Nos. 17-55813, 17-56082

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.

Appeal from the United States District Court for the Central District of California, No. 5:17-cv-00295-RGK-KK, Hon. R. Gary Klausner

PETITION FOR PANEL REHEARING AND REHEARING EN BANC FOR APPELLEE MONSTER ENERGY COMPANY

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DECEMBER 5, 2019

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INTRODUCTION AND RULE 35(b) STATEMENT

The panel's split decision announces a far-reaching, unprecedented disclosure rule that creates an impermissible presumption of evident partiality in *all* private arbitrations. Left standing, it will dramatically destabilize private dispute resolution. It casts doubt on scores of completed proceedings, inviting disappointed parties to attack arbitrators for noncompliance with a newly-invented disclosure rule. As Judge Friedland's dissent warns, the novel rule will also disrupt prospectively, "spur[ring] years of quibbling over the extent of disclosures required by arbitrators." Dissent 24. It will expand the bases and number of challenges to arbitrator appointments, requiring increased district court intervention. All this despite the lack of "a single reported federal decision" endorsing the majority's approach. Dissent 23. At its core, the decision reinstates the very "judicial indisposition to arbitration" that the Federal Arbitration Act was enacted to overcome. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581-82 (2008).

Using JAMS's standard disclosure form, the arbitrator here disclosed he has an "economic interest in the overall financial success of JAMS." Majority 5. He also advised "the parties should assume" JAMS had conducted any number of arbitrations with the parties or their counsel and may do so in the future. *Id.* And

JAMS's website disclosed "dozens of arbitrations" with appellee Monster. Dissent 20.

Nonetheless, the majority found these disclosures inadequate to inform appellant Olympic of the arbitrator's alleged possible bias in favor of "repeat player" Monster. In addition to "economic interest," the majority said, the arbitrator should have disclosed his "*ownership* interest," leaving unanswered what an "ownership interest" is other than merely a type of economic interest. Majority 12 (emphasis added). Instead of advising the parties to assume JAMS had conducted past arbitrations with one or both of them, the majority concluded, JAMS should have handed them a list. *Id.* The finality of arbitration decisions should not turn on such fine distinctions.

As Judge Friedland observed, neither this Court, the Supreme Court, nor any other federal court has vacated an arbitration award because of "an undisclosed potential source of bias stemming from the structure of the private arbitration industry itself." Dissent 23. If arbitrators have incentives to favor repeat players, then owners, aspiring owners, and non-owners alike would share those incentives—as would JAMS, AAA, and every other arbitration firm. "That an arbitrator has an ownership interest in the arbitration firm, not just a financial interest in that firm more generally, is hardly the sort of 'real' and 'not trivial' undisclosed conflict that" this Court "has held requires vacatur." Dissent 21-22

(quoting *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1110 (9th Cir. 2007)).

The majority's new rule will require re-doing myriad past and ongoing arbitrations, "prolong[ing] disputes that both parties have already spent tremendous amounts of time and money to resolve." Dissent 24. Going forward, this nebulous rule will turn the demanding "evident partiality" standard into an escape hatch for losing parties, who likely will "think up after the fact some argument that an arbitrator's disclosure did not fully convey the arbitrator's financial interest." *Id.* The majority's rule, for example, may require vacatur if the arbitrator failed to disclose the *size*, *nature*, or *effect* of her ownership interest; the arbitration firm's profits from the winning party's business; those profits attributable to business from the winning party's *lawyers*; and so forth. That prospect undermines the FAA's "policy in favor of expeditious and relatively inexpensive means of settling [disputes]." *Pack Concrete, Inc. v. Cunningham*, 866 F.2d 283, 285 (9th Cir. 1989).

This "question of exceptional importance" should be resolved by the entire Court. Fed. R. App. P. 35(b)(1)(B). The Court should grant rehearing to restore certainty to parties in arbitration and ensure that arbitration remains a "quicker, more informal, and often cheaper" means of dispute resolution. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018).

BACKGROUND

A. The Underlying Dispute

In 2006 and 2007, Olympic and Monster agreed to make Olympic the exclusive distributor of Monster-branded beverages in part of Washington. Their agreements had 20-year terms but permitted Monster to terminate earlier without cause upon payment of an agreed severance. ER552. They also provided that any dispute "shall be settled by binding arbitration conducted by JAMS." ER553, ER591, ER613.

In 2015, Monster exercised its termination rights, repurchased Olympic's remaining inventory, and sent Olympic the contractual severance of $2.5 million. Olympic objected, contending that notwithstanding the agreements, Washington's franchise law prohibited termination without cause. ER553; *see* Wash. Rev. Code § 19.100.180(2)(j).

Monster demanded arbitration and moved in district court to compel arbitration. ER553. Olympic opposed, arguing the arbitration provision was unconscionable because of the parties' supposedly unequal bargaining power. SER838. The court rejected that argument, noting Olympic's "obvious sophistication" as an experienced beverage distributor, and compelled arbitration before JAMS. ER553; SER839.[1]

[1] Olympic never appealed this decision.

B. The Arbitration

JAMS provided the parties a list of seven arbitrators. ER222. Under JAMS's rules, if the parties cannot agree on an arbitrator, each party may strike two names and rank the remainder; the arbitrator with the highest combined ranking is appointed. ER222; SER860. Using that procedure, JAMS appointed the Honorable John W. Kennedy, Jr. (Ret.). ER233.

The arbitrator provided disclosures using JAMS's standard form (ER236-251), which included a version of the following statement repeated on several pages:

> I practice in association with JAMS. Each JAMS neutral, including me, has an economic interest in the overall financial success of JAMS. In addition, because of the nature and size of JAMS, the parties should assume that one or more of the other neutrals who practice with JAMS has participated in an arbitration, mediation or other dispute resolution proceeding with the parties, counsel or insurers in this case and may do so in the future.

ER241; *see* ER243-248. He also disclosed a previous arbitration with Monster—where he ruled *against* Monster—and another pending distributor-termination arbitration with Monster. He disclosed that Monster's counsel represented Monster in those arbitrations. ER243-248. Further, JAMS's website (which Olympic admitted reviewing before agreeing to the arbitrator) featured records showing JAMS administered 81 arbitrations involving Monster. Dissent 20 & n.3. Those included 60 arbitrations known to Olympic: Olympic knew that Monster

sent identical termination notices to hundreds of other distributors, that those distributors also had agreements with Monster requiring JAMS arbitration, and that 60 terminated distributors were in then-pending JAMS arbitrations with Monster. ER389 (136:1-23); SER952. Olympic did not inquire further or move to disqualify the arbitrator.

After hard-fought litigation culminating in a two-week hearing, the arbitrator ruled for Monster. ER551-560. He found Olympic did not qualify for protection under Washington's franchise law and Monster thus properly terminated the agreements. ER558. He awarded Monster its costs and attorney's fees. ER561-566.

C. The District Court Proceedings

Monster petitioned to confirm the arbitration award. Olympic cross-petitioned to vacate, alleging "evident partiality . . . in the arbitrators" under the FAA, 9 U.S.C. § 10(a)(2). Olympic asserted that, after the arbitration, it learned Judge Kennedy was a part-owner of JAMS in a phone call with JAMS's counsel. ER218; SER899-900. It argued that failure to disclose this "ownership interest," given Monster's status as a "repeat player" in JAMS arbitrations, established evident partiality. ER16-17.

