No. 17-55813

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY BEVERAGES, LLC d/b/a OLYMPIC EAGLE DISTRIBUTING,

Appellant,

v.

MONSTER ENERGY COMPANY, f/k/a HANSEN BEVERAGE COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL CALIFORNIA AT RIVERSIDE

D.C. No. 5:17-cv-00295-RGK-KK
Hon. Judge R. Gary Klausner
United States District Court Judge

OPENING BRIEF OF APPELLANT
CITY BEVERAGES, LLC d/b/a OLYMPIC EAGLE DISTRIBUTING
UNDER SEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, City Beverages, LLC d/b/a Olympic Eagle Distributing certifies that it has no parent corporation and no publicly held corporation or other publicly held entity owns 10% or more of City Beverages, LLC d/b/a Olympic Eagle Distributing.

Dated: February 23, 2018.

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I. INTRODUCTION

The Arbitrator in this matter failed to disclose ownership in a firm that has substantial and ongoing business with the prevailing party, Monster Energy. The undisclosed ownership in JAMS—a for-profit company—gave the Arbitrator a direct financial interest in up to half of the fees paid in at least 97 arbitrations directed to JAMS by Monster over the last five years and in future fees from the ongoing relationship.

In his award, the Arbitrator recognized and then pointedly disregarded applicable state law, finding that Washington's Franchise Investment Protection Act did not prohibit termination of Appellant City Beverages, LLC (known as Olympic Eagle) eight years into a 20-year agreement. The Arbitrator then awarded $3,000,000 in attorneys' fees and costs by applying a statute that even Monster conceded was inapplicable.

To avoid the appearance of bias evident in the award to Monster Energy, the U.S. Supreme Court in *Commonwealth Coatings* directed arbitrators to follow the "simple requirement" to disclose any financial interest they have in a firm doing substantial business with a party to the litigation. This Court enforced the duty in *Schmitz v. Zilveti*, where it vacated an award when the arbitrator failed to disclose that his law firm had represented the corporate parent of a party. In *New Regency Productions, Inc. v. Nippon Herald, Films, Inc.*, this Court again enforced this disclosure duty, vacating an award because the arbitrator had not disclosed that he had taken a job as an executive with a company that was negotiating a contract with a party.

As this Court found in *New Regency*, partial or misleading disclosures do not "shift the onus" to the party to search for the full truth. The Arbitrator in this case adopted a JAMS copyrighted form that says "each" of its neutrals has a "financial interest in the overall success of JAMS." This half-truth conceals not only his ownership interest, but also that *most* JAMS neutrals *are not* owners. The Arbitrator had the duty to give both parties the information necessary to make an informed decision about whether they should choose a neutral who is an owner or one who is not.

Detailed information about JAMS' ownership structure, including which neutrals are owners, is not publicly available. A recent law review article flagged the possibility that some JAMS neutrals are owners. Depositions taken in another lawsuit after the award had been entered in this case confirmed this and revealed additional non-public information about JAMS. JAMS identified the Arbitrator as an owner only after the final award.

The Arbitrator, as an owner, has a direct financial interest in up to half of all fees generated by Monster arbitrations. The Arbitrator's failure to disclose that he had a direct stake in a substantial and ongoing financial relationship with Monster creates the appearance that he might be partial in his consideration of this matter.

In addition to the appearance of partiality, this Court's *Comedy Club* decision provides an alternative basis for vacating the award, because the Arbitrator manifestly disregarded the law in finding that Olympic Eagle was not entitled to protection from early termination under Washington's Franchise Investment Protection Act ("FIPA"). Olympic Eagle was one of about 100 Anheuser-Busch distributors who agreed to co-brand their franchises with Monster Energy products pursuant to 20-year agreements. Olympic Eagle grew the business almost fourfold, helping the Monster brand go from being an also-ran to a leader in the energy drink segment. Monster, relying on its *unilateral* rights in the contracts, terminated the agreements just eight years into the 20-year term so it could transfer the valuable distribution rights to Coke as part of a $2.15 billion transaction.

Monster asserted FIPA was inapplicable because no franchise fee had been paid. Its CEO swore under oath in the District Court that the company had not retained any of the $1 million in an initial "buyout fee" or other fees totaling $5.9 million that Olympic Eagle had paid to Monster. Monster's CEO finally admitted, two weeks before the arbitration hearing, that the company had retained about half of Olympic Eagle's initial "buyout fee."

But Monster also urged the Arbitrator to adopt a 50-percent-of-sales test from Connecticut to deny FIPA protection, knowing that even though Monster was one of Olympic Eagle's top three brands and represented one third of its earnings, sales of the product would not meet that percentage threshold. The Arbitrator acknowledged in his award that "courts in Washington have not imposed a percentage requirement." He nevertheless adopted the reasoning under Connecticut law that only parties who are "dependent" on the relationship are entitled to franchise protection. Just months before the Arbitrator's award, the Washington Supreme Court in *Department of Labor and Industries v. Lyons Enterprises* rejected this view of FIPA, but the Arbitrator disregarded that ruling.

The award should be vacated and the matter remanded for an arbitration proceeding that includes full disclosure of financial interests so that Olympic Eagle can make an informed choice of neutrals and receive a hearing free from the appearance of partiality. Given its prominence, if JAMS is not made to comply with the "simple requirement" to make complete and accurate disclosures of an arbitrator's financial interests, other arbitration providers will be emboldened to conceal similar financial interests with half-truths and partial information.

II. JURISDICTIONAL STATEMENT

The Central District of California ("District Court") had jurisdiction over this case pursuant to 28 U.S.C. § 1332(a). Monster Energy Company ("Monster") is a Delaware corporation with its principal place of business in California. City Beverages, LLC dba Olympic Eagle Distributing ("Olympic Eagle") is a Missouri corporation with its principal place of business in Washington. The amount in controversy in the lower court exceeded $75,000.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291 and 9 U.S.C. §16 (a)(1)(D). Olympic Eagle appeals a decision of the District Court, entered on May 9, 2017, granting Monster's Petition to Confirm Arbitration Award and Denying Olympic's Cross-Petition to Vacate Arbitration Award. Appellant's Excerpts of Record ("ER") 14-21. Olympic Eagle also appeals a final decision entered by the District Court on July 19, 2017. ER 4-6.

This appeal is timely. The District Court entered an order granting Monster's Petition to Confirm Arbitration Award and denying Olympic Eagle's Cross-Petition to Vacate Arbitration Award on May 9, 2017. ER 14. Pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A), Olympic Eagle filed its notice of appeal of that order less than 30 days later, on June 7, 2017. ER 11-13. The District Court entered a final judgment on July 19, 2017. ER 4-6. Pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A), Olympic Eagle filed its notice of appeal of the final judgment on July 27, 2017. ER 1-3.

III. ISSUES PRESENTED FOR REVIEW

A. Does a neutral arbitrator's failure to disclose that he is an owner and shareholder of a for-profit business and entitled to a share of revenues from a substantial and ongoing relationship with a party create a "reasonable impression of partiality" that requires vacating the arbitrator's award?

B. Is an arbitrator's statement that "each JAMS neutral" has "an economic interest in the overall financial success" of his arbitration service—when in fact most neutrals do *not* share his ownership interest—a half-truth that effectively conceals the arbitrator's direct interest in the ongoing business relationship with one of the parties to the litigation?

C. Does a partial disclosure of an arbitrator's interest in a business, contained in a 16-page document that gives the appearance of thorough and complete disclosure, place the onus on a party to make further inquiries?

D. When a party makes a *prima facie* case that an arbitrator failed to disclose a material financial relationship, does the District Court err when it fails to rule on a request to conduct limited discovery on that relationship?

E. In determining whether a distributor is protected under Washington's Franchise Investment Protection Act, does an arbitrator manifestly disregard the law by holding that franchise protection only applies to entities that are economically dependent upon the franchise relationship when the Washington Supreme Court recently rejected that very principle?

F. Does an arbitrator manifestly disregard Washington's one-way fee provisions for franchise-termination claims by awarding fees to a defendant under a statute that both parties agreed was inapplicable to this case?

G. Does a district court err in awarding fees for post-arbitration proceedings under state law when the arbitration contract is governed by the Federal Arbitration Act and provides only the arbitrator the authority to award fees?

IV. STATEMENT OF THE CASE

A. Olympic Eagle Adds Monster Energy Drinks To Its Successful Anheuser-Busch Franchise.

Olympic Eagle is a successful Anheuser-Busch ("AB") franchise, selling mostly beer in regions of western Washington state. ER 348. Though Monster Energy had initial success with its new energy drink brand, it needed a higher-quality distribution system to continue growing that brand. ER 478-479, 778-780.

In 2006, Olympic Eagle was one of about 100 AB distributors that agreed to co-brand their business by promoting and selling Monster energy drinks for 20 years in an exclusive territory. ER 348. Olympic Eagle was "not allowed to negotiate different terms" in its contract with Monster. ER 552.

Monster required Olympic Eagle to pay $1 million to purportedly "buy-out" Monster's prior distributors. ER 552. Monster did not disclose that it would keep for itself a substantial portion of this fee and concealed this fact through false, sworn statements by its CEO to the District Court and the Arbitrator. ER 350-353, 360-361. The CEO is a former commercial litigator and a member of the California Bar. ER 370.

Monster also required Olympic Eagle to pay other ongoing fees, including a four-percent royalty and a per-case marketing fee, ER 552, much of which Monster spent on national promotional campaigns. ER 660, 663, 681-682. Olympic Eagle paid a total of $5.9 million in initial and ongoing fees to Monster. ER 663.

The contract required Olympic Eagle to be solely responsible to grow Monster sales in its exclusive territory. ER 468, 585, 604. Olympic Eagle's substantial investment of time, money, and relationships helped transform Monster products from an also-ran in the market to the No. 1 selling energy drink in convenience stores. ER 658. Sales increased almost fourfold. ER 700-701.

