to mislead SRe. There is, however, no evidentiary basis for this sensational characterization.

Continuing with its conspiracy theory, SRe leaps to the conclusion that "Dassenko and Gentile were partial to St. Paul" because "there is *no other possible explanation* for Dassenko and Gentile's pronounced and mutual selectivity in withholding from Scandinavian their contemporaneous participation in [the Platinum Bda] arbitration." SROB-46 (emphasis supplied). On the contrary, there are many other possible explanations, including sheer inadvertence, a mistaken belief that they had already disclosed it, or non-materiality. Indeed, time and again, the record demonstrates that the arbitrators made supplemental ad hoc disclosures that had previously slipped their mind, or that they thought they had already mentioned but had not. *See, e.g.*, OB-12; JA-122-23, 126, 143-45, 167-68, 269-70. Far from

demonstrating, as SRe contends, that the *only possible explanation* for the arbitrators' failure to disclose the Platinum Bda Arbitration is evident partiality, the record is far more suggestive of simple inadvertence, and, certainly, SRe failed to meet its exceptionally heavy burden of proof to demonstrate otherwise. Inadvertence was particularly likely in this case, as the parties involved in the two arbitrations were not related, and SRe did not advise the arbitrators at any time that it wanted disclosures about their involvement with any Platinum company, in spite of SRe's knowledge of the existence of a limited connection between St. Paul and certain Platinum companies. OB-10; JA-88, 129.

More important, even if SRe's characterization of the facts were accurate (which it is not), SRe's claim that disclosure of the two arbitrators' overlapping service "was critical to the impartiality of the arbitral process," SROB-2-3, is a profound exaggeration. Just as the mere fact that a district judge has presided over two trials involving similar issues, common witnesses, and related parties suggests nothing inherently negative about the judge's impartiality, the mere fact of overlapping arbitral service suggests nothing inherently negative about the impartiality of the arbitrators. Overlapping service is simply not the kind of fact that, by itself, demonstrates partiality because a reasonable person would not *have to conclude* on the basis of it that the arbitrators were partial to St. Paul. *See Morelite*, 748 F.2d at 84. The *Morelite* standard is the one that must be met here, and the facts of this

case do not even come close. This reality, of course, explains SRe's great efforts to impugn the motives and character of the two arbitrators. But its efforts are speculative spin and do a great disservice to the interests of justice.[2]

The unadorned truth of this matter is that, during the course of the Scandinavian Re Arbitration, Dassenko and Gentile were selected to serve on a second arbitration panel that involved reinsurance, a witness (Hedges) testified in both proceedings, and a party (Platinum Bda) was an affiliate of two entities (Platinum Holdings and Platinum US) that did a small amount of business with St. Paul, but had no direct or substantial connection with any of the St. Paul entities. OB-24, 37-43, 50 n.14. Because these facts do not suggest that any of the arbitrators had a connection with a party in the Scandinavian Re Arbitration or otherwise were partial towards a party, the arbitrators did not have any actual obligation to disclose anything. The lack of materiality is aptly demonstrated in the record, as St. Paul noted at length in its Opening Brief, by the failure of either party to object to the arbitrators' involvement on the basis of other similar and often more substantial

[2] On this point, it is important to note that SRe's suggestion that St. Paul had some obligation to place a "statement or declaration in the record from either Dassenko or Gentile" explaining the reason for their failure to disclose the Platinum Bda Arbitration is meritless, as the obligation is squarely on SRe to meet the "very high" burden on a party seeking to avoid confirmation and satisfy the extremely narrow standard for vacatur on the basis of evident partiality. *See Blair*, 462 F.3d at 110; *Gianelli Money Purchase Plan & Trust v. ADM Inv. Servs., Inc.*, 146 F.3d 1309, 1311-12 (11th Cir. 1998). The law presumes confirmation in keeping with congressional policy favoring arbitration awards, and it is SRe's responsibility to demonstrate sufficient grounds for an alternative result.

disclosures. OB-13, 42, 53; JA-116-17, 150-53. That, taken alone, means SRe has not met its burden to demonstrate sufficient grounds for vacatur, and the decision below to the contrary is erroneous.