The district court confirmed the award. ER14-21. It found that Olympic "waived its evident partiality claim because Olympic failed to timely object when

it first learned of the potential 'repeat player' bias." ER17. "As a sophisticated commercial entity, Olympic certainly should have been aware of the potential for a 'repeat player' bias after the Arbitrator disclosed his 'economic interest' in JAMS at the outset of the arbitration." ER17. Olympic failed to "investigate or object to the Arbitrator's potential conflict of interest" until *after* it lost. ER17.

The court also ruled against Olympic on the merits. It observed "[a]n ownership interest in JAMS is merely a type of economic interest," and found "no reason to require that the Arbitrator have disclosed his particular economic interest at a granular level unless the parties inquired further after he made his initial economic interest disclosure." ER17.

D. The Panel's Split Decision

The majority reversed and vacated the award. *First*, the majority decided Olympic "did not have constructive notice of the Arbitrator's potential non-neutrality, and therefore did not waive its evident partiality claim." Majority 10. This despite acknowledging that Olympic "knew that the Arbitrator had some sort of 'economic interest' in JAMS," that the arbitrator "disclosed his previous arbitration activities that directly involved Monster," *and* that the arbitrator told the parties to assume JAMS conducted other arbitrations for one or both parties and/or their counsel. Majority 9. The majority concluded Olympic could not have discovered "the crucial fact" of "the Arbitrator's ownership interest." *Id.*

Second, the majority concluded "the Arbitrator's failure to disclose his ownership interest in JAMS—given its nontrivial business relations with Monster—creates a reasonable impression of bias." Majority 17. It assumed—without citation or support—that "as a co-owner of JAMS, the Arbitrator has a right to a portion of profits from *all* of its arbitrations, not just those that he personally conducts." Majority 12. It further presumed—again without citation or support—that "[t]his ownership interest . . . greatly exceeds the general economic interest that all JAMS neutrals naturally have in the organization" and "is therefore substantial." *Id.* It determined JAMS's 97 Monster arbitrations over five years were "hardly trivial," while acknowledging it had no information about "the Arbitrator's specific monetary interest in Monster-related arbitrations" or any other "empirical evidence." Majority 12 & n.3.[2]

Based on those unsupported assumptions, the majority announced a new rule: even where arbitrators disclose they have an economic interest in their arbitration firm *and* that their firm does business with the parties and their counsel, vacatur for evident partiality is mandatory if arbitrators do not disclose (1) "their ownership interests, if any, in the arbitration organizations with whom they are affiliated in connection with the proposed arbitration," and (2) "those

[2] In March 2017, when Olympic petitioned to vacate, JAMS's website showed 97 Monster arbitrations. ER219. When the arbitrator made his disclosures, it showed 81 Monster arbitrations. Dissent 20 n.3.

organizations' nontrivial business dealings with the parties to the arbitration." Majority 17.

Judge Friedland dissented. She concluded the additional disclosure of the arbitrator's ownership interest in JAMS would not "have made any material difference." Dissent 18. The information the arbitrator disclosed, combined with other readily accessible information, "was more than enough" to allow Olympic "to consider whether the Arbitrator might have had an incentive to try to please Monster and thereby keep its repeat arbitration business." Dissent 20-21. An arbitrator's "ownership interest in the arbitration firm," beyond "a financial interest in that firm more generally, is hardly the sort of 'real' and 'not trivial' undisclosed conflict" requiring vacatur. Dissent 22 (quoting *New Regency*, 501 F.3d at 1110).

Judge Friedland also recognized the new rule's disruptive impact. It "will require vacating awards in numerous cases decided by JAMS owners (who make up about a third of JAMS arbitrators)"—and owners of other arbitration firms—"who did not disclose their ownership interests." Dissent 24. The many "lingering questions" about "how detailed an arbitrator's disclosures must be" to satisfy the majority's "unclear" standard will "generate endless litigation over arbitrations that were intended to finally resolve disputes outside the court system." Dissent 22-23.

REASONS REHEARING SHOULD BE GRANTED

I. THE NEW RULE CREATES AN IMPERMISSIBLE PRESUMPTION OF EVIDENT PARTIALITY BASED ON UNSUPPORTED ASSUMPTIONS AND THE VERY NATURE OF PRIVATE ARBITRATION

As Judge Friedland explained, "[n]othing in existing caselaw" supports the majority's sweeping yet vague rule that all arbitration awards must be vacated for evident partiality unless the arbitrator, having disclosed an economic interest in the arbitration firm, *also* discloses any unspecified "ownership interest." Dissent 23; *see* Majority 17. That rule conflicts with precedents of the Supreme Court, this Court, and other courts. And it is premised on conjecture about "ownership interests" and arbitrators' behavior utterly lacking any factual support.

A. The Rule Is Based On Unsupported Assumptions And Generalizations

In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, the Supreme Court held the FAA mandates vacatur for evident partiality where the arbitrator "might reasonably be thought biased against one litigant and favorable to another." 393 U.S. 145, 150 (1968). Thus, the Court required "that arbitrators disclose to the parties any dealings that might create an impression of possible bias." *Id.* at 149. .

The evident partiality standard is demanding. The challenger "has the burden of showing partiality." *Woods v. Saturn Distribution Corp.*, 78 F.3d 424, 427 (9th Cir. 1996). The "legal standard for evident partiality" under

Commonwealth Coatings "is whether there are 'facts showing a reasonable impression of partiality.'" *New Regency*, 501 F.3d at 1106 (quoting *Schmitz v. Zilveti*, 20 F.3d 1043, 1048 (9th Cir. 1994)). Generalized and conclusory "argument" that undisclosed information "necessarily demonstrated likely partiality" is insufficient. *Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 646 (9th Cir. 2010); *see Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 645 (6th Cir. 2005) ("[T]he party seeking invalidation must demonstrate more than an amorphous institutional predisposition toward the other side . . . . ").[3]

Any undisclosed facts must be material. "[V]acatur is only appropriate if the conflict left undisclosed was real and 'not trivial,'" rather than "attenuated" or "insubstantial." *New Regency*, 501 F.3d at 1110; *see Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring) (disqualification not required if undisclosed facts are "trivial"). Critically, the materiality of undisclosed facts must be assessed

[3] Many courts have rejected evident partiality claims on facts much more troubling than anything here. *See, e.g., Republic of Argentina v. AWG Grp. Ltd.*, 894 F.3d 327, 336-37 (D.C. Cir. 2018) (failure to disclose arbitrator was a shareholder and board member of company managing $2 billion of investments in several parties; challenger "fail[ed] to put forth any specific facts beyond the dollars invested to show why that interest was more than trivial to such a mammoth investment firm."); *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 254-55 (3d Cir. 2013) (failure to disclose party's affiliate contributed to arbitrator's judgeship campaign; amounts were "far less than 1 percent" of total received).

"against the background of previously disclosed information." *New Regency*, 501 F.3d at 1110.

The majority's rule contravenes these principles. At every turn, the decision ignored the disclosed facts and instead was premised on unsupported assumptions. For instance, the majority asserted that, "as a co-owner of JAMS, the Arbitrator has a right to a portion of profits from *all* of its arbitrations, not just those that he personally conducts." Majority 12. But it cited nothing supporting this very specific factual assertion about the arbitrator's compensation. Moreover, it agreed with the district court that an "ownership interest is 'merely a type of economic interest.'" Majority 8.