B. Monster Terminates The 20-year Agreement After Just Eight Years As Part Of A $2.15 Billion Transaction With Coke.

While Monster could terminate the agreement with Olympic Eagle without cause upon payment of a severance fee, Olympic Eagle "sign[ed] on for a 20-year relationship [it] could not terminate except for cause" or an AB triggering event. ER 380; *see also* ER 585-587. In 2014, eight years into the 20-year agreement, Monster invoked its unilateral right to terminate the agreement and offered to pay Olympic Eagle a contractual severance of $2.5 million. ER 553.

Monster terminated Olympic Eagle not for any cause, but as part of a $2.15 billion equity investment by The Coca-Cola Company ("Coke"). ER 349, 552-553. Monster agreed to transfer rights held by the AB distributors to Coke. ER 349. Monster terminated most of the AB distributors, making a few exceptions for those who asserted franchise protection in other states. ER 349, 706.

Olympic Eagle invoked the Washington Franchise Investment Protection Act, RCW 19.100.180, which prohibits termination without cause and voids any contract provision that says otherwise. ER 349, 553, 621. Monster served an arbitration demand on Olympic Eagle and one week later filed an action in the District Court seeking to compel arbitration before JAMS. ER 350, 553.

In briefing before the District Court, Olympic Eagle asserted that the $1 million initial payment was a franchise fee, establishing one of the three elements necessary for protection under FIPA. ER 350. Monster's CEO responded with a declaration stating: "Defendants...misleadingly allege that the 'Buy-Out Contribution'...represents a franchise fee under FIPA.... Monster was not the beneficiary of the Buy-Out Contribution." ER 361. He later admitted this statement was false. ER 489-491; *see also* ER 777-778.

The District Court compelled arbitration before JAMS in Orange County as specified by Monster in its form agreement with the AB distributors. ER 350, 553. In August 2015, JAMS provided a list of seven "available" neutrals that included the Hon. Judge W. Kennedy, Jr. (Ret.) and his wife. ER 222. After the parties consulted about their choices, JAMS appointed Judge Kennedy. ER 233.

C. The Arbitrator Fails To Require Monster To Verify The CEO's Sworn Statement That It Did Not Retain A Portion Of The $1 Million "Buyout Fee."

In February 2016, Olympic Eagle requested documents supporting Monster's CEO's declaration filed with the District Court stating the company had not retained any of Olympic Eagle's $1 million initial buyout fee. ER 351. In his first deposition on May 20, 2016, the CEO reiterated his sworn statement, testifying that the buyout fee was "pretty much" revenue neutral but that Monster may have recorded "nominal" revenue from the process. ER 382.

Olympic Eagle sought the Arbitrator's assistance in pursuing this discovery, making a written request for a hearing and briefing schedule on a motion to compel. ER 351, 411-419. The Arbitrator said that Olympic Eagle should contact his case manager if it believed a call was necessary. ER 351, 412. Olympic Eagle contacted the Arbitrator's case manager at JAMS twice to schedule the call but never received a response. ER 351, 411-412; *see also* ER 435 (informing the Arbitrator "we did tee this up for you several weeks ago and we never got it on the calendar").

Near the end of the dispositive-motions hearing on July 11, 2016, the Arbitrator told Monster to make its controller available to Olympic Eagle to discuss documents related to the buyout fee. ER 438-439. Although Olympic Eagle made several follow-up requests in writing, Monster failed to comply with the Arbitrator's request. ER 351. Olympic Eagle informed the Arbitrator of Monster's refusal, but he took no action to compel Monster to produce its controller. ER 351.

D. The Arbitrator Denies Summary Judgment, Including On Monster's "Sophisticated Franchise" Theory.

The dispositive-motions hearing addressed, among other issues, the assertion by Monster's CEO that Olympic Eagle was not entitled to franchise law protection because "there was never an intention…[for] franchise laws to protect a large, sophisticated, professional distributor…." ER 385; *see also* ER 386 ("It's intended to protect a guy whose got $5,000 and puts it in a Subway franchise.").

This sophisticated-franchisee issue was squarely before the Arbitrator. As Monster confirmed in its reply brief on summary judgment, "Olympic cite[d] the Washington Supreme Court's recent *Lyons* decision for the proposition that 'large, sophisticated franchisees' are subject to FIPA. … Olympic further assert[ed that] *Lyons* 'rejected the proposition asserted by Douglas C. Berry… that… concerns… about unequal bargaining power are outdated and no longer applicable' because 'modern franchising mostly involves large, sophisticated franchisees.'" ER 738 (quoting Olympic Eagle's Opposition to Monster's Motion for Summary Disposition at 6).[1]

Both parties submitted declarations from franchise experts. Monster's own expert stated that a business in Washington may be a co-branded franchise "where two (potentially more) names are substantially associated with the same business." ER 515. One of Olympic Eagle's experts—the former head of the state agency responsible for the enforcement of FIPA—declared that Washington had never used a percentage-of-sales approach to determine whether the "substantial association" element of a franchise was satisfied. ER 545, 789-790.

By an order dated August 5, 2016, the Arbitrator denied the parties' summary judgment motions.[2]

E. The CEO Admits His Prior Statement That Monster Did Not Retain Any Of The $1 Million "Buyout Fee" Was False.

In summary judgment briefing, Monster reaffirmed the CEO's statements that the company had not benefitted from the $1 million initial fee. Monster said

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[1] *See also* Olympic Eagle's Opposition to Monster's Motion for Summary Disposition at 5-6, which is attached as Exhibit A to Appellant's Motion For Judicial Notice.

[2] *See* Arbitrator's Ruling on Competing Summary Disposition Motions, which is attached as Exhibit B to Appellant's Motion For Judicial Notice.

that "[n]o evidence supports the claim that Monster 'kept much of' Olympic's buyout contribution, much less any of it." ER 752-753.[3]

But on August 11, 2016, about two weeks before the arbitration hearing, Monster produced accounting records showing that it had, in fact, retained a significant portion of the buyout fees paid by AB distributors, including Olympic Eagle. ER 501-502, 505-10. In his second deposition, on August 12, 2016, Monster's CEO was shown transcripts of his prior statements during corporate earnings calls in 2006 and 2007 when he had reported that Monster was receiving substantially more money from buyout fees paid by AB distributors than it was paying out to terminated distributors. ER 475-478, 480-486.

The CEO finally admitted that his company had retained a substantial portion of Olympic Eagle's $1 million buyout fee, stating "[i]t was retained by Monster and it was ultimately allocated to other costs and expenses…." ER 488; *see also* ER 489 ("The math is clear. The difference came in to Monster, that's clear.").

[3] Monster admitted in later briefing that it first analyzed whether it had kept any of Olympic Eagle's buyout fees during discovery in these proceedings – almost one year after the CEO's sworn statements. ER 721-722.

F. The Arbitrator Disregards The Washington Supreme Court And Follows Connecticut Law In Finding That Only Distributors Who Are "Dependent" On The Relationship Are Entitled To Protection Under Washington Franchise Laws.

After a hearing that began August 29, 2016 and lasted more than two weeks, the parties received the Arbitrator's Interim Award on November 17, 2016, finding that Olympic Eagle is not entitled to protection under the Washington Franchise Investment Protection Act. ER 551-558. Although the Arbitrator correctly recognized that "courts in Washington have not imposed a percentage requirement" when interpreting "substantial association" with a trademark or advertising under FIPA, ER 556, he nevertheless adopted Monster's argument that he should interpret the Washington statute by looking to Connecticut law, which requires a distributor to be dependent on a supplier for franchise protection to apply. ER 555-556, 714-716.

On January 25, 2017, the parties received the Arbitrator's $3 million Award of Attorneys' Fees and Costs to Monster. ER 561-564. The Arbitrator adopted Monster's argument that the fees were permissible under a FIPA provision that allows claims for failure to register or properly disclose in connection with a franchise sale. ER 561-564. Olympic Eagle did not bring a claim under this provision, and Monster previously informed the Arbitrator that this provision did not apply to the case. ER 798.

In his final award, the Arbitrator acknowledged the importance of his decision to Monster: "I'm sure that, because an unfavorable ruling to Monster in this case would have the likely effect of emboldening those other AB distributors, it was extremely important to Monster to prevail in this case." ER 564.

G. JAMS' Disclosures Concealed The Fact That The Arbitrator Was An Owner Entitled To A Share Of Revenues From Significant Ongoing Business With Monster.

Monster filed a petition to confirm the awards with the District Court, and Olympic Eagle filed a cross-petitioned to vacate. After the final awards, Olympic Eagle's attorneys found an article posted on Westlaw in August 2016 in the UCLA Entertainment Law Review where the authors reported on their interviews with JAMS leadership. ER 165, 213, 261.

The article says that "[m]any JAMS neutrals are also 'owners' of JAMS. To our knowledge, JAMS is the only major provider where many of its neutrals are also owners who have a profit interest in matters handled by other JAMS' neutrals. As such, the 'owners' receive not only a share of their own fees in the proceedings they act as neutral in, but also a share of JAMS' overall profits." ER 264 (Ronald J. Nessim & Scott Goldman, *Mandatory Arbitration Provisions Involving Talent and Studios and Proposed Areas for Improvement*, 22 UCLA Ent. L. Rev. 233, 245 (2015)).

This article raised a concern about whether the Arbitrator had disclosed his financial interest in JAMS' extensive relationship with Monster. ER 213-214. Monster began specifying the JAMS Orange County office as the location for arbitration around the year 2000, switching from the American Arbitration Association ("AAA"), a not-for-profit provider. ER 279, 301, 313. Monster is a significant client for the JAMS Orange County Office, which has handled at least 97 arbitrations and 17 mediations for Monster the previous five years. ER 219, 343-346. JAMS retains up to 50 percent of the fees charged by its arbitrators. *See* Nessim, *supra*, at 245; ER 264.