SRe avoids any discussion of the District Court's mistaken characterizations of the record, but they are significant. If, as SRe emphasizes, the District Court reached its decision by "[t]aking into account 'all of the circumstances,'" those mischaracterizations played a critical role in generating the erroneous result that the District Court reached. SROB-46.[3]

As St. Paul explained in its Opening Brief, the record is clear that the two arbitrations did not involve related parties. OB-49-50, Ex. A; JA-318. SRe con-

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[3] For example, the District Court adopted SRe's explanation regarding the substance of Hedges' testimony, stating that the two arbitrations

> 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; JA-545-546. The District Court then speculated that Hedges' testimony in the Platinum Bda Arbitration may have contradicted his testimony in the Scandinavian Re Arbitration and, thus, negatively affected Dassenko's and Gentile's opinions regarding Hedges' credibility. SA-34-35. First, it is not necessarily inconsistent that Hedges advocated against enforcing the Scandinavian Re Agreement as written on the theory that it did not comport with the parties' mutual understanding, whereas he advocated enforcing the terms of the Platinum Bda Agreement as written because he believed the terms accurately reflected the parties' intentions. Second, because Hedges' testimony in the Platinum Bda Arbitration is not part of the record, it is not possible from an evidentiary perspective to conclude that Hedges contradicted himself.

cedes this point, arguing instead that connection to the parties in another arbitration is not a necessary requirement to demonstrate evident partiality, but SRe fails to acknowledge the consequences that flow from the District Court's clear error in that regard. SRe offers no explanation for the District Court's view of the Smillie affidavit, which played a critical role in the District Court's erroneous determination that the two arbitrations involved related parties. *See* OB-50 n.14; SA-19.

SRe attempts to shrug off St. Paul's explanation that there was no overlap in time between the two arbitrations until June 2, 2008 at the earliest, and likely much later. SROB-38. But the distorted timeline in this case is significant because the bulk of the disclosures in the Scandinavian Re Arbitration, including but not limited to the initial disclosures, were made at a time when Dassenko and Gentile had *nothing to disclose* with respect to the Platinum Bda Arbitration because they did not yet even know it existed. *See, e.g.*, JA-268-69. No reasonable person could conclude that someone is partial to another for failing to disclose a connection that did not yet exist. SRe offers no explanation for the District Court's insinuation that Dassenko somehow inappropriately "did not mention working with Gentile on any arbitration [or] disclose any relationship with Platinum" at a time when the record clearly reflects Dassenko had no such connections. OB-54; SA-9; JA-459. Instead, SRe highlighted the significance of that factually unsupported assertion by citing it for the very proposition that "Dassenko and Gentile never disclosed to

Scandinavian that they were *concurrently* serving together in the Platinum-PMA arbitration." SROB-11 (emphasis supplied) (citing SA-9).

SRe stresses repeatedly that the arbitrators did not disclose their involvement in the Platinum Bda Arbitration "day after day after day, for nearly a year," but this serves only to confuse the issue. SROB-47. Again, the vast majority of disclosures in the arbitration below, including the more formal initial disclosures, were made at a time when the arbitrators had no connection to the Platinum Bda Arbitration, as the Platinum Bda Arbitration *did not even exist*. *See* JA-112-20, 129, 459. The period of time during which they did not disclose their concurrent involvement in the Platinum Bda Arbitration was marked by sporadic, ad hoc disclosures, some of which evidenced confusion on the part of the arbitrators as to whether they had already made the relevant disclosure. *See, e.g.*, JA-167-68.

SRe implies misconduct on the part of Gentile for mentioning meeting with Hedges in Bermuda, but not separately mentioning the Platinum Bda Arbitration videotaped testimony. SROB-47. But if Gentile actually sought to hide his connection with Hedges, it makes no sense for him to have mentioned meeting him at all. Furthermore, as noted, that interaction in the record only serves to underline the lack of importance the parties placed on such connections to the witnesses, as neither St. Paul nor SRe posed any follow-up questions to Gentile about any potential connection they might have with each other. *See* JA-164. Likewise, SRe

points out that the arbitrators disclosed the Scandinavian Re Arbitration in the Platinum Bda Arbitration, but if the arbitrators were truly partial to both St. Paul and Platinum Bda, as SRe erroneously contends, it makes no sense that they would have disclosed their involvement in the Scandinavian Re Arbitration to the parties involved in the Platinum Bda Arbitration. Why tip their hand in one arbitration but not the other?

Fundamentally, the actions of the arbitrators during the concurrent period are perfectly consistent with a good faith belief on the part of the arbitrators that they had already disclosed the Platinum Bda Arbitration, and are ultimately far more suggestive of inadvertence than mischief. At an absolute minimum, it is certainly "possible" that inadvertence was the reason for nondisclosure rather than partiality, and SRe's contention to the contrary serves only to emphasize their inappropriately slanted and legally insupportable approach.[4] SRe was obligated to meet its burden of proof by providing evidence that is "direct, definite and capable of demonstration rather than remote, uncertain or speculative," and, because it failed to meet

[4] Moreover, under *Applied Industrial*, arbitrators are vested with discretion to assess the materiality of potential conflicts, and are only obligated to inform the parties of those that are "nontrivial." *Applied*, 492 F.3d at 138 ("It therefore follows that where an arbitrator has reason to believe that a nontrivial conflict of interest 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 that there might be a conflict and his intention not to investigate."). SRe failed to provide the District Court with any evidence that Dassenko and Gentile had any reason to believe that any of the issues that the District Court highlighted were nontrivial, and certainly none demonstrated a "conflict of interest."

that burden, the decision below is legally insupportable. *Harter v. Iowa Grain Co.*, 220 F.3d 544, 553 (7th Cir. 2000) (internal quotation marks and citation omitted); *see also Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 707-08 (2d Cir. 1985); OB-53.