The majority also cited nothing for its central factual premise—that an ownership interest "greatly exceeds the general economic interest that all JAMS neutrals naturally have in the organization." Majority 12. If a "repeat player" bias exists, it is not self-evident why it would affect owners more than non-owners, let alone "greatly" so. Plainly, *all* JAMS arbitrators necessarily benefit from fees JAMS earns in *all* proceedings it administers, not just those the specific arbitrator conducts. For *any* private dispute resolution firm, those fees pay the firm's operating costs—including rent, staff payroll, etc. And, as Judge Friedland observed, "JAMS might terminate the non-owner's JAMS affiliation" altogether if the non-owner finds against repeat players. Dissent 21. Owners, by contrast,

might stand to lose only their share of profits from that repeat player's business. *See id.* Thus, both owners and non-owners have "similar incentives to decide cases in a way that is acceptable to repeat player customers." *Id.*[4]

This disagreement about whether owners are more biased than non-owners, and what other financial incentives must be disclosed to satisfy the majority's new rule, highlights the decision's failure to ground itself in facts specific to this dispute. *Lagstein*, 607 F.3d at 646. It also proves the dissent's point—an arbitrator's disclosure of her "financial interest in [her] firm more generally" is sufficient; the supplementary detail of an undefined "ownership interest" would not "make a material difference to whether that arbitrator was accepted by" the other party. Dissent 21-22. Vacatur for not disclosing that fact thus ignores well-settled precedent that the undisclosed conflict must be "real" and "not trivial." Dissent 22.[5]

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[4] Indeed, the sole support for the majority's endorsement of a "repeat player" bias was a study of arbitrations conducted by the AAA—a non-profit organization without *any* owners. Majority 15.

[5] Other conclusions were similarly flawed. Noting JAMS's 97 Monster arbitrations over five years (Majority 12), the majority disregarded that JAMS conducts over *13,000* cases *a year* (ER622). Nothing supports the majority's assumption that an unspecified interest in unknown profits from a tiny fraction of JAMS's business created an "impression of bias." Majority 12. Further, *Olympic's lawyers* were involved in 23 other JAMS arbitrations. SER964-965. Because "lawyers often help their clients choose arbitrators," "it is possible that a JAMS arbitrator would have had an incentive to please the lawyers representing Olympic" instead of Monster. Dissent 20 n.2.

B. The Rule Creates An Impermissible Presumption Against Arbitration

More fundamentally, although premised on a presumed "repeat player" bias in private arbitration, the majority's decision did not establish any such bias. It cited only a single, 20-year-old law review article, describing a single study of *employment* arbitrations (unlike the commercial arbitration here). Majority 15. In fact, courts *reject* the hypothesis that arbitrators favor repeat players. *E.g.*, *Nat'l Indem. Co. v. IRB Brasil Resseguros S.A.*, 164 F. Supp. 3d 457, 483-84 (S.D.N.Y. 2016) ("suggestion" that arbitrator "was motivated to favor" party "so that 'future work would come from'" that party did not establish evident partiality), *aff'd*, 675 F. App'x 89 (2d Cir. 2017); *Malone v. Superior Court*, 226 Cal. App. 4th 1551, 1569 (2014) (rejecting "assumption" that "an arbitrator would be more likely to rule" for "a 'repeat player'"). To the contrary, "[c]oncern with professional reputation" deters such bias. *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983). "Though for-profit, JAMS is in the business of being neutral, and a persistent bias in favor of certain parties would undermine its overall success." *Pokorny v. Quixtar Inc.*, No. 07-201, 2008 WL 850358, at *18 (N.D. Cal. Mar. 31, 2008), *aff'd*, 601 F.3d 987 (9th Cir. 2010).

Departing from those decisions, the majority here became the first to vacate an award based on presumed partiality deriving from the "business" of private arbitration. Dissent 23-24. This Court's previous decisions vacating awards for

nondisclosure all involved undisclosed relationships unrelated to arbitration. *See, e.g.*, *New Regency*, 501 F.3d at 1106-07 (failure to disclose employment with company negotiating film deal with party); *Schmitz*, 20 F.3d at 1044 (failure to disclose arbitrator's law firm represented parent company of party); *see Commonwealth Coatings*, 393 U.S. at 146 (failure to disclose arbitrator served as engineering consultant for party).

For good reason, no other court has gone this far. As Judge Friedland explained, in those decisions vacating awards, "[t]here is no reason the parties would know about the potential partiality . . . unless the arbitrator disclosed the relationship." Dissent 24. By contrast, any "potential partiality that stems from the very structure of private arbitration is obvious to anyone who understands arbitrators' general economic interest in repeat business." *Id.* Particularly where arbitrators *disclose* that general economic interest, the majority's unsupported presumption that ownership interests make arbitrators more partial falls far short of the required showing.

In both approach and outcome, the decision is an unprecedented outlier among evident partiality cases. Rehearing should be granted to bring the decision back in line with precedents of the Supreme Court, this Court, and other courts.

II. THE NEW RULE WILL SIGNIFICANTLY DISRUPT PRIVATE DISPUTE RESOLUTION

The majority's unprecedented, erroneous rule will seriously jeopardize the finality of arbitration now and in the future. The decision has already caused alarm. *E.g.*, Christopher Mason et al., *Ninth Circuit "Monster" Ruling*, Arbitration Alert (Oct. 28, 2019) (the decision "promises to reverberate through the alternative dispute resolution industry"); Eriq Gardner, *How a Dispute About Energy Drinks May Disrupt Legal Fights in Entertainment*, Hollywood Reporter (Oct. 31, 2019); Marc J. Goldstein, *Monstrous*, Arbitration Commentaries (Nov. 9, 2019) (arbitration practitioners are "uncomfortable with the Monster Majority's analysis," and their "distress is aggravated by the fact that the Monster Majority construes the mandate of *Commonwealth Coatings* in a fashion that most federal appellate courts have not").

The majority's rule "will require vacating awards in numerous cases." Dissent 24. About one-third of JAMS arbitrators are owners. Majority 12 n.2. Their decisions must be discarded if the arbitrator failed to disclose her ownership interest and/or JAMS's "nontrivial business dealings" with the winning party. Arbitrations by other arbitration firms' owners must also be redone. This will

"prolong disputes that both parties have already spent tremendous amounts of time and money to resolve." Dissent 24.[6]

This disruption will not end soon. The "uncertainty created by the majority's opinion" leaves many "lingering questions" about "the extent of disclosures required by arbitrators." Dissent 23-25. The rule is unclear on its own terms:

- What is an ownership interest?
- Must an arbitrator disclose the nature, extent, and effect of her ownership interest?
- What other types of economic interest must be separately disclosed, despite falling within the broader, disclosed economic interest?
- How many arbitrations and over what period qualify as "nontrivial business dealings" mandating disclosure?
- Because "lawyers often help their clients choose arbitrators" and "it is possible that a[n] arbitrator would have . . . an incentive to please the lawyers" (Dissent 20 n.2), must prior arbitrations with the lawyers and law firms representing the parties be disclosed?

[6] The new rule may also prompt litigation against arbitration firms themselves for providing allegedly misleading disclosures that failed to specifically disclose ownership interests.

- Are "nontrivial business dealings" (Majority 14) determined by fee amounts? Number of arbitrations? Must mediation and other services be included?
- Must the fees paid for each prior service exceed any threshold to trigger disclosure?

And the majority's reasoning will fuel further disclosure challenges:

- Must arbitrators disclose "the arbitration firm's total profits" so "parties may assess … whether the business of the party in question is significant overall?" Dissent 22.
- Must non-owners disclose comparable incentives, such as profit-sharing bonuses, increased incentives for frequent selection, and the criteria and prospect for becoming an owner?
- Must owners and non-owners disclose their personal financial circumstances so parties can evaluate whether each disclosed ownership interest—or any other type of economic incentive—is "substantial"?