At the beginning of the arbitration, a disclosure statement was provided to the parties that said it was "prepared by JAMS personnel and reviewed by the arbitrator." ER 236. The "Disclosure Checklist" included the statement that it is "the copyrighted property of JAMS." ER 237. The JAMS disclosure also stated six times: "The neutral practices in association with JAMS. Each JAMS neutral, including the neutral in this case, has an economic interest in the overall financial success of JAMS." ER 243-248. The Arbitrator repeated this statement in his personal disclosure.[4] ER 241.

After the awards and based upon what it had learned in the Nessim article, Olympic Eagle sought information from JAMS about the Arbitrator, including

[4] Though not included on his personal disclosure, during the dispositive-motions hearing, the Arbitrator also referenced his time "on the board" of JAMS. ER 426.

whether he or his wife (also a JAMS neutral) had ownership that might give them a direct financial interest in Monster Energy's business with JAMS. ER 252-253.

On March 2, 2017, JAMS General Counsel wrote that it would not respond to these requests in part "to protect [the] privacy interests of the arbitrator and his spouse." ER 254. On March 13, 2017, Olympic Eagle served JAMS with a subpoena, requesting the same information that was sought in its February 24 letter. ER 289-296. On March 15, 2017, outside counsel for JAMS confirmed over the telephone that the Arbitrator is an owner of JAMS but declined to share any other information. ER 218, 297. She also refused to confirm the ownership interest in writing. ER 218, 297.

In April, 2017, Olympic Eagle serendipitously obtained transcripts of the depositions of three JAMS representatives taken in January and late March of 2017 in an unrelated lawsuit. ER 107. Their testimony stated:

(1) JAMS is the largest private dispute resolution provider in the world. ER 136.

(2) It is a for-profit entity, with approximately 320 neutrals, of which 107 are owners. ER 142, 159, 161-162.

(3) JAMS owners are shareholders, and each shareholder has an equal ownership interest. ER 136.

(4) JAMS distributes a portion of its profits annually to its shareholder neutrals. ER 154. Its non-owner neutrals are not entitled to profit distributions or bonuses. ER 162.

(5) Non-owner neutrals are compensated exclusively based on a percentage of the fees paid by parties for their neutral services. ER 148-149, 154, 162.

Olympic Eagle also moved to compel answers to the subpoena seeking information about the Arbitrator's financial interests in the company's relationship with Monster. ER 22-47. On May 9, 2017, a few days prior to the hearing date on the motion to compel, the District Court granted Monster's petition to confirm the arbitration award and denied Olympic Eagle's petition to vacate. ER 14-21. The motion to compel was never decided. ER 21.

In an order dated June 28, 2017, the District Court awarded Monster $3,000,000 in attorneys' fees in the arbitration and $256,058 on the post-award cross petitions. ER 7-10. It entered judgment on July 19, 2017. ER 4-6.

V. SUMMARY OF ARGUMENT

The Arbitrator's award should be vacated because he failed to disclose a substantial interest in a firm which had "more than trivial business" with Monster. Although the Arbitrator disclosed the one prior case he had arbitrated in which Monster was a party, he failed to disclose that he was an owner of JAMS, with a financial interest in up to 50 percent of the fees paid in at least 97 Monster arbitrations during the preceding five years, as well as in fees from future Monster arbitrations.

In addition to failing to disclose these material facts, the JAMS form disclosure concealed—under the half-truth that "each JAMS neutral" had a financial interest in the economic success of JAMS—that most JAMS arbitrators are not owners and are compensated only by the parties, the usual and customary practice in arbitration. JAMS has in the past recognized that an appearance of bias is created by having its owners serve as arbitrators in matters involving repeat corporate users. In those instances, it sought to address the issue by appointing only non-owner arbitrators.

The Arbitrator's awards should also be vacated because he recognized and then ignored Washington law in order to deny Olympic Eagle protection under Washington's Franchise Investment Protection Act. The Arbitrator manifestly disregarded the Washington Supreme Court's decision in *Lyons* which rejected a dependency test for franchise protection. He instead relied on Connecticut law to determine that, because Olympic Eagle was not economically dependent on the Monster relationship, it was not protected by Washington's franchise laws.

The Arbitrator also ignored applicable Washington law when he awarded attorneys' fees to Monster. He justified the award by applying the wrong franchise statute and ignoring the correct statutes and authority which allow an award of fees only to the party seeking protection.

VI. ARGUMENT

The Ninth Circuit subscribes to the majority view that a claim of arbitrator partiality may be brought under the Federal Arbitration Act only "when the arbitration is completed and an award rendered." *In re Sussex*, 781 F.3d 1065, 1073 (9th Cir. 2015) (internal quotation omitted). The District Court's decision to vacate or confirm an arbitration award is reviewed *de novo*, *New Regency Productions, Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1105 (9th Cir. 2007), including "the court's adoption of a standard of impartiality for arbitrators…." *Woods v. Saturn Distribution Corp.*, 78 F.3d 424, 427 (9th Cir. 1996).

In such a review, federal courts "should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149, 89 S. Ct. 337, 339, 21 L. Ed. 2d 301 (1968). An award may be vacated on these grounds even when no actual bias is shown. *Schmitz v. Zilveti*, 20 F.3d 1043, 1047 (9th Cir. 1994). "Whether the arbitrator's decision itself is faulty is not necessarily relevant." *Woods*, 78 F.3d at 427.

Although this Court is "cognizant of the public interest in efficient and final arbitration," it "believe[s] that a rule encouraging 'arbitrators [to] err on the side of disclosure' is consistent with that interest." *New Regency*, 501 F.3d at 1111 (quoting *Commonwealth Coatings*, 393 U.S. at 152). There is "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 Coatings*, 393 U.S. at 149.

A. The Arbitrator Created The Appearance Of Partiality By Not Disclosing He Was An Owner With A Right To A Portion Of All Fees From JAMS' Ongoing And Substantial Relationship With Monster.

An arbitrator gives the appearance of partiality when he or she fails to disclose "'a substantial interest in a firm which [was doing] more than trivial business' [with] a party to the arbitration." *New Regency*, 501 F.3d at 1107 (quoting *Commonwealth Coatings*, 393 U.S. at 151–52). As this Court found in *Schimtz*, a "'reasonable impression' of partiality is not equivalent to, nor does it imply, a finding of actual bias." 20 F.3d at 1046-47 (recognizing that, in *Commonwealth Coatings*, "no actual bias was shown"). Thus, "courts examining nondisclosure cases have not required proof of actual bias in showing 'evident partiality.'" *Id*. at 1046.

The District Court applied the wrong standard when evaluating whether the Arbitrator's disclosure demonstrated evident partiality. Citing this Court's decision in *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006), the District Court reasoned that Olympic Eagle had offered "no particularized evidence of the Arbitrator's partiality or bias resulting from his economic interest in JAMS," stating there was "nothing that would strongly suggest evident partiality on the part of the Arbitrator." ER 17. But the issue in *Nagrampa* was the unconscionability of arbitration clauses under California state law—not evident partiality in arbitrator disclosures under the FAA. 469 F.3d at 1285.

Under *Commonwealth Coatings* and Ninth Circuit decisions following it, Olympic Eagle was not, as the District Court found, required to provide "particularized evidence" of the Arbitrator's partiality. This Court should vacate the Monster awards under the Federal Arbitration Act, 9 U.S.C. § 10(a)(2), as it has in other cases where an arbitrator's failure to disclose information created a reasonable impression of partiality. *See, e.g.*, *New Regency*, 501 F.3d 1101*; Zilveti*, 20 F.3d 1043.[5] Vacating the Monster Awards would further the purpose of Federal

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[5] Where the Ninth Circuit has not found evident partilaility, the undislcosed information was too attenuated, insubstantial, or indirect to vacate the award. *See A. Miner Contracting, Inc. v. Dana Kepner Co., Inc.*, 696 F. App'x 234, 235–36 (9th Cir. 2017) (arbitrator's law partners had represented unaffiliated attorney in divorce proceeding who, in turn, had represented one of the parties to the arbitration in an earlier matter); *Ruhe v. Masimo Corp.*, 640 F. App'x 685, 686 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 72, 196 L. Ed. 2d 197 (2016) (arbitrator's brother had represented a competitor to one of the parties in litigation against that party in two prior matters); *In re Sussex*, 781 F.3d at 1074-75 (arbitrator had tried to start a company to attract investors for litigation financing but had no relationship with either party to the arbitration); *Braggs v. Jones*, 614 F. App'x

Arbitration Act "section 10(a)(2) [which] instructs that the parties should choose their arbitrators intelligently.... The parties can choose their arbitrators intelligently only when facts showing potential partiality are disclosed." *Zilveti*, 20 F.3d at 1047.

1. While Appearing To Disclose All Relationships With The Parties, The Arbitrator Concealed His Financial Interest In JAMS' Relationship With Monster.

Under the Supreme Court's decision in *Commonwealth Coatings*, "the Arbitrator's failure to 'disclose to the parties any dealings that might create an impression of possible bias' is sufficient to support vacatur." *New Regency*, 501 F.3d at 1105 (quoting *Commonwealth Coatings*, 393 U.S. at 149). JAMS itself has recognized the importance of making "all initial disclosures that, to an objective observer, might create an impression of partiality." ER 194.[6]

The JAMS disclosure document runs 16 pages and provides the appearance of being comprehensive and complete. ER 236-251. The form includes six pages

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901, 903 (9th Cir. 2015) (arbitrator once had an office in the same building as counsel for a party); *Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 646 (9th Cir. 2010) (more than a decade earlier, arbitrator had appeared before a co-arbitrator in an unrelated matter); *Apusento Garden (Guam) Inc. v. Superior Court of Guam*, 94 F.3d 1346, 1352 (9th Cir. 1996) (arbitrator and expert witness were, unbeknownst to them, limited partners in entity that owned apartment complex unrelated to the arbitration).