SRe argues that the parties broadened their arbitration agreement with subsequent actions. SROB-29. Specifically, SRe contends that the arbitration was somehow governed by "agreed-upon terms" between the parties that included (1) "the parties' expectations of the arbitrators as reflected in the disclosure questionnaire"; (2) "the ARIAS rules of disclosure to ensure impartiality"; and (3) "Scandinavian's specific query…into whether Gentile's service on a panel in another case involved…similar issues." SROB-29. This is simply not so. The Scandinavian Re Agreement is the sole agreement between the parties addressing arbitral procedure and it provides only 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's contention to the contrary is unsound.

With respect to the application of the "ARIAS" rules, as St. Paul explained in its Opening Brief, because the Scandinavian Re Agreement did not require the use of arbitrators affiliated with any particular arbitration or industry organization, the parties' lists included both ARIAS as well as non-ARIAS arbitrators. OB-8; JA-61-75, 424 n.2. The actual arbitration agreement did not dictate the use of ei-

ther ARIAS arbitrators or ARIAS rules of disclosure, and the parties did not agree that the ARIAS rules would govern the proceedings. JA-424 ("St. Paul was never asked to agree – and St. Paul never agreed – that any organization's rules or codes would govern or apply."). SRe offers no explanation for these facts, which contradict its novel "agreed upon terms" theory.

More fundamentally, however, as St. Paul explained in its Opening Brief, the ARIAS rules *themselves* specifically provide that they are not "intended to [nor] 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." OB-43; JA-103; SROB-5a. SRe offered no explanation for how to reconcile the self-imposed limitation in the ARIAS rules with the disclosure standard it advocates, nor did it offer any explanation for its contradictory position below that "violations of these standards do not alone establish evident partiality." OB-43; JA-542. Furthermore, SRe offered no criticism or argument against the prudent course adopted by various courts that an error in compliance with industry rules "would not, by itself, require *or even permit* a court to nullify an arbitration award." OB-43 n.13; *Montez v. Prudential Secs., Inc.*, 260 F.3d 980, 984 (8th Cir. 2001) (emphasis supplied); *see also Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680-81 (7th Cir. 1983).

SRe's contention that the disclosure questionnaire or the single instance

where SRe posed a follow-up question to a disclosure made by Gentile somehow generated amorphous "agreed upon terms" of arbitration is likewise insupportable. The "agreed upon terms" of arbitration are found in one place – the arbitration clause of the reinsurance agreement. Parties cannot change those terms by asking a single follow-up question to an arbitrator's disclosure any more than they can nullify an arbitration award simply by saying they do not want to be bound by it. Indeed, the reinsurance agreement specifically forecloses such informal modifications and states that "[t]his Agreement constitutes the *entire* agreement between the parties," and that it can only be modified by a formal amendment process, which was not undertaken in this case. JA-70 (emphasis supplied). Furthermore, contrary to SRe's contention, and as St. Paul explained in its Opening Brief, OB-12, while SRe inquired whether the other arbitration involved casualty business similar to the underlying business that St. Paul reinsured, SRe did *not* inquire whether the reinsurance contracts, issues, or witnesses in the two proceedings were the same or similar. JA-168.

IV. SRe Has Not Met Its Burden of Demonstrating Evident Partiality with Respect to the Interim Order, and the Issue Has Not Been Waived.

Just as SRe bears a "very high" burden of demonstrating impartiality on the part of the arbitrators to overturn the Scandinavian Re Award, it likewise bears the same burden with respect to the arbitrators' interim order. Inasmuch as there is no evidence that Dassenko and Gentile even knew about the Platinum Bda Arbitration

at the time they participated in issuing the interim order, it is simply not possible for SRe to mount a challenge to the interim order as somehow tainted with partiality.

With respect to waiver, St. Paul argued below that the arbitrators were not evidently partial at any time in the proceedings, including when they issued the interim order. JA-321-52, 639-47. Following the decision below, St. Paul timely appealed and specifically raised the issue in its notice of appeal. JA-652 (noticing appeal from all aspects of the judgment and order that, *inter alia*, "prohibited respondents from drawing down on any of the security posted in their favor under the parties' reinsurance agreement."). The issue has not been waived.

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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I hereby certify that on November 4, 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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