The FAA does not require an arbitrator "to provide the parties with his complete and unexpurgated business biography." *Commonwealth Coatings*, 393 U.S. at 151 (White, J., concurring). But under the majority's decision, parties and arbitrators can never be certain whether the arbitrator disclosed enough details to

withstand a post-hoc evident partiality attack. The majority's indeterminate standard will "spur years of quibbling," Dissent 24; "[e]xpensive satellite litigation over nondisclosure … will proliferate" and "seriously jeopardize the finality of arbitration," *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 285 (5th Cir. 2007) (en banc).

The majority's independently erroneous waiver holding compounds these problems. For the majority, even if a party knows generally of an arbitrator's *potential conflict*, no waiver occurs unless it knew or had reason to know all the *specific facts*. *See* Majority 8-9. *But see Fidelity Fed. Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1313 (9th Cir. 2004) (waiver exists where a party "has constructive knowledge of *a potential conflict* but fails to timely object" (emphasis added)). The majority's permissive approach to waiver, combined with its expansive view of evident partiality, allows losing parties "to think up after the fact some argument that an arbitrator's disclosure did not fully convey the arbitrator's financial interest." Dissent 24. It incentivizes parties not to inquire about disclosed conflicts before choosing an arbitrator, but instead "conduct intensive, after-the-fact investigations to discover the most trivial of" undisclosed facts if they lose. *Positive Software*, 476 F.3d at 285.

Left standing, the decision will undermine the entire system of private arbitration. The majority essentially concluded that Judge Kennedy's economic

interests were too closely aligned with JAMS's for him to be impartial. The majority nowhere explained why this logic does not mean that *JAMS itself*—and every other arbitration firm—is too biased to adjudicate disputes fairly because of alleged incentives to keep repeat business. This Court has held that "merely raising the 'repeat player effect' claim, without presenting more particularized evidence demonstrating impartiality, is insufficient" to void an arbitration agreement. *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1285 (9th Cir. 2006) (en banc). The Supreme Court, too, rejects the "speculat[ion] that arbitration panels will be biased" and "decline[s] to indulge th[at] presumption." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991). The majority's rule allows litigants to accomplish on the back-end what they cannot on the front-end: avoid arbitration by gesturing vaguely at arbitrators' (or arbitration companies') presumed bias toward repeat players. Rehearing is necessary to protect the finality of arbitrations and arbitration's very viability as a consensual, efficient dispute-resolution procedure.

CONCLUSION

Rehearing or rehearing en banc should be granted.

Dated: December 5, 2019

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

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9th Cir. Case Number(s) 17-55813, 17-56082

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is (*select one*):

◉ Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: 4,179.

(Petitions and answers must not exceed 4,200 words)

OR

○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/ Joseph R. Palmore **Date** Dec 5, 2019

*(use "*s/[typed name]*" to sign electronically-filed documents)*

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONSTER ENERGY COMPANY, FKA Hansen Beverage Company, *Petitioner-Appellee*, v. CITY BEVERAGES, LLC, DBA Olympic Eagle Distributing, *Respondent-Appellant.*	Nos. 17-55813 17-56082 D.C. No. 5:17-cv-00295-RGK-KK OPINION

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted July 12, 2019
Pasadena, California

Filed October 22, 2019

Before: MILAN D. SMITH, JR. and MICHELLE T. FRIEDLAND, Circuit Judges, and MICHAEL H. SIMON,* District Judge.

Opinion by Judge Milan D. Smith, Jr.;
Dissent by Judge Friedland

---

* The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

SUMMARY[**]

Arbitration

The panel reversed the district court, vacated a final arbitration award between Monster Energy Co. and City Beverages, LLC, doing business as Olympic Eagle Distributing, and vacated the district court's award of post-arbitration fees to Monster Energy Co. for its petition to confirm the award.

After Monster terminated its distribution agreement with Olympic Eagle, the parties proceeded to arbitration. The parties chose an arbitrator from a list of several neutrals provided by JAMS, the arbitration organization specified in the agreement. The arbitrator ruled in favor of Monster, and Monster asked the district court to confirm its award. Olympic Eagle sought to vacate the award based on later-discovered information that the arbitrator was a co-owner of JAMS—a fact that he did not disclose prior to arbitration.

The panel first held that Olympic Eagle had not waived its evident partiality claim because it did not have constructive notice of the arbitrator's potential non-neutrality.

The panel then held that before an arbitrator is officially engaged to perform an arbitration, to ensure that the parties' acceptance of the arbitrator is informed, arbitrators must disclose their ownership interests, if any, in the arbitration

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

organizations with whom they are affiliated in connection with the proposed arbitration, and those organizations' nontrivial business dealings with the parties to the arbitration. In this case, the arbitrator's failure to disclose his ownership interest in JAMS, coupled with the fact that JAMS has administered 97 arbitrations for Monster over the past five years, created a reasonable impression of bias and supported vacatur of the arbitration award. Because the panel vacated the arbitration award, the panel also vacated the district court's award of post-arbitration fees to Monster.

Dissenting, Judge Friedland disagreed that, in an evaluation of whether the arbitrator might favor Monster, the additional information the majority believed should have been disclosed would have made any material difference. She would therefore reject Olympic Eagle's effort to vacate the arbitration award in Monster's favor.

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OPINION

M. SMITH, Circuit Judge:

City Beverages, LLC, doing business as Olympic Eagle Distributing (Olympic Eagle), and Monster Energy Co. (Monster) signed an agreement providing exclusive distribution rights for Monster's products to Olympic Eagle for a fixed term in a specified territory. After Monster exercised its contractual right to terminate the agreement, the parties proceeded to arbitration to determine whether Olympic Eagle was entitled to protection under Washington law, and thus whether Monster had improperly terminated the agreement without good cause. From a list of several neutrals provided by JAMS, the arbitration organization specified in the agreement, the parties chose the Honorable John W. Kennedy, Jr. (Ret.) (the Arbitrator). At the outset of arbitration, the Arbitrator provided a series of disclosure statements. In the final arbitration award (the Award), the Arbitrator determined that Olympic Eagle did not qualify for protection under Washington law.

The parties filed cross-petitions in the district court, with Monster seeking to confirm the Award and Olympic Eagle moving to vacate it. The district court ultimately confirmed the Award.

We conclude, given the Arbitrator's failure to disclose his ownership interest in JAMS, coupled with the fact that JAMS has administered 97 arbitrations for Monster over the past five years, that vacatur of the Award is necessary on the ground of evident partiality. We therefore reverse the district court and vacate the Award. We also vacate the district court's award of post-arbitration fees to Monster for its petition to confirm the Award.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

In 2006, Olympic Eagle, an Anheuser-Busch (AB) distributor, agreed to promote and sell Monster energy drinks for twenty years in an exclusive territory. The contract permitted Monster to terminate the agreement without cause upon payment of a severance fee. Eight years later, Monster exercised its termination right and offered to pay Olympic Eagle the contractual severance of $2.5 million.

In response, Olympic Eagle invoked Washington's Franchise Investment Protection Act (FIPA), which prohibits termination of a franchise contract absent good cause. *See* Wash. Rev. Code § 19.100.180(2)(j). Monster served an arbitration demand on Olympic Eagle and filed an action in the district court seeking to compel arbitration. The district court ruled in favor of Monster and compelled arbitration before JAMS Orange County, as specified by Monster in its form agreement with the AB distributors.