[6] ER 191-195 (R. Davidson, *Conflicts of Interest, What Are They, And Must They All Be Disclosed*) is also available at https://www.jamsadr.com/pdf-viewer.aspx?pdf=/files/uploads/documents/articles/davidson-conflicts-interest-2012-05.pdf (last accessed on February 13, 2018).

disclosing the Arbitrator's prior cases with parties or attorneys in the matter ER 243-248, as well as other disclosures like whether he had a financial interest in a party, ER 238, or in the subject matter of the arbitration, ER 239, or one "that could be substantially affected by the outcome of the arbitration," ER 239.

The particular disclosures at issue in this case—that "The neutral practices in association with JAMS" and "Each JAMS neutral, including the neutral in this case, has an economic interest in the overall financial success of JAMS"—appear on six separate pages. ER 243-248. The Arbitrator repeated these statements separately on a seventh page. ER 241.

If the Arbitrator was merely an independent contractor "practicing in association with JAMS" and not also an owner of JAMS stock, these disclosures would be substantially complete. But JAMS and the Arbitrator have a duty to disclose ***all*** financial interests in a party, direct or indirect, not to pick and choose. *See New Regency*, 501 F.3d at 1110-11; *Zilveti*, 20 F.3d at 1048 ("the parties rather than the arbitrators or the courts should be the judges of the partiality of arbitrators"); *see also Neaman v. Kaiser Found. Hosp*., 9 Cal. App. 4th 1170, 1177, 11 Cal. Rptr. 2d 879 (1992), *reh'g denied and opinion modified* (Oct. 23, 1992) (award vacated because an arbitrator, while disclosing he had served on prior panels involving one of the parties, failed to disclose that on five of those he had been that party's chosen representative on a multi-arbitrator panel).

Despite the appearance of being thorough and complete, the JAMS form failed to disclose any information about JAMS, the Arbitrator's ownership in JAMS, or its relationship with Monster, including that:

(1) JAMS is a for-profit company (ER 142);

(2) the Arbitrator is one of 107 shareholders in JAMS, giving him a direct stake in the company's substantial, ongoing business relationship with one of the parties to the arbitration (ER 133);

(3) JAMS has administered 97 arbitrations with Monster in the prior five years (ER 219, 343-346);

(4) JAMS retains up to 50 percent of the fees paid by the parties in arbitrations (ER 264);

(5) the Arbitrator has a right to a portion of the fees paid in past and future Monster arbitrations (ER 154); and

(6) most JAMS arbitrators are not owners and therefore do not have a direct financial interest in the Monster business with JAMS (ER 142, 159, 161-162).

The number of Monster arbitrations can be found on the JAMS website under a California-required consumer disclosure, ER 346, but none of the other information is included.

The relationship between JAMS and Monster is ongoing and substantial. Monster is one of JAMS' top commercial litigation clients in California. ER 108-

109, 190. Monster requires in its form contracts that all disputes with its hundreds of distributors be directed to the JAMS Orange County Office. ER 218, 337. If Monster is dissatisfied with JAMS, it can amend these agreements to change arbitration service providers, as it did in about 2000 when it switched from AAA to JAMS. *See* ER 301, 313.[7]

The possible source of bias in such arrangements was highlighted by *The New York Times*, which reported, "[M]ore than three dozen arbitrators described how they felt beholden to companies. Beneath every decision, the arbitrators said, was the threat of losing business." Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES, Nov. 1, 2015.[8]

The Arbitrator in this matter stated that he knew "it was extremely important to Monster to prevail in this case" because "an unfavorable ruling to Monster…would have the likely effect of emboldening…other AB distributors." ER 564.

Federal Courts have consistently vacated arbitration awards where direct or indirect financial relationships with a party—or the concrete possibility of such relationships—are not fully disclosed by the arbitrator. In *Commonwealth*

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[7] *See also* ER 626-628 (Monster unilaterally amended its agreement with Olympic Eagle).

[8] Available at https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html (last accessed February 13, 2018).

Coatings, the Supreme Court vacated a unanimous, three-arbitrator award based on one arbitrator's failure to disclose "sporadic" dealings with a party "involving fees of about $12,000 over a period of four of five years." 393 U.S. at 146. Neither party had alleged any *actual* partiality, unfairness, or bias, and the challenging party's own chosen arbitrator had ruled against it. *See id*. at 152 (Fortas, J., dissenting).

Likewise, in *Schmitz v. Zilveti*, this Court found that any undisclosed ownership interest in a firm that has done business with one of the parties creates an appearance of bias. 20 F.3d at 1049. The arbitrator's law firm had represented the parent company of a party "in at least nineteen cases during a period of 35 years…." *Id*. at 1044. The award was vacated even though the arbitrator was unaware of the undisclosed relationship.

And in *New Regency*, the Ninth Circuit found that failure by the arbitrator to disclose an indirect financial interest—he had taken a job with a company that was negotiating a significant movie contract with a party to the arbitration—warranted vacating the award. 501 F.3d at 1110. This Court found an appearance of bias even though the "arbitrator had no direct role in the negotiations…and…the record lacked evidence that the arbitrator was even aware of the potential relationship." *Noel Madamba Contracting LLC v. Romero*, 137 Hawai'i 1, 14, 364 P.3d 518 (2015) (citing *New Regency*, 501 F.3d at 1107-08); *see also In Re Sussex*, 781 F.3d at 1074 ("we have held there was 'evident partiality' in cases that involved direct financial connections between a party and an arbitrator or its law firm, or concrete possibility of such connections"); *Rosenhaus v. Jackson*, CV143154MWFJCGX, 2016 WL 4592180, at *7 (C.D. Cal. 2016) ("an arbitrator's failure to disclose a potentially lucrative source of future income from one of the parties…can create a reasonable impression of bias").[9]

New Regency cited the Eight Circuit's decision in *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157, 158 (8th Cir. 1995), reversing a district court's order confirming an arbitration award. The Eight Circuit found the arbitrator "had failed to disclose his job title and that his employer had 'ongoing business relationships with one of the parties.'" 501 F.3d at 1108-09. This Court recognized, "[a]lthough the arbitrator was not personally involved in those relationships, the court wrote that as a high ranking officer, he had a substantial interest in his firm, which did more than trivial business with the party." *Id.* at 1109 (internal quotation omitted).

[9] *New Regency* also discussed the Second Circuit's decision in *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2d Cir. 2007), which held that an arbitration award could be vacated for evident partiality where "one of three arbitrators, the chairperson, president, and CEO of a 'multi-billion dollar company with 50 offices in 30 countries,' 'fail[ed] to either investigate what he knew to be a potential business relationship between his corporation' and a parent company of a party 'or inform them that he had walled himself off from learning more.'" *New Regency*, 501 F. 3d at 1108.

2. The Half-Truth That Each JAMS Neutral Has An Economic Interest In The Company's Overall Financial Success Concealed That Olympic Eagle Had A Choice Of Arbitrators Who Were Owners And Those Who Were Not.

In *New Regency*, this Court rejected the argument that an arbitrator's partial disclosure of "past employment history and business dealings placed the onus on [a party] to make further inquiries." 501 F.3d at 1110. Instead, this Court found "it is precisely against the background of previously disclosed information" that an arbitrator's disclosure statement "might have 'misled' [a party] 'into believing that no nontrivial conflict exist[ed].'" *Id.* (quoting *Applied Indus.*, 492 F. 3d at 137).

The District Court in this case simply ignored *New Regency* when it found that "Olympic…waived its evident partiality claim because [it] failed to timely object when it first learned of the potential 'repeat player' bias due to the Arbitrator's economic interest in JAMS." ER 17. It held that the "proper time for Olympic to further investigate or object to the Arbitrator's potential conflict of interest…was before the arbitration award was issued." ER 17.

The District Court relied on *Fidelity Federal Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306 (9th Cir. 2004), which does ***not*** support a finding of waiver when a partial or misleading disclosure is made. Instead, this Court confirmed what most federal courts had already held: an evident partiality challenge ***is not*** waived "unless the party had real, actual knowledge of the conflict" or "knew or should have known of the facts" but failed to object prior to the award. *Id.* at 1313. This

Court found waiver occurred in *Fidelity* because a party had failed to request ***any*** disclosures even though the arbitrator had first been appointed as a representative of the other party and only later agreed to be neutral, thus giving "constructive notice" of a potential relationship between the arbitrator and selecting party. *Id*.[10]

Unlike in *Fidelity,* Olympic Eagle received what appeared to be a complete disclosure. But it did not know, and had no reason to believe, the Arbitrator was an owner with a direct financial interest in JAMS' ongoing and substantial relationship with Monster. That information was neither disclosed nor publicly available. ER 213-216, 287-288.

3. JAMS Cannot Shift Its Disclosure Obligations To A Party Through Half-Truths And Misleading Disclosures.

Benjamin Franklin observed in *Poor Richard's Almanac* that "Half the Truth is often a great Lie."[11] The Supreme Court recently agreed, finding "the rule that half-truths—representations that state the truth only so far as it goes, while omitting critical qualifying information—can be actionable misrepresentations."

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[10] The Ninth Circuit has likewise found waiver when the objecting party was *fully aware* of the arbitrator's alleged conflict yet failed to object prior to the issuance of an award. *See Johnson v. Gruma Corp.*, 614 F.3d 1062, 1069 (9th Cir. 2010); *Sheet Metal Workers Int 'l Ass 'n Local 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 746 (9th Cir. 1985); *accord Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1204 (11th Cir. 1982) ("Waiver applies only where a party has acted with ***full*** knowledge of the facts") (emphasis added).

[11] Available at http://www.politifact.com/truth-o-meter/article/2013/dec/17/did-benjamin-franklin-say-half-truth-often-great-l/ (last accessed February 13, 2018).