JAMS provided a list of seven neutrals to conduct the arbitration, and the parties chose the Arbitrator. The Arbitrator's multi-page disclosure statement, provided to the parties at the commencement of arbitration, contained the following provision:

> I practice in association with JAMS. Each JAMS neutral, including me, has an economic interest in the overall financial success of JAMS. In addition, because of the nature and size of JAMS, the parties should assume that one or more of the other neutrals who practice with JAMS has participated in

> an arbitration, mediation or other dispute resolution proceeding with the parties, counsel or insurers in this case and may do so in the future.

II. Procedural Background

Following two weeks of hearings, the Arbitrator issued an interim award, finding that Olympic Eagle was not entitled to protection under FIPA. Two months later, the Arbitrator awarded Monster attorneys' fees (together with the interim award, the Award).

Thereafter, Monster filed a petition in the district court to confirm the Award, and Olympic Eagle cross-petitioned for its vacatur. Olympic Eagle sought to vacate the Award based on later-discovered information that the Arbitrator was a co-owner of JAMS—a fact that he did not disclose prior to arbitration. Olympic Eagle also requested information from JAMS regarding the Arbitrator's financial interest in JAMS, and Monster's relationship with JAMS. When JAMS refused to divulge this information, Olympic Eagle served JAMS with a subpoena. In the face of further resistance, Olympic Eagle later moved to compel JAMS's response to the subpoena.

Ultimately, the district court confirmed the Award, denying Olympic Eagle's cross-petition and finding its motion to compel moot. The district court then awarded Monster attorneys' fees from both the arbitration and the post-arbitration proceedings. Judgment was entered, and Olympic Eagle timely appealed.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over this appeal pursuant to 9 U.S.C. § 16 and 28 U.S.C. § 1291, and we review de novo the district court's confirmation of an arbitration award. *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1105 (9th Cir. 2007).

ANALYSIS

The Federal Arbitration Act permits a court to vacate an arbitration award "where there was evident partiality . . . in the arbitrators." 9 U.S.C. § 10(a)(2).[1] Olympic Eagle seeks vacatur of the Award based on the Arbitrator's failure to fully disclose his ownership interest in JAMS. Monster contends that the district court correctly found Olympic Eagle's argument waived, and, alternatively, that the Arbitrator's disclosures were sufficient. We first consider whether Olympic Eagle waived its evident partiality claim, and, finding that it did not, then turn to the merits.

I. Waiver

The district court held, and Monster continues to argue, that Olympic Eagle waived its evident partiality claim because it failed to timely object when it first learned of

[1] Our dissenting colleague makes much of the fact that persons who litigate their claims in arbitration have voluntarily given up the extensive protections afforded to parties by the conflict of interest statutes and rules governing federal judges. However, she fails to similarly credit the fact that federal law also provides some comparable protections to parties in arbitration by also permitting courts to vacate arbitration awards when there is "evident partiality . . . in the arbitrators." 9 U.S.C. § 10(a)(2); *see infra* Section II.

potential "repeat player" bias and the Arbitrator disclosed his economic interest in JAMS.

In *Fidelity Federal Bank, FSB v. Durga Ma Corp.* (*Fidelity*), we joined several of our sister circuits that utilize a constructive knowledge standard when considering whether a party has waived an evident partiality claim. 386 F.3d 1306, 1313 (9th Cir. 2004). There, we held that the disgruntled party was on notice that the challenged arbitrator may have been non-neutral given the process the parties employed to pick their arbitration panel: each party picked one arbitrator and the arbitrators picked the third. *Id.* Moreover, the party had failed to request disclosures from the arbitrator or object to the lack of disclosures. *Id.* Given these facts, we concluded that the party had waived its partiality objection. *Id.*

Our post-*Fidelity* waiver cases involved less complicated factual scenarios than the case before us. *See Johnson v. Gruma Corp.*, 614 F.3d 1062, 1069 (9th Cir. 2010) (finding waiver where the party knew for at least "a year or two" of the prior professional relationship between the arbitrator and opposing counsel's spouse before the arbitrator ruled); *Metalmark Nw., LLC v. Stewart*, No. 06-35321, 2008 WL 11442024, at *1 (9th Cir. May 6, 2008) (finding no waiver because the arbitrator failed to disclose conflicts and neither party had selected the arbitrator). Unlike these prior cases, the situation here is more akin to a partial disclosure—the Arbitrator disclosed his "economic interest" in JAMS prior to arbitration, but Olympic Eagle did not know it was an ownership interest. Although the district court correctly noted that an ownership interest is "merely a type of economic interest," the key issue is whether Olympic Eagle had constructive notice of the Arbitrator's potential non-neutrality.

We find that Olympic Eagle lacked the requisite constructive notice for waiver. To be sure, it knew that the Arbitrator had some sort of "economic interest" in JAMS. But the Arbitrator expressly likened his interest in JAMS to that of "each JAMS neutral," who has an interest in the "overall financial success of JAMS." The Arbitrator also disclosed his previous arbitration activities that directly involved Monster, in which he ruled against the company. In context, these disclosures implied only that the Arbitrator, like any other JAMS arbitrator or employee, had a general interest in JAMS's reputation and economic wellbeing, and that his sole financial interest was in the arbitrations that he himself conducted. Thus, even if the number of disputes that Monster sent to JAMS was publicly available, that information alone would not have revealed that this *specific* Arbitrator was potentially non-neutral based on the totality of JAMS's Monster-related business.

The crucial fact—the Arbitrator's ownership interest—was not unearthed through public sources, and it is not evident that Olympic Eagle could have discovered this information prior to arbitration. In fact, JAMS repeatedly stymied Olympic Eagle's efforts to obtain details about JAMS's ownership structure and the Arbitrator's interest post-arbitration. Accordingly, Olympic Eagle did not have constructive notice of the Arbitrator's ownership interest in JAMS—the key fact that triggered the specter of partiality.

Furthermore, we have repeatedly emphasized an arbitrator's duty to investigate and disclose potential conflicts. *See, e.g.*, *New Regency*, 501 F.3d at 1110–11 (holding that the arbitrator's new employment triggered duty to investigate possible conflicts). The Arbitrator undoubtedly knew of his ownership interest in JAMS prior to arbitration yet failed to disclose it. To find waiver in this

circumstance would "'put a premium on concealment' in a context where the Supreme Court has long required full disclosure." *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W. 3d 518, 528 (Tex. 2014) (quoting *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1204 (11th Cir. 1982)). Thus, we hold that Olympic Eagle did not have constructive notice of the Arbitrator's potential non-neutrality, and therefore did not waive its evident partiality claim.

II. Evident Partiality

The Supreme Court has held that vacatur of an arbitration award is supported where the arbitrator fails to "disclose to the parties any dealings that might create an impression of possible bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968). In a concurrence, Justice White noted that when an arbitrator has a "substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed," *id.* at 151–52 (White, J., concurring)—a formulation of the rule that we have adopted. *See, e.g.*, *New Regency*, 501 F.3d at 1107. By contrast, we have observed that "long past, attenuated, or insubstantial connections between a party and an arbitrator" do not support vacatur based on evident partiality. *Id.* at 1110; *see also Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 646 (9th Cir. 2010) (finding no evident partiality where the arbitrator's alleged ethical misconduct "occurred more than a decade before th[e] arbitration and concerned neither of the parties to the case").

In *New Regency*, we considered an arbitrator's failure to disclose his new employment as an executive at a film group that was negotiating with one of the party's executives for the development of a movie. 501 F.3d at 1107, 1111. Prior

to the arbitration, the arbitrator disclosed only that he had "negotiated deals" with that same party's leadership, but failed to update his disclosures once the new employment began. *Id.* at 1106. Because the film deal was "real and nontrivial," we found a "reasonable impression of partiality [] sufficient to support vacatur." *Id.* at 1110–11. Similarly, in *Schmitz v. Zilveti*, we vacated an arbitration award for evident partiality where the arbitrator's law firm had represented the parent company of one party in "at least nineteen cases during a period of 35 years." 20 F.3d 1043, 1044 (9th Cir. 1994). Thus, under our case law, to support vacatur of an arbitration award, the arbitrator's undisclosed interest in an entity must be substantial, *and* that entity's business dealings with a party to the arbitration must be nontrivial.

Here, the Arbitrator submitted a disclosure statement in accordance with JAMS's rules. He disclosed that within the past five years he had served as a neutral arbitrator for one of the parties, firms, or lawyers in the present arbitration; that within the past two years he or JAMS had been contacted by a party or an attorney regarding prospective employment; and that he "practice[s] in association with JAMS. Each JAMS neutral, including me, has an economic interest in the overall financial success of JAMS." The Arbitrator also disclosed that he arbitrated a separate dispute between Monster and a distributor, resulting in an award against Monster of almost $400,000. He did *not*, however, disclose his ownership interest in JAMS and JAMS's substantial business relationship with Monster.

Our inquiry is thus two-fold: we must determine (1) whether the Arbitrator's ownership interest in JAMS was sufficiently substantial, *and* (2) whether JAMS and Monster were engaged in nontrivial business dealings. If the answer

to both questions is affirmative, then the relationship required disclosure, and supports vacatur.

First, as a co-owner of JAMS, the Arbitrator has a right to a portion of profits from *all* of its arbitrations, not just those that he personally conducts. This ownership interest—which greatly exceeds the general economic interest that all JAMS neutrals[2] naturally have in the organization—is therefore substantial. Second, Monster's form contracts contain an arbitration provision that designates JAMS Orange County as its arbitrator. As a result, over the past five years, JAMS has administered 97 arbitrations for Monster: an average rate of more than one arbitration per month. Such a rate of business dealing is hardly trivial, regardless of the exact profit-share that the Arbitrator obtained.[3] In sum, these facts demonstrate that the Arbitrator had a "substantial interest in [JAMS,] which has done more than trivial business with [Monster]"—facts that create an impression of bias, should have been disclosed, and therefore support vacatur. *Commonwealth Coatings*, 393 U.S. at 151–52 (White, J., concurring).

We acknowledge that previous cases did not address an arbitrator's interest in his own arbitration service.

[2] Indeed, only about one-third of JAMS neutrals are owner-shareholders.

[3] Although the record does not reveal the Arbitrator's specific monetary interest in Monster-related arbitrations, we do not require such empirical evidence to conduct the triviality inquiry. *See New Regency*, 501 F.3d at 1111 (finding that a "high-profile" project was not unimportant, even though "the record [did] not allow us to place a dollar value" on it); *Schmitz*, 20 F.3d at 1044, 1048 (finding generally that an arbitrator's *firm's* representation on nineteen cases in 35 years resulted in impression of impartiality).

Nonetheless, the Court did not distinguish between an arbitrator's organization and other entities, nor do we see any reason to insulate arbitration services from the principles that the Court articulated *Commonwealth Coatings*.

Some states within our circuit have already legislated extensive requirements for neutral arbitrators to ensure full disclosure. In California, for example, arbitrators are required to disclose "all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be impartial," including the "existence of any ground specified in [Cal. Civ. Proc. Code § 170.1] for disqualification of a judge." Cal. Civ. Proc. Code § 1281.9(a). Similarly, Montana requires arbitrators to disclose "all matters that could cause a person aware of the facts underlying a potential conflict of interest to have a reasonable doubt that the person would be able to act as a neutral or impartial arbitrator," including any ground for the disqualification of a judge. Mont. Code Ann. §§ 27-5-116(3)–(4).

In addition, under the Revised Uniform Arbitration Act (the RUAA), which has been adopted by several states in our circuit, an arbitrator must disclose "any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator," including a financial interest in the outcome of the proceeding. *See, e.g.*, Or. Rev. Stat. Ann. § 36.650(1)(1). The RUAA also establishes a presumption of evident partiality when the arbitrator does not disclose a "known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party . . . ." *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-3012(E).

In the states that have enacted the referenced measures, arbitrators currently operate under disclosure rules akin to,

or more burdensome than, the easily satisfied obligations we set forth here. Fundamentally, these disclosure requirements safeguard the parties' right to be aware of the relevant information to assess the arbitrator's neutrality.

We note that although judges are bound by somewhat different rules than arbitrators, judges are clearly not immune from recusal requirements when our neutrality might be reasonably questioned. *See, e.g.*, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009) ("The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (holding that the Due Process Clause requires recusal when a judge has a "direct, personal, substantial pecuniary interest" in a case). Unlike the standards governing judges, however, our ruling in this case does not require automatic disqualification or recusal—only disclosure prior to conducting an arbitration concerning (1) the arbitrator's ownership interest, if any, in the entity under whose auspices the arbitration is conducted, *and* (2) whether the entity under whose auspices the arbitration is conducted and one or more of the parties were previously engaged in nontrivial business dealings. Once armed with that information, and the answers to any other inquiries the parties may wish to pose as a result of knowing that information, the parties can make their own informed decisions about whether a particular arbitrator is likely to be neutral. It is simplicity itself, and no real burden, for an arbitrator to disclose his or her ownership interest in an arbitration company for which he or she works, as well as the organization's prior dealings with the parties to the arbitration.

Although this litigation involved two sophisticated companies, the proliferation of arbitration clauses in everyday life—including in employment-related disputes, consumer transactions, housing issues, and beyond—means that arbitration will often take place between unequal parties. *See* Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. Rev. 931, 934 (1999); *see also Aspic Eng'g & Constr. Co. v. ECC Centcom Constructors, LLC*, 913 F.3d 1162, 1169 (9th Cir. 2019) (noting, "We have become an arbitration nation."). Clear disclosures by arbitrators aid parties in making informed decisions among potential neutrals. These disclosures are particularly important for one-off parties facing "repeat players." *See* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Emp. Rts. & Emp. Pol'y J. 189, 209–17 (1997) (finding that employees disproportionately failed to recover damages against repeat-player employers compared to non-repeat-player employers).

Ultimately, we agree with Justice White:

> The arbitration process functions best when an amicable and trusting atmosphere is preserved and there is voluntary compliance with the decree, without need for judicial enforcement. This end is best served by establishing an atmosphere of frankness at the outset, through disclosure by the arbitrator of any financial transactions which he has had or is negotiating with either of the parties. . . . The judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality. That role is best consigned to the parties, who are the

> architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business.

Commonwealth Coatings, 393 U.S. at 151 (White, J., concurring).

In accordance with the interest of finality, judicial review of arbitration awards is often unexacting. However, the Supreme Court has nonetheless clearly endorsed the judicial enforcement of an arbitrators' duty to disclose. Placing the onus on arbitrators to disclose their ownership interests in their arbitration organizations, and their organizations' nontrivial business dealings with the parties to the arbitration, is consistent with both the principles of *Commonwealth Coatings* and our court's precedents.

Although our dissenting colleague raises concerns about the finality of recent arbitral judgments in light of our ruling in this case, she correctly notes that the applicable statute of limitations to vacate an arbitration award, *which is only three months*, will limit the impact of our ruling on recently decided arbitrations. 9 U.S.C. § 12; *Stevens v. Jiffy Lube Int'l, Inc.*, 911 F.3d 1249, 1251–52 (9th Cir. 2018). Prospectively, arbitration organizations like JAMS, which are already well-accustomed to extensive conflicts checks and disclosures, will have no difficulty fulfilling, and even exceeding, the requirements described here.