Universal Health Servs., Inc. v. United States, 136 S. Ct. 1989, 2000, 195 L. Ed. 2d 348 (2016). One who makes a representation "must disclose enough to prevent his words from being misleading." *Id.* at n. 3 (internal citation omitted); *Junius Constr. Co. v. Cohen*, 178 N.E. 672, 674 (N.Y. 1931) (Cardozo, J.) (finding reasonable reliance when the seller of property disclosed the existence of two roads crossing it but did not disclose a third).

Arbitrators also "must take steps to ensure that the parties are not misled into believing that no nontrivial conflict exists." *Applied Indus.*, 492 F.3d at 138. As the Eleventh Circuit said in *Middlesex*,

> By positing that appellants have the duty to inquire into the background of the arbitrator, appellant attempts to shift to the parties to the arbitration the burden of determining and disclosing bias or the reasonable appearance thereof. Neither federal nor Florida law supports such a result. As the district court aptly stated, "for the arbitration process to work successfully, the onus must be placed on the arbitrator to reveal potential bias."

Middlesex, 675 F.2d at 1204.

In providing disclosure statements, JAMS itself has acknowledged that its arbitrators may not hide behind partial disclosures: "[W]hen you do make a disclosure, take care that it is complete and wholly accurate. An inaccurate or false disclosure will lead to special scrutiny." ER 194.

The JAMS disclosure form includes the half-truth that "Each JAMS neutral…has an economic interest in the overall financial success of JAMS."

ER 243-248. But the rest of the story is omitted: (1) that some JAMS neutrals are owners while most are not; and (2) the owners receive a share of up to 50 percent of fees from ***all*** arbitrations, not just the matters they arbitrate.

Instead, the disclosure gave Olympic Eagle's CFO "the impression that all neutrals are treated the same financially. Because JAMS' website also said that all arbitrators are independent contractors, it did not occur to [Olympic Eagle] that Judge Kennedy might have an ownership stake in JAMS." ER 578. Indeed, the disclosure that all neutrals "practice in association with JAMS" indicates they have no additional status, such as employee or owner. *See* ER 243-248.

There is no information on the internet or elsewhere that reveals which JAMS neutrals are owners and which are not.[12] ER 212-214. The Arbitrator's ownership interest was only disclosed orally in response to a subpoena issued after the arbitration had ended, and JAMS refused to confirm it in writing. ER 217-218; *see also* ER 111-120, 123-125, 128-129.

This Court's reasoning in *New Regency*—that partial disclosure does not shift to a party the onus of seeking information that may show potential bias—has been echoed by several state courts. In *Ponderosa Pine Energy, LLC v. Tenaska Energy, Inc.*, 57 Tex. Sup. Ct. J. 617, 437 S.W.3d 518 (2014), the Texas Supreme

[12] Olympic Eagle's expert at the District Court, a UCLA law professor whose expertise is arbitration, mistakenly referred to JAMS as "non-profit" in a published article only a few years earlier. ER 58.

Court held that an evident partiality challenge was not waived because a party had failed to make additional inquiries after the partial disclosure of relationships between the arbitrator and lawyers for another party. The arbitrator had disclosed that the law firm for a party had recommended him for other arbitrations and had met with him to discuss possible business with a legal outsourcing company. 437 S.W.3d at 525. But the arbitrator had failed to disclose that he was also an owner of the outsourcing company, was active in administering and marketing, and had discussed the possibility of doing business with the law firm in the future. *Id*. at 525-26.

The Texas Supreme Court concluded that "[t]aken together, this undisclosed information might cause a reasonable person to view [the arbitrator] as being partial toward [the law firm's] client…to gain their favor in securing business…from [the law firm]." *Id.* at 526. The Texas Supreme Court rejected the argument that disclosing the existence of each relationship without additional detail was sufficient, observing the proposed test would "serve to encourage partial disclosures…negat[ing] the [U.S.] Supreme Court's directive to be 'scrupulous to safeguard the impartiality of arbitrators' in a process not subject to appellate review." *Id.* at 527 (quoting *Commonwealth Coatings*, 393 U.S. at 149).

The Texas Supreme Court also held the party "did not waive its evident partiality challenge by proceeding to arbitration based upon information it was unaware of at that time." *Id*. To hold otherwise "'would put a premium on concealment' in a context where the Supreme Court has long required full disclosure." *Id.* at 527-28 (quoting *Middlesex*, 675 F.2d at 1204).

The California Court of Appeals reached a similar conclusion in *Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP*:

> A party to an arbitration is not required to investigate a proposed neutral arbitrator in order to discover information, even public information, that the arbitrator is obligated to disclose. Instead, the obligation rests on the arbitrator to timely make the required disclosure. The fact that the information is readily discoverable neither relieves an arbitrator of the duty to disclose nor precludes vacating the award based on the nondisclosure.

219 Cal. App. 4th 1299, 1313, 162 Cal. Rptr. 3d 597, 607 (2013), *as modified on denial of reh'g* (Oct. 23, 2013) (internal citation omitted).

JAMS has apparently made a corporate decision to include on its disclosure forms a half-truth that suggests all arbitrators have the same economic interest in the company's success. This boilerplate statement conceals the truth that some arbitrators have a direct financial stake in revenues from large, ongoing clients like Monster, and most do not. If the award is not vacated, JAMS and every other for-profit arbitration firm will be emboldened to conceal the financial interests of neutrals, impairing the parties' ability to make a fully informed choice of arbitrator.

4. The Arbitrator's Ownership Interest In JAMS Was Material And Should Have Been Disclosed.

Where "an arbitrator knows of a material relationship with a party and fails to disclose it, a reasonable person would have to conclude that the arbitrator was evidently partial." *New Regency*, 501 F.3d at 1108 (internal quotation omitted). The District Court nevertheless held that "[a]n ownership interest in JAMS is merely a type of economic interest," and found "no reason to require that the Arbitrator…disclose[] his particular economic interest at a granular level." ER 17.

But *Commonwealth Coatings* drew a line between "economic interests" that matter and those that do not: "a substantial interest in a firm which has done more than trivial business with a party." 393 U.S. at 150. JAMS has been aware of this distinction—and the need to disclose it—for years. In 1999, accusations were made that JAMS was favoring an ongoing arbitration customer, the telecommunications company MCI. To address concerns of potential bias, a JAMS Vice President told the *Washington Post* that JAMS had adopted a rule that arbitrators assigned to hear MCI matters "***cannot have any ownership in JAMS***."[13]

JAMS knows having one of its owners serve as a neutral creates the appearance of bias for some parties. At least one federal district court has found

[13] Caroline E. Mayer, *MCI's Fine Art of Fine Print*, Wash. Post., Dec. 14, 1999 (available at https://www.washingtonpost.com/archive/business/1999/12/14/mcis-fine-art-of-fine-print/48e19bc5-4a83-469c-a18f-edb7645d09cb/?utm_term=.7bd272bc60c1) (last accessed February 13, 2018) (emphasis added).

"[t]he fact JAMS neutrals are shareholders in the corporation creates the appearance of bias." ER 173 (*Stewart & Assocs. Int'l v. Alticor, Inc.*, No. 05-3440-CV, slip op. at *8 (W.D.Mo. Nov. 20, 2006)).[14] JAMS nevertheless has developed a boilerplate disclosure, adopted by the Arbitrator, that conceals the differences between the economic interest of owners and non-owners. JAMS denied Olympic Eagle the choice between a neutral with a direct interest in the Monster relationship and a non-owner neutral with no such stake.

B. The Arbitrator Manifestly Disregarded Well-Defined And Applicable Washington Law By Adopting Connecticut's Economic-Dependency Test For Franchise Protection.

An arbitration award should be vacated under the Federal Arbitration Act, 9 U.S.C § 10(a)(4), when arbitrators exceed their powers by acting in "manifest disregard of law." *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) (citing *Kyocera Corp. v. Prudential–Bache T Servs.*, 341 F.3d 987, 997 (9th Cir. 2003) (*en banc*)). Manifest disregard exists where it is "clear from the

[14] *Stewart* was one of several courts that considered whether JAMS' relationship with the multi-level distributor Amway (and its successor) improperly tipped the arbitration playing field against distributors. *See, e.g.*, *Pokorny v. Quixtar, Inc.*, 601 F.3d 987 (9th Cir. 2010); *In re Morrison*, 421 B.R. 381 (Bankr. S.D. Tex. 2009); *Nitro Distrib., Inc. v. Alticor, Inc.*, 03-3290-CV-W-RED, 2005 WL 6936246 (W.D. Mo. Sept. 16, 2005), *aff'd*, 453 F.3d 995 (8th Cir. 2006).

record that the arbitrator recognized the applicable law and then ignored it." *Id.* (internal quotation omitted).[15]

The Arbitrator recognized that applicable Washington law does not require a distributor to conduct a certain percentage of its business with a franchisor to qualify for franchise law protection. ER 556. And Olympic Eagle explained that Washington franchise law does not consider whether an entity is economically dependent. ER 696. The Arbitrator ignored the law and impermissibly imposed his own brand of "industrial justice." *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671–72, 130 S. Ct. 1758, 1767–68, 176 L. Ed. 2d 605 (2010).

The Ninth Circuit views Washington's Franchise Investment Protection Act as "the most comprehensive franchise statute of its kind." *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1218 (9th Cir. 1983); *see also 1-800-Got Junk? LLC v. Sup. Ct.*, 189 Cal. App. 4th 500, 518, 116 Cal. Rptr. 3d 923, 936 (2010), *as modified* (Nov. 19, 2010) (Washington's FIPA "affords a franchisee ***far greater*** protection from summary termination of a franchise" than California franchise law) (emphasis added). Under FIPA, it is an "unfair or deceptive act or practice" to

[15] Some Ninth Circuit decisions have stated an additional requirement—that the legal standard be "well defined, explicit, and clearly applicable." *See Matthews v. NFL Management Council*, 688 F.3d 1107, 1116 (9th Cir. 2012). Others continue to analyze the existence of manifest disregard using the standard stated in *Comedy Club* and its progeny. *See Sanchez v. Elizondo*, 878 F.3d 1216, 1223 (9th Cir. 2018); *Biller v. Toyota Motor Corp.*, 668 F.3d 655, 665 (9th Cir. 2012). The Arbitrator's refusal to follow Washington law meets either standard.

"[t]erminate a franchise prior to the expiration of its term except for good cause." RCW 19.100.180(2)(j); *see also* RCW 19.100.190(1). Any contractual provision that conflicts with FIPA is void. RCW 19.100.220(2).

To establish that it was protected from termination under FIPA, Olympic Eagle had to show that it (1) paid a franchise fee of more than $500 for the right to enter or continue the relationships, (2) operated "an aspect" of its business under a marketing plan recommended or proscribed by Monster, and that (3) the business was "substantially associated" with the trademark or advertising of Monster. *See* RCW 19.100.010(6)(a); *see also* ER 773-774. Product distribution franchises like Olympic Eagle "represent the largest percentage of total retail sales coming from all franchises." Michael Seid & Dave Thomas, *Franchising For Dummies* 16 (2nd ed. 2010).

While Monster initially contested the franchise fee element, making false statements to the District Court and Arbitrator that it had not retained any of a $1 million initial fee, ER 350-351, 382, 739-740, its CEO confirmed in his deposition testimony that Monster had retained "several hundred thousand dollars" from Olympic Eagle's initial fee. ER 490-491. The extensive efforts by Monster to conceal these facts demonstrate it was aware that "[t]he '*franchise fee*' element is what most often separates 'ordinary dealership' or distributorship-type relationships from 'franchises.'" Rupert M. Barkoff & Andrew C. Selden, *Fundamentals Of Franchising*, xix (ABA, 3rd ed. 2008) (italics in original); *see also* ER 773-776 (*citing Jon K. Morrison, Inc. v. Avis Rent-A-Car Sys., Inc.*, C02-2383P, 2003 WL 23119903, at *5 (W.D. Wash. 2003) ("Often, only the franchise fee will separate the legitimate franchise from the common everyday commissioned sales agent.")).

Monster also admitted Olympic Eagle paid $1,105,165 in "national marketing fees." ER 501. These mandatory fees, ER 473, 552, 681-682, which were used for national advertising campaigns administered by Monster, ER 474, 723, also meet the "franchise fee" definition of "any fee or charge" paid "to continue a business under a franchise agreement." *See, e.g.*, *Lobdell v. Sugar 'N Spice, Inc.*, 33 Wash. App. 881, 891-92, 658 P.2d 1267 (1983) (candy distributor paid a franchise fee because it was required to pay to advertise the franchisor's products). Ignoring these admitted facts, the Arbitrator concluded that the "parties are in dispute" about whether a portion of this payment was a franchise fee, and he declined to resolve that dispute. ER 555.

Undisputed testimony and documents showed Monster recommended and required that Olympic Eagle operate "an aspect"[16] of its business under an annual business plan that included standards for pricing, promoting, and advertising the

[16] FIPA merely requires that an "***an aspect***" of the franchised business is operated under a "marketing plan prescribed ***or*** suggested in substantial part" by the franchisor. RCW 19.100.010(6)(a)(i) & (11) (emphases added); ER 790.

Monster Energy brand. ER 686-688, 720, 750-751, 790-792. In each annual plan, Monster prescribed quotas for sales and other promotional activity, including development of Monster-branded retail space. ER 681-684; *see also* ER 464-465 (Monster and distributor work on marketing plan together, including a volume goal); ER 470 (for Walmart you "communicate to your distributors that this is the deal…this is the pricing….").

Monster testified that each year it gave Olympic Eagle a business plan "template" reflecting Monster's annual priorities, and Monster set the sales goals. ER 686-688, *see also* ER 471 (the "complete marketing plan" "is ultimately the result of a lot of discussion between the distributor and our local rep"); ER 472 ("[E]ach distributor and [Monster] work that out…and then come back to a tailor-made plan for that distributor that everybody approves and agrees to.").

Monster also recommended, and in some cases set, the prices at which Olympic Eagle could sell to retail chains. ER 468 ("we have a recommended price"); ER 469 (pricing for "a national account you set it nationally"). Nevertheless, the Arbitrator ignored this evidence and found there was "substantial disagreement" as to "whether [Olympic Eagle] sold Monster products under a Monster prescribed 'marketing plan….'" ER 555.

1. The Arbitrator Recognized And Disregarded That "Courts In Washington Have Not Imposed A Percentage Requirement" To Determine If A Relationship Is A Franchise.

Monster's CEO conceded that its form agreement required Olympic Eagle to "advertise and promote" Monster's "product using [Monster's] trademarks in an authorized fashion," ER 400, including by "aggressively distribut[ing] and encourage[ing] the utilization of merchandising aids and promotional materials…throughout the territory." ER 401. He also acknowledged that Olympic Eagle invested substantial money and effort in advertising the Monster brand. *See* ER 402-403, 501.

To avoid the conclusion that Olympic Eagle met the third requirement for franchise protection—that its business was "substantially associated" with the "trademark or advertising" of the energy drink—Monster argued for the application of a 50-percent-of-sales test from Connecticut. ER 715-716, 741-742.

In his decision, the Arbitrator candidly acknowledged that the percent-of-sales test was inconsistent with Washington law:

> ***The courts of some states have imposed a percentage test*** to resolve the "substantial association" requirement. That percentage has normally been 50%, the logic being that if half of the distributor's business was independent of the entity whose goods it was distributing, an early termination of a distribution agreement would not have a devastating economic impact on the distributor. ***The courts in Washington have not imposed a percentage requirement***, but the meaning of the statute should be ascertained in the context of the evil it is designed to prevent, that evil primarily relating to economic vulnerability of the distributor.

ER 555-556 (emphasis added).

The Arbitrator's correct conclusion that Washington courts "have not imposed a percentage requirement" was based on extensive briefing from the parties that showed he was aware of the following:

First, the Washington Act specifically applies to distribution agreements. ER 687, 682 (citing RCW 19.100.010(6)(a)(i) and one of the first reported decisions under Washington's franchise laws, *Lobdell v. Sugar 'N Spice, Inc.*, *supra*, which found a distribution agreement for candy display racks in grocery stores to be a franchise).

Second, Washington Courts look to California for interpretations of similar provisions of their franchise laws, [17] including the "substantial association" element which a Federal District Court in Washington found to be "identical in all relevant respects." *Atchley v. Pepperidge Farm, Inc.*, No. CV-04-452-EFS, 2012 WL 6057130, at *8 (E.D. Wash. Dec. 6, 2012); ER 696.

Third, Monster's proposed percent-of-sales test has been rejected under California's similar law. ER 789-790. "**The percentage of gross revenues of a 'franchisee' under an agreement is not a factor in determining whether the**

[17] Washington franchise law was "modeled in part on" and "mirrors" California franchise law. *See Red Lion Hotels Franchising, Inc. v. MAK, LLC*, 663 F.3d 1080, 1091 (9th Cir. 2011) (citing Chisum, *supra*, at 335); *Roberts v. C.R. England, Inc.*, 848 F. Supp. 2d 1087, 1089 (N.D. Cal. 2012); *see also* ER 539-542.

Agreement in question is a 'franchise.'" Cal. Comm'rs Op. No. 74/9F (May 23, 1974) (emphasis added); ER 790.

Under California law, a franchisor's trademark must merely be communicated to the franchisee's customers to trigger coverage of franchise statutes. *See Kim v. Servosnax, Inc.*, 10 Cal. App. 4th 1346, 13 Cal. Rptr. 2d 422 (1992) (even though the "franchisee" never used the trademark in conducting its business); *see also* ER 689-690, 748.

Fourth, Connecticut's franchise statute, while sharing some common terms, is distinct from those in Washington and California. ER 696. Connecticut does not have a franchise fee requirement. C.G.S. § 42-133e(b). *See* Jason J. Cabral, *The Connecticut Franchise Act: How Important is the Absence of a Franchise Fee Requirement in the Connecticut Franchise Act?*, 25 Quinnipiac L. Rev. 663, 684 (2007). As a stand-in for the franchise fee requirement, Connecticut courts have created an "economic dependence" test manifested as the 50-percent-of-sales requirement.[18]

Finally, the Arbitrator learned from experts for both parties that co-branded franchises—where a company represents two or more franchise systems—are

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[18] Connecticut courts, accordingly, have come to focus on issues like the percentage of sales to determine "how dependent, or associated, the franchisee is on its franchisor." *Hartford Elec. Supply Co. v. Allen-Bradley Co., Inc.*, 250 Conn. 334, 360, 736 A.2d 824, 839 (1999); *see also Grand Light & Supply Co., Inc. v. Honeywell, Inc.*, 771 F.2d 672, 677 (2d Cir. 1985).

common and protected under Washington's franchise laws.[19] Monster's own franchise expert conceded that franchises may—under Washington law—be "co-branded," resulting "in a situation…where two (potentially more) names are substantially associated with the same business—normally in a side-by-side format." ER 514-515. Monster's expert used the example of co-branded Taco Bell and KFC franchises, but there are many other examples.[20] ER 527-528, 530, 696-697. Olympic Eagle was a co-branded franchisee of Anheuser-Busch and Monster products, sometimes using signs and displays with both brands.[21]

2. The Arbitrator Dispensed His "Own Brand Of Industrial Justice" By Adopting A Connecticut Economic-Dependency Test Recently Rejected By The Washington Supreme Court.

As the Supreme Court held in *Stolt-Nielsen*, "when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice…his decision may be unenforceable." 559 U.S. at 671 (internal quotation omitted). "In that situation, an arbitration decision may be

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[19] Co-branding is so common that a popular franchising guide devotes an entire chapter to the topic. *See* Seid et al., *supra*, 217-232 (Ch. 12: Acquiring Other Brands). "Co-branding is when more than one brand operates in a single location. It may be two brands (dual branding), three brands (triple branding) or any other multiple (multi-branding)…." *Id.* at 217.