CONCLUSION

As the *Commonwealth Coatings* Court stated, "We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might

create an impression of possible bias." 393 U.S. at 149. We thus hold that before an arbitrator is officially engaged to perform an arbitration, to ensure that the parties' acceptance of the arbitrator is informed, arbitrators must disclose their ownership interests, if any, in the arbitration organizations with whom they are affiliated in connection with the proposed arbitration, and those organizations' nontrivial business dealings with the parties to the arbitration.

Here, the Arbitrator's failure to disclose his ownership interest in JAMS—given its nontrivial business relations with Monster—creates a reasonable impression of bias and supports vacatur of the arbitration award. Because we vacate the arbitration award, we also vacate the district court's award of post-arbitration fees to Monster.[4]

REVERSED and VACATED.

[4] We further deny Olympic Eagle's request to take judicial notice and grant Monster's request to take judicial notice. We deny the amicus motions filed by the Legal Academics and Eric Kripke. We find moot the amicus motion filed by Warner Bros. We grant the amicus motion filed by the National Beer Wholesalers Association, finding it relevant and useful. *See* Fed. R. App. P. 29(a)(3)(B).

FRIEDLAND, Circuit Judge, dissenting:

The majority vacates the arbitration award for "evident partiality" because the Arbitrator failed to disclose that he had an ownership interest in JAMS. In the majority's view, this undisclosed fact was necessary for the parties' informed selection of this Arbitrator because it creates an impression that differs meaningfully from that created by the facts the Arbitrator did disclose: (1) that he had a financial interest in JAMS's success generally, and (2) that Monster was a repeat customer of JAMS. I disagree that, in an evaluation of whether the Arbitrator might favor Monster, the additional information the majority believes should have been disclosed would have made any material difference. I would therefore reject Olympic Eagle's effort to vacate the arbitration award in Monster's favor.

I.

The Framers of our Constitution built protections against judicial partiality into Article III. Federal judges have life tenure and may not have their salaries diminished while in office. U.S. Const. art. III, § 1. As federal employees, federal judges receive their salaries from the government, not from the parties who appear before them. These structural protections are designed to help ensure that federal judges will decide cases based on the law and the facts, not out of concern about remaining popular enough to be selected to decide the next case or to receive the next paycheck. *See* The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that Article III's provision of life tenure is meant "to secure a steady, upright, and impartial administration of the laws").

When parties like those here, who could have their disputes resolved in federal court, instead have entered into

a contract that requires resolving any disputes in private arbitration (whether the arbitration term was desired by both parties or not), they have given up those Article III protections. *See Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983) (explaining that parties to a commercial arbitration have "cho[sen] their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen"). By nature of the fact that arbitrators are hired and paid by the parties for whom they conduct private arbitrations, arbitrators have an economic stake in cultivating repeat customers for their services. In addition, arbitrators affiliated with an arbitration firm have an interest in not causing the firm to lose its top clients. At least to some extent, this means arbitrators have incentives to make decisions that are viewed favorably by parties who frequently engage in arbitrations.[1] This feature of private arbitration, even if distressing, is an inevitable result of the structure of the industry.

In this case, the Arbitrator disclosed that he had a financial interest in JAMS's success. He further disclosed that he had personally conducted one arbitration in which Monster was a party and had been selected to decide another case involving Monster and a different distributor. And he made clear that "the parties should assume that one or more of the other neutrals who practice with JAMS has participated in [a] . . . dispute resolution proceeding with the parties . . . in this case and may do so in the future." Olympic Eagle also knew that Monster used a form contract with its hundreds of distributors requiring that disputes be resolved

[1] Individual arbitrators may be able to put these incentives out of their minds and make impartial decisions, but the incentives exist nonetheless.

through arbitration before JAMS—and therefore had even more reason to know that Monster had likely hired other JAMS arbitrators or at least had the potential to do so in the future.[2] Indeed, the parties had litigated about the form contract, and the district court had held that Olympic Eagle had validly agreed to its terms, a ruling Olympic Eagle has not appealed. And before the arbitration began, Olympic Eagle could easily have accessed an online record showing that JAMS had conducted dozens of arbitrations between Monster and its consumers.[3] *See Consumer Case Information*, JAMS, https://www.jamsadr.com/consumercases/ (last visited Oct. 11, 2019); *see also* Cal. Code Civ. Proc. § 1281.96 (requiring arbitration companies to disclose information about their consumer arbitrations).

This was more than enough information to allow Olympic Eagle to consider whether the Arbitrator might

[2] It is unclear the extent to which a JAMS arbitrator would have had a similarly strong incentive to please Olympic Eagle, itself a large beverage distribution company. There appears to be nothing in the record that indicates whether Olympic Eagle was a repeat customer of JAMS or how frequently it engages in arbitrations. But it is possible that a JAMS arbitrator would have had an incentive to please the lawyers representing Olympic Eagle, given that lawyers often help their clients choose arbitrators. According to a court filing submitted by Monster, an international law firm that helped represent Olympic Eagle in this dispute with Monster had represented parties in at least twenty-three other cases involving arbitration with JAMS.

[3] As of August 27, 2015—when JAMS sent Monster and Olympic Eagle a list of potential arbitrators—JAMS had disclosed on its website at least eighty-one arbitrations involving Monster. *Consumer Case Information*, JAMS, https://web.archive.org/web/20150506072558/http://www.jamsadr.com/files/Uploads/Documents/JAMS-Consumer-Case-Information.xlsx (May 6, 2015) (accessed by searching for "http://www.jamsadr.com/files/Uploads/Documents/JAMS-Consumer-Case-Information.xlsx" in the Internet Archive Wayback Machine).

have had an incentive to try to please Monster and thereby keep its repeat arbitration business. The majority reasons, however, that the Arbitrator's interest as a JAMS owner should have been specifically disclosed because it "greatly exceeds the general economic interest that all JAMS neutrals naturally have in the organization." Maj. Op. at 12. I do not see how this information would have made a material difference in Olympic Eagle's evaluation of the Arbitrator. Owners of JAMS have an interest in maximizing JAMS's amount of business, because they share in JAMS's profits. Likewise, non-owner arbitrators have an interest in advancing their professional careers and maintaining their status with JAMS, which creates similar incentives to decide cases in a way that is acceptable to repeat player customers—otherwise, JAMS might terminate the non-owner's JAMS affiliation.

Notably, by the time the Arbitrator was being selected, Olympic Eagle had committed to resolving any dispute with Monster through arbitration at JAMS. This necessarily meant that Olympic Eagle agreed the arbitration would be conducted by a JAMS arbitrator, whether that arbitrator was an owner of JAMS or a non-owner of JAMS. Because both types of arbitrators would have at least some incentive to keep repeat customers of JAMS such as Monster happy, it is unclear why knowing the details of the financial relationship between any specific potential arbitrator and JAMS would make a material difference to whether that arbitrator was accepted by Olympic Eagle.[4] That an arbitrator has an

[4] The majority also highlights that the Arbitrator failed to disclose more concrete information about Monster's past use of JAMS. Maj. Op. at 11. To the extent the majority believes this nondisclosure further supports vacating the arbitration award, *compare* Maj. Op. at 11 (noting the Arbitrator did not disclose "JAMS's substantial business relationship

ownership interest in the arbitration firm, not just a financial interest in that firm more generally, is hardly the sort of "real" and "not trivial" undisclosed conflict that our court has held requires vacatur. *See New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1110 (9th Cir. 2007) (quotation marks omitted).

The majority also leaves unclear how detailed an arbitrator's disclosures must be. Is it enough to reveal the fact that the arbitrator is an owner, or must the arbitrator disclose information such as how large the ownership interest is? Is it necessary to disclose the arbitration firm's total profits from the prior year—or maybe each year in the prior decade—so parties may assess, for example, whether the business of the party in question is significant overall? And how many prior arbitrations must a corporation have engaged in with an arbitration firm for there to be "nontrivial business dealings," Maj. Op. at 14, that require disclosure?[5]

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with Monster"), *with* Maj. Op. at 17 (emphasizing "the Arbitrator's failure to disclose his ownership interest in JAMS," and the existence of JAMS's "nontrivial business relations with Monster," but not mentioning the Arbitrator's nondisclosure of those "business relations"), I disagree. Given that owners and non-owners have similar incentives to favor repeat players, the extent of a repeat player's relationship with the firm as a whole—which would not vary from arbitrator to arbitrator—would be of little help in deciding whether to choose any particular arbitrator. And even if the Arbitrator did not disclose precise details, he *did* disclose that Monster was a repeat customer.

[5] The majority indicates that generally, if an arbitrator has an ownership interest in his firm, and his firm has significant prior dealings with a party, both pieces of information must be disclosed. It is unclear, however, whether the majority's approach requires an arbitrator to disclose significant prior dealings even if he has no ownership interest, and vice-versa. *Compare* Maj. Op. at 17 (stating that "arbitrators must disclose their ownership interests, *if any*" and their firm's "nontrivial

Does the fee paid for each of these prior arbitrations need to exceed any threshold to trigger disclosure? And, because lawyers often choose or help choose arbitrators, giving arbitrators an incentive to please lawyers who bring clients to arbitrations, must prior arbitrations with the lawyers or law firms representing the parties also be disclosed?

As these lingering questions demonstrate, ruling for Olympic Eagle is likely to generate endless litigation over arbitrations that were intended to finally resolve disputes outside the court system. Nothing in existing caselaw forces this error. Olympic Eagle has not pointed us to a single reported federal decision holding that an undisclosed potential source of bias stemming from the structure of the private arbitration industry itself warrants vacating an arbitration award. The majority acknowledges as much by conceding that there are no prior cases directly on point. Rather, the precedent binding us that vacated arbitration awards because of a failure to disclose information involved an arbitrator who had a relationship with one of the arbitrating parties that was totally unrelated to prior arbitrations. *See Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 146, 149–50 (1968) (arbitrator failed to disclose that he had occasionally served as an engineering consultant for one of the parties over several years); *New Regency Prods.*, 501 F.3d at 1107–11 (arbitrator failed to disclose his employment with a company negotiating a film deal with one of the parties to the arbitration); *Schmitz v. Zilveti*, 20 F.3d 1043, 1044, 1048–50 (9th Cir. 1994) (arbitrator failed to disclose that his law firm represented in at least nineteen matters a parent company of one of the

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business dealings with the parties to the arbitration" (emphasis added)), *with* Maj. Op. at 11–12 (suggesting that disclosure is only required if there is both an ownership interest and substantial business dealings).

parties to the arbitration). There is no reason the parties would know about the potential partiality arising from such a relationship unless the arbitrator disclosed the relationship. By contrast, the potential partiality that stems from the very structure of private arbitration is obvious to anyone who understands arbitrators' general economic interest in repeat business for themselves or their firm.

In the short run, adopting Olympic Eagle's position will require vacating awards in numerous cases decided by JAMS owners (who make up about a third of JAMS arbitrators) who did not disclose their ownership interest.[6] If there are other firms where arbitrators similarly hold ownership interests, the majority's approach will likewise require vacatur in those arbitrators' cases with repeat players unless there was a disclosure of the ownership interest.

In the long run, adopting Olympic Eagle's position could spur years of quibbling over the extent of disclosures required by arbitrators. And this slippery slope may have no bottom. If the losing party to an arbitration is less of a repeat player than its opponent, it will likely be able to think up after the fact some argument that an arbitrator's disclosure did not fully convey the arbitrator's financial interest in the potential future arbitration business of the winning party or its lawyers. The result will be to prolong disputes that both parties have already spent tremendous amounts of time and money to resolve. Olympic Eagle, for example, only

[6] Of course, the statute of limitations for filing a motion to vacate an arbitration award may place a limit on how much litigation there will be. *See* 9 U.S.C. § 12; *Stevens v. Jiffy Lube Int'l, Inc.*, 911 F.3d 1249, 1251–52 (9th Cir. 2018) (discussing statute of limitations for petitions to vacate arbitration awards).

objected to the Arbitrator's lack of disclosure after it lost the arbitration. By that point, more than a year had passed since the district court compelled arbitration, and the agreed-upon Arbitrator had conducted a hearing lasting nine days. The arbitration fee alone was $160,000, and Monster was awarded $3 million in attorney's fees and costs.[7] To avoid the uncertainty created by the majority's opinion, which would inevitably exist even after further disclosures are attempted, parties may shift to using arbitrators who are unaffiliated with any arbitration firm. These arbitrators may be less likely to have expertise—but be at least equally likely to want to retain the business of potential repeat customers. *Cf. ANR Coal Co., Inc. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 498–99 (4th Cir. 1999) ("[S]ubjecting arbitrators to extremely rigorous disclosure obligations would diminish one of the key benefits of arbitration: an arbitrator's familiarity with the parties' business." (citing *Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring))).

Although I would affirm the Arbitrator's award in favor of Monster, I note that lack of disclosure about a party's prior arbitrations might require vacatur in some instances. For

[7] Ruling for Olympic Eagle could also lay the groundwork for further disputes over whether arbitrators with ownership interests have a conflict that disqualifies them under state law from arbitrating cases involving a repeat player. *See* Cal. Code Civ. Proc. § 1281.91(d) (allowing for disqualification under certain circumstances, including those described in Cal. Code Civ. Proc. § 170.1(a)(6)(A)(iii)—when "[a] person aware of the facts might reasonably entertain a doubt that the [decision-maker] would be able to be impartial"); *see also* Alaska Stat. § 09.43.380(b) ("An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding . . . may not serve as an arbitrator required by an agreement to be neutral."); Ariz. Rev. Stat. Ann. § 12-3011(B) (same); Haw. Rev. Stat. § 658A-11(b) (same); Nev. Rev. Stat. § 38.226(2) (same).

example, if one of the parties had used the exact same arbitrator to resolve numerous disputes, and the arbitrator always ruled in its favor, vacatur might be appropriate based on the arbitrator's failure to disclose that arbitration history. But the facts of this case are nowhere near so extreme. The Arbitrator had previously decided one dispute between Monster and a distributor, and that proceeding resulted in an award of almost $400,000 *against* Monster. The Arbitrator had also been selected to decide a dispute between Monster and another distributor, which was still pending at the time of the arbitration involving Monster and Olympic Eagle. The disclosure the Arbitrator made to the parties provided accurate information about both arbitrations.

II.

To the extent that the private arbitration system favors repeat players, I think it is unfortunate that so many parties forgo the protections of Article III and turn to arbitration instead. It is especially unfortunate when arbitrations involve a non-repeat player party that had no choice but to agree to arbitration in order to acquire employment, purchase a product, or obtain a necessary service. The majority laudably seeks to mitigate disparities between repeat players and one-shot players in the arbitration system. But I disagree that requiring disclosures about the elephant that everyone knows is in the room will address those disparities. It will only cause many arbitrations to be re-done, and endless litigation over how many repeated arbitrations there will be.

I therefore respectfully dissent.