[20] Olympic Eagle's briefs cited examples of companies that own many franchises under different brands. ER 783-784.

[21] At Monster's direction, Olympic Eagle promoted Monster and AB side-by-side. Olympic Eagle was asked to "tie in Monster displays wherever possible. ***For AB wholesalers tie-ins with as many 'Bud Bowl' displays as possible***." ER 685.

vacated under § 10(a)(4) of the FAA on the ground that the arbitrator exceeded his powers, for the task of an arbitrator is to interpret and enforce a contract, not to make public policy." *Id*. at 672.

From the very beginning of this dispute, Monster recognized that unless the Arbitrator disregarded existing law, Olympic Eagle would meet the requirements for termination protection under FIPA. Ultimately and only after Monster finally corrected its false statements and conceded it had retained at least several hundred thousand dollars in fees, the Arbitrator obliged Monster's request to ignore Washington and California law and adopt Connecticut franchise principles.

Monster repeatedly asked the Arbitrator to apply a 50-percent-of-sales test on the policy ground that "sophisticated" distributors like Olympic Eagle were not dependent on the relationship and therefore not the type of party the franchise laws were intended to protect. ER 715-719, 737, 741-746. Its CEO stated in his first deposition his belief that franchise laws were not intended to protect a "sophisticated, professional distributor." ER 385-386.

In an earlier matter involving Crown Distributing (another terminated Washington distributor), Monster convinced a different JAMS arbitrator to adopt this economic-dependency theory. *See* ER 196-201. Doug Berry, the attorney for Crown Distributing, ER 202, predicted in a law review article that Washington Supreme Court would adopt Connecticut's percent-of-sales test if presented with the issue. Douglas C. Berry, et al., *State Regulation of Franchising: The Washington Experience Revisited*, 32 Seattle U. L. Rev. 811, 840-41 (2009); *see also* Douglas C. Berry, et al., *Substantial Association with a Trademark: A Trap for the Unwary*, 32 Franchise L.J. 130, 135 (2013). Monster cited this in seeking summary judgment in the Olympic Eagle arbitration. *See, e.g.*, ER 738.

In his article, Berry argued that FIPA was passed at a time of "rampant speculation" and that "the need for strict franchise regulation has eased over the last thirty-five years as the power and information imbalance between franchisors and franchisees has shifted or disappeared entirely." Berry, et al., *supra* at 819. He concluded,

> The reality now—if it was not when FIPA was enacted—is that franchisees **are often wealthier and more sophisticated than the franchisor they deal with**, and any power the franchisor may have is often constrained by competition with other franchisors for a franchisee's business.

Id. at 873 (emphasis added).

Contrary to Berry's prediction and shortly after the Crown arbitrator's decision, the Washington Supreme Court ***rejected*** the argument that Washington franchise laws should only protect economically vulnerable entities. A few months after a JAMS arbitrator dismissed the Crown claim, the Washington Supreme Court affirmed that FIPA and its "bill of rights" provision was a response to concerns about "oppressive practices historically associated with the sale of franchises." *Dep't of Labor & Indus. of State v. Lyons Enters. Inc.*, 185 Wash.2d 721, 732**,** 374 P.3d 1097 (2016). It found franchisors have "power to control" franchisees through agreement terms and "have used this power to terminate franchises arbitrarily [and] to coerce franchisees under threat of termination." *Id.* at 732-33 (quoting *Coast to Coast Stores, Inc., v. Gruschus*, 100 Wash.2d 147, 150, 667 P.2d 619 (1983) (quoting Donald S. Chisum, *State Regulation of Franchising: The Washington Experience*, 48 Wash. L. Rev. 291, 297- 98 (1973))).

Expressly refuting the "economic dependency" principles proposed by Berry, advocated by Monster, and ultimately adopted by the Arbitrator in this case, the Washington Supreme Court held,

> We have previously recognized that it was in response to these concerns that the legislature included in FIPA a franchisee "bill of rights." Although subsequent commentary has questioned the validity of these fears, especially in light of the sophisticated franchisees operating today, *see* Berry, *supra*, at 873, the legislature enacted FIPA with the purpose of protecting franchisees, and it is through that lens that we continue to view its provisions.

Lyons, 185 Wash.2d at 733 (internal citation and quotation omitted).

Relying on Connecticut law, the Arbitrator impermissibly substituted his own policy views to override the Washington Supreme Court, writing "the meaning of the statute should be ascertained in the context of the evil it is designed to prevent, that evil primarily relating to ***economic vulnerability*** of the distributor." ER 556 (emphasis added). The Arbitrator disregarded Washington law when he adopted the reasoning behind Connecticut's percent-of-sales requirement, noting that "the 'clear purpose' of the Connecticut statute was 'to prevent a franchisor from taking unfair advantage of the relative ***economic weakness*** of the franchisee.'" ER 556 (quoting *Grand Light & Supply*, 771 F.2d at 677 (2d Cir. 1985) (emphasis added)).

3. The Arbitrator Applied The Wrong Section Of Washington's Franchise Statute To Award Monster $3 Million In Attorneys' Fees And Costs.

The Arbitrator again manifestly disregarded Washington law by awarding Monster $3 million in fees and costs under a provision of Washington's franchise law dealing with the offer or sale of a franchise, which has no bearing on this case involving Washington's franchise relationship laws. *See* RCW § 19.100.190(2) & (3). He disregarded the correct provision, RCW 19.100.190(1), which requires franchise-relationship claims to be brought through Washington's Consumer Protection Act, RCW 19.86, *et seq*, and only allows the party seeking protection to recover fees. The award of fees and costs should be vacated.

a. The Arbitrator Adopted Monster's Argument And Used An Inapplicable Franchise "Sale" Provision To Award Fees In A Franchise "Relationship" Case.

In his interim award, the Arbitrator found the "purpose of the arbitration was to resolve the dispute as to whether Washington's FIPA applies to the Monster-OE contracts and to the Monster-OE relationship…." ER 558. In its trial briefs, Monster argued correctly that the relationship claim was governed by the Washington Consumer Protection Act, ***not*** RCW 19.100.190(3). ER 798; *see also* ER 724-726.

In its fee application, however, Monster reversed course and—directly contrary to its trial briefs—argued that RCW 19.100.190(3) applied to Olympic Eagle's relationship termination claim. ER 813. The Arbitrator dismissed Olympic Eagle's argument that Washington's Consumer Protection Act was the relevant statute for considering a fee application under the franchise "bill of rights" and, instead, adopted Monster's argument that the CPA "is not the relevant statute for purposes of this case." ER 562.

b. The Consumer Protection Act—Which Both Parties Agreed Applied To The Relationship Termination Claim—Allows Only Olympic Eagle To Recover Attorneys' Fees.

In its trial brief, Monster argued that "FIPA itself provides no statutory remedy for termination of a franchise without good cause. Rather, FIPA provides that such a violation 'shall constitute an unfair or deceptive act or practice under the provisions of chapter 19.86 RCW' (the CPA). *See Payless Car Rental System, Inc. v. Draayer*, 43 Wash. App. 240, 243-45 (1986)…." ER 798. Monster made the same argument in summary judgment briefing and oral argument,[22] and the Arbitrator agreed that "consumer law applies." ER 427.

Olympic Eagle's responsive briefing explained that, like many such consumer statutes, the Washington CPA has a ***one-way*** attorneys' fee provision that Washington courts have held overrides an inconsistent contract provision. ER 808-809 (citing *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wash.2d 598, 605, 293 P.3d 1197 (2013) (*en banc*)).

In *Reudy v. Clear Channel Outdoors, Inc.*, the district court explained the underlying policy of such provisions:

> [C]ertain statutes…place[] limits on a prevailing defendant's ability to recover attorneys' fees, *even if there is a fee provision in the parties' contract*. In other words, if you sue under circumstances in which there is a statute that provides for fees only to a prevailing plaintiff, and the defendant prevails, even if you have a contract with the other party which also provides for fees, the statute "trumps" the contract and the defendant is not entitled to attorneys' fees.

693 F. Supp. 2d 1091, 1100 (N.D. Cal. 2010), *aff'd sub nom. Reudy v. CBS Corp.*, 430 F. App'x 568 (9th Cir. 2011) (emphasis added); *see also* ER 808-809.

The Washington Supreme Court explained in *Gandee* that although it was not aware of "a blanket rule precluding recovery of costs and fees by a prevailing defendant where an enforceable agreement so provides," "the 'loser pays'

[22] ER 427 ("FIPA does not establish a remedy for a termination without good cause. The only time there would be a remedy is if they can also prove all the elements under the Consumer Protection Act under Washington law.").

provision" was substantively unconscionable. 176 Wash.2d at 606; *see* ER 808-809; (citing *Brinkley v. Monterey Fin. Servs., Inc.*, 242 Cal. App. 4th 314, 347, 196 Cal. Rptr. 3d 1 (2015)); *see also Pokorny*, 601 F.3d at 1004 (fee-shifting clause put distributors "who demand arbitration at risk of incurring greater costs than they would bear if they were to litigate their claims in federal court, the district court properly held that the clause is substantively unconscionable").

The Arbitrator exceeded his authority because the CPA's one-way fee provision overrides Monster's contractual fee provision. *See Gandee*, 176 Wash.2d at 605; *Reudy*, 693 F. Supp. 2d at 1100.

C. The District Court Erred In Refusing To Consider Olympic Eagle's Request For Discovery On The Extent Of The Arbitrator's Financial Relationship With Monster.

A trial court's decision to deny discovery in motion-to-vacate proceedings under the FAA is generally reviewed for abuse of discretion. *See Woods*, 78 F.3d at 430. But Judge Klausner did not exercise his discretion when he denied Olympic Eagle's motion to compel post-arbitration discovery as "moot." ER 21. His failure to exercise discretion should be reviewed "*de novo*" and reversed if the award is not vacated. *See Garrett v. City and County of San Francisco*, 818 F.2d 1515, 1518-19 & n.3 (9th Cir. 1987) (reversing grant of summary judgment).

Several Circuit Courts have remanded to allow discovery when a party has made a *prima facie* case that an arbitrator failed to disclose relationships that might show partiality. *See, e.g.*, *University Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1341-43 (11th Cir. 2002). The Second Circuit found, for example, that discrepancies between an arbitrator's possible conflicts and his disclosures "require that [the] case be remanded so that an evidentiary hearing may be held and the full extent and nature of the relationships at issue may be ascertained." *In re Sanko S.S. Co., Ltd. v. Cook Indus., Inc.*, 495 F.2d 1260, 1262-63 (2d Cir. 1973).

District Courts in this and other circuits have likewise found discovery is appropriate in post-arbitration proceedings under the FAA. *See, e.g.*, *Rosenhaus*, 2016 WL 4592180, at *1 (vacating arbitration award after granting a party's request for discovery); *International Broth. of Elec. Workers, Local Union No. 323 v. Coral Elec. Corp.*, 104 F.R.D. 88, 90-91 (S.D. Fla. 1985); *Frere v. Orthofix, Inc.*, 00CIV.1968(RMB)(MHD), 2000 WL 1789641, at *5 (S.D.N.Y. Dec. 6, 2000).

Shortly after the final award was issued in this case, Olympic Eagle learned that "[m]any JAMS neutrals are also 'owners' of JAMS…who have a profit interest in matters handled by other JAMS' neutrals." ER 264. On February 24, 2017, Olympic Eagle sought informally to find out whether the Arbitrator or his wife had an ownership interest in JAMS. ER 252-253. JAMS refused to respond, ostensibly, "to protect [the] privacy interests of the arbitrator and his spouse." ER 254.

Olympic Eagle then served JAMS with a subpoena requesting the same information that had been sought in the letter. ER 289-294. On March 15, 2017, outside counsel for JAMS stated over the telephone that the Arbitrator is an owner but refused to confirm it in writing. ER 84-85. Monster filed formal objections contesting this evidence. ER 206.

On April 13, 2017, before the cross-petitions to vacate and confirm had been set for hearing, Olympic Eagle moved *ex parte* to continue the hearing so that the District Court could rule with the benefit of a full record. ER 88-103. The next day Olympic Eagle moved to compel JAMS to provide information about the Arbitrator's financial interests. ER 22-47.

Olympic Eagle sought discovery to determine (1) the accuracy of the Arbitrator's actual disclosure, (2) the extent of his interest in JAMS, (3) the value his interest in 97 Monster arbitrations, and (4) whether there is an agreement between Monster and JAMS that includes the kind of special benefits that were held to be "substantively unconscionable" in a Ninth Circuit decision addressing JAMS' practices with its substantial customers seven years ago. *See Pokorny*, 601 F.3d at 1002-04; *see also Nitro Distib.*, No. 03-cv-3290, 2005 WL 6936246, at *12-14 (W.D. Mo. Sept. 16, 2005) (JAMS procedures for Amway distributor disputes did "not come close to passing any reasonable test of fairness and neutrality required for a legitimate arbitration proceeding").

The District Court failed to rule on Olympic Eagle's request for answers to any of these questions. ER 21. The District Court's denial of the opportunity to develop the factual record, without even considering Olympic Eagle's request, was reversible error and requires remand to allow discovery if the award is not vacated.

D. The District Court's Award Of Fees To Monster For Post-Arbitration Proceedings Violates The Federal Arbitration Act.

Although a district court's decision on "attorneys' fees is typically reviewed for abuse of discretion, any elements of legal analysis and statutory interpretation underlying the district court's attorneys' fees decision are reviewed *de novo*, and factual findings underlying the district court's decision are reviewed for clear error." *V.S. ex rel. A.O. v. Los Gatos-Saratoga Joint Union High School Dist.*, 484 F.3d 1230, 1232 (9th Cir. 2007) (internal quotation omitted).

Judge Klausner relied on this Court's unpublished decision in *SCIE LLC v. XL Reinsurance America, Inc.*, 397 F. App'x 348 (9th Cir. 2010) to grant $256,634 of post-award attorneys' fees to Monster. ER 8-10. This legal error is reviewed *de novo* as the *SCIE LLC* decision was made under state law and is inapplicable to this case, which was decided under the Federal Arbitration Act. *See* ER 591, 613.

The attorneys' fees clause in the parties' contract says that in "addition to all other relief, ***the arbitrator*** shall have the power to award reasonable attorneys' fees and costs to the prevailing party." ER 591, 613 (emphasis added). In 2014, the Central District of California, interpreting the exact same provision, declined to award Monster fees in post-arbitration proceedings holding that "attorneys' fees are not awardable under the FAA and the parties' agreement does not authorize an award of attorneys' fees." *Monster Energy Co. v. HRHH Hotel/Casino, LLC*, CV 13-01888-R, 2014 WL 293773, at *2 (C.D. Cal. Jan. 27, 2014).

In *Menke v. Monchecourt*, the Seventh Circuit refused to award attorneys' fees, holding "there is nothing in the Federal Arbitration Act which provides attorneys' fees to a party who is successful in seeking confirmation of an arbitration award in the federal courts." 17 F.3d 1007, 1008–1009 (7th Cir. 1994). The Sixth Circuit likewise refused to award attorneys' fees on post-award proceedings because the "Agreement here only authorizes an *arbitrator* to award attorneys' fees and costs during *arbitration*, and authorizes the district court to enter the award as a judgment." *Crossville Medical Oncology, P.C. v. Glenwood Systems*, LLC, 610 F. App'x 464, 468 (6th Cir. 2015) (italics in original).

District courts in this Circuit have also refused to award attorneys' fees in post-arbitration proceedings under the FAA where the arbitration contract gave only the arbitrator the discretion to award attorneys' fees. *See Monster Energy Co.*, 2014 WL 293773, at *2; *Hannibal Pictures v. Les Films de l'Elysee*, CV 12-6434 CAS JCGX, 2012 WL 6608595, at *2 (C.D. Cal. Dec. 18, 2012).

In *SCIE LLC*—the decision the District Court relied on in this case—the Ninth Circuit upheld Judge Snyder's decision to award post-arbitration fees. But *SCIE LLC* applied California state law, not the FAA. *See* 397 F. App'x at 350-51 (applying *Ajida Techs., Inc. v. Roos Instruments, Inc.*, 87 Cal. App. 4th 534, 552, 104 Cal. Rptr. 2d 686 (2001)).

In *Hannibal Pictures*, Judge Snyder acknowledged this material difference and denied fees under the FAA, stating that *Ajida* was "inapplicable because it was not decided under the FAA, and based its conclusion that a court rather than an arbitrator could award post-arbitration attorneys' fees on California law that does not apply in this case." *Hannibal Pictures*, 2012 WL 6608595, at *3, n.1. Under the FAA, Judge Snyder refused to award fees because "the agreement [gave] the arbitrator discretion concerning what amount of attorney's fees should be awarded in a particular case" – not the court. *Hannibal Pictures*, 2012 WL 6608595, at *2.

Although the FAA does not provide an independent basis for jurisdiction, it does create a body of "substantive" federal law regarding arbitration. *See Southland Corp. v. Keating*, 465 U.S. 1, 12, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). This Court applies the FAA to any arbitration agreement unless the agreement "clearly and unmistakably indicate[s] that [state] law of arbitrability should apply...." *Brennan v. Opus Bank*, 796 F.3d 1125, 1129 (9th Cir. 2015). "A general choice-of-law clause within an arbitration provision does not trump the presumption that the FAA supplies the rules for arbitration." *Sovak v. Chugai Pharmaceutical Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002).

Here, like in *Hannibal Pictures*, the parties' arbitration is governed by the FAA because the choice-of-law clause in Paragraph 25 of the parties' Agreement does not "clearly and unmistakably" indicate that the California arbitration law should apply. ER 591, 613; *see* 2012 WL 6608595, at *2. And because the agreement limits the discretion to award fees to the Arbitrator, the District Court's award of fees for post-arbitration proceedings was outside its authority.

VII. CONCLUSION

The Arbitration Award to Monster should be vacated because the neutral JAMS arbitrator failed to disclose his financial interest in a firm doing substantial interest with Monster Energy, and he manifestly disregarded the law in his ruling. Alternatively, the matter should be remanded to allow discovery on the Arbitrator's undisclosed financial interests in JAMS.

Dated: February 23, 2018

Respectfully submitted,

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STATEMENT OF RELATED CASES

We are aware of no cases pending in the Court that would be deemed related to this case under Ninth Circuit Rule 28-2.6.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on February 23, 2018 I electronically filed the foregoing Brief of Appellee with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

Dated: February 23, 2018.

s/ Sandra D. Lonon
Sandra D. Lonon
Legal Assistant

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-55813

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Signature of Attorney or Unrepresented Litigant: s/ Michael K. Vaska

Date: February 23, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CERTIFICATE OF SERVICE
SEALED DOCUMENTS
INTERIM CIRCUIT RULE 27-13

Case Number: 17-55813

Case Title: City Beverages, LLC d/b/a Olympic Eagle Distributing v. Monster Energy Company

Note: Documents to be filed under seal are to be submitted electronically. As the parties will not have online access to those documents once they are submitted, the CM/ECF electronic notice of filing will not act to cause service of those documents under FRAP 25(c)(2) and Ninth Circuit Rule 25-5(f). Interim Circuit Rule 27-13(c) therefore requires an alternative method of serving the motion or notice to seal and the materials to be sealed.

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DESCRIPTION OF DOCUMENTS:

Opening Brief of Appellant City Beverages, LLC d/b/a Olympic Eagle Distributing

Signature: s/ Michael K. Vaska

(use "s/" format with typed name)

Date: February 23, 